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Parallel Imports: Striking a Delicate Balance in a Multifaceted Environment

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ABSTRACT

The article explores how states handle the legal, economic, and political aspects of parallel imports in light of the national interests and interests of IP owners, manufacturers, alternative importers, and consumers. It discusses the conflicts of interest among these actors regarding the legalization of parallel imports and the positive and negative consequences for each. The doctrine of exhaustion of rights and the right to import are critical elements of parallel imports. Respective regulations emerge from the interaction between public and private entities, prioritizing public interest and sometimes overlooking the interests of IP owners and consumers. The paper discusses the shifting attitudes of countries towards allowing parallel imports, showing a growing acceptance of the international principle of exhaustion of IP rights. The practical implications of this shift are analyzed using Ukraine as a case study. It also highlights how foreign policy factors, such as European integration and the armed conflict with the Russian Federation, have influenced Ukraine's stance on parallel imports.

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parallel imports, TRIPS Agreement, foreign trade, IP rights exhaustion, right to import

Introduction

Parallel imports are often seen as one of the most intriguing and mysterious aspects of international trade (Heath, n.d.). Such a perception is mainly because this type of import is tailored to specific tasks based on the characteristics of a particular national market. Since parallel imports exploit price differences between markets (Li et al., 2022), goods from low-price markets are channeled into high-price markets outside multinational firms' authorized distribution systems – a phenomenon that varies on a product-by-product basis. For instance, automobiles and luxury goods are the most common goods parallelly imported due to their high value (Wang et al., 2023). In certain situations, such as when sanctions are in place or companies cannot establish their production or ensure consistent supplies, parallel imports may be politically supported and allowed by law (Chang et al., 2023). This support can result in a deliberate and officially sanctioned infringement of the rights of foreign manufacturers and brands to control the introduction of their products to foreign markets (Nurmagambetov & Nurmagambetov, 2024). The issue of parallel imports within customs unions is a specific case that needs addressing. A typical example is the European Union, where legal disputes regarding parallel imports are frequent. In these disputes, both proponents and opponents have alternating success (Gommers et al., 2024; Zhang, 2022).

Manufacturers and IP owners may have somewhat different attitudes towards parallel imports. The general focus is on the adverse effects of parallel imports, such as bypassing the official distribution network, restricting control over prices, service quality, and other branding aspects, and entering genuine goods into unauthorized markets. Creating a high-quality product, maintaining a positive company image, offering distinctive and recognizable customer service features, providing a system of preferences, and offering after-sales services all require significant effort and substantial investments. A brand is a symbol that adds uniqueness to a product or service, distinguishing it from others. Through branding, businesses can differentiate their products or services based on quality, reliability, and originality (Yogiswara et al., 2022, p. 307).

At the same time, the price level for such goods in official networks covers the costs of promoting brands. However, those imported through the parallel import system into a specific country do not. Several studies point out that manufacturers can employ various strategies to derive additional benefits from parallel imports, such as increasing overall sales or different positioning of products initially destined for distinct markets (Li et al., 2022; Birg, 2023). These strategies allow us to consider parallel imports as one of the options for promoting products to foreign markets, which, although it has its setbacks, still has its niche in international trade.

The same applies to the discussion about parallel imports' impact on prices. Parallel imports are typically cheaper than officially imported goods, leading to lower overall prices and reduction of licensing fees in the long term and resulting in direct and indirect savings for customers (Li et al., 2021; Granlund, 2022). However, the end consumer may not see a significantly lower price due to logistics costs, intermediary procurement, and the pricing behavior of IP owners copied by parallel importers (Kanavos & Vandoros, 2010).

All the above raises several issues. What factors can impact reaching a compromise between beneficiaries of parallel imports and official distributors? Is it possible to ensure fair and standardized approaches to the exhaustion of trademark rights? How is the exclusivity of the right to import guaranteed? What is the current judicial practice trajectory? These are the questions currently asked by most stakeholders and researchers in the field of IP protection and compliance with consumer rights.

Methodology

The article analyzes contemporary literature on parallel imports to identify the key benefits and drawbacks of such imports for various stakeholders and explores the resulting conflicting interests. It includes a case study of the changing trends in judicial practice and legislation on parallel imports in Ukraine and examines the impact of external factors on these changes.

1. Parallel Imports and Balance of Interests

The WTO Glossary (n.d.) defines parallel imports as the process where a product, made legally (not pirated) abroad, is imported without the permission of the IP right-holder (e.g., the trademark or patent owner). Parallel imports, as defined by the International Trademark Association (n.d.), refer to goods manufactured by or under the license of the brand owner, formulated or packaged for a specific jurisdiction. However, these goods are imported into a different jurisdiction against the brand owner's intention. The classic example of parallel imports involves purchasing a product at a lower price in one country and selling it in another country where the product is more expensive through the official distribution network (Ishikawa et al., 2020, p. 137). The price for such a product is generally lower than that of an official representative, but it exceeds the purchase price to cover associated costs. This margin satisfies parallel importers, mainly small and medium-sized entrepreneurs. With the development of online commerce, consumers act as parallel importers of goods for their needs. Consumers, on the other hand, agree to forgo service and promotions and take a risk on quality in exchange for a lower price. They may also pay the same or even a higher price for a scarce or unavailable product in their country. Unauthorized suppliers may resort to tax minimization, evasion, and customs undervaluation.

For buyers, the benefits of parallel imports clearly outweigh the risks. They receive (i) lower prices that gradually reduce for similar goods and eventually for original ones on official trading platforms due to competition development between official dealers of the copyright holder and independent importers (Ganslandt & Maskus, 2004); (ii) goods of predominantly original quality; and (iii) a broader choice and elimination of shortages in the domestic market (Brewer, n.d.). For customers, parallel imports have some apparent drawbacks. These differences may include a lack of adaptation for specific countries, meaning significant disparities from officially supplied products. These disparities can manifest in many ways, such as varying keyboard layouts, language settings, user manuals, steering wheel placement, product composition, components, packaging, and the absence of standard inspection by national quality and safety control authorities. Additionally, there may be no warranty service for such goods, and they are not covered by branded companies' return policies or money-back guarantees (Zhang et al., 2021). The International Trademark Association (2015) suggests a specific standard to prevent the importation of goods that differ significantly from those authorized for sale by the copyright holder, which means there are more differences between parallel imported goods than just the price. While price and brand often influence consumer purchasing decisions, there are other important factors to consider, as discussed above.

When it comes to official distribution networks, negative factors associated with parallel imports are predominant. These include (i) the costs of advertising and promoting the product in the local market do not pay off; (ii) demand for goods and after-sales service decreases; and (iii) lower quality or different products with other components in their composition may enter the market, which could harm the reputation of the manufacturer and the product (Mamunya, 2021).

Manufacturers have multiple but complex choices when facing the issue of parallel imports. These choices typically include (i) reducing prices by cutting distribution and marketing expenses, using cheaper components, or optimizing processing; (ii) enhancing products and services offered (Mantovani & Naghavi, 2012); (iii) establishing an independent direct supply chain to foreign retail networks; and (iv) taking discriminatory actions against independent suppliers (Iravani et al., 2016). The latter, for example, may involve charging higher maintenance and repair fees for parallel imported goods (Ishikawa et al., 2020, p. 138). The wide range of potential complex solutions leads to questions about the manufacturer's and brand's margin of safety. The brand value may decrease as products become available to consumer groups that the manufacturer intentionally avoided (Iravani et al., 2016). This is particularly crucial for luxury goods, as they are frequently targeted for parallel imports due to their high value (Wang et al., 2023; Wu & Zhao, 2021).

In aggregate, finding a satisfactory solution for all parties involved in parallel imports is challenging, as their interests are conflicting, and legal safeguards often need to be revised. Moreover, with the rapid development of e-commerce and online trade platforms, international companies operating in geographically separate markets face even more severe challenges from gray markets (Swanson, 2014; Zhang & Feng, 2017; Zhang et al., 2021). One instance of parallel imports to Ukraine involves Yves Rocher, a French brand of beauty products. The original products are available in official distribution networks and on the company website (https://www.yves-rocher.ua) in various cities. Meanwhile, the Yves Rocher France group operates in the Viber messenger, where the same products are sold at a 30 %–70 % discount. The group also advertises almost freely in the application, reaching an increasing number of consumers. The group currently has around 5,000 members (4,757 as of May 4, 2024). While it may not have the same customer reach as official stores or the website, its competitive pricing and positive product reviews are driving its growth and expanding its influence in the market. The group also engages in promotions with substantial price reductions and sells expiring goods at minimum prices (with discounts of up to 80 %), which official distributors do not practice.[1] It is anticipated that the influence of these groups on the market for these products will grow if more groups adopt similar practices.

Despite the ambivalent attitude towards parallel imports, their use is not prohibited by international treaties and is recognized as a flexible mechanism of foreign trade. It is a way to implement the principles of free trade and free competition and equalize prices. Neither the TRIPS Agreement nor the Paris Convention for the Protection of Industrial Property prohibits parallel imports, leaving their regulation to the discretion of each jurisdiction. The use of this approach in developing countries for medicines has been endorsed and backed by The Doha Declaration on the TRIPS Agreement and Public Health 2001, as well as the subsequent Amendment of the TRIPS Agreement in 2005. The EU-Ukraine Association Agreement states that the Parties are free to establish their own regime for the exhaustion of intellectual property rights, subject to the provisions of the TRIPS Agreement (Art. 160). However, the entities involved in such an import system consistently navigate the fine line between legality and potential infringement based on the application of the principle of exhaustion of rights as outlined in the national laws of specific countries.

2. The Interplay between Exhaustion of Rights and the Right to Import

The main issues surrounding parallel import include the exhaustion of rights (first-sale doctrine; Bonadio, 2011) and the right to import. The first is viewed as a way to balance the exclusive rights of patent owners with the interests of free trade and access to goods for consumers. The territorial principle of the exclusive right is established in the Paris Convention for the Protection of Industrial Property (Articles 4bis and 6) and TRIPS (Articles 6 and 28). However, the exhaustion doctrine dates back over a century to the works of Josef Kohler (2018), which gained popularity in Germany and eventually extended to Switzerland, Austria, the Netherlands, and some other Nordic countries (Mukherjee, 2023a, p. 57).

In the *international regime*, the copyright holder's rights are exhausted when the products protected by a registered trademark are lawfully presented on the market in any state. This regime is favorable for importers because it does not require permission from the copyright holder (manufacturer). By enabling intra-brand competition and restricting multiple monetary gains from the same patent, international exhaustion removes the possibility of IPRs becoming a non-tariff trade barrier (Mukherjee, 2023b, p. 103). However, its use within the internationally recognized borders of some states may present specific difficulties, such as satellite equipment with built-in mechanisms for tracking the areas where it is allowed to operate (requiring activation in particular territories). Starlink, for example, can be used in most countries except Afghanistan, China, Cuba, Iran, North Korea, Russia, Syria, and Venezuela.[2] Additionally, according to point 5.1 of the Starlink Terms of Service, "Starlink may immediately suspend your Services if your new location is not in an authorized territory (marked "Available or Waitlist")" on the Starlink map (Starlink, n.d.).

[1] From personal observations of the authors in the Viber messenger.

[2] https://www.starlink.com/map?view=availability

Under the *national regime* (Art. 6 TRIPS), it is necessary to obtain permission from the copyright holder to distribute the product, regardless of its introduction into commercial circulation abroad. The rights are "exhausted" only when the product is introduced in the "home" market. A *regional exhaustion regime* is based on agreements between participants, such as a customs union. This regime was introduced into the EU by First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks (no longer in force) and was eventually repealed by Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks (recast). Moreover, it has been extended to the European Economic Area (Iceland, Norway, and Liechtenstein).

Document SCP/21/7 of the Secretariat of the Standing Committee on the Law of Patents of the World Intellectual Property Organization describes the practice of applying these rights, as well as mixed exhaustion regimes. The document shows that as of 2014, most countries predominantly applied national treatment to protect domestic IP owners. At the same time, regimes within national legislations differed, depending on product categories or intellectual property objects. The 2022 indicators have significantly shifted (Table 1). With no universally accepted standards regarding the exhaustion of rights, many states opt to establish the most suitable one. As of 2022, the prevailing trend is an international regime, demonstrating a shift in states' perspectives toward promoting free trade and expanding markets.

Table 1. Evolution of state preferences in establishing rights exhaustion regime (compiled by authors from documents of the World Intellectual Property Organization, 2014, 2022).

	2014	2022
National exhaustion	**27** Australia, Brazil, El Salvador, Japan, Madagascar, Russian Federation, Tajikistan, etc.	**30** Albania, Barbados, Belarus, Belize, Bhutan, Bosnia and Herzegovina, Brazil, El Salvador, Madagascar, Tajikistan, etc.
International exhaustion	**19** Argentina, Chile, China, Costa Rica, India, Jordan, Pakistan, Ukraine, etc.	**59** Antigua and Barbuda, Argentina, Armenia, Chile, China, Costa Rica, India, Jordan, Kyrgyzstan, Liberia, Pakistan, United States of America, Uruguay, etc.
Regional exhaustion	**22** EU members, Member States of the Agreement Revising the Bangui Agreement of March 2, 1977, etc.	**33** EU members, Saint Vincent and the Grenadines, United Kingdom
Mixed exhaustion regime	**4** Oman, Philippines, South Africa, Switzerland	**8** Andorra, Indonesia, Oman, Philippines, Rwanda, Russian Federation, Switzerland, Singapore
Uncertain	**4** Algeria, Israel, New Zealand, Sri Lanka	**More than 10** Angola, Azerbaijan, Canada, Egypt, Hong Kong, Japan, New Zealand, Republic of Korea, South Africa, Sri Lanka, the Lao People's Democratic Republic, Uzbekistan

The second important aspect of parallel imports involves the issue of the right to import, which is primarily governed by public law instruments such as customs clearance rules, import licensing, or internal sales regulations for certain goods. This is often influenced by the political and macroeconomic interests of the state, which in turn determines the state's approach to parallel imports and the potential for its legalization. However, IP owners can lobby for changes in national laws favoring national exhaustion (Calboli, 2022, p. 38). Parallel importers-retailers can also advocate for their interests to legitimize parallel imports (MDOffice, 2020; Vyivanko, 2022).

A state's role in regulating parallel imports is especially crucial for pharmaceutical products due to the need to comply with special conditions for their transportation (e.g., temperature and humidity). Unauthorized importers may fail to meet requirements, thus risking the health of patients in the country of destination (Tomarov, 2019). In such cases, public and state interests are just as important as those of manufacturers and IP owners. An import license is mandatory for such a category of goods, making imports through unofficial channels illegal. Similar restrictions are necessary for other products that could harm people's health, such as alcohol, food, and medical equipment. However, experience in EU countries with parallel imports, which provide access to cheaper medicines, shows a positive impact on medical budget spending.

In certain situations, such as when sanctions are imposed or trade with specific countries is halted, the legalization of parallel imports becomes a significant international policy issue. In these cases, parallel imports could be seen as a tactic in economic confrontation, and the concept of rights exhaustion is referred to as an action against "unfriendly" countries, as seen when the Russian Federation acted after the invasion of Ukraine (Russian Government, 2022). Despite formal justifications of parallel imports as an action against foreign companies, in reality, it is often an attempt to address the shortage of necessary foreign products.

3. Parallel Imports in Ukraine: Between the EU-Integration and Russian Invasion

Ukraine, like many other countries, at one point adhered to the national doctrine of exhaustion of rights. According to Article 12 of the Law of Ukraine on Copyright and Related Rights, the copyright owner has the exclusive right to permit or prohibit others from using their work, including importing copies. This wording emphasizes the priority of protecting the owner's interests and generally follows the national model of rights exhaustion (Yevkov, 2014, p. 143).

Since 2014, there has been a shift towards the international exhaustion of law within the judicial practice framework. For example, the decision of the Malinovsky District Court of Odesa No. 521/6940/14-p dated May 29, 2014, confirmed the international principle of exhaustion of rights. It noted that Ukrainian legislation on IP did not prohibit or restrict "parallel import," hence imposing no duties on the customs administration to counter it. The court relied on Art. 6 of the TRIPS Agreement, which states that nothing in the Agreement shall be used to resolve the issue of exhaustion of IPR. Any action against "parallel import" in Ukraine can only be taken to court by the rights holder. This means that bringing an original product into Ukraine with which the rights holder has no issues does not violate their IPR.

The Higher Commercial Court of Ukraine confirmed the application of the international principle to the exhaustion of trademark rights in Ukraine in its decision on case No. 904/2029/15, dated October 20, 2015. Specifically, it noted that the provisions of the sixth part of Article 16 of the Law of Ukraine "On the protection of rights to trademarks for goods and services" do not tie the exhaustion of the rights of trademark owners to the introduction of the goods by them or with their consent into civil circulation exclusively on the territory of Ukraine. The court concluded that trademark owners, or those with their consent, can introduce their goods into civil circulation in the territory of another state. After this introduction, the owner cannot limit or prohibit the subsequent resale of the product in other countries where their rights are protected, including in Ukraine.

The absence of territorial restrictions supports an international approach to rights exhaustion in Ukraine. The same points were highlighted in the decision of the Rivne Appeal Commercial Court dated February 2, 2016 (case No. 918/1141/15), which was upheld by the decision of the Higher Commercial Court dated April 12, 2016. This was also emphasized in the letter of the Higher Commercial Court No. 01-06/521 dated February 28, 2017, regarding "Some issues on the application of legislation by commercial courts for the protection of rights to intellectual property objects."

The international exhaustion regime was fully implemented following amendments to Article 397 of the Customs Code of Ukraine at the end of 2019. Under the new regulations, customs measures to protect IPR do not apply to "original goods." This category includes (i) goods that are manufactured with the consent of IP owners, (ii) goods that are manufactured by a person authorized by a copyright holder to produce a certain number of goods, and even (iii) goods that are manufactured in quantities exceeding the agreed one between a respective person and a copyright holder. In addition, the same article excluded the application of measures to protect IP toward personal belongings and goods imported by physical persons in hand luggage and accompanied luggage for personal consumption. These changes were implemented to align Ukrainian customs legislation with Regulation (EU) No 608/2013 of the European Parliament and of the Council dated 12 June 2013 concerning customs enforcement of intellectual property rights. As noted by Mamunya (2021), parallel imports of genuine products into Ukraine could no longer be considered trademark infringement. However, restrictions remained for medicines and plant protection products that have the relevant supplementary protection certificates.

In 2020, the Ukrainian Ministry of Finance issued two orders (No. 281 and No. 282 dated June 9, 2020) that introduced a new customs procedure to protect intellectual property rights and updated regulations for the Customs Register of Intellectual Property Rights. The Ministry outlined two main objectives for implementing these orders: (i) to strengthen efforts against counterfeit and pirated goods, and (ii) to expedite the movement of authentic products across the Ukrainian customs border and facilitate their unimpeded customs clearance (Ministry of Finance of Ukraine, 2020c). In addition, the Ministry's objective was to address the issue of patent trolling, which became a significant concern in Ukraine at a certain point. As part of this, the Customs Register was revised to include only trademarks, inventions, industrial designs, copyright and related rights objects, geographical indications, plant varieties, and integrated circuit designs. Notably, utility models, a common target of patent trolls in Ukraine, were intentionally excluded from this list.

The changes in legislation have limited the power of IP owners to use customs clearance as a tool to pressure competitors and alternative importers (Nikitchenko, 2019). However, customs can still stop the clearance of contrafact goods, demand a change in their labeling, or destroy them. Customs officers can use additional sources of information to determine whether this product is counterfeit, in addition to the information from the Customs Register (Crane IP, n.d.). Furthermore, even small batches of contrafact goods (up to three units or weighing up to 2 kilograms), which are transported by international mail and express mail, can also be subject to destruction.

The Russian invasion has also impacted Ukraine's attitude to the parallel import of medicines. Initially, the new edition of the Law of Ukraine on medicinal products was to permit parallel import 30 months after the end of martial law. However, due to the urgent need for medicines and the rapid increase in medicine prices in Ukraine (AptekaOnline.ua, 2024), a draft law was developed in May 2024 to fast-track parallel imports. It aims to increase the availability of medicines for the population, with implementation scheduled for January 1, 2025. If the parliament passes this bill, the Ukrainian Ministry of Health will be required to approve the procedure for granting a permit for parallel imports of medicinal products and the procedure for maintaining a specific Register of such products. Parallel imported medicines will not be sold in pharmacies but only distributed through government purchases. Businesses desiring to import such medical products will need to acquire a specific license.

Conclusions

The choice of a regime for the exhaustion of rights and approaches to regulating the right to import is resolved within the discretion of national legal systems, creating a mechanism for interaction between public and private actors. Public law establishes the rules and regulations for enforcing the chosen exhaustion of rights model and the control of imports, including implementing specific procedures and non-tariff regulations within states or customs unions. The preferences of IP owners or manufacturers and the expectations of consumers are also important but less decisive factors.

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Фасій Б., Височин Д., Фасій А. Паралельний імпорт: досягнення тонкого балансу у багатогранному середовищі. – Стаття.

У статті досліджується практика вирішення державами правових, економічних та політичних питань паралельного імпорту з урахуванням національних інтересів та інтересів власників ІВ, виробників, альтернативних імпортерів та споживачів. Аналізуються конфлікти інтересів між цими суб'єктами щодо легалізації паралельного імпорту, а також позитивні та негативні наслідки для кожного з них. Доктрина вичерпання прав і право на імпорт визнаються критичними елементами паралельного імпорту. Відповідні нормативні акти стають результатом взаємодії державних та приватних суб'єктів з дотриманням пріоритету громадських інтересів, але іноді з ігноруванням інтересів власників ІВ та споживачів. Авторами аналізується зміна ставлення країн до паралельного імпорту з демонстрацією зростаючого визнання міжнародного принципу вичерпання прав ІВ. Практичні наслідки цієї зміни визначаються на прикладі України. Також висвітлюється те, як зовнішньополітичні фактори (європейська інтеграція та збройний конфлікт з Російською Федерацією) вплинули на позицію України стосовно паралельного імпорту.

Ключові слова: паралельний імпорт, Угода ТРІПС, зовнішня торгівля, вичерпання прав ІВ, право на імпорт.