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The CFI Microsoft Judgment and TRIPS Competition Flexibilities

Tu T. Nguyen * & **Hans Henrik Lidgard** **

Abstract

The CFI Microsoft judgment is the first decision handed down by any court situated in a WTO Member state that regards the competition rules in the TRIPS Agreement in order to partly justify the application of domestic competition laws to the exercise of intellectual property rights (IPRs). The TRIPS Agreement allows WTO Members to enact and apply national competition laws to IPR-related anti-competitive practices. The position of the CFI finds support in this fact. Still, it is regrettable that the CFI did not invoke the TRIPS competition rules in justifying the Commission's decision to force Microsoft to supply interoperability information. This article considers the consequences of the European position and the effects of TRIPS flexibilities for developing countries.

1. Introduction

The ruling of the European Court of First Instance (CFI) in *Microsoft v. Commission*,[i] which was rendered on September 17, 2007, was a landmark judgment dealing with the interaction between competition law and intellectual property rights (IPRs). It is also the first judgment given by a court[ii] of a World Trade Organization (WTO) member which invokes the competition rules in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)[iii] to justify the application of domestic competition laws in the exercise of IPRs. The judgment has direct consequences for the European Union (EU), but the indirect consequences on other WTO members should not be underestimated.

This article investigates the CFI judgment in so far as it relates to the TRIPS Agreement and competition flexibilities in the TRIPS Agreement itself. The effect on national law is discussed, as well as the implications for developing countries.

2. The CFI's judgment

2.1. Summary

In response to the European Commission's decision[iv] on Microsoft's two anti-competitive practices, Microsoft appealed to the CFI, claiming that it had not violated Article 82 EC, nor had it abused its dominant position either by (i) its refusal to license interoperability information to its competitors or (ii) its bundling of Windows Media Players with the

Windows client PC operating system. Furthermore, it contended that compulsory licensing and unbundling demands, which were imposed on Microsoft as remedies for the two alleged abuses, were incompatible with the TRIPS Agreement.

Concerning the refusal to license, the CFI re-affirmed the European Court of Justice (ECJ) and its previous rulings that a firm holding a dominant position "has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market."[v] Then, mainly basing itself on *Magill*[vi] and *IMS Health*[vii] - the two judgments of the ECJ relating to refusals to license - the CFI observed that a refusal to license by a firm holding a dominant position may, in exceptional circumstances, constitute an abuse under Article 82 EC. Abuse is likely to be found, if the four-pronged test used in *Magill* and *IMS Health* is satisfied.[viii] The CFI contended that in this case, (i) Microsoft's interoperability information was indispensable for non-Microsoft work group server operating systems to be capable of interoperating with the Windows domain architecture;[ix] (ii) the refusal to license entailed the risk of the elimination of all competition in the server operating system market;[x] (iii) the refusal prevented the appearance of new products incorporating genuine technical developments (as against mere cloned products) for which there was potential customer demand;[xi] and (iv) the refusal was not objectively justified.[xii] Each component of the test was satisfied and Microsoft's refusal to license was thus incompatible with EC competition law. The CFI did not feel it had to proceed to access the particular circumstances invoked by the Commission in proving Microsoft's abuse under this head.[xiii]

With regard to the abusive conduct related to tying, beginning with the the concept of tying and case law, the CFI agreed with the Commission that tying infringes Article 82 if five requirements are cumulatively met, namely (i) the tying and tied goods are two separate products; (ii) the undertaking concerned is dominant in the tying product market; (iii) the undertaking concerned does not give customers the choice of obtaining the tying product without the tied product; (iv) tying forecloses competition; and, as above, (v) tying is not objectively justified.[xiv] The CFI agreed that all five requirements were satisfied. With respect to the foreclosure of competition, the previous case law had just focused on the foreclosure effects on the tied product market on the basis of the so-called leveraging theory of tying.[xv] However, *Microsoft v. Commission* was the first case where a Community court also considered foreclosure effects on the tying product market.[xvi] In other words, the CFI confirmed that, for a dominant firm, tying may be used not only as a sword to "attack and conquer" the tied product market, *i.e.* offensive tying, but also as a shield to monopolize the tying product market, *i.e.* defensive tying.[xvii]

The CFI thus concluded that Microsoft committed two types of abusive conduct, each incompatible with Article 82 EC. The next section of this article deals with how the court responded to the Microsoft claims that the two remedies, the compulsory licensing of interoperability information and the removal of Windows Media Player from Windows, were incompatible with the TRIPS Agreement.

2.2. TRIPS-related arguments

From the international law perspective, the TRIPS Agreement prevails in a case of conflict with domestic law.[xviii] Obviously, it is used to settle IPR-related disputes between two WTO members before the WTO Dispute Settlement Body. Put differently, as one of the pillars of the WTO, the TRIPS Agreement imposes international obligations on WTO members within a domestic context. However, it cannot be interpreted as requiring members to give direct effects to it in their domestic law.[xix] So the question of whether a party to a dispute before courts of a WTO member can invoke the TRIPS provisions to protect that party's rights is answered by the domestic law of that member.

There are two main approaches to the issue, monist and dualist. In a country with a monist approach, such as most of the civil law tradition countries, international agreements are incorporated directly into domestic law, *i.e.* they are self-executing. In a country with a dualist approach, such as most common law countries, international agreements become national law only after passing further national legislation, *i.e.* they are not recognized as self-executing.[xx]

In the United States of America (US), the Uruguay Round Agreements Act states that "no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."[xxi] This means that the TRIPS Agreement is not self-executing in the US. Furthermore, Section 102(c)(1) of this Act also specifically precludes any person from using the TRIPS Agreement as a cause of action, a defense, or from challenging government action on the ground that such action is inconsistent with the TRIPS Agreement. This was upheld by US courts of appeals in 2005 and 2007.[xxii]

In Vietnam, which joined the WTO as its 150th member in 2007, the TRIPS Agreement is deemed self-executing. The Law on signing, accessing, and implementing international treaties classifies Vietnam as a monist country.[xxiii] In its Resolution ratifying the Vietnam's WTO accession protocol, the National Assembly clearly stated that the TRIPS Agreement and other Vietnam commitments to the WTO are directly applicable in Vietnam.[xxiv]

The EU position takes a basically dualist approach. In *Develey v. OHIM*,[xxv] a judgment given a month after the CFI's *Microsoft v. Commission* judgment, the ECJ reiterated the final recital in the preamble to Council Decision No. 94/800[xxvi] and the position of its previous judgments[xxvii] that the TRIPS Agreement cannot be directly invoked before the Community courts. However, the court also stated that "it is not contrary to Community law for… the TRIPS Agreement to be directly applied by a national court subject to the conditions provided by national law;" that is, EU member states can be monist.[xxviii]

Whether or not the TRIPS Agreement is directly applied at national level, WTO members must comply with their obligations under it. However, the TRIPS Agreement does not contain a uniform law on IPRs. Rather, it provides a set of minimum standards for IPR protection that may be implemented differently by members; and it leaves many aspects to the discretion of national laws.[xxix] In other words, each WTO member has some freedom in establishing and enforcing an IPR regime, provided it respects the TRIPS' minimum standards.[xxx]

Regarding *Microsoft v. Commission*, and basing itself on the argument that the TRIPS Agreement does not have a direct effect at the Community level, the CFI held:

> *... the TRIPS Agreement, does not prevail over primary Community law...* WTO agreements are not in principle among the rules in the light of which the Community judicature is to review the legality of measures adopted by the Community institutions… *It is only where the Community has intended to implement a particular obligation assumed under the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Community*

> *judicature must review the legality of the Community measure in question in the light of the WTO rules*… the circumstances of the present case clearly do not correspond with either of the two situations.[xxxi] (emphasis added)

This ruling is entirely compatible with both the case law of the ECJ and the EU dualist approach to the TRIPS Agreement. Simply put, Microsoft could not invoke the TRIPS Agreement to argue that the Commission decision is not legitimate. Consequently, the CFI rejected Microsoft's claim that the Commission decision requiring Microsoft to license its interoperability information to its competitors infringed the TRIPS Agreement.[xxxii]

Regarding the unbundling remedy, the CFI reiterated that Microsoft could not rely on the TRIPS Agreement to support its claim because of the lack of direct effect.[xxxiii] However, the CFI went further by stating that:

> In any event, there is *nothing in the provisions of the TRIPS Agreement to prevent the competition authorities of the members of the WTO from imposing remedies* which limit or regulate the exploitation of intellectual property rights held by an undertaking in a dominant position *where that undertaking exercises those rights in an anti-competitive manner*. Thus, as the Commission correctly observes, it follows expressly from Article 40(2) of the TRIPS Agreement that the *members of the WTO are entitled to regulate the abusive use of such rights in order to avoid effects which harm competition*.[xxxiv] (emphasis added)

The CFI also held that the unbundling remedy was proportionate to the goal of ending the abuse in question and resolving the competition issues identified while it caused the least possible inconvenience to Microsoft and its business model. Furthermore, it contended that merely hiding the icons of certain application programs, a measure taken by Microsoft pursuant to its concurrent settlement in the US, was not sufficient.[xxxv]

It is clear that the CFI interpreted the TRIPS Agreement, particularly Article 40(2), in such a way that, if followed elsewhere, would allow WTO members freely to adopt and enforce national competition law on IPR exploitation. It is certainly the case that, when the Commission and Community courts apply Article 82 (or 81) EC, they will focus on the nature of anti-competitive conduct. IPRs cannot by virtue of their existence alone, justify anti-competitive practices that harm competition. If such practices are discovered, appropriate measures can be applied to correct the anti-competitive effects.

This is the first time that a court of a WTO member, particularly a court from the developed world, has applied the competition rules of the TRIPS Agreement to justify its enforcement of domestic competition law in an IPR-related area. However, in order to fully appreciate the CFI's interpretation and its implications, the competition rules in the TRIPS Agreement should first be reviewed.

3. TRIPS competition flexibilities

The negotiating history of the TRIPS Agreement reflects the serious concerns of developing countries regarding the adverse effects of IPR-related anti-competitive practices; these were born from the unsuccessful negotiations on the International Code of Conduct on Transfer of Technology in the 1970s-1980s.[xxxvi] In contrast, developed countries with established national rules for control of these practices were initially uninterested in having such rules in the TRIPS Agreement at all.[xxxvii] As a compromise, even though the TRIPS Agreement is an international treaty dealing with IPRs, it now contains certain competition law provisions, namely Articles 8(2), 31(k), and 40.[xxxviii]

3.1. Competition affects TRIPS interpretation

Under the heading "principles," Article 8(2) states:

> Appropriate measures, provided that they are consistent with the provision 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.

This Article recognizes the members' power to adopt appropriate measures to prevent three inter-dependent kinds of IPR-related practices: (i) the abuse of IPRs by right holders; (ii) practices that unreasonably restrain trade; and (iii) practices that adversely affect international technology transfer. Such restrictive practices cover both unilateral IPR-related abuses and contractual restraints on IPR-related trade. However, due to the scope of the TRIPS Agreement, Article 8(2) does not apply to other potentially anti-competitive practices whose primary object does not directly relate to IPRs. This might include mergers and acquisitions and joint ventures.[xxxix]

The term "anti-competitive practices" is not a defined term and the WTO Reference Paper on Basic Telecommunications merely lists three anti-competitive practices.[xl] However, the WTO Panel in *Mexico-Telecoms*, the first real competition case before the WTO, interpreted the term very broadly.[xli] It is thus clear that the list in question is not exhaustive and definitely covers "actions that lessen rivalry or competition in the market." It probably also includes "horizontal price-fixing and market-sharing agreements by suppliers which, on a national or international level, are generally discouraged or disallowed."[xlii]

Since WTO law cannot be "read in clinical isolation from public international law,"[xliii] especially the general rule of interpretation contained in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the TRIPS Agreement "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Therefore, the term "anti-competitive practices" in the TRIPS Agreement can be interpreted broadly. Moreover, with similar interpretations, Articles 8(2), 40(1), and 40(2), taken together, will be applicable to anti-competitive practices relating to all the different IPRs covered by the TRIPS Agreement.

3.2. Unilateral practices

Regarding unilateral conduct as an IPR abuse, Article 31(k) acknowledges that compulsory licensing may be a remedy available to correct such anti-competitive practices. It waives certain conditions in cases of compulsory licensing of patents to remedy anti-competitive practices. It stipulates that:

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

Consequently, if the conduct of a patent holder is judged to be anti-competitive by a judicial or administrative process, the competent authorities of a member can authorize compulsory licensing with neither prior negotiation with the patent holder, nor a requirement to mainly supply patent-embodied products in the domestic market. Furthermore, the amount of remuneration can be smaller than might be the case in a commercial transaction. This is often provided for in national legislations. For example, the US Federal Trade Commission (FTC) found in *Rambus*[xlv] that Rambus' acts of deception towards a standard setting body constituted exclusionary conduct by unlawfully monopolizing the markets in favor of 4 technologies. It then granted compulsory licenses and set the maximum royalty rates that Rambus could charge firms, implementing standards embodying Rambus' patents. These rates do not exceed 0.25% to 0.5%[xlvi] for 3 years, after which the rates drop to zero, though Rambus claimed that average rates were 1-2 percent. The FTC held:

> Royalty rates unquestionably are better set in the marketplace, but [the anti-competitive conduct of the IPR holder] has made that impossible. Although we do not relish imposing a compulsory licensing remedy, the facts presented make that relief appropriate and indeed necessary to restore competition.[xlvii]

This observation, to some extent, clearly explains the rationale of Article 31(k) of the TRIPS Agreement.[xlviii]

It is worth noting that the TRIPS Agreement does not stipulate the grounds under which compulsory licensing is allowed, in general, and is no more specific in the case of IPR-related anti-competitive practices. A WTO member can enact its own laws and regulations on the matter, and after a judicial or administrative procedure, the competent authorities can grant compulsory licenses. Members can, of course, also provide for other remedies, such as injunctions, damages, fines, etc.

When the CFI required Microsoft to license its interoperability information to its competitors after reasonably determining that Microsoft's unilateral refusal to license that information was in breach of EU competition law, it was acting in a way compatible with the TRIPS Agreement.

3.3. Contractual licensing

Regarding anti-competitive practices in contractual licenses, Article 40, as *lex specialis* provisions within a framework established by Article 8(2), provides:

> 1. Members agree that *some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology*.
>
> 2. Nothing in this Agreement shall prevent Members from specifying in their legislation *licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition* in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, *appropriate measures to prevent or control such practices*, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member[xlix] (emphasis added).

Article 40(1) acknowledges that some licensing practices and conditions are anti-competitive, but it does not list them. Article 40(2) then goes on to list certain anti-competitive practices in contractual licenses, namely exclusive grant back conditions, conditions preventing challenges to validity, and coercive package licensing. However, the list is not exhaustive because the wording makes it clear that these practices are selected as examples only. Furthermore, as part of the negotiation history of the TRIPS Agreement, the Brussels Draft listed fourteen anti-competitive licensing practices which have also been listed in the Draft of International Code of Conduct on Transfer of Technology (1985 version).[l]

Besides the substantive rules in Article 40(2), Articles 40(3) and 40(4) also stipulate procedural rules for consultations and cooperation between a member who is enforcing its licensing-related competition control and another member whose national or domiciliary is alleged, under the law of the former, to be engaged in licensing-related anti-competitive practices.

The competition rules in the TRIPS Agreement, therefore, do not contain precise obligations subjecting the exercise of IPRs to competition law principles. They just provide WTO members with substantial discretion and leeway to enact and enforce national competition legislation.[li] In other words, Articles 8(2), 31(k), and 40 of the TRIPS Agreement recognize the power of members to control IPR-related anti-competitive practices.

Reading Article 40(1) out of context, one might argue that members are obliged to control anti-competitive practices relating to technology licensing because it clearly recognizes the adverse effects and impediments of some licensing practices, or conditions on trade and on the transfer and dissemination of technology. However, the key aim of the TRIPS Agreement is to protect IPR-related international trade by establishing minimum standards for IPR protection under national law. The competition provisions in the TRIPS Agreement, as a compromise between the concerns of developed country members and developing ones, are an exception to, or a reservation regarding IPR protection.[lii] If minimum standards of IPR protection are ensured, foreign IPR holders cannot succeed in complaining that their rights are adversely affected by anti-competitive practices caused by other IPR holders in a WTO member. Also for a WTO member to be able to complain before the WTO Dispute Settlement Body that IPR-related anti-competitive practices in another member adversely affect trade and/or impede the transfer and dissemination of technology (restraining outflows or inflows of technology transfer, for instance), it must prove that such anti-competitive practices are the effects of an action, *i.e.* direct involvement, not mere non-action, of the second member in the private firm's anti-competitive conduct. This was elaborated in WTO panel reports in *Japan-Film*[liii] and *Argentina-Hide and Leather*.[liv]

Accordingly, Article 40(1) cannot be interpreted as an affirmative obligation imposed on WTO members. Simply put, national legislative bodies alone have the right to reasonably determine which practices are anti-competitive and forbidden.

Going back to *Microsoft v. Commission*, one can conclude that the TRIPS competition rules invocation by the CFI concerning Microsoft's anti-competitive tying is fully compatible with the TRIPS Agreement.

4. Enforcing TRIPS competition flexibilities

If it is to take advantage of the competition flexibilities in the TRIPS Agreement, a WTO member must promulgate national legislation (or case law) addressing IPR-related anti-competitive practices regardless of whether it is a monist or dualist country. However, the competition rules in the TRIPS Agreement, particularly Articles 8(2) and 40(2), still limit the members' sovereign power to adopt competition legislation concerning IPRs. The rules require that measures adopted to control IPR-related anti-competitive practices be "consistent" with the TRIPS Agreement and "appropriate."

Regarding the consistency requirement, this limitation has at least two implications: (i) domestic competition laws, regulations and the enforcement of both must comply with the fundamental principles of the TRIPS Agreement, and (ii) they must not deprive parties of the minimum IPR protection standards established by the TRIPS Agreement itself.

Firstly, the anti-competitive practices of IPR holders may affect the use of intellectual property and hinder the transfer and dissemination of technology. That is precisely why competition rules preventing such practices are specifically addressed in the TRIPS Agreement. Note 3 of the TRIPS Agreement clearly states that:

> For the purpose of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as *matters affecting the use of intellectual property rights* specifically addressed in this Agreement[lv] (emphasis added).

Additionally, Article 63(1), which deals with transparency, also lists the subject matters of the TRIPS Agreement. One of them is "prevention of the abuse of intellectual property rights." The issue of IPR-related competition is, therefore, one of the subject matters of the TRIPS Agreement. This leads to the fact that member's competition laws and regulations must comply with fundamental principles of the TRIPS Agreement, in particular, and with WTO laws, in general. Put differently, the overriding WTO principles of national treatment, most-favored-nation, and transparency are to be applied to all domestic competition laws and regulations concerning IPRs. If a member fails to respect these principles, when adopting and applying measures preventing IPR-related anti-competitive practices, it may be subject to the WTO dispute settlement system.[lvi]

Secondly, measures to prevent and control IPR-related anti-competitive practices cannot be a mere pretext to undermine the minimum standards of the IPR protection guaranteed by the TRIPS Agreement. This means that domestic competition laws and regulations have to contribute to "a balance of rights and obligation"[lvii] for IPR holders and society. In other words, a WTO member's exercise of its rights to adopt and enforce domestic IPR-related competition legislations must be consistent with the principle of good faith.[lviii]

This limitation reflected a concern, observable in the negotiation history of the TRIPS Agreement, that some members, particularly some advanced developing countries, might use their domestic competition laws and regulations to limit concessions under the TRIPS Agreement.[lix] It aims to prevent excessive application of national competition law which might harm the regular exercise and exploitation of IPRs covered by the TRIPS Agreement. It still confirms that competition law and intellectual property law are *in pari materiae* and that competition law is the second layer that helps to establish a balance of rights and obligations relating to IPRs. Competition law is supposed to safeguard the dynamic competition that should result from and is the basis for IPR protection,[lx] but that is as far as it may go.

Regarding the appropriateness requirement, Articles 8(2) and 40(2) require that measures adopted to prevent or control IPR-related anti-competitive practices be "appropriate" and "needed." This imposes a negatively defined limitation on national remedial action which prohibits "clearly excessive remedies, which unnecessarily put the intellectual property altogether in jeopardy."[lxi] In WTO agreements, the terms "appropriate," "necessary," and "reasonable" are often used when members are given the right to frame an issue which is to function as an exception to WTO obligations.[lxii] They aim at (i) reflecting a balance in WTO agreements between preserving the freedom of members to determine and achieve specified regulatory objectives through measures chosen by them, and (ii) discouraging members from adopting and maintaining measures that unduly restrict trade.[lxiii]

In consequence, the competent authorities must weigh and balance a series of factors including (1) the contribution made by the specific measure to the enforcement of the law or regulation in question; (2) the importance of the common interests or values protected by that law or regulation; and (3) the accompanying impact of the law or regulation on trade and, in the case of enforcement of national competition law as applied to technology, the impact on IPRs, IPR-related trade, and the transfer and dissemination of technology.[lxiv] However, the reasonable availability of the less trade-restrictive measures is often applied as an alternative test.[lxv]

Besides the consistency and appropriateness requirements, members also have some consultation and cooperation obligations at least for control of anti-competitive practices in contractual licenses under Articles 40(3) and 40(4). However, these consultation and cooperation obligations are just basic rules of natural justice, and their precise applicability is limited.

Finally, at least in theory, if the adoption and enforcement of a national IPR-related competition measure by a WTO member, even if not inconsistent with the TRIPS Agreement, nullifies or impairs benefits accruing to another member as a result of the terms of the TRIPS Agreement, the measure may be challenged before the WTO Dispute Settlement Body under the non-violation complaints provisions.[lxvi] If such a challenge is successful, the member whose competition law measure has been challenged will most likely have to compensate the complaining member.[lxvii] However, non-violation complaints are temporarily not applied in accordance with (1) Article 64(2) of the TRIPS Agreement; (2) Paragraph 11.1 of the Decision on Implementation-related Issues and Concerns adopted at the WTO Ministerial Conference in 2001; and (3) Paragraph 45 of the Hong Kong Ministerial Declaration in 2005. Therefore, whether the non-violation complaints in practice are available for competition law enforcement-related disputes under the TRIPS Agreement is a matter that remains to be determined by the TRIPS Council.[lxviii]

In *Microsoft v. Commission*, the four-pronged test relating to the refusal to license and the five-pronged test relating to the tying, as applied by the CFI, were in harmony with the TRIPS consistency and appropriateness requirements because both tests consist of weighing and balancing the rights inherent in IPRs and the anti-competitive effects caused by the abusive conduct of the right holder.

5. Implications for developing countries

In an era of globalization and trade liberalization, all developing countries would like to attract both foreign investment and inflows of technology from developed countries as a way to speed up national economic growth. In the process of importing technology, developing countries also have to come to grips with IPR-related anti-competitive practices. The TRIPS Agreement gives WTO members the freedom to enact and apply national competition legislation to control and correct these practices. However, the application of national competition law to such practices is complicated and difficult for both developed and developing countries. There are many internal and external challenges which prevent developing countries from enforcing their competition law and thus controlling anti-competitive restrictions in technology transfer agreements and other abuse of IPRs. Merely adopting competition law and IPR-related competition provisions is not, therefore, a panacea.

If a developing country pro-actively uses the flexibilities allowed by the TRIPS Agreement and learns from the experiences of the developed countries, it could ensure benefits flowing to its citizens, gain access to advanced technologies, and develop its economy and still be in compliance with the TRIPS Agreement. Simply put, developing countries need to design and enforce their IPR-related competition law in a way that suits their markets and responds to their historical contexts, objectives, and development needs.[lxix]

However, when applying competition law to IPRs and technology transfer, developing countries should minimize internal obstacles, avoid external ones, and try and obtain technical assistance from developed countries. In particular, developing countries should focus on IPR-related abuses that directly affect consumer benefits, namely excessive pricing of high technology-embodied products, refusals to license, and anti-competitive tying in technology transfer agreements. To help implementation, developing countries should adopt guidelines; this will also be in compliance with the transparency and certainty requirements of the TRIPS Agreement. Finally, developed countries should cooperate and assist developing countries, not only in the context of IPR protection, but also by encouraging the dissemination and transfer of technology generally.

Recently, some developing countries have succeeded in invoking the public health-related flexibilities in the TRIPS Agreement.[lxx] Additionally, the EU, in its court's ruling in *Microsoft v. Commission* as noted, has officially recognized that the enforcement of national competition law regarding the exploitation of IPRs is indeed compatible with the TRIPS Agreement. Therefore, developing countries can always take advantage of the competition-related flexibilities in the TRIPS Agreement to promote inflows of technology transfer from developed countries. In order to do this, they should carefully review their national competition and intellectual property law to appropriately apply these flexibilities in practice. However, balances between the enforcement of competition law and the existence of IPRs must always be taken into account.

In any event, developing countries must comply with two principles. First, competition law itself, like other branches of law, always have two faces: a legal order, *i.e.* a set of norms, and legal practices, *i.e.* enforcement of the norms.[lxxi] Promulgation of competition legislation relating to technology transfer without due enforcement is worse than no regulation. Developing countries must build and improve their competition infrastructures so that their national competition law on international technology transfer is well implemented to protect national interest and customer welfare. Second, the competition law must be antitrust in nature; neither anti-IPR nor anti-trade. The enforcement of national competition law as applied to international technology transfer must take the legitimate rights of IPR holders into account, regardless of their nationality. It cannot hinder international trade liberalization nor adversely affect the minimum standards of IPR protection provided by the TRIPS Agreement.

6. Concluding remarks

The TRIPS Agreement allows WTO members to appropriately enact and apply national competition law to IPR-related anti-competitive practices. However, the competition rules of the TRIPS Agreement do not provide any detailed guidelines as to how this may be done. The application of national competition law to anti-competitive restraints in technology transfer agreements and to the refusal to transfer technology varies between developed and developing countries and even within the developed countries, themselves. Developing countries currently under-enforce their competition legislations in this area while they are net importers of technology. Although they have to comply with high standards of IPR protection, they seem not to use competition law-related flexibilities under the TRIPS Agreement to promote dissemination and transfer of IPR-intensive technology from developed countries.

In *Microsoft v. Commission*, the CFI relied on the TRIPS Competition flexibilities to justify its application of EU competition law to Microsoft's tying activities. However, it is regrettable that the CFI avoided direct invocation of the TRIPS Agreement in justifying the Commission's decision forcing Microsoft to supply interoperability information. The CFI could have gone even further by similarly applying its argument to Microsoft's complaint regarding the remedy correcting Microsoft's illegal tying. The CFI could have plausibly reasoned that Articles 8(2) and 31(k) in conjunction - even though Article 31(k) relates to patents alone - allow WTO members to regulate anti-competitive conduct, such as a refusal to license and to grant compulsory licenses to correct such conduct.

On one hand, the CFI did invoke the competition rules of the TRIPS Agreement to justify the competition authority's remedy. On the other hand, it in a sense, avoided so doing. This is likely to create inconsistency in its ruling, and this also reduces the pioneering role of the *Microsoft v. Commission* ruling regarding the application of the competition rules of the TRIPS Agreement at a domestic level. However, this does not alter the fact that although there are now differing competition law approaches to refusals to license on the two sides of the Atlantic,[lxxii] neither is incompatible with the TRIPS Agreement. If the US brings the EU to the WTO Dispute Settlement Body to complain about the EU approach, it will fail because the competition rules of the TRIPS Agreement allow it.

In sum, from the developing countries' perspective, the CFI made a breakthrough by invoking the TRIPS competition flexibilities in *Microsoft v. Commission*, but it could have gone much further. However, the CFI's invocation of the TRIPS competition rules could help competition authorities in developing countries to enact and apply national competition law to the IPR-related area in an appropriate but extensive manner. Reasonable enforcement could allow developing countries to take advantage of the competition flexibilities in the TRIPS Agreement, serve their national interests, and protect customer welfare. National competition law should still, however, be used as a last resort.

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[i] *Microsoft Corp. v. European Comm'n*, Court of First Instance of the European Communities (EU), Case T-201/04, September 17, 2007, OJ 2007 C 269/45.

[ii] Council Decision 94/800/EC, 1986-1994 O.J. (EU) *available at* http://www.legaltext.ee/text/en/PH2881.htm (establishing that the European Community is a WTO member in connection with matters within its jurisdiction).

[iii] Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, [hereinafter TRIPS] *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

[iv] EC Commission Decision of 24 March 2004 relating to a proceeding under art. 82 of the EC Treaty, Case COMP/C-3/37.792 Microsoft, OJ 2007 L32/23.

[v] *Microsoft*, *supra* note i, ¶ 229. *See also NV Nederlandsche Banden-Industrie Michelin v. European Comm'n*, Case 322/81 ¶ 57, 1983, E.C.R 3461; *Irish Sugar PLC v. European Comm'n*, Case T-228/97 ¶ 112, 1999 E.C.R. II-2969.

[vi] *Radio Telefis Eireann and Independent Television Publications Ltd v. European Comm'n*, Joined Cases C-241/91 P and C-242/91, 1995 E.C.R. I-743.

[vii] *IMS Health GmbH & Co. v. European Comm'n,* Case C-418/01, 2004 ECR I-5039.

[viii] *Microsoft supra* note i, ¶¶ 331-333.

[ix] *Id.* at ¶¶ 392-393, 413, 421-422.

[x] *Id.* at ¶¶ 561-563, 593, 519-620.

[xi] *Id.* at ¶¶ 647, 651-653, 657-658, 665.

[xii] *Id.* at ¶¶690-691, 696, 710-712.

[xiii] The Commission argued that "Microsoft's conduct presented three characteristics which allowed it to be characterized as abusive. The first consists in the fact that the information which Microsoft refuses to disclose to its competitors relates to interoperability in the software industry, a matter to which the Community legislature attaches particular importance. The second characteristic lies in the fact that Microsoft uses its extraordinary power on the client PC operating systems market to eliminate competition on the adjacent work group server operating systems market. The third characteristic is that the conduct in question involves disruption of previous levels of supply". *Microsoft*, *supra* note i, ¶¶ 317, 336.

[xiv] *Microsoft*, *supra* note i, ¶ 859.

[xv] *See, e.g.*, *Hilti AG v. Comm'n*, Case T-30/89, 1991 E.C.R. II-1439, *appeal denied* in *Hilti v. Comm'n*, Case C-53/92, 1994 E.C.R. I-667; *Tetra Pak Int'l SA v. European Comm'n*, Case T-83/91, 1994 E.C.R. II-755, *appeal denied in Tetra Pak Int'l SA v. European Comm'n*, Case C-333/94 1996 E.C.R. I-5951.

[xvi] *Microsoft*, *supra* note i, ¶ 1088 (agreeing with the Commission that "the bundling increases the content and applications barriers to entry, which *protect Windows*, and facilitates the erection of such barriers for Windows Media Player" (emphasis added)).

[xvii] *See generally*, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *see also* European Comm'n Guidelines on the application of art. 81 of the EC Treaty to technology transfer agreements, OJ 2004 C 101/2, para. 193 (holding that "the main restrictive effect of tying is foreclosure of competing suppliers of the tied product. *Tying may also allow the licensor to maintain market power in the market for the tying product by raising barriers to entry since it may force new entrants to enter several markets at the same time*" (emphasis added)).

[xviii] *See* Vienna Convention on the Law of Treaties art. 26, 27, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

[xix] WTO Panel Report, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, ¶ 7.72, (Dec. 22, 1999).

[xx] Martin Dixon, TEXTBOOK ON INTERNATIONAL LAW, 88-90 & 94-97, (Oxford University Press 2007); Xin Zhang, *Direct Effects of the WTO Agreements: National Survey*, 2 INT'L TRADE L. & REG. 35 (2003); Thomas Cottier & Krista N. Schefer, *The Relationship between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. J. 83 (1998).

[xxi] Uruguay Round Agreements Act, Pub. L. No. 103-465, sec. 102(a)(1), 108 Stat. 4809 (1994).

[xxii] *See In re Rath*, 402 F.3d 1207, 1209 n. 2 (2d Cir. 2005); *ITC v. Punchgini*, 482 F.3d 135, 161-62 (2d Cir. 2007).

[xxiii] Law on Conclusion, Accession and Implementation of Treaties art. 6, Law No.: 41/2005/QH11 (2005) (Vietnam).
[xxiv] Resolution Ratifying the Protocol of Accession of the Socialist Republic of Vietnam to the Agreement Establishing the World Trade Organization point 2, No. 71/2006/QH11 (2006) (Vietnam).
[xxv] *Develey v. OHIM*, Case C-238/06 P, ¶¶ 38-39 & 44 (Oct. 25, 2007), OJ 2007 C 315/16.
[xxvi] Council Decision No. 94/800/EC, *supra* note ii .
[xxxvii] *See, e.g.*, *Portugal v. Council*, Case C-149/96, ,1999 ECR I-8395, ¶¶ 42-48; *Dior and Others,* Joined Cases C-300/98 and C-392/98,, 2000 ECR I-11307, ¶¶ 44-45; *Anheuser-Busch*, Case C-245/02, 2004 ECR I-10989, ¶ 54. For further, *see* Antonis Antoniadis, *The European Union and WTO Law: a Nexus of Reactive, Coactive, and Proactive Approaches*, 6(1) WORLD TRADE REV. 45 (2007); Antonello Tancredi, *EC Practice in the WTO: How Wide is the 'Scope for Manoeuvre'?*, 15(5) EJIL 933 (2004).
[xxviii] *Merck Genéricos Produtos Farmacêuticos v. Merck & Co*, Case C-431/05, ¶ 48 (Sept. 11, 2007), OJ 2007 C 269/9.
[xxix] *See* TRIPS, *supra* note iii, at art. 1.1.
[xxx] Carlos M. Correa, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT vii (2007).
[xxxi] *Microsoft v. Comm'n, supra* note i, ¶¶ 798-802.
[xxxii] *Id.* at ¶ 812.
[xxxiii] *Id.* at ¶¶ 1189-90.
[xxxiv] *Id.* at ¶ 1192 (emphasis added)
[xxxv] *Id*. at ¶¶ 1223-28. It is worth noting that measures imposed by South Korea's Fair Trade Commission (KFTC) for Microsoft's tying conduct in South Korea were even stricter than the Commission's measures. *See* the holding of the KFTC in its Microsoft Decision on February 24, 2006 translated and analyzed in Sejin Kim, *The Korea Fair Trade Commission's Decision on Microsoft's Tying Practice: the Second-Best Remedy for Harmed Competitors*, 16 PAC. RIM L. & POL'Y J. 375, 378 (2007).
[xxxvi] *See* Susan K. Sell, CODES OF CONDUCT FOR THE INTERNATIONAL TRANSFER OF TECHNOLOGY: DEVELOPMENT, COMPETITION, AND COOPERATION, PhD Dissertation, University of California, Berkeley, 1989

[xxxvii] UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 543-46, (2005).
[xxxviii] *See* TRIPS, *supra* note iii, at art. 6 (Stipulating exhaustion of IPRs may be considered as part of the competition rules in broad sense. However, this paper does not deal with issues relating to exhaustion of IPRs.) *See also infra* note xlviii.
[xxxix] UNCTAD-ICTSD, *supra* note xxxvii at 547; Hanns Ullrich, *Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 730-31 (Keith E. Markus & Jerome H. Reichman eds. 2005); Pedro Roffe, *Control of Anti-competitive Practices in Contractual Licences under the TRIPS Agreement*, *in* INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 279-80 (Carlos M. Correa & Abdulqawi A. Yusuf eds. 1998).
[xl] World Trade Organization Reference Paper on the Negotiating Group on Basic Telecommunications (Apr. 24, 1996), http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm (last visited Apr. 21, 2008).

[xli] Panel Report, *Mexico - Measures Affecting Telecommunication Services (Mexico- Telecoms)*, WT/DS204/R (June 1, 2004).
[xlii] *Id.* at ¶ 7.237.
[xliii] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).
[xliv] TRIPS, *supra* note iii at art. 31(k)..
[xlv] *In the Matter of Rambus, Inc.*, No. 9302, (F.T.C filed June 18, 2002), *available at* http://www.ftc.gov/os/adjpro/d9302/index.shtm.
[xlvi] However, the rate for JEDEC-Compliant Non-DRAM Products that comply with DDR SDRAM Standards is 1 percent.
[xlvii] *Rambus*, No. 9302.
[xlviii] In addition to article 31(k) which is a general provision, article 31(c) mentions the possibility of authorizing compulsory licensing regarding semi-conductor technology patents as a remedy for correcting anti-competitive practices as determined by judicial or administrative authority.
[xlix] TRIPS Agreement, *supra* note iii, art. 40(1) and 40(2)..
[l] *See* Daniel Gervais, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 278-79 (Sweet & Maxwell 2d ed. 2003).
[li] Working Group on the Interaction between Trade and Competition Policy, European Community—*Communication from the European Community and Its Member States*, ¶ 22, (September 25, 1998).
[lii] Ullrich, *supra* note xxxix, at 733-34.
[liii] Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.41, WT/DS44/R (Mar. 31, 1998) [hereinafter *Japan-Film*]. In this case, on account of the anti-competitive and exclusionary distribution system of Fuji, which blocked Kodak's access to the Japanese market for photographic film and paper, Kodak petitioned the US Trade Representative. The US then filed complaints against Japan to the WTO Dispute Settlement Body. The US alleged that Japan had implemented and maintained certain laws, regulations, requirements, and measures affecting the distribution and sale of imported consumer photographic film and paper. The US considered that such measures nullified or impaired benefits accruing to it, within the meaning of Article XXIII:1(b) of GATT. The WTO Panel contended that in order to win such a non-violation case, the complainant had to prove that three conditions were cumulatively satisfied: (i) *the practice was the effect of a government's measure upon private parties' behavior*; (ii) such measure related to a benefit reasonably anticipated to accrue from prior tariff concessions by upsetting the competitive relationship between imports and domestic products; and (iii) the benefit accruing to the complainant state had in fact been nullified or impaired by the measure in questions.
[liv] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hide and the Import of Finished Leather*, ¶ 11.49 and 11.51,WT/DS155/R (Dec. 19, 2000) (the EC claiming there was a cartel of tanners operating in the Argentinean market, which, as one of its objects, stifled the export of bovine hides, and that Resolution 2235/96 of Argentina Government provided the means for making effective these export restrictions. The WTO Panel tacitly established that, in order to prove Argentina's violation, the EC had to demonstrate cumulatively that: (i) there was a cartel, (ii) *the cartel was attributed to the defendant Member's direct involvement*, (iii) there was an export restraint, and (iv) there was a causal relation between the alleged cartel and the alleged export restrictions)..
[lv] TRIPS, *supra* note iii, at Art. 3.1.
[lvi] Clause-Dieter Ehlermann & Lothat Ehring, REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 544 (Oxford University Press 2005) (after analyzing WTO competition rules, one may argue that "not only competition laws of WTO Members but also their application in individual cases already today are subject to the dispute settlement system").
[lvii] TRIPS, *supra* note iii, at Art. 7.
[lviii] *See* Appellate Body Report, *United States – Import Prohibition of Shrimp and Certain Shrimp Products*, ¶ 1,58, WT/DS58/AB/R (Oct. 12, 1998); *See Also* Panel Report, *United States- Section 211 Omnibus Appropriation Acts of 1998*, ¶ 8.57, WT/DS176/R (Aug. 6, 2001) (The good faith principle as "a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting".).
[lix] UNCTAD, *supra* note xxxvii, at 551.

[lx] *Id*. at 551.
[lxi] *Id*. at 554.
[lxii] *See, e.g.*, TRIPS, *supra* note iii, at arts. 3(2), 8, 27(2), and 40(2); General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, at arts. VI, XII, XIV (1994), *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm [hereinafter *GATS*]; General Agreement on Tariffs and Trade, April 15, 1994, 33 I.L.M. 1125, at arts. XI, XX [hereinafter *GATT*]; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, at art. II (1994) [hereinafter *Technical Barriers*]; Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, at art. II (1994) [hereinafter *Phytosanitary*].
[lxiii] Working Party on Domestic Regulation, *"Necessity Tests" in the WTO*, Note by the Secretariat, S/WPDR/W/27, 2003, at para. 4, *available at* http://www.ictsd.org/issarea/stsd/Resources/Docs/Nectest.PDF.
[lxiv] Appellate Body Report, *Korea—Measures Affecting Import of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS169/AB/R (Dec.11, 2000), *available at* http://www.worldtradelaw.net/reports/wtoab/korea-beef(ab).pdf; Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-containing Products*, ¶ 172, WT/DS135/AB/R (March 12, 2001). *See generally* Neumann, J. & Türk, E., *Necessity Revisited - Proportionality in WTO Law after Korea-Beef; EC-Asbestos and EC-Sardines*, JOURNAL OF WORLD TRADE, Vol. 37 No. 1 (Feb. 2003).
[lxv] *See EC- Asbestos*, *supra* note lxiv, ¶¶ 168-75.
[lxvi] *See* TRIPS, *supra* note iii, at Art. 64; GATT *supra* note lxii, at Art. XXIII(1)(b); *see also* the Understanding on Rules and Procedures Governing the Settlement of Disputes of the Marrakesh Agreement Establishing the World Trade Organization, Annex 2 [hereinafter *DSU*] , *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm at Art. 26.
[lxvii] *See* DSU, *supra* note lxvi, at Art. 26(1)(d). The WTO Appellate Body in *India- Patents* held that "under Article XXIII:1(b) of the GATT 1994, a Member can bring a "non-violation" complaint when the negotiated balance of concessions between Members is upset by the application of a measure, whether or not this measure is inconsistent with the provisions of the covered agreement. The ultimate goal is not the withdrawal of the measure concerned, but rather achieving a mutually satisfactory adjustment, usually by means of compensation."); Appellate Body Report, *India- Patents Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 41, WT/DS50/AB/R (Dec. 19, 1997).
[lxviii] WTO, Ministerial Declaration of November 2001, WT/MIN(01)/17, ¶ 11.1 (2001); WTO, Ministerial Declaration of December 2005, WT/MIN(05)/DEC, ¶ 45 (2005); Appellate Body Report, *India- Patents Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, ¶ 42 (Dec. 19, 1997). *See also* TRIPS Council, *Non-violation and Situation Complaints*, IP/C/W/349/Rev.1 (2004).
[lxix] Eleanor M. Fox, *Economic Development, Poverty and Antitrust: the Other Path*, 13 SW. J. L. & TRADE AM. 221, 235 (2007); UN General Assembly Resolution A/RES/59/221, February 11, 2005, ¶ 30.
[lxx] For example, in late 2006 and early 2007, the Thai government issued three compulsory licenses with respect to drugs for treatment of AIDS and heart diseases without any direct unfavorable reaction from developed countries. *See* Thai Ministry of Public Health & National Health Security Office, *Facts and Evidence on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand*, 38-46.
[lxxi] See Kaarlo Tuori, CRITICAL LEGAL POSITIVISM, Ashgate, 2002, at 121.
[lxxii] Regarding the US approach, see Statement on European Microsoft Decision issued by the Assistant Attorney General for Antitrust of the US Department of Justice on September 17, 2007, <http://www.usdoj.gov/atr/public/press_releases/2007/226070.pdf>.