Panel on Exploring the Flexibilities Under Global Standards:
A Comparative Analysis of Policy Space in WTO Law

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Can One Size Fit All?

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Outline

- Intellectual Property in the Context of International Economic Regulation
- Policy Space in the Areas of Trade in Goods and Services (GATT, GATS)
- Comparable Flexibilities under TRIPS?
Intellectual Property in the Context of International Economic Regulation

- **Increasing impact** of global rules on trade, IP, investment, etc **on public interests**

- **Dominant discourse** about market liberalisation, investment protection and security and predictability of international trade – **marginalisation** of public interests in global rules

- **Lack of consensus** on regulating public interests – dominant approach therefore limited to providing **policy space on the domestic level**
Intellectual Property in the Context of International Economic Regulation

Thesis:

- The increased impact of trade rules on domestic policies calls for strong regulatory tools which allow recognising, and, if necessary, *giving preference* to public policy interests in a transparent and rationale process of balancing.

- The more intense international economic regulation becomes, the stronger is the need for including a comprehensive and flexible regime which takes into account all interests affected.

- The need for such balancing exists in IP as much as other fields of international economic law with similar impact on public interests. The mechanisms for balancing should therefore allow an *equivalent level* of recognition and enforcement of these interests.
Policy Space in the Areas of Trade in Goods and Services (GATT, GATS)

- Within WTO Rules on trade in goods, **Art.XX GATT** contains a general exception from GATT obligations

- Art.XX GATT exceptions are not to be interpreted narrowly – they ensure the overall balance of interests in GATT (US – Gasoline)

- Art.XX GATT allows WTO Members to give preference to public interests over trade obligations

- **Art.XIV GATS** contains an almost identical exception on service obligations
Policy Space in the Areas of Trade in Goods and Services (GATT, GATS)

Article XX - General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
Comparable Flexibilities under TRIPS?

- **Art.8:1 TRIPS** – a downgraded copy of Art.XX GATT

- **Artt. 13, 17, 26:2, 30; 31 TRIPS** – three step tests which primarily focus on right holders’ interests; CL mechanism

- **Preamble & Art.7 TRIPS, para.5 (a) Doha Declaration** – interpretation (also) based on TRIPS objectives

- **Art.1:1 3rd sentence TRIPS** – autonomy in implementation mechanisms
Comparable Flexibilities under TRIPS?

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<th>Art.8B.2 (W/76)</th>
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<td><strong>Principles</strong></td>
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| (2) In formulating or amending their national laws and regulations on IPRs, *PARTIES have the right to adopt appropriate measures* to protect public morality, national security, public health and nutrition, or to promote public interest in sectors of vital importance to their socio-economic and technological development. | (1) *Members may*, in formulating or amending their laws and regulations, *adopt measures* necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, *provided that such measures are consistent with the provisions of this Agreement.* | *Subject to (…), nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:*
|                  |               | (a) *necessary* to protect public morals; *(b) necessary* to protect human, animal or plant life or health; *(g) relating to the conservation of exhaustible natural resources (…)* |
Comparable Flexibilities under TRIPS?

Nature of IP Protection to justify Differences?

- GATT obligations, tariff bindings secure market access, limit non-tariff barriers

- IPRs grant merely negative rights – no positive monopolies guaranteeing market access, exploitation of IP protected goods/services; thus: “(…) freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement” (EC-GIs)

- But realising public policies may require to make IP protected subject matter available to the public; to certain groups; for certain purposes…
Comparable Flexibilities under TRIPS?

Conclusions

- “Negative right“ concept, i.e. the nature of IP does not justify the significant difference between Art.8:1 TRIPS and Art.XX GATT
- TRIPS provisions on exceptions (Art.13, 17, 26:2, 30, 31, 40) necessary to guarantee an equivalent balance of interests & and domestic policy space
- As currently applied by WTO Panels, especially the three step test does not live up to this normative call
- Interpretation based on TRIPS objectives should as much as possible be utilised to fill this gap
Thank you for your attention!

Please send comments and critique to

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