Preface

Competition law and IP law are two major areas of law governing the market and promoting economic efficiency, consumer welfare, competition, innovation and technology transfer. Although they share the same objectives, the anti-competitive exercise of IPRs through unilateral or collusive conduct may adversely affect competition and innovation, and in fact hinder technology transfer. The negative effects of such exercise are not limited to the territory of one country. They expand to other countries, especially now IP protection is globalized while competition law is still a domestic issue. Applying competition law to control IPR abuses in general, and international technology transfer-related anti-competitive practices in particular, needs to be considered at both domestic and international levels.

Issues concerning IPR-related competition law in general, and competition rules regarding technology transfer under the TRIPS Agreement in particular, have been studied from a variety of perspectives for a long time. However, they have been, and will continue to be, controversial issues because of their complexity and the way the issues change over time. They are also one of the most difficult issues in legal studies.

Although the competition issue, one of the four so-called Singapore issues, was no longer on the negotiating agenda of the WTO in the Doha Round, it is still a timely and 'hot' issue at both domestic and international levels. As IPRs are protected globally by the minimum standards of the TRIPS Agreement, or even the higher standards of TRIPS-plus bilateral or regional agreements, competition law plays a very important role in addressing possible IPR abuses. It is commonly accepted that competition law should develop in tandem with the development of IP protection. Countries that do not have competition laws on their books and enforced deprive themselves of an important public interest safeguard. Appropriate competition law and policy towards technology transfer depend on, and should be compatible with, the level of development and the economic, political, and institutional environment of a country. There are many ways to adopt and apply domestic competition law to technology transfer so as to foster domestic economic growth and consumer welfare.

It seems that developed countries have tailored their competition law to cover IPRs in general, and technology transfer in particular, all in the light of their overall innovation objectives. Aiming at promoting innovation and

protecting IPR holders, the developed countries are trying to minimize the impact of competition law on technology transfer. However, intervention can be undertaken if it is proved, on a case-by-case basis, that IPR-based market power is unreasonably restraining competition in the relevant market. From the competition law perspective in developed countries, IPRs (and technology) are considered like other kinds of property. Any IPR-related anti-competitive practices, including both collusive and unilateral conduct, are scrutinized under competition law with due regard to the legal monopoly granted by IP law to right holders.

In contrast, competition law is quite new and not well developed in most developing countries. Further, even if certain IPR-related anti-competitive conduct may be addressed in their competition and/or IP legislation, developing countries rarely apply these laws. In practice, finding an optimal solution in a specific case for the application of competition law to technology transfer is not an easy task for competition authorities, even in developed countries. The competent authorities in developing countries are faced with greater and more serious problems. This is one of the reasons why developing countries rarely use competition flexibilities in the TRIPS Agreement to address international technology transfer-related anti-competitive conduct.

This book, which focuses on competition law and technology transfer in the context of the competition flexibilities of the TRIPS Agreement, has two purposes. The first is the investigation of competition law and international technology transfer under the TRIPS Agreement in the light of the experience of both developed and developing countries. The second is the drawing of relevant implications for developing countries. Chapter 1 of the book analyses technology transfer and competition rules under the TRIPS Agreement. Chapter 2 investigates the application of competition law to technology transfer in the US and the EU, two representatives of the developed world. A similar investigation in developing countries is made in Chapter 3, with the focus on a handful of specific cases, and Vietnam is selected as a case study. In Chapter 4, the global development of the relationship between competition law and technology transfer is reviewed with a focus on the perspective of the WTO. Possible implications for developing countries are discussed in Chapter 5. It is worth noting that the issues discussed in this book are limited to two categories of anti-competitive practices in the context of international technology transfer. They are: (i) anti-competitive contractual restraints in international technology transfer agreements, and (ii) unilateral abuses by IPR holders which relate to refusal to transfer and excessive pricing of technology-embodied products, where no technology transfer agreement is available, together with compulsory licensing as a remedy correcting those abuses.

In this book, the term 'technology' is confined to patents, know-how, soft-

ware copyright, or a combination of them.¹ The term ‘technology transfer’, unless otherwise stated, is understood as licensing between two unconnected firms, which is directly related to the production, or assignment of the technology. Therefore, issues relating to technology pools, standard setting, IPR settlement, technology transfer-related mergers and acquisitions are outside the scope of the book. As to the terms ‘developed countries’ and ‘developing countries’, there are no definitions of developed and developing countries in the WTO. According to a recent UNCTAD report, Japan and Israel in Asia, Canada and the US in America, Australia and New Zealand in Oceania, and the EU Member States, Iceland, Norway and Switzerland in Europe are considered as developed countries.² The other countries, including LDCs, are classified as developing countries for the purpose of this book, unless otherwise stated. Note also that the terms ‘competition law’ and ‘antitrust law’ are used equivalently. All of the websites indicated in this book were revisited and double-checked for the last time on 22 September 2009.

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Last but not least, all constructive comments and criticism on this book are welcome. I can be reached at tu.nguyen@jur.lu.se or tgtntt@gmail.com.

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¹ It coincides with the definition in Article 1.1 of the TTBER 2004.

² UNCTAD (2009), ‘Trade and Development Report 2009’, UNCTAD/TDR/2009, p. xi. The list of developed countries used in this report (except Iceland and Israel) is similar to the list of countries having submitted reports to the TRIPS Council in pursuance of developed country Members’ commitments under Article 66.2 of the TRIPS Agreement. See WTO (2008), ‘Submissions under Article 66.2 of the TRIPS Agreement’, IP/C/W/522.