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# EXHAUSTION AND PARALLEL IMPORTATION OF INTELLECTUAL PROPERTY RIGHTS UNDER TRIPS: POLICY CHALLENGES IN GLOBALIZED DISTRIBUTION AND HOW MULTILATERAL TRADE NORMS INTERACT WITH NATIONAL IP EXHAUSTION DOCTRINES

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Sandra Jose, Gujarat Maritime University

## ABSTRACT:

This paper's primary purpose is to analyse the policy challenges in globalized distribution and how multilateral trade norms interact with national IP exhaustion doctrines. Article 6 of TRIPS creates a conscious legal ambiguity by allowing each WTO member to define its own exhaustion regime, a policy choice protected from WTO dispute settlement. This has resulted in a very fragmented global system where national, regional, and international exhaustion doctrines exist side by side. Through a comparative legal and economic methodology, this research investigates the implications of this fragmentation. The study first examines the text and negotiating history of TRIPS, including the pivotal role of the Doha Declaration, before conducting case studies of the United States, the European Union, India, and South Africa to illustrate the application and rationale of each major exhaustion regime.

The paper combines economic and legal scholarship to evaluate the central tension between national policy flexibility and the need for a harmonized international system. It analyzes how parallel importation, enabled by broader exhaustion rules, affects international price discrimination, corporate profitability, and R&D investment, while also considering the pro competitive effects and consumer welfare benefits.

## INTRODUCTION

Globalization has transformed the distribution of goods and technology, pushing the doctrines of Intellectual Property Rights (IPR) exhaustion and their interplay with multilateral trade norms into visibility. While often mixed up, *international exhaustion* and *parallel imports* are distinct. International exhaustion means that an authorized sale of a patented product anywhere extinguishes the right holder's control over its subsequent distribution. Parallel imports, by contrast, involve the resale of genuine goods legally produced and marketed in one jurisdiction into another without the authorization of the local IPR holder.

The intellectual property system, grounded in exclusive, time limited rights, drives innovation by ensuring a return on creative and financial investment. Yet, exclusivity is curtailed by the doctrine of exhaustion which eliminates the right holder's control once a product is placed on the market with consent. This principle legitimizes parallel imports, creating "grey markets" where goods flow across borders in refusal of right holders' market segmentation strategies. Such price exploitation embodies the tension between free trade ideals and IPR enforcement.

The WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) squarely reflects this tension. While TRIPS harmonized IP standards globally, it deliberately avoided prescribing an exhaustion regime. Article 6 explicitly states that "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." This calculated a gap caused from disagreement during the Uruguay Round was later reaffirmed by the Doha Declaration, which emphasized member states sovereign freedom to determine exhaustion policies, especially for ensuring access to affordable medicines.

The central argument of this paper is that the ambiguity entrenched in Article 6, while a practical compromise, has institutionalized a core fault line within the global IP system. The absence of harmonization forces states to continuously reset between two competing imperatives: protecting monopolistic rights that drive innovation and enabling the free flow of goods essential to competition and access. In a globalized economy, this unresolved tension remains one of the most pressing challenges at the intersection of trade and intellectual property law.

## **STATEMENT OF PROBLEM**

The central problem stems from the deliberate ambiguity of Article 6 of the TRIPS Agreement, which stipulates that for the purposes of dispute settlement, the agreement shall not be used to address the issue of intellectual property rights exhaustion. This provision, born from a negotiating impasse, effectively grants WTO member states the sovereign right to determine their own exhaustion regimes without fear of multilateral challenge, a stance explicitly reaffirmed by the Doha Declaration. Consequently, this "agreement to disagree" has institutionalized a fragmented and unpredictable global legal framework where national, regional, and international exhaustion doctrines coexist. This creates a fundamental conflict between the territorial nature of intellectual property rights and the borderless reality of globalized commerce, leading to significant legal uncertainty, undermining the ability of IP

holders to implement consistent international pricing and distribution strategies, which will create policy tension between protecting innovation and promoting consumer access to goods at competitive prices.

## **OBJECTIVES**

1. To critically analyze how Article 6 of the TRIPS Agreement creates a fragmented global legal framework by allowing WTO members to independently determine their own IP exhaustion doctrines.
2. To comparatively assess the economic and policy consequences of the three main exhaustion regimes (national, regional, and international) on global price structures, parallel importation, and the enforcement of IP rights.
3. To evaluate the tension between the objectives of TRIPS to protect IP rights and promote technological innovation and the use of exhaustion as a flexibility to achieve national public policy goals, such as increasing access to affordable medicines.

## **SCOPE OF STUDY**

This study examines the legal and economic tensions created by Article 6 of the TRIPS Agreement and its role in shaping the doctrine of intellectual property exhaustion. It will analyze the provision's text, history, and interpretations, alongside domestic laws and rulings from selected WTO members representing national, regional, and international regimes. The comparative analysis will focus on how these frameworks affect multinational corporations in sectors like pharmaceuticals and electronics, influencing pricing, parallel importation, and cross-border IP enforcement.

## **RESEARCH METHODOLOGY**

This study will employ a multi faceted research methodology that combines doctrinal legal analysis, a comparative case study approach, and economic analysis to provide a comprehensive understanding of the issue. It begins with a doctrinal analysis of primary and secondary legal sources, focusing on TRIPS Article 6, alongside GATT and the Vienna

Convention, to situate the exhaustion doctrine within international trade law. A comparative case study of selected WTO member states (national, regional, and international regimes) examines laws, court rulings, and policies to show how different systems operate. To test hypotheses, the study integrates economic and empirical analysis, drawing on secondary data, market prices, industry reports, and trade studies to measure the impact of parallel imports on prices, competition, and IP holders.

## **SCHEME OF CHAPTERIZATION**

Chapter 1: Introduction – Introduces the concepts of exhaustion of intellectual property rights and parallel importation, highlights the problem of ambiguity in TRIPS Article 6, and sets out research aims, hypotheses, scope, and structure.

Chapter 2: TRIPS Agreement and Exhaustion – Explains the objectives and principles of TRIPS, with focus on Article 6, its history, and linkages with Articles 7, 8, and the Doha Declaration, showing member states' flexibilities.

Chapter 3: Comparative National Regimes – Compares exhaustion doctrines: national (e.g., U.S.), regional (EU), and international (e.g., India, South Africa), analyzing laws, court cases, and practical effects for IP holders and consumers.

Chapter 4: Economic Impact of Parallel Importation – Examines how parallel imports influence pricing, market segmentation, grey markets, competition, corporate profits, and consumer welfare, using economic studies and industry evidence.

Conclusion

## **CHAPTER II - THE TRIPS AGREEMENT AND DOCTRINE OF EXHAUSION**

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is a foundational international treaty administered by the World Trade Organization (WTO) that establishes comprehensive baseline standards for the regulation and protection of intellectual property rights (IPRs) across all member states. Coming into force in 1995, TRIPS marked a historic integration of IP law into the multilateral trade framework, reflecting a significant shift wherein intellectual property issues were no longer governed solely by specialized treaties but became subject to enforceable trade disciplines and WTO dispute resolution mechanisms. The overarching objectives of TRIPS, as articulated in Article 7, are to promote technological

innovation and the transfer and dissemination of technology in a manner conducive to social and economic welfare. This balance seeks to harmonize the interests of right holders and users of technology, recognizing that IP protection should encourage innovation while also promoting wider access to technological advances.<sup>1</sup>

Core to the operation of the TRIPS Agreement are the principles of non discrimination embodied in the rules of "national treatment" and "most-favored-nation" (MFN) treatment, enshrined respectively in Articles 3 and 4<sup>2</sup>. National treatment precludes WTO members from discriminating between their own nationals and those of other members with respect to IP protection and enforcement, mandating equal treatment. Similarly, MFN treatment requires that any advantage, favor, privilege granted by a member to the nationals of any other country must be extended immediately and unconditionally to the nationals other members. These twin principles are foundational to ensuring a level playing field in the global trade of intellectual property goods and services, preventing market distortions and discriminatory practices.<sup>3</sup>

The relationship of Article 6 to Articles 7 and 8 of the TRIPS Agreement is critical for contextual interpretation. Article 7 elucidates the objectives of IP protection under TRIPS, emphasizing a balance between rights and obligations aimed at fostering innovation while promoting public interest and socio economic welfare. Article 8 empowers members to adopt measures to protect public health and prevent abuses of IP rights that would unreasonably restrain trade or adversely affect technology transfer. These articles collectively affirm that while IP rights are protected under TRIPS, their exercise must be calibrated with public interest goals and economic realities.<sup>4</sup>

The significance of this framework was profoundly reaffirmed by the 2001 Doha Declaration on the TRIPS Agreement and Public Health, which arose from global concerns around access to affordable medicines<sup>5</sup>. The Declaration explicitly underscored that the provisions relevant to exhaustion are intended to leave WTO members free to establish their own regimes without legal challenge, subject to national treatment and MFN rules.<sup>6</sup>

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<sup>1</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

<sup>2</sup> *Id.* art. 3.

<sup>3</sup> Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 209 (5th ed. 2021).

<sup>4</sup> Alison Slade, *Articles 7 and 8 of the TRIPS Agreement: A Force for Convergence within the International IP System*, 42 *Legal Issues Econ. Integration* 215, 218 (2015) (arguing that Articles 7 and 8 provide the foundation for a policy perspective supportive of social and economic development).

<sup>5</sup> Doha Declaration on the TRIPS Agreement Public Health, WT/MIN(01)/DEC/2 (Nov. 20, 2001)

<sup>6</sup> *Id.* ¶ 5(d).

In sum, the interplay of TRIPS Article 6 with the Agreement's broader objectives and principles, along with the bolster provided by the Doha Declaration, frames a context where national legal autonomy in exhaustion policy coexists with overarching multilateral trade commitments.

## **CHAPTER III - A COMPARATIVE ANALYSIS OF NATIONAL EXHAUSTION REGIMES**

### **3.1 National Exhaustion: The Case of the United States**

The doctrine of national exhaustion is exemplified by the legal framework in the United States. Under this regime, the IP holder's rights are deemed exhausted only upon the first authorized sale within the boundaries of the specific national market. This means that an IP owner or its licensed distributor can block the importation of genuine goods sold abroad without authorization.<sup>7</sup> This approach supports the IP holder's ability to engage in price discrimination across different markets and to maintain control over distribution channels. Key judicial decisions have reinforced this framework; for example, the U.S. Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons*<sup>8</sup> underscored the boundaries of exhaustion concerning goods lawfully made abroad.

### **3.2 Regional Exhaustion: The Harmonized Approach of the European Union**

In contrast, the European Union represents a regional exhaustion regime characterized by a harmonized legal framework backed by the principle of the free movement of goods within the internal market.<sup>9</sup> This regional exhaustion supports market integration and competition within the EU's single market while preserving IP holders' rights against imports from outside the EU. The European Court of Justice has played a crucial role in defining and affirming this doctrine, balancing IP protection with the fundamental freedoms of the EU Treaty.<sup>10</sup> For IP holders, regional exhaustion limits control over national markets within the EU but broadens the potential consumer base. Consumers benefit from increased market competition and access to products at potentially lower prices.

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<sup>7</sup> Irene Calboli, *Market Integration and the Right to Control in the Exhaustion of Intellectual Property Rights*, 30 *Cardozo Arts & Ent. L.J.* 1, 15 (2012)

<sup>8</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

<sup>9</sup> Treaty on Functioning of the European Union . 34, Mar. 25, 1957, 2012 O.J. C 326/47.

<sup>10</sup> Case 15/74, *Centrafarm BV v. Sterling Drug Inc.*, 1974 E.C.R. 1147

### 3.3 International Exhaustion: The Approach of India and South Africa

The international exhaustion doctrine is represented by countries such as India and South Africa, which have adopted broader interpretations that exhaust IP rights after the first sale anywhere globally.<sup>11</sup> This regime allows parallel importation of genuine products from any country without the IP holder's consent. It is often justified on public policy grounds, including enhancing consumer access to affordable goods and promoting competition. South Africa similarly applies international exhaustion, supporting access to essential medicines and other critical goods.<sup>12</sup> The international exhaustion approach challenges IP holders' ability to segment markets and protect price differentials but serves national interests in social welfare and economic development. It also places greater legal and logistical burdens on IP holders seeking to enforce distribution rights globally.<sup>13</sup>

### 3.4 Comparative Implications

Comparing these doctrines reveals differences in how countries balance the proprietary rights of IP holders with broader economic and social objectives. National exhaustion regimes prioritize IP holders' control and market segmentation; regional exhaustion regimes reflect a compromise favoring economic integration within defined group, and international exhaustion regimes emphasize public health and consumer welfare.

These case studies elucidate that no exhaustion regime is inherently superior; rather, each reflects a policy choice shaped by economic conditions, legal traditions, and social priorities.<sup>14</sup> The continued coexistence of these divergent doctrines within the global trade system underscores the complex challenges faced by multinational corporations, policymakers, and international institutions working to harmonize IP protection while fostering competition and consumer access in a globalized marketplace.

## CHAPTER IV – THE ECONOMIC IMPACT OF PARALLEL IMPORTATION

The fragmented legal framework surrounding the doctrine of exhaustion under the TRIPS Agreement has profound economic implications, particularly through the phenomenon of

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<sup>11</sup> Shamnad Basheer, *India's Tryst with TRIPS: The Patents (Amendment) Act, 2005*, 1 Indian J. L. & Tech. 15, 22 (2005)

<sup>12</sup> Republic of South Africa, *Draft Intellectual Property Act of the Republic of South Africa, Phase I* 14 (2007)

<sup>14</sup> Peter K. Yu, *The International Enclosure Movement*, 82 Ind. L.J. 827, 895 (2007)

parallel importation, often referred to as the "grey market."<sup>15</sup> Parallel importation involves the import and resale of genuine, IP protected goods through unauthorized channels, capitalizing on price differentials between national markets. The economic consequences of this practice are multifaceted, influencing international price discrimination, market segmentation strategies, and overall price levels for IP protected products.<sup>16</sup>

#### **4.1 Erosion of International Price Discrimination**

One of the most significant economic effects of parallel importation is its erosion of international price discrimination. Multinational corporations often engage in differential pricing, setting prices for the same product based on the economic conditions, income levels, and competitive landscapes of individual countries.<sup>17</sup> By doing so, companies can maximize profits and simultaneously improve accessibility in lower income markets. However, parallel importation undermines this strategy by allowing arbitrageurs to purchase goods in lower priced markets and resell them in higher priced markets without the consent of the IP holders. This practice effectively reduces the ability of companies to segment markets, leading to a convergence of prices, commonly referred to as price equalization.<sup>18</sup>

#### **4.2 Impact on Profitability and Investment**

Economic studies have documented that the presence of grey markets constrains the prices that companies can charge in high priced jurisdictions, thereby reducing profitability. These economic dynamics implicate broader concerns about incentives for innovation and the sustainability of IP intensive industries.<sup>19</sup>

#### **4.3 Pro-Competitive Effects and Consumer Welfare**

On the other hand, proponents argue that parallel importation has important pro competitive effects that enhance consumer welfare. By breaking down exclusive distribution arrangements and facilitating the flow of lower priced goods into markets traditionally shielded by high

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<sup>15</sup> Herbert Hovenkamp, *The Exhaustion Doctrine*, 12 J. Competition L. & Econ. 37, 38 (2016).

<sup>16</sup> Keith E. Maskus & Yongmin Ch. *Vertical Price Control and Parallel Imports: Theory and Evidence*, 34 Rev. Indus. Org. 1 (2009)

<sup>17</sup> F. M. Scherer & Jayashree Watal, *Post-TRIPS Options for Access to Patented Medicines in Developing Nations*, 5 J. Int'l Econ. L. 913, 926 (2002).

<sup>18</sup> Mattflynn.com, *What is Parallel Importing?* (Sept. 15, 2021),

<sup>19</sup> Herbert Hovenkamp, *The Exhaustion Doctrine*, 12 J. Competition L. & Econ. 37, 40 (2016).

prices, parallel trade can increase accessibility and affordability for consumers.<sup>20</sup> This is particularly critical in sectors like pharmaceuticals, electronics, and luxury goods, where price disparities are stark. Consumer welfare benefits from increased purchasing power, greater market competition, and enhanced product availability.<sup>21</sup>

The importation also compels companies to balance pricing strategies carefully to minimize arbitrage opportunities without sacrificing profitability or market penetration.<sup>22</sup> Nevertheless, the economic impact of parallel importation cannot be viewed through a singular lens. The benefits to consumers and market efficiency are counterbalanced by challenges to the sustainability of innovation incentives and the economic interests of IP holders. Policy debates often revolve around achieving an optimal balance that preserves the delicate interplay between fostering innovation, securing fair returns on investment, and promoting broad based consumer welfare.<sup>23</sup>

Understanding these economic impacts is essential for policymakers aiming to design balanced IP regimes that encourage innovation while ensuring that consumers worldwide can access quality products at competitive prices. The nuanced economic considerations emerging from this environment underscore the importance of ongoing research and dialogue to harmonize IP law with equitable market dynamics.<sup>24</sup>

## CHAPTER V- THE ECONOMIC IMPACT OF PARALLEL IMPORTATION

The preceding chapters have laid a comprehensive foundation for understanding the complex and multifaceted nature of the exhaustion doctrine within the ambit of the TRIPS Agreement.<sup>25</sup> The comparative legal analysis reveals a fragmented global landscape where the freedom afforded by TRIPS Article 6 has led to the coexistence of divergent national, regional, and international exhaustion regimes. This diversity reflects varied socio economic contexts

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<sup>20</sup> Frederick M. Abbott, *The TRIPS Agreement, Access to Medicines, and the WTO Doha Ministerial Conference*, 5 J. World Intell. Prop. 15, 29 (2002).

<sup>21</sup> Carsten Fink, *Entering the Jungle of Intellectual Property Rights Exhaustion and Parallel Importation* 15 (World Bank Dev. Research Grp. Working Paper No. 2838, 2002).

<sup>22</sup> Keith E. Maskus & Yongmin Chen, *Vertical Price Control and Parallel Imports: Theory and Evidence*, 34 Rev. Indus. Org. 1, 18 (2009).

<sup>23</sup> Yannis S. Katsoulacos & David Ulph, *An Economic Approach to Parallel Imports Effects and Competition Policy*, 12 Russian J. Econ. 185, 186 (2020).

<sup>24</sup> *Generally* Pierre Dubois & Morten Sæthre, *On the Effect of Parallel Trade on Manufacturers' and Retailers' Prices*, 88 Rev. Econ. Stud. 1883 (2021).

<sup>25</sup> U.N. Conference on Trade and Dev. [UNCTAD], *The TRIPS Agreement*, at 1, U.N. Doc. UNCTAD/ITE/1 (1996)

and public policy priorities but also generates significant legal uncertainty and economic friction for multinational corporations and policymakers alike.<sup>26</sup>

### 5.1 Synthesizing the Central Research Problem

Evaluating the TRIPS Agreement's approach to exhaustion exposes a fundamental dichotomy between the benefits of national policy flexibility and the costs of an unharmonized system.<sup>27</sup> The flexibility preserved by Article 6 empowers WTO members to tailor exhaustion doctrines to their domestic needs, enabling developing countries to prioritize public health and consumer access, often through international exhaustion regimes that facilitate parallel importation.<sup>28</sup> However, this very legal autonomy breeds unpredictability, complicating cross border IP enforcement and undermining the ability of IP holders to implement coherent global market strategies, particularly regarding price segmentation and investment incentives.<sup>29</sup>

The economic analysis elaborates on this tension by demonstrating how parallel importation, fostered by international and regional exhaustion doctrines, disrupts traditional pricing models and market segmentation strategies. Policymakers face the arduous task of mediating these competing interests, striving to balance innovation incentives with equitable access to goods.<sup>30</sup>

### Ongoing Debates and the Future of the Exhaustion Doctrine

Ongoing policy debates at institutions such as the WTO and WIPO underscore the contentious nature of exhaustion doctrine governance. While there is broad agreement on the importance of flexibility, calls for greater harmonization have intensified in response to the practical difficulties firms encounter in navigating a patchwork of exhaustion regimes.<sup>31</sup> Proposals range from enhanced dialogue and guidelines on managing exhaustion and parallel imports to ambitious efforts aimed at developing a more coherent multilateral framework that could reduce litigation and trade disputes.

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<sup>26</sup> Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, in *The WTO and Global Governance* 311, 320 (F. M. Abbott et al. eds., 2020)

<sup>27</sup> Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 199 (3d ed. 2008) (explaining that Article 6 represents an "agreement to disagree" on the issue of exhaustion).

<sup>28</sup> Doha Declaration on the TRIPS Agreement Public Health, WT/MIN(01)/DEC/2, ¶ 5(d) (Nov. 20, 2001)

<sup>29</sup> Keith E. Maskus, *Intellectual Property Rights and the Global Economy* 145 (2000)

<sup>30</sup> Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* 91 (2007).

<sup>31</sup> Christopher S. Gibson, *Should the WTO Harmonize Parallel Import Laws? An Analysis of the Exhaustion Doctrine with a Particular Focus on TRIPS*, 19 *Tul. J. Int'l & Comp. L.* 193, 219 (2010)

Looking forward, the future of the exhaustion doctrine may be shaped by evolutions rather than reforms. The growing interdependence of global markets and the ascent of digital trade and e-commerce introduce new complexities that demand adaptive legal approaches.<sup>32</sup> The establishment of clearer interpretive frameworks within existing trade agreements, accompanied by practical dispute resolution mechanisms, could facilitate a more predictable legal environment.

## CONCLUSION

The exhaustion doctrine remains representative of the broader challenges that characterize international intellectual property law: the constant tension between protecting private innovation and promoting public interests and access in a deeply interconnected world. Navigating this tension requires a sensitive approach that acknowledges the legitimacy of diverse policy choices while encouraging greater logical flow in international legal instruments. The task ahead for policymakers, practitioners, and scholars is to reconcile these competing imperatives to foster a global IP regime that is both fair and effective in the 21st century.

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<sup>32</sup>Anette Kur, *Exhaustion in the Digital Age, in* Exhausting Intellectual Property Rights 175, 176 (Irene Calboli & Shubha Ghosh eds., 2018) (discussing the challenges of applying traditional exhaustion principles to digital goods); W. R. Meier-Ewert, *Intellectual Property and Digital Trade*, at 9 (WTO Staff Working Paper No. ERSD-2021-3, 2021).

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