



# Human Rights, Intellectual Property and Competition Law:

From Fragmentation to Coherence

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## Early Links

- International human rights protection began with combating slave trading. It was a matter of human dignity, as well as of equal conditions of competition.
- Later, this linkage was largely lost ....

# Legal Fragmentation and Splendid Isolation

- Constitutional and public law
- Fundamental and Human Rights
- Administrative law
- Government Procurement
- Public international law

- Private law - contractual liberty
- commercial law
- Intellectual property law
- unfair competition
- competition law and policy
- Private and public international law

# Topics for Discussion

- How to define the relations of human rights, IPRs and competition law?
- Domestic relations under constitutional law
- International relations under international law ?
- Specific Areas:
  - The Issue of Labour standards
  - Protection of Traditional Knowledge (TK)
  - Access to essential drugs (HIV/AIDS)

# • • • Domestic Law (including EU)

- Constitutional framework offers potentials to achieve coherence:
  - Fundamental rights (including economic freedoms) and human rights
    - inform the shaping of IPRs and competition law (programmatically function of human rights)
    - inform the interpretation of IPRs and competition law (constitutional interpretation)

# Interfacing Domestic Law

- National Constitutional Courts case law on commercial matters; problem of horizontal effect (*Drittwirkung*)
- ECHR: case law on commercial matters
  - Example: *Hertel c. Switzerland* (53440/99)
- ECJ: case law explicitly interfacing EC law and human rights
  - Examples: *ERT* (ECJ Rep [1991] I 2995) *Familia Press* (ECJ Rep [1997] I 3689)

# Potential Relations in EC Case

## Law: Examples

- Gender Discrimination (Art. 141 ECT)  
*Defrenne* ICJ Rep [1976] 455; but see [1978] 1365
- Abuse of dominant position and freedom of press and information *Magill* (ECJ Rep [1991] II 535) *Bronner* (ECJ Rep [1998] 7791)
- Abuse of dominant position and Boycott  
*United Brands Company* (ECJ Rep. [1978] 207)
- Access to drugs - parallel imports  
*(Merkt/Stephar* (ECJ Rep [1981] 2063)

# International Human Rights

“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”

Art. 28, Universal Declaration of Human Rights, December 10, 1948



# Relevant Human Rights

- Protection of Private Property,
- Protection of Intellectual Property (Moral rights only)
- Equality and Non-discrimination

- Right to health
- Right to food
- Right to education
- Rights of Children
- Rights of Women
- Rights of Indigenous Peoples
- Right to environment (sustainable development)
- Freedom of Speech
- Freedom of Association

# Human Rights Protection since 1948

- Internationalisation of Human Rights (in response to state failures)
  - Universal Declaration 1948, UN Conventions, Standards ILO, WHO
  - Regional protection (e.g. UCHR)
  - Comprehensive regulation of civil, political and social rights and standards: top down
  - Lack of financing and effective enforcement
- Standards of Justice and Equity

# International Trade Regulation

- Multilateralisation of market access rights and conditions of competition, complex regulatory systems:
  - GATT 47, WTO 1995 (GATT 94, GATS, TRIPs)
  - Regional integration (EEC, NAFTA, Mercosur, ASEAN, Comecon)
- Principles of Non-discrimination (MFN, NT), enforcement (sanctions)

# Comparison

- Utilitarian tradition and statal claims
- progressive, bottom up
- Relatively strong dispute settlement and enforcement in WTO
- regional systems beyond negative integration

- Individualist tradition and claims
- top down, comprehensive
- Weak international enforcement in UN System
- Regional systems more effective

# Commonalities

- Both areas part of post World War II Order
- libertarian traditions (fundamental boundaries and New Deal)
- Equality of Opportunities
- MFN and NT emanation of equality before the law
- rule of law and Good Governance

# Mutual Support

- *Handel and Wandel*, FDI
- Economic growth and welfare, affording social security nets
- Freedom and Equality
- trade sanctions for human rights enforcement

- Open societies, political discourse and adjustment
- social rights and entitlement facilitate open markets
- legitimisation of economic policies

# Mutual Tensions

- Producer driven
- Increasing gaps of rich and poor
  - domestically
  - internationally (LDCs, LLDCs)
- no trickling down of welfare gains per se
- ecological concerns

- Social rights, women's rights not promoted per se
- Authoritarianism not contained
- Farmers' rights denigrated
- Third generational rights ignored

# Not a One-way Street

- The relationship of Human Rights, competition law and IPRs is complex
- Economic protectionism is not conducive to realisation of human rights
- Open markets and equal conditions are essential to combat protectionism
- It is not simply a relationship of subordination, but of mutual interaction



# The Challenge of Operational Interface

- To what extent should Human Rights and economic regulation be taken into account in mutual interpretation of respective instruments:
  - In interpreting Human Rights ?
  - In interpreting trade regulation?

# SECTION 3. INTERPRETATION OF

## TREATIES

### Article 31

#### General rule of Interpretation

- 1. A treaty 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.
- 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

# SECTION 3. INTERPRETATION OF TREATIES

## Article 31

### General rule of Interpretation

- 3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
- 4. A special meaning shall be given to a term if it is established that the parties so intended.

# In Law-making

- To what extent should we take into account human rights and trade regulation in shaping new rules and commitments:
- In shaping trade rules: e.g. in trade in agriculture?
- In shaping human rights, e.g. in relation to right to health and food?

# Enforcement

- To what extent should trade regulation be used in order to enforce human rights?
- Economic sanctions for non-economic concerns?
- For human rights inherently essential for the trading system? If yes, which ones ?
- Core human rights? If yes, which ones?

# Institutional Structures

- How to bring about institutional interface of human rights and trade regulation in international fora ?
  - Law making processes?
  - Dispute settlement ?
- How to shape WTO dispute settlement to take such concerns into account ?
- How to shape UN human rights assessment to take into account trade regulation?

# Specific Areas

1. Labour Standards
2. Plant Genetic Resources and the protection of Traditional Knowledge
3. Patent law and access to essential drugs

# 1. Labour Standards

- Labour standards are informed both by human rights and concerns of equal conditions of competition
- Developing countries opposed to inclusion in WTO law
- Production and Process Methods (PPMs) in WTO terms



# Controversial PPMs

- MFN and National Treatment (Art.I, III GATT, Art. XVII GATS)
- Competitive relationship of like products
- Market access
- limited exceptions (Art. XX GATT, XIV GATS)
- Production methods essential element in chain of production
- essential for incorporating human rights values and environmental concerns
- TBT Agreement

## 2. Plant Genetic Resources: Increasing Gaps

- Broad legal protection of genetically engineered products (patents, plant variety protection)
- Full and free use of traditional knowledge in relation to resources for genetic engineering
  - seeds, landraces
  - traditional medicines
  - traditional pesticides

# Permanent Sovereignty over Natural Resources

- **Public Good**
  - Res nullius
  - Free Flow of PGRA
  - non-assignable resources supported by public policy measures
    - financial instruments including subsidies in research, trade
    - national and international programs

- **Proprietary**
  - Property Allocation and Assignment
- Sui generis IPRs: TIP Rights (Traditional Intellectual Property Rights)
  - Exclusive Rights
  - Licensing
  - Contractual Compensation

# • • • Notion of Traditional Knowledge

- Cumulative body of knowledge about the identity, the function and the management of PGR, more specifically PGRFA:
  - held by farming communities (PGRFA)
  - held by *indigenous people and minority cultures*
  - the systematic information that remains in the *informal sector*
- Comprises *information* as well as *skill and practice*, not the product itself

# Protecting Traditional Knowledge in IPR Law

- Ethical Challenge: Restoring Equity
- How to link IPRs to Benefit Sharing and Protection of Biodiversity?
- How to balance Appropriations with preexisting Investment found in Public Domain?
- How to bring about de-fragmentation and an international system?

# Impending Reforms of Patent Law

- Efforts to bring about Benefit-sharing and Access under CBD:
  - Establishment of electronic data on TK:
    - protection of prior art (WIPO)
    - Disclosure of source
    - Prior informed consent (PIC)
    - Farmers' privileges (Genetic engineering)

# Notion of TIP Right

- *Commercially viable information*
  - on the use of PGR for production processes (food, medication, pesticides, cultivation of land and forests, techniques supporting human labour)
- *vital for conservation and sustainable use of biological resources and/or socio-economic value*
- *developed over years in indigenous/local communities*
- *constantly evolving in response to a changing environment (not static)*

# Purposes of TIP Right

- Socio-economic functions:
  - distributinal justice
  - empowerment (vis-à-vis governments, industry), autonomy
  - Valuation
- Socio-ecologic functions:
  - Incentive to avoid loss of biodiversity
  - food security
  - food/health safety



### 3. Access to Essential Drugs

- Patent duration 20 years as of filing (TRIPs Art. 33 )
- Rights conferred: prevent and stop the making, using, offering for sale, selling, importing of a patent product without consent (generics, piracy, counterfeiting)
- Exemptions, in particular research (Art. 30) *Canada Patent*, compulsory licensing (Art. 31)

# Availability

- 95% of Essential Drugs (WHO List) are off patent
- Main Issue: Advanced drugs and HIV Retroviral Drugs on patent
- Low levels of research for specific LDC diseases (Malaria, sleeping disease, TB) due to lack of potential returns
- Inadequate distribution systems and funding

# Pricing

- Exclusive marketing rights for an average period of 8 years only in practical terms
- Import monopoly and import restriction on generic drugs from abroad
- Lack of competition - increasing prices in most advanced medicines likely, but:
- Public pressures (NGOs)
- Price controls and regulations possible

# Compulsory Licensing of Medicines

- The purposes of compulsory licensing
  - making available a product otherwise denied at reasonable cost or at all
  - influencing pricing in voluntary licensing negotiations
  - no limitations of public policy purposes in Article 31 TRIPs
- Detailed conditions to be met for CL in Art. 31 TRIPs

# Compulsory Licensing for Essential Drugs

- Compulsory licensing possible predominantly for the supply of the domestic market of the Member authorising such use, Art. 31(f).
- Compulsory licensing useless for countries short of sufficient manufacturing base
- Compulsory import licensing without effect as of 2005 due to introduction of patenting abroad (export prevention by patent holder)

# Doha Declaration on Public Health and Waiver

- Pharmaceutical Industries pursued aggressive policies against parallel trading
- Political pressures from NGOs and DC blaming WTO
- Doha Declaration reaffirms priority of public health and principles enshrined in Articles 6, 8 and 31 TRIPs
- Waiver 2003 allows for export licensing (Art. 31 f)

## Practical Effect of Waiver

- Generics producers will be entitled to export a wide range of products essential for combating HIV/AIDS, TB, malaria and other epidemics in all countries (except of 23 industrialised countries)
- labelling and quantitative monitoring, no re-importation (see also best practices)
- Adequate remuneration to right holder
- Impact on R&D in the future?

# Additional Regulatory Instruments

- Import tariffs
- Testing and Marketing Approval (Food and Drug Administration)
- Price controls within administration of the public health system
- Competition policies against abuse of intellectual property rights (Art. 40 TRIPs)
- WTO negotiations on trade and competition beneficial for human rights protection



# Findings

- The TRIPs Agreement allows for balanced solutions relating to IP protection of medicines; WTO took too much of the blame
- The main problem of access remains funding of research and distribution in poor countries (funding, international solidarity) and the implementation of Human Rights

# Overall Conclusions

- Complex interaction of human rights, competition rules and IPRs not explored in international law
- Human Rights increasingly inform the shaping of international economic law, in particular IPRs
- Human Rights suitable for interpretation of WTO law, in particular the issue of like products and IPRs

# Overall Conclusions

- Implementation of social rights require affirmative action (finance) way beyond the trading system - Concertation of IOs
- The impact of competition law and IPRs on human rights' interpretation remains to be explored



Thank you for your attention!

