

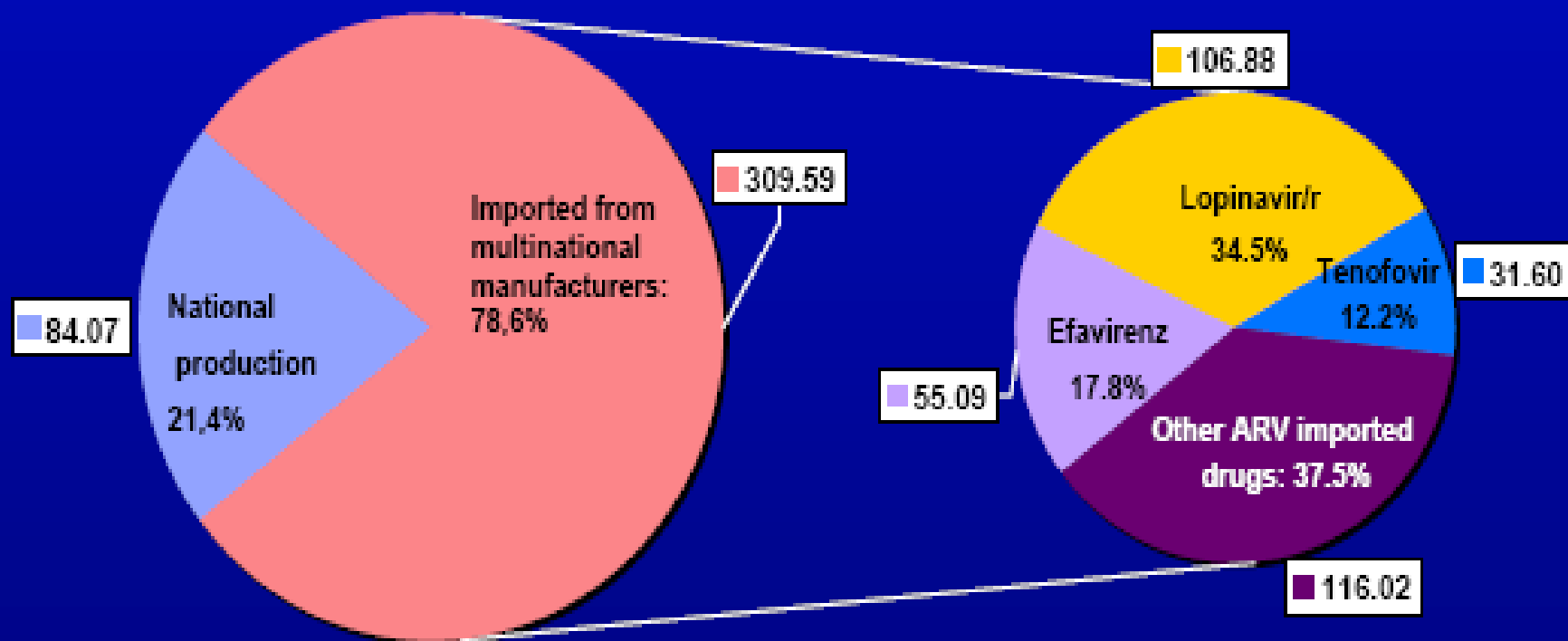
The development and Potential Social Impact of Competition Law Provisions

Intellectual Property and Competition Law and Policy

**Competition Provisions in RTA Agreements
TRALAC/UNCTAD Conference
Cape Town, October 4th, 2006**

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Breakdown of expenditure* on ARV procurement (2005), by source of drug. **Brazil, 2005**



*US\$ million for 180,000 patients

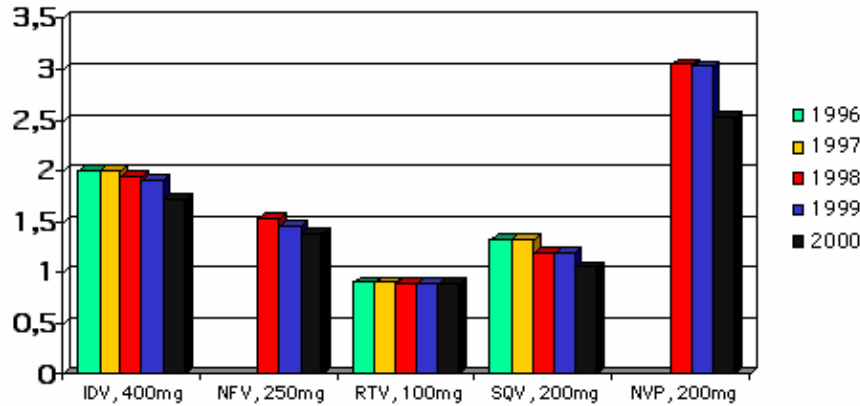
IP and Competition

- IP and Competition should have complementary and interdependent roles
- From a dynamic efficiency perspective intellectual property and competition law should be both about development and innovation
- Exploring this interdependence should bring important outcomes in terms of welfare
 - The appropriate level of IP protection in a particular country may vary significantly over time according to local models of production and levels of development

Competition: Effects on Price

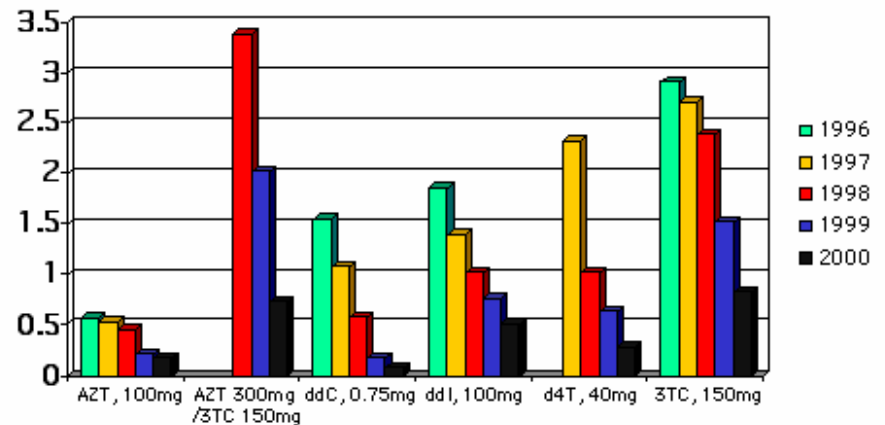
Graph 1. Prices of Brazilian Antiretrovirals
Price stability without generic competition

Average reduction: 9% (without IDV in 2000 when it was generic)



Graph 2. Prices of Brazilian Antiretrovirals
Price reduction from generic competition

Average reduction: 79%



Generic Competition

“Our Message to brand name manufacturers is clear; you deserve the fair rewards of your research and development; you do not have the right to keep generic drugs off the market for frivolous reasons... Generic Drugs make American health care far more affordable.”

President Bush, October 21, 2000

TRIPS: Elevation of the Minimum Standard of IPRs Protection

- The TRIPS Agreement indicated a major change in international economic relations and elevated the minimum standard of intellectual property protection adopted by WTO countries
- Developing countries identify costs deriving from the implementation of the TRIPS Agreement
 - ✓ Patents: Ex.: requirement of patenting all products (including drugs), extension of term of duration
 - ✓ Other issues: database, software, data exclusivity
 - ✓ Effects on prices and implementation

Competition policy as a tool for balancing IPRs

- To the extent IPRs are granted, competition Law has an important role to develop in this context
- Even though IPRs should be about fostering innovation and development, inadequate rules and standards may affect competition, competitiveness and, thus, innovation and development
- The main task is to transform such interdependence into adequate policies, rules and standards

TRIPS: Principles and Objectives

- Reduce distortions and impediments to trade: IPRs are not to be used as (non-tariff) barriers to trade
- Balance protection of IPRs owners with economic and social welfare, as well as with technological development:

“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.”

Article 8.2 – Provided that compatible with the provisions of the Agreement, measures may be adopted to prevent the abuse of intellectual property rights by its owners.

TRIPS and Competition Policy

- Introducing competition in relation to IPRs is not inconsistent with the TRIPS Agreement
- Adopting provisions and measures to foster competition are part of the flexibilities that are built-in the TRIPS Agreement
 - Procedure of implementing and interpreting the TRIPS Agreement is required to balance rights and obligations

TRIPS Flexibilities

TRIPS contemplates flexibilities and safeguards:

- **Compulsory license** (art. 31)
- **Exhaustion of rights (“parallel imports”)** (art. 6)
- **Exceptions to rights conferred** (art. 30)
- **Control of anti-competitive practices in contractual licences** (art. 40)
- **Implementation deadlines** (art. 64)
- **Limitation of dispute settlement cases (exclusion of “non-violation” and “situation”** (artigo 64,2)
- **Definition of patentable subject matter and patentability of living things** (art. 27 and art. 27,III.b)

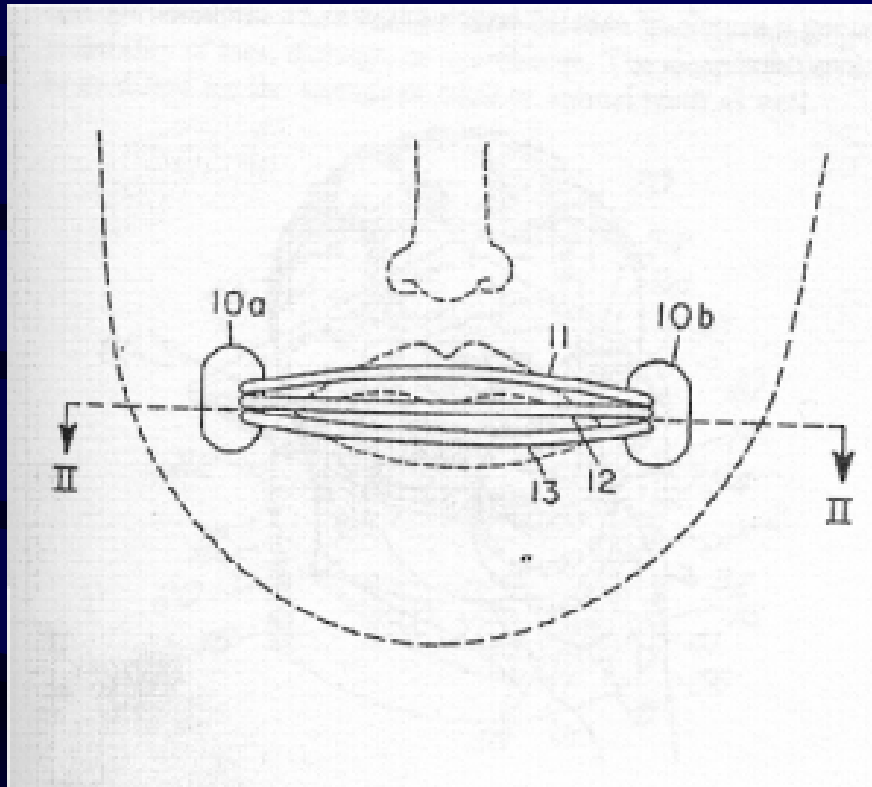
TRIPS Flexibilities for implementing competition provisions

- The adoption of some of those flexibilities in national laws are an important tool to guarantee a balanced and adequate protection of IPRs
- It's up to each country to define its adequate balance, and it is in the interest of all that competition is not unduly limited by inadequate use of IPRs
 - Either by means of the design of the IP rules; or
 - By means of the investigation of mergers and anticompetitive conducts

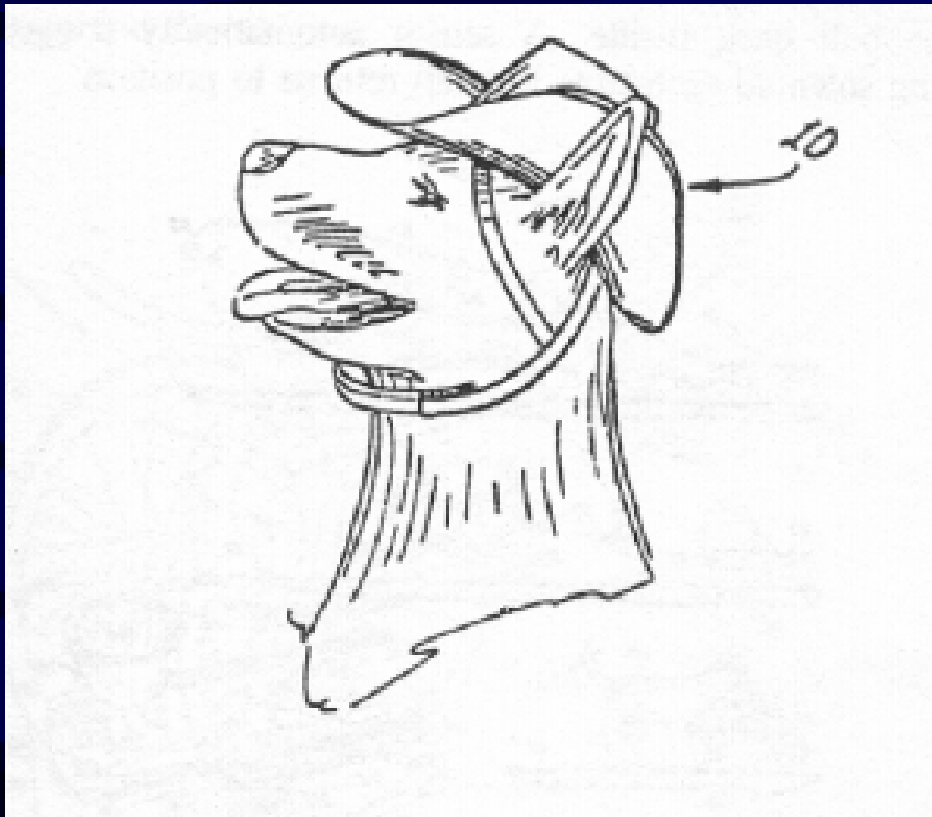
Fostering competition when designing IPR rules

- If the standard for patentability is too low and overly broad patents are granted, it is likely that competition will be harmed = static inefficiencies are created in the form of deadweight losses and wealth transfer losses
- FTC (2003) study (*To promote innovation: the proper balance of competition and patent law and policy*) has indicated that some “circumstances suggest that an overly strong presumption of a patent’s validity is inappropriate”.

Prof. Carlos Correa has indicated some examples...



**Mouth Appliance for
Assisting in Weight Control**
Patent Number: 4,883,072
Date of Patent. Nov. 28, 1989
Inventor: Edward W. Bessler,
Fort Mitchell, KY



Animal Hat Apparatus and Method

Patent Number: 4,969,317
Date of Patent: Nov. 13, 1990
Inventor: April Ode, Lake
Havasu City, AZ

Fostering competition when designing IPR rules

- Analogous situations could apply in the case of
 - Second use
 - Polimorphism
 - Basic research
- Brazil has been discussing issues patentability criteria

IPRs and Anticompetitive Conducts

- IPR holders may aim to expand its rights by means of anticompetitive conducts, such as, in some cases:
 - Refusals to deal
 - Tying or restrictive licenses
 - Patent pools
 - Cross licenses
 - Standard settings
 - IP (sham) litigation/settlements in IP litigation

Rule of Reason

Remedies for Anticompetitive Conducts by means of IPRs

- Remedies, such as compulsory licenses (CL), can be used to restrict the abusive use of IPRs
- The Brazilian law defines three hypothesis in which CL can be used:
 - Abuse of market power
 - Public emergency
 - National interest
- Brazilian experience in granting CL is inexistent
 - At most, the threat of CL has been used as a bargaining tool
 - Need of clear rules and standards

IPRs and Competition Provisions in RTAs

- IPRs have been strengthened in TRIPS and then in RTAs
- Competition authorities should participate in the negotiation of RTAs and, from a local perspective, prevent IPR abuses that damage competition
- Avoid IP interests to undermine competition through monopoly conduct, horizontal agreements and vertical restraints

Thank you

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