THE INTERSECTION BETWEEN INTELLECTUAL PROPERTY RIGHTS AND ANTITRUST LAW IN BRAZIL

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INTELLECTUAL PROPERTY LAW

& (/VS?)

ANTITRUST LAW

- **COMMON OBJECTIVES**:
  - stimulate economic development;
  - promote innovation; and
  - encourage competition.

- **DIFFERENT TOOLS:**
  - Antitrust Law prevents unlawful monopolies, abuse of dominance and exclusionary practices;
  - IP Law creates exclusive rights.

- **COMPLEMENTARY ACTIVITIES:**
  - Complementarity is important to achieve the common objectives, institutional stability and trust in the system.
  - IP and antitrust must be regarded as equally important, even though on a case-by-case basis one may outweigh the other.
  - Countries that depend on foreign investment and innovation, like Brazil, need to guarantee institutional stability.

INTELLECTUAL PROPERTY UNDER BRAZILIAN ANTITRUST LAW

- The Administrative Council for Economic Defense is the Brazilian Antitrust Authority responsible for applying Law 12.529/2011 (Antitrust Law).
- CADE has jurisdiction over mergers, unilateral abuse of dominance, collusive and exclusionary practices.
- IP-related issues are subject to antitrust proceedings in the context of anticompetitive practices and merger filings.

- **MERGERS:**
  - The transfer of intangible assets between competitors is subject to merger proceedings (including IP rights and technology transfer) (Article 90, II);
  - CADE is able to require compulsory licensing and other measures related to IP rights in order to mitigate the harmful effects of a proposed merger (Articles 60, §2, V, VI).

- **ANTICOMPETITIVE PRACTICES:**
  - Restricting access or use of IP rights and the abusive exercise of IP rights (including sham litigation) may constitute antitrust violations insofar as such acts characterize a violation of the economic order (Article 36, §3, XIV and XIX).

LANDMARK ANTITRUST CASES INVOLVING IP IN BRAZIL

- *Associação Nacional dos Fabricantes de Autopeças (ANFAPE) v Volkswagen do Brasil Indústria de Veículos Ltda., Fiat Automóveis S.A. and Ford Motor Company Brasil Ltda.* (ANFAPE case)
  - Alleged abuse of industrial design rights in the automobile parts aftermarket;
- *Associação Brasileira das Indústrias de Medicamentos Genéricos (Pró-Genéricos) v Eli Lilly do Brasil e Eli Lilly and Company* (Eli Lilly case)
  - IP-related sham litigation in the medical drug market;
- *Bayer Aktiengesellschaft and Monsanto Company* (Bayer-Monsanto case)
  - IP was central in defining the relevant market and in determining the effects of IP concentration as barriers to entry in the seeds and pesticides markets.

THE ANFAPE CASE

- Filed by the National Association of Independent Manufacturers of Automobile Parts (ANFAPE) against OEMs Volkswagen, Fiat and Ford.
- ANFAPE argued that OEMs abused their IP rights by enforcing the industrial design (ID) of automobile parts in the aftermarket.
- The Facts:
  - Certain OEMs had filed claims before the judiciary to enforce ID and preclude the independent manufacturers from marketing unlicensed auto parts.
  - ID was legally obtained and there was no legal restriction to aftermarket enforcement
  - Auto parts are must-match and needed in order to restore the car's original appearance.
  - ANFAPE argued that (i) the enforceability of the ID was preventing competition in the aftermarket; and (ii) that the ID was a competitive advantage for the OEMs in the primary market and its enforcement in the aftermarket was abusive.

THE ANFAPE CASE

- Decision:
  - CADE confirmed its jurisdiction to decide on cases involving alleged abuse of IP.
  - CADE confirmed that the ID had been legally obtained and that the Brazilian IP Law (Law 9.279/1996) did not limit the enforcement of ID to the primary market.
  - CADE stated that the mere existence of ID, as currently provided under the law, could produce harmful effects to competition in the aftermarket.
  - However, **its jurisdiction was restricted to cases in which an abuse of IP rights was identified. Absent such an abuse, any anticompetitive effects arising from the application of the law should be directed at the legislature**.
  - In these cases, the agency is precluded from taking action since it cannot override the current IP legislation.

THE ELI LILLY CASE

- Filed by the Brazilian Association of Generic Medication Industries against Eli Lilly of Brazil and Eli Lilly and Company.
- The Association argued that Eli Lilly had used sham litigation in order to obtain exclusive marketing rights (EMR) for a medical drug used in cancer treatment.
- The Facts:
  - Eli Lilly's patent application had been rejected by INPI (National Industrial Property Institute). As a result, Eli Lilly had filed several suits against INPI, which led to the suspension of the patent application review by the Office.
  - During the suspension of the review, Eli Lilly requested a modification of the scope of the patent registration to include a pharmaceutical product in addition to the process that had been originally filed.
  - Given that INPI was barred from analyzing the requested modification as a result of a judicial decision, Eli Lilly filed a separate suit on grounds of misleading information, requesting EMR over the pharmaceutical product, as foreseen by the TRIPS Agreement.
  - Eli Lilly's injunction was successful and the company was awarded a temporary EMR for eight months.

THE ELI LILLY CASE

- Decision:
  - CADE considered the three requirements for establishing sham litigation, as developed by case law: (1) implausibility of the claims, (2) provision of erroneous information and (3) unreasonableness of the means used.

  - CADE found the defendants guilty of sham litigation for the following reasons:
    - 1) the suits filed by Eli Lilly were manifestly unreasonable in the sense that they were not credible and had no chance of succeeding, since the patentability of the pharmaceutical product whose IP was being enforced had never been analyzed by INPI;
    - 2) the defendants omitted relevant information, such as the suspension of the patent review and the modification of the patent scope, from their submissions filed in the judicial suits; and
    - 3) the means used to enforce the IP rights were deemed unreasonable since the same claim had been filed in several different courts.

THE BAYER-MONSANTO CASE

- Merger between Bayer Aktiengesellschaft and Monsanto Company.
- The Facts:
  - Vertical chain comprised of three stages: biotechnology development; development and reproduction of seed varieties; and commercial production and sale of seeds.
  - Relevance of IP rights: 1) in biotechnology development: traits could be patented; 2) in the development and reproduction of seed varieties: protection of new cultivars.
  - Both Bayer and Monsanto were active in all three stages of the chain, which gave rise to serious antitrust concerns, such as an increase of barriers to entry for new players and market concentration stemming from the IP rights jointly held by Bayer and Monsanto.
  - The licensing of IP rights formed the basis for the interaction between these stages: possible increase of barriers to entry for new players and market concentration stemming from the IP rights jointly held by Bayer and Monsanto.

THE BAYER-MONSANTO CASE

- Decision:
  - CADE recognized that in markets in which IP is essential to competition, IP may be equivalent to market power and that the concentration of a significant amount of IP in one player may lead to a dominant position and increased barriers to entry.
  - Merger remedies included an obligation to license certain traits and cultivars held by the companies to competitors in order to mitigate concerns of increased barriers to entry and potential exclusionary effects of the merger on competition.
- This case exemplifies that IP may be both the defining issue and solution in merger control cases.

GROWING & NECESSARY DIALOGUE

- These cases show the path CADE will continue to follow in order to develop and consolidate its experience in addressing IP-related antitrust issues.
- CADE and INPI are developing an important institutional dialogue through a cooperation agreement in order to exchange knowledge, information and technical cooperation.
- Intra-agency dialogue and cooperation ensures stability, reliability and legal certainty: IP rights will be respected and abuses will be investigated.

THANK YOU

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IP ENFORCEMENT AND COMPETITION LAW

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Competences of Indecopi

Vitamins and nutritional supplements market

Indecopi

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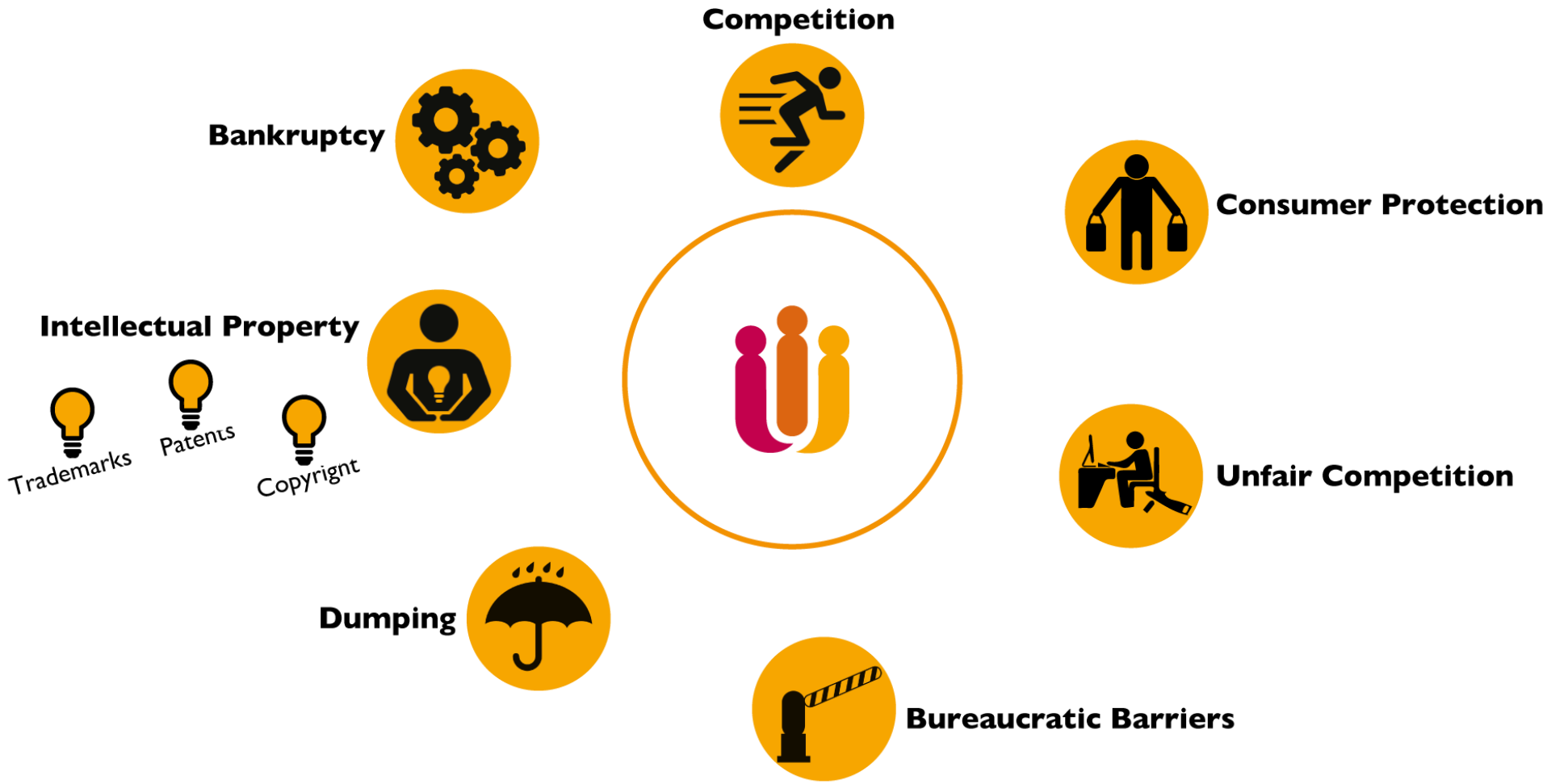

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I. INTELLECTUAL PROPERTY AND COMPETITION LAW

Complainant: Lab. Nutrition Corp. S.A.C.
Defendant: José Abraham Villacorta Olano and others.
Subject: Unfair competition for infringement of the general clause

(I) Market

- Commercialization of vitamins and nutritional supplements identified with trademarks owned by American companies.
- The companies didn't have commercial representatives or exclusive suppliers in Peru.
- The American trademarks were not registered in Peru.

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(II) Commercial strategy: Create barriers of access for his competitors and hinder their permanence in the vitamins and food supplements market:

Repeatedly apply for the registration of well-known trademarks marketed abroad, without authorization of the owners; and,

after obtaining their registration, take legal actions against all suppliers that imported and commercialized products identified with these trademarks.

Trademarks

Carbo Plus
Mega Mass
CELL MAS
REDLINE
RIPPED FAST
SERIOUS MASS
NO-EXPLODE

(III) Arguments of the defense: Trademark registration constitutes the regular exercise of their right, which is subject to the principle of territoriality.

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(IV) Decision:

Commercial relationship between Mr. Villacorta and the American company Dymatize prior to trademark registration: existence of a license agreement for use through which the company provided its products to Mr. Villacorta, but without authorizing him to register the brands that identify the said products.

Mr. Villacorta had experience in importing, marketing and distributing vitamin products and nutritional supplements since 1991, so he knew or was in the possibility of knowing that the registered trademarks were used abroad.

The registered trademarks were fanciful and not used by Mr. Villacorta, they were only registered for speculative or obstructionist purposes.

(V) Unfair competition act: it's an act contrary to corporate good faith to register, on a third party's own initiative, a distinctive sign identifying products manufactured abroad, in order to be their sole distributor in the national market and eliminate competition.

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INTELLECTUAL PROPERTY AND COMPETITION LAW

Sometimes the industrial property system is used improperly to hinder the entry or permanence of competitors in the market. Indeed, sometimes an economic agent undertakes commercial strategies designed to create barriers of access for its competitors and hinders its permanence in the market. So the agent repeatedly applies for the registration of well-known brands marketed abroad, without the authorization of its owners; and once the registration is obtained, legal actions are taken against all the suppliers that import and market products identified with those brands.

Against these practices, the Peruvian administrative system offers correction mechanisms such as: complaints about unfair competition, denials of registration for trademark applications submitted in bad faith or capable of generating unfair competition, invalidity actions under grounds of bad faith, among other mechanisms.

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INTELLECTUAL PROPERTY AND COMPETITION LAW

Indecopi is a technical agency, specialized in knowing and resolving issues of intellectual property and unfair competition.

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