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PARALLEL IMPORTS AND PARALYSED LAWS: AN EXAMINATION OF THE NEED FOR UNIFORMITY

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Abstract

Parallel trade refers to the sale of non-counterfeited products in another country without the permission of the intellectual property owner. Though it is not a new issue, the problems created by it are increasing day by day. It creates a conundrum between the rights of IP owners and the objective of free trade throughout the world. Currently, there is no uniform law regarding the legality of this practice. Since there is no international agreement providing a direction, countries are making laws according to their social conditions. The current trend is that developed countries being producers of manufactured goods prefer national exhaustion regime, on the other hand, developing and underdeveloped countries being consumers, prefer international exhaustion.

This paper seeks to explain the issue of parallel imports and the possible kinds of exhaustion regime. Further, it will scrutinize the exhaustion regimes followed by developed and developing nations and highlight the problems due to the lack of uniformity in the same. It highlights drawbacks of the failure of international organizations in harmonization of laws. This paper will further emphasize on the need for harmonization of laws in a way to ensure flexibility along with uniformity. It shows that a uniform 'rigid' rule might not be the best of all solutions. For the same, a solution model is being proposed wherein country autonomy will be ensured by following the principle of regional exhaustion based on the functioning of the EU.

Keywords: Parallel trade, Exhaustion regime, Harmonization, Uniformity, Flexibility.

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Introduction

Parallel Trade refers to the resale of goods between countries without the authorization of the owner of Intellectual Property Rights. These goods are also known as 'gray market goods' and are sold by distribution channels and not IP owners. For example, the selling of Swiss company Omega's Seamster watch by US Company Costco without permission, shipping of Apple iPhones from the USA to Asian countries, etc. To clarify, it is not an illegal or informal-sector activity going on between countries, rather it is a response to international price discrimination created by differences in economic and social systems of countries whereby an identical product is sold at different prices in different countries.[3]

These price differences arise due to currency fluctuation and cost of distribution in different countries. Other reasons for parallel imports are cross-border elements and restrictions on competition policy.[4] The products sold are genuine and not counterfeit products, however these might not offer the original producer's warranty and other after-sales services. This has both economic and legal consequences.

Economically, it prevents the establishment of a monopolistic market by offering products at different prices and increases an opportunity of choice for consumers and hence, facilitates free trade. However, at the same time, it violates the legal rights of IP owners. This has been a controversial issue unsettled for a long time and has recently become a matter of much litigation because of globalization and integration of markets.

This paper will critically analyze the problem of parallel imports persisting in the world currently. The paper is divided into four parts starting with a brief explanation of the varied treatment of the doctrine of exhaustion around the world and the rationale behind such doctrine. The second part will majorly deal with the concept of exhaustion regime. The third part provides a brief overview of the current international legal regulation regimes of exhaustion adopted by the developed and developing countries and the authors have chosen three countries i.e. the U.S.A., EU and India for the analysis of the same.

[3]Margaret K. Kyle, *Parallel Trade In Pharmaceuticals: Firm Responses And Competition Policy* (Barry E. (ed.) Juris Publishing 2009)
[4]Isabel antón Juárez, 'The Ten Commandments of Parallel Trade' [2016] 8 CDT 55

Lastly, in the fourth part the author has attempted to highlight several practical difficulties currently faced by developed and developing countries because of ambiguity on the question of the legality of the practice and inconsistency created due to Article 6 of the TRIPS Agreement. Therefore, it discusses the need for uniformity in international rule with respect to parallel trade and ponders over the possible solutions to this problem.

Review of Literature

- **Stefan M. Miller, *Parallel imports: Towards a flexible uniform international rule,* JOURNAL OF COMMERCIAL BIOTECHNOLOGY (2009) 15, 21 – 43. doi: 10.1057/jcb.2008.40.**

  This article argues that economic examination of parallel imports and their effects on incentives to develop leads to the conclusion that some exhaustion rights regimes are more efficient than others. Further, it attempts to determine whether a uniform supranational regime would be desirable for addressing the existing conundrum. A flexible system of national exhaustion only (restrictive of parallel imports) between countries with high trade costs and a system of regional exhaustion among countries with low trade costs is proposed.

- **Shamnad Basheer, Mrinalini Kochupillai, *Trips, Patents and Parallel Imports in India: A Proposal for Amendment*, INTERNATIONAL JOURNAL OF INTELLECTUAL PROPERTY LAW, https://www.nalsar.ac.in/IJIPL/Files/Archives/Volume%202/4.pdf.**

  This paper examines the apparent uncertainties and addresses the gaps in Indian legislation relating to exhaustion and parallel imports. It proposes legislative changes to close these loopholes and broaden the extent of exhaustion contemplated while maintaining compliance with TRIPS. The third section proposes a harmonious interpretation of the present legislative provision in order to eliminate uncertainties and optimally balance the rights of patentees and parallel importers without breaching the TRIPS agreement.

Understanding Parallel Imports Vis-à-Vis Exhaustion

Intellectual Property Laws grant distribution rights to IP holders which gives them the right to decide whether they want to put their work in a market or not. This right, however, is limited by the doctrine of exhaustion. The doctrine of exhaustion of Intellectual Property Rights which was introduced by German scholar Joseph Kohler[5] determines a point where the right holders lose their right to control the resale of the protected goods. As Christopher Heath explains-"*..it is not the right as such that is exhausted, but the possibilities of exercising it.*"[6] This simply means that the rights of the IP owner are not extinguished after the sale, but they cannot use these rights to prevent a future sale.

The *rationale* for this doctrine is straightforward. From an economic perspective, right owners receive an amount of money at the first sale of the product so that it would be inappropriate to receive further amounts (e.g. royalties) at any subsequent change of property of the same good.[7]

The overall purpose of exhaustion regimes is therefore to strike and maintain a balance between public interest (i.e. free movement of innovative goods) and private interest of IPR owners (i.e. remuneration for their creative and artistic efforts)[8]. A country can either follow a "no exhaustion" regime where the rights of IP owners do not exhaust at any point, or can choose to enforce any one of the *national, international or regional exhaustions*.[9]

As per the doctrine of **International exhaustion**[10], the IP right in the product gets exhausted at the moment the goods are put in the market anywhere in the world. In this case, the buyer of such goods, then, is free to resell them in any other market, as long as the buyer does not tamper with the quality of goods.

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[5]Christopher Heath, 'Legal Concepts of Exhaustion and Parallel Imports' in Christopher Heath (eds), *Parallel Imports in Asia*, (KLI 2004)
[6]Margaret K. Kyle, Parallel Trade In Pharmaceuticals: Firm Responses And Competition Policy (Barry E. (ed.) Juris Publishing 2009)
[7]Bonadio, E., 'Parallel Imports in a Global Market: Should a Generalized International Exhaustion be the Next Step?' *[2011]* 33(3) EIPR 153
[8]M. Slotboom, 'The Exhaustion of Intellectual Property Rights - Different Approaches in EC and WTO Law' [2003] 6(3) JOWIP 421
[9]International Trademark Association Position Paper On Parallel Imports'(2015) ITA https://www.inta.org/Advocacy/Documents/2015/INTA_PIC_Position_Paper.pdf accessed 10 September 2020
[10] Shamnad Basheer, Mrinalini Kochupillai, *'Exhausting' Patent Rights in India: Parallel Imports and TRIPS Compliance,* (13th Vol. Journal of Intellectual Property Rights, 2008)

As per the doctrine of **National exhaustion**[11], once the product has been sold by the IP owner in the domestic market and the consideration has been received, his exclusive rights over the domestic jurisdiction are exhausted. Consequently, the buyer of an article bearing IP can lawfully resell or transfer the same within the country itself. Such resale without the permission of the IP Owner will not amount to infringement as the rights of the owner have been exhausted. However, the buyer does not have the right to resell the goods in a different country without the permission of the right holder.

As per the doctrine of **Regional exhaustion**[12], the IP right in the product gets exhausted within the countries belonging to a specific region where the product has been first sold. The buyers of an article bearing IP can resale in that specific region but not outside that region.

The laws of a particular country may potentially apply the principle of exhaustion differently for different forms of IP like patents, trademarks, and copyrights. Moreover, the countries are free to choose their exhaustion regime according to their stand in the global market. Further, parallel imports are legal where the IP laws of that area recognize international exhaustion and illegal where it recognizes national exhaustion or no exhaustion.

[11] Shamnad Basheer, Mrinalini Kochupillai, *'Exhausting' Patent Rights in India: Parallel Imports and TRIPS Compliance,* (13th Vol. Journal of Intellectual Property Rights, 2008)
[12] Shamnad Basheer, Mrinalini Kochupillai, *'Exhausting' Patent Rights in India: Parallel Imports and TRIPS Compliance,* (13th Vol. Journal of Intellectual Property Rights, 2008)

Status Quo in Developed and Developing Countries

Before deliberating on the possible inferences of parallel imports, it is very important to see how the current legal systems across the globe are addressing the issue. For the same, E.U., U.S.A and India are discussed below as the U.S.A and the EU are two developed world leaders with different systems, and India is a developing economy.

1. European Union

The major idea behind the creation of the EU was harmonization of laws for creating a market that can compete at a global level.[13] The European Union works on a system of "Community – Based exhaustion" in order to ensure the existence of a strong internal market and free trade amongst the member states.

The urge for free trade balances the negative impacts of parallel trade.[14] However, parallel trade loses its privilege outside the European Union as the same is not allowed between a member and a non-member since there is no promotion of the idea of a larger European Market in such a scenario.[15] Thus if a product has already been introduced outside the EU, IP rights can still be enforced within the EU.

Article 30 of Treaty of Rome[16] and various other agreements prohibits quantitative restrictions on imports between member states. Before 1988, different members used to apply different exhaustion regimes (for example – UK applied international exhaustion regime). Thereafter, First Council Directive 89/104/EEC of 21 December 1988 was introduced by the Council for European Community to harmonize trademark laws in the EU. Article 7(1) of the First Trademark Directive[17] states that a trademark owner cannot prevent the importation of a good from a Member State to another Member State if the good is legitimately put on the circulation of the first Member State's market.

[13]Timothy A. Brisson & Victor Gallo, *Patent Law Basics*, (8th Vol. NEV. LAW. 2000)
[14]Shanker A. Singham, 'Competition Policy and the Stimulation of Innovation: TRIPS and the Interface Between Competition and Patent Protection in the Pharmaceutical Industry', (2000) 26th edn.,Brook.J.Int'l Law
[15]Claude E. Barfield & Mark AGroombridge, 'Parallel Trade in the Pharmaceutical Industry: Implications for Innovation, Consumer Welfare, and Health Policy', (1999) 10th edn. Fordham Intell. Prop. Media & Ent. L.J. 185, 199
[16]Treaty establishing the European Economic Community, 11957E/TXT, art.30
[17]First Trademark Directive, OJ L 40, art. 7(1)

In the case of *Centrafarm v. Winthrop*[18], the European Court of Justice (ECJ) had upheld the doctrine of regional exhaustion in the EU as it was the goal of EEC in the past and the present EU. The Court has also clarified the interpretation of Article 7(1) by stating that international exhaustion cannot be allowed within the EU.[19] In furtherance of this, in 1993, CTM (Community Trademark) Regulation[20] was adopted which is substantially identical to Article 7(1).

A third party in possession of genuine goods can put them in the European Market once they have been already introduced in any member state and the same cannot be prevented on the basis of the brand owner's IP right. Articles 34 and 35 of Treaty on the Functioning of the European Union (**TFEU**)[21] prohibits quantitative restrictions on import. The ECJ's interpretation of Articles 30 to 36 establishes the legality of parallel imports. This leads to price equalization and hence promotes a unified market.[22] However, the owner of IP Right can prevent commercialization of such goods if there is any legitimate reason like change in condition of the goods etc.

Article 36[23] creates an exception stating some justified grounds like public morality, public policy or public security; the protection of health and life of humans or the protection of industrial and commercial property, etc. under which restrictions on imports can be imposed. Amongst these exceptions, 'the protection of industrial and commercial property' is of importance in this context of intellectual property rights. However, these exceptions are interpreted strictly in order to ensure free trade. This strikes a balance between domestic and community interests, and ensures that these exceptions do not become a means of arbitrary discrimination or a disguised restriction on trade as mentioned in the article.

As far as Patent is concerned, there is no such system which gives the patentee an exclusive right in all the member states of the EU and therefore, the ECJ lacks jurisdiction in such matters. ECJ gives more importance to marketing consent than to monopolistic rights by emphasizing on the fact that "*the substance of a patent right should basically confer the exclusive right on the inventor to the first marketing of the patented product in order to permit a remuneration for the inventive activity*".[24]

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[18]*Centrafarm BV and Adriaan de Peijper v. Winthrop BV* (1974), E.C.R. 1974 -01183
[19]*Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH* [1998], C-355/96; *Sebago Inc. and Ancienne Maison Dubois & Fils SA v. G-B Unic SA* [1999], C-173/98; *Zino Davidoff SA v. A & G Imports Ltd and Levi Strauss & Co. and Others v. Tesco Stores Ltd and Others* [2002] R.P.C.20
[20]Council Regulation (EC) [1994] No 40/94, OJ L 11
[21]Treaty on the Functioning of the European Union, [2002] O.J. (C 325), art. 34-35
[22]*Offieve van Justice vs. de Peijer*, (1976) E.C.R. 613, 1976 C.M.L.R. 271
[23]Treaty on the Functioning of the European Union, [2002] O.J. (C 325), art. 36
[24]*Merck & Co. Inc. v. Stephar*, [1982] 13 IIC 70

Even when the inventors introduced products in member states where they did not own a patent, automatic exhaustion was assumed by the court.[25] This basically means that a patentee will have to obtain a patent in every member state separately to get the benefit of invention or refrain oneself from introducing the same product in countries where they lack patents. Since patenting in the EU is already very expensive and the process is very long, this system of patenting does not seem to be feasible.

The legislative content related to parallel trade is uniform and equally enforceable throughout the EU. The members are not free to retain their domestic laws or international exhaustion regimes as it will defeat the whole purpose of harmonization of laws. This has created a substantial parallel import market in the EU. However, there is still a need for more uniform and systematic laws in relation to parallel trade of products which are protected by Intellectual Property Rights in the light of the EU's goal of a unified market.

2. United States

The United States has a different approach towards dealing with the territorial applications of the "first sale rule" or the exhaustion in Intellectual property like trademark, patent or copyright. The application of the doctrine of exhaustion in all the three regimes varies. For trademark, there are a number of separate statutory sources that establish a partial or qualified rule of international exhaustion for United States trademark law.[26]

These include the Lanham Act in §42[27] as well as §32(a)[28] (for registered marks) and §43(a)[29] (for unregistered marks). An additional right can be found in the Tariff Act in §526.[30] The first significant case[31] of trademark exhaustion came in 1886 in which the court refused to protect the trademark owners and recognized the principle of 'universality' in which genuine trademarked products could be imported as parallel imports in the U.S.

[25] *Merck v. Primecrown,* [1997] 1 CMLR 83
[26] Christine Haight Farley, 'Territorial Exclusivity in U.S. Copyright and Trademark Law' [2014] WCOLR 42
[27] The Lanham Act 1946, 15 U.S.C.A. s 1124
[28] The Lanham Act 1946, 15 U.S.C.A. s 1114
[29] The Lanham Act 1946, 15 U.S.C.A. s 1125(a)
[30] The Lanham Act 1946, 19 U.S.C.A. s 1526
[31] *Apollinaris Co. Ltd. v. Scherer* [1886] 27 Fed. 18 (C.C.S.D.N.Y.)

However in 1923[32], court opted a different approach and the concept of 'territoriality' was recognized which accentuated the rights of trademark proprietor. Although this approach did not last for a long time and in the beginning of 1980s, the USA had changed its approach towards parallel imports to make it a more liberal one as seen in the present scenario- limiting the rights of the IP proprietor.

Few exceptions to the national exhaustion of trademarks were highlighted through a series of cases. The first exception being the situation where the goods were originally manufactured by the U.S. and parallel imports could not be denied therein- it was called the "round trip scenario". The second exception was called the "common control"[33]exception where the parallel import of trademarked goods could not be opposed when "the foreign and domestic trademark owners are parent and subsidiary companies or are otherwise subject to common ownership or control".[34]

The third exception was the situation where the goods are genuine goods there is no violation of §42 of the Lanham Act.[35] Since the very purpose of the trademark rights is to avoid consumer's confusion regarding the quality and nature of goods, the question that the courts came across was what happens when the goods are "materially different". The court[36] held that §42 does bar importation regardless of the fact that the parallel imports are made by an affiliate of the U.S. trademark owner. The burden of proof lies on the importer and not the trademark owner to prove that the goods are not materially different.

As we move on to Copyright, according to the §602 of the United States Copyright Act, 1955, unauthorized importation into the United States of copies purchased outside the United States is an infringement of the U.S. copyright owner's exclusive right to distribute copies under §106[37]. However, the §106 distribution right is limited by the first sale doctrine in §109[38] which gives the owner of a particular copy that has been lawfully made under the statute right to sell or otherwise dispose of that copy notwithstanding the copyright owner's exclusive distribution right. The Supreme court ruled that the goods that make 'round trip' are exempted from §602.[39]

[32] *A. Bourjois & Co. Inc. v. Katzel* [1923] 260 U.S. 689
[33] The Lanham Act 1946, 19 U.S.C. s 1526
[34] *Yamaha Corp. of America v. ABC International Traders, Corp* 703 F. Supp. 1398
[35] *Weil Ceramics & Glass, Inc. v. Dash* [1989] 878 F.2d 659
[36] *Lever Brothers Company v. United States* [1989] 877 F.2d 101
[37] The Lanham Act 1946, 17 U.S.C. s 106
[38] *John Wiley & Sons, Inc. v. Kirtsaeng* [2012] 654 F.3d [210] 212-13
[39] *Quality King Distributors Inc. v. L'Anza Research Int'l* [1998] 523 U.S. 135

Moreover in 2013[40], the Supreme Court gave its ruling that the first sale doctrine limited even those goods that were lawfully made abroad and imported into the U.S. As a result, that foreign sale exhausted the copyright within the U.S. Lastly, as per the United State Code §271, the patent owner has the right to exclude others from making, using, offering for sale, selling, or importing the patented invention. Under §261 of title 35 of the United State code, the patent owner can impose and enforce territorial restrictions in the United States on sales on distributors.[41]

However, in the year of 1998 the U.S Supreme Court gave a judgment in favor of parallel importer and sowed seeds for free trade. In the case of *Quanta Computer, Inc vs. LG Elecs*[42], the court stated that once the U.S. patent owner sells the product, the subsequent use or resale of that patent product by the purchaser doesn't infringe. Thus, it is clear that the United States has neither adopted the international exhaustion nor the territorial exhaustion theory to its fullest possible extent.

3. India

In India, each kind of intellectual property right has its own legislation. For instance, trademarks are governed by the Trade Marks Act, 1999, patents are governed by the Patents Act, 1970 and so on. Each legislation has a different approach towards the issue of parallel imports. Section 30 (3) & (4) of the ***Trade Marks Act, 1999*** provides that there will be no infringement of a trade where the goods bearing a registered trademark are sold by a person who has lawfully acquired it by the registered proprietor or the goods have been put on the market under the registered trade mark by the proprietor or with his consent.

However, *§30(4) of the Act* puts a limitation on such a trade by specifying that sub-section 3 shall not apply in case there is legitimate reasons for the trademark owner to oppose the further dealing in the goods, where the goods have been changed, altered or impaired after they have been put on the market. Thus, in a nutshell we can say that Indian law provides for parallel imports of trademarked goods however this rule is not applicable when the product is physically and materially altered, changed or destroyed without the consent of the trademark owner.[43]

[40] *Kirtsaeng v. John Wiley & Sons, Inc* [2013] 133 S. Ct. 1351
[41] *Boesch vs Graff* [1890]133 U.S .697
[42] [2008] 553 U.S. 617
[43] *Samsung Electronics Co. Ltd & Anr. v. G. Choudhary and Another* [2006] CS (Os) 1602

Further, as we move on to patents, the Patent Act 1970 had no provisions regarding exhaustion prior to the Patent (Amendment) Act, 2002 where the parallel imports were highlighted for the first time under §107A(b)[44] which states that there will be no infringement of patent rights when the patented product is imported by a person who is duly '*authorized by the patentee*' to distribute or sell the product. Though we can infer that there is a freedom of parallel imports of patented products, but this right was limited and subject to interference by the Patentee.

The amended §107A(b) of Patent Act, 1970 allows the importation of patented products by any person authorized under the law to distribute or sell those products. Thus, a patented property is exhausted by the first act of introduction of the product in the market by the patentee. In developing countries like India, mostly international exhaustion is followed in order to get goods at a cheaper price for the consumers.

Also, most countries do not have a properly coded legislation to deal with this issue due to which they mostly rely on judicial pronouncements. This further creates lack of uniformity and leads to exploitation of rights of IP owners. There are various other problems which will be discussed in the next section of the paper.

[44] The Patents Act, 1970, §107A(b).

'Uniformity' in International Rule: A Global Concern

1. Failure of international organisations

The most important international agreement in the field of IPR is the TRIPS agreement which was concluded in 1994.[45] In consonance with its objective of free trade across the world, it was expected from WTO to clarify its stance on Parallel trade.[46] However, neither TRIPS nor WIPO directly addresses the issue of parallel imports and leaves determination of Exhaustion to the respective members without any interference. Article 6 of the TRIPS Agreement clearly states that nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.[47] As a result, every country has a freedom to formulate its exhaustion regime as per their national needs. Although flexibility is a very important aspect of international law, taking no stance at all is certainly not the best idea for mainly two reasons. The first reason is that it is difficult for countries to enforce the contracts privately because of various factors like differences in their legal structures, international relations etc. The second reason is that it would be difficult to trace the source of parallel imports when the goods will be transferred from one country to another.

2. Problems faced by developing countries

The trade perspective of the international rule that focuses on the importance of free competition, incentivizes states to adopt a regime of international exhaustion. Looking from the perspective of developing countries that mostly prefer international exhaustion in order to provide goods to their consumers at a cheaper rate, this approach seems a bit vexed. Developing countries argue that international exhaustion that permits parallel imports fosters WTO's free-trade principles and is efficient in preventing high retail prices because of increased local competition. But to the contrary, prohibiting international exhaustion will in fact increase the willingness of IPR holders to place goods into local markets because the risks of a grey-market are decreased. The resulting market segmentation will also result in lowered prices and increased global economic benefits. [48]

[45]Christopher Heath, 'Parallel Imports and International Trade', WIPO https://www.wipo.int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf accessed 12 September 2020
[46]Cottier, [1991] 28 CMLR 383, 401
[47]TRIPS Agreement, UNCTAD/EDM/Misc.232/Add.18, art.6
[48]Miller, S. 'Parallel imports: Towards a flexible uniform international rule' [2009] JCB 15 https://doi.org/10.1057/jcb.2008.40 accessed on 12 September 2020

Needless to say, several developed country governments and multinational companies exert substantial pressure on developing countries that allow parallel trade[49] and have threatened to impose sanctions on them. Developing countries are coerced to submit to higher levels of protectionism despite the flexibility of making laws.[50] Along with this, companies have serious concerns over market segmentation and price differentiation caused between developed and developing countries due to parallel trade.[51] As a result of this price discrimination, original right holders may find their profits getting diminished due to which they might limit their incentives for further innovations, slowing down the pace of technological change and product development.

3. Other problems

There are warranty issues in products that are obtained through parallel trade because such a product may not be covered by the manufacturer's warranty. Especially when electronic items, software or automobiles are concerned, it becomes perilous. Therefore, the consumer is left with no alternative but to suffer as the actual manufacturer cannot be contacted.

Traders and IPR owners are facing jurisdictional issues and other complexities because of the lack of uniformity in the system. Generally, members can file complaints against each other under a dispute settlement mechanism under WTO agreements. However, when Article 6 of TRIPS is silent about the stance, no complaint in this regard can be heard at an international forum which further creates possibilities of inter-country disputes since there is no forum for dispute settlement.

Moreover, if the uniform rigid rule of national exhaustion is accepted worldwide, it will be against the main motive of WTO which is to establish free trade between the countries and such rigidity will act as a barrier to the same. It will become a serious concern for the developing countries as some essentials such as pharmaceuticals etc. are available at a much cheaper rate through parallel imports. Furthermore, the IP owners will tend to create a monopoly in the market leading to anti-competitiveness. Thus, the main motive is to ascertain how maximum global economic efficiency can be achieved while addressing local needs.

[49]G. Dutfield, 'Delivering Drugs to the Poor: Will the TRIPS Amendment Help?' [2008], 34 AJLM 107,116
[50]G.E. Evans, 'Strategic Patent Licensing for Public Research Organizations: Deploying Restriction and Reservation Clauses to Promote Medical R&D in Developing Countries', [2008] 34 AJLM 175, 184
[51]H.E. Bale Jr., 'The Conflicts between Parallel Trade and Product Access and Innovation: The Case of Pharmaceuticals', [1998] 1 JIEL 637, 648

4. A possible way out

The debate over whether parallel imports should be legalized is unending. Since the world has become a global village and parallel trade a bustling activity, there is a need to find a mid-way in order to safeguard the rights of IP owners along with ensuring free trade and catering to the needs of consumers of developing countries.

A uniform yet flexible rule needs to be set up where in-country autonomy will be maintained along with uniformity over the question of the legality of parallel imports throughout the world. This will ensure that self-interested actions and coercion by superior countries over inferior are checked and countries will have enough autonomy to deal with their local problems without undue constraint.[52] An arrangement is sought wherein co-operation and communication between the countries are maintained. It is proposed that the regime of 'regional exhaustion' is best suited for the objective that is to be achieved. While intellectual property rights tend to create a monopoly of their owners in the market, they also hinder the free movement of goods. Therefore, the concept of regional exhaustion has been proposed.

Under this regime, the rights of IP owners will expire after the first sale in a particular agreed region and not outside that. Countries will be free to decide on which countries they would want to follow regional exhaustion. It must be based on a group of nations willing to work together and cooperate, usually a homogeneous group of countries with similar economic conditions. In this paper, we have discussed three different regimes through case studies of the USA, EU and India. Each one represents a different scenario and also highlights the problem of lack of legislation on this issue. When closely analyzed, the authors believe that the model followed by the EU is well suited for the world.

The system of Regional Exhaustion is feasible because parallel trade usually takes place between neighboring countries. In such a situation, countries should come together and with the help of international organizations, they must develop a regime of regional exhaustion for themselves. For example, south-east Asian countries could come up and make their own regional-exhaustion regime by entering into treaties or African countries can make one exhaustion regime for themselves and so on. The EU has proved to be very successful at the implementation of this systematic model.

[52] H.E. Bale Jr., 'The Conflicts between Parallel Trade and Product Access and Innovation: The Case of Pharmaceuticals', [1998] 1 JIEL 637, 648

Furthermore, a benefit of the approach of the EU can be seen in research and development (R&D). The IP owner invests a lot of capital and time into developing the product which includes innovations and improvements of the product. Without this expensive R&D, there would not be any new unique innovation of the product in the market. In addition to R&D, the concept of "goodwill" or reputation of Intellectual property cannot be overlooked. There are many factors that increase the goodwill of the product because of the owner of the IP, one such example being marketing. Thus, the concept of R&D is worth protecting as these investments are not free of charge. Additionally, regional exhaustion will give the IP owner power to approve the parallel imports and they will not be forced to compete with their own product.

Consumers' demands and interests will be fulfilled. Especially in the pharmaceutical and food industry, the anti-competitive behavior of IP owners will be checked.[53] Countries with weak production capacity will benefit from this practice and will lead to their economic growth. The problem of price differentiation will also reduce since a group of countries will follow uniform pricing and the price variation is very less likely to be wide. It will also eliminate the issue of the 'quality' of the product.

Flexibility in rules would allow individual nations to formulate laws according to their legal systems and group as a whole to ensure smooth trading. Such a system will be favorable for all the stakeholders as it will facilitate free trade within the region and uphold the rights of IP owners. This will not only ensure continued investment by benefitting the brand owners but will also equally enable local traders to earn their livelihood. It will allow consumers to differentiate between products that they are buying and have confidence in the same.[54]

[53] Maskus, K.E., 'Intellectual Property Rights in the Global Economy, Institute for International Economics', [2000] Washington, D.C.
[54]'International Trademark Association Position Paper On Parallel Imports', (2015) ITA, https://www.inta.org/Advocacy/Documents/2015/INTA_PIC_Position_Paper.pdf

Conclusion

Parallel trade is a complicated intersection between trade, IP and Competition Policy. The concepts of exhaustion and parallel imports are rather debatable, and the unanimous approach to these concepts is not as obvious and practical as it seems. A regime that favors National exhaustion or no exhaustion prevents parallel imports whereas a regime that is in favor of regional or international exhaustion supports parallel imports.

Clearly, the freedom given to the countries to adopt their own exhaustion regime because of the TRIPS negotiation of Article 6 has created conflicts between the representatives of developed and developing countries. While the developing nations are more inclined towards international exhaustion regime i.e. towards free parallel importation as such a regime provides the imported products at a cheaper rate, the developed countries argue that such "unfairness" of laws does not adequately protect the Intellectual property and also limits the incentives for further innovation.

Thus, there is a need for uniformity in international rule to deal with the issue of parallel imports. The failure of TRIPS to reach an accord also raises a question as to whether such a uniform rule is even possible. Thus this paper argues that uniformity is possible but any uniform rule must provide adequate flexibility to safeguard the local needs of the countries when such uniform rules act as a barrier to the best interest of the country and international market. If a regime of rigid uniform international exhaustion is adopted, it would definitely go with the free trade objective of WTO but would be an injustice to the IP owners.

Moreover, if the National exhaustion regime is adopted as a uniform rule, it would seriously hamper the availability of essential goods and medicines for populations that would be unable to bear the retail price of such goods if parallel imports were disallowed. Proceeding from this overall conclusion, the first recommendation is the adoption of "regional exhaustion" to be the best-suited regime. A regional exhaustion system will aim at boosting the movement of goods across its member states. It will be at par with the free trade objective of WTO as it allows parallel imports within the borders.

In other words, regional exhaustion is international exhaustion "on a small scale", thus benefiting both the IP holders and the member countries. The second recommendation is that a future regime on parallel imports should be made taking into consideration the market structure and the competition policy. The reason to apply such competition provisions is that it[55]:

> *"...would ensure that the economic functions of intellectual property rights are adequately protected and at the same time, it would provide for appropriate control of any abuses of intellectual property rights."*

In closing, it is to mention that the specific issues raised here in relation to the parallel imports are a part of a larger goal of better rules in the international trading system with respect to intellectual property and investments which will in turn result in contestable markets and enhanced global economic welfare.

[55]Claude E. Barfield & Mark A. Groombridge, 'The Economic Case for Copyright Owner Control over Parallel Imports' [1998] 1 J. World Intell. Prop. 903