Petroleum Business Review

Research Article-Law Studies

Petroleum Business Review, Vol. 5, No. 3, pp. 53–60, Summer 2021

Interaction of Intellectual Property Rights and Competition Law and the Question of Technology Transfer in Iran's Oil Industry

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ARTICLE INFO

Keywords:
Competition Law
Intellectual Property Law
Iranian Oil Law
Oil Law
Oil Contracts
Technology Transfer Law

Received: 26 February 2021
Revised: 15 April 2021
Accepted: 03 July 2021

DOI:10.22050/pbr.2021.275221.1169

ABSTRACT

Understanding the interplay between intellectual property (IP) rights and competition law in the context of technology transfer in the Iranian oil industry is a point this work discusses. While intellectual property rights enjoy a historical record and appropriate rules in this regard, the competition rights in Iran are taking their initial steps. This imbalance stems from forming the legal system of oil in Iran based on contractual frameworks over time. The nagging problem to elaborate in this article is that technology transfer can be expected to occur when legal organizations concerning the relevant industries have already defined the type and purpose of technology transfer. Moreover, the general targeting in the upstream laws alone cannot meet the legal requirements for appropriate technology transfer. Therefore, when even one of the mentioned factors does not exist, one cannot expect constructive interaction in the above-mentioned legal systems.

1. Introduction

The equilibrium between intellectual property rights and competition law is one of the hiding points in the legal systems of developing countries. One of these two legal grounds extends beyond the other, and the effect of this imbalance can be seen in different areas. The point in this article is why, despite more than a hundred years since the inception of the oil industry in Iran, there has not been a legal framework that would allow the technology transfer process in this country to develop in the long run. Iran's reliance on the industry has become foreign technology.

2. Intellectual property and technology transfer

Since the 1970s, developing countries have spoken of different international contexts that have expressed their desire to increase technological capabilities and reduce the development gap between countries in the north and south. In response, in several negotiations, including the Uruguay round, developed countries argued that strengthening intellectual property protection has been critical for promoting technology transfer flows to developing countries. This argument has been raised repeatedly by fans of the TRIPS[2].

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[2] See: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results OF The Uruguay Round vol. 31, 33 I.L.M. 81 (1994)

Some studies have been conducted to assess the impact of intellectual property on technology transfer (Maskus, 2000). However, existing evidence is limited and ambiguous, as is the case with studies of the implications of intellectual property regimes in foreign direct investment. Some countries have been among the significant technology borrowers in the pre-TRIPS due to the weakness of their intellectual property (IP) protection programs, such as South Korea, Taiwan, and Brazil.[3] Of course, the reverse situation can be found. Some countries (including many African countries) have developed low-tech standards as technology importers compared to the requirements of developed countries. The simple explanation, of course, is that intellectual property rights are just one of many factors in this field and certainly not the most crucial factor affecting the cross flows of technology boundaries (Masku et al., 2005).

Although protecting intellectual property rights will increase the transfer of technology through trade, foreign direct investment, licensing, and other factors also involve technology transfer in various ways as follows:

Stability and security; required legal and institutional implementation; human resources (skilled); physical communications; transparency and efficiency of the legal system; country economic development level; development strategy; business orientation; commercial barriers structure; the ability to emulate countries; the size of the market and population; per capita GDP; the purchasing power of people; the cost of production factors such as labor; transportation costs; the abundance of resources; tax levels; investment regulations and incentives; competitive rules; privatization and size of the private sector; and corruption. "(Bozorgi, 2006: 144–145)

At the beginning of its introduction, the TRIPS agreement indicates that reducing distortion and barriers to international trade, including international technology transfer, is its primary objective. In addition, it emphasizes that measures and procedures are needed to enforce intellectual property rights. The fifth paragraph of the Introduction emphasizes the goals of development and technology, with maximum flexibility in this regard.[4] Article 7, including the goals of intellectual property rights, has been raised in the discussion of technology transfer. The TRIPS agreement establishes a legal framework to promote and encourage technology transfer, particularly from developed countries to developing countries. However, technology transfer occurs in reality and, to some extent, depends on how the developing country has adopted the approach (Nguyen, 2010).

The question is how agreements like TRIPS foster technology transfer to LDCs. Moreover, the main answer usually refers to the control of anticompetitive practices in contractual licenses, disclosure of patent information, and compulsory licenses. The same question arises about applying competition law to technology transfer in developing countries. There are some obstacles for developing countries, such as internal obstacles, lack of capacity, deficiency of legislation, absence of competition culture. The primary recommended approach is an international cooperation between competition authorities and harmonization through international forums such as WTO, OECD, and UNCTAD (Maskus, 225–255).

3. Transfer of technology to least developed countries (LDCs)

The issues affecting technology transfer to developing countries are unlikely to be resolved within the limited contours of the TRIPS agreement and other WTO disciplines. Expanded use of the flexibilities allowed by such rules is an essential component of any future strategy. However, a set of complementary measures and innovative schemes will be necessary to reduce the dramatic North–South asymmetry in technological capacities and attain the development objectives that the international community endorsed at the Johannesburg Summit on Sustainable Development (Maskus, 250).

Domestic competition law in the IPRs/technology-related area should be neither too strict nor too lax. However, it is challenging to balance IPRs and competition law in practice. Although they have a similar development level, the US and the EU are different in their approaches to IPR-related competition law. Developing countries should, and deserve to, tailor and

[3] See Also: OECD, International Licensing: Survey Results (1987).

Also: OECD, the Internationalization OF Software and Computer Services (1989).

[4] Preamble to the TRIPS Agreement; Canada – Pharmaceutical Patent, supra note 112, para. 4.30.

appropriately enforce their domestic IPR-related competition law to meet their particular socio-economic contexts. To this end, developing countries should understand the complexity of IPRs and competition law, and they should adapt and customize IPR-related competition laws to fit local needs and sustainable development. While IP protection is being globalized under the TRIPS agreement, IPR-related competition law in developing countries needs to be "glocalized" to balance that protection and serve national interests and consumer welfare. Analysis of the intersections between IP and competition rules will lead to a false trail if it attributes a direct role in promoting innovation and intellectual property and a direct role in promoting competition to the latter. Instead, one should recognize a dialectical exchange between the two disciplines, which aim at different but often synergic objectives, and therefore often interact to eliminate situations that would obstruct both innovation and competitive dynamics. Thus, through this dialectical exchange, each discipline, by fulfilling its function, can also indirectly serve the aims of the other. A convergence of goals can be acknowledged from an industrial policy angle, i.e., the objective of strengthening and promoting European competitiveness. However, such a perspective may serve to comprehend better the substantial grounds of a normative and jurisprudential evolution rather than to interpret and apply the positive law (Nguyen,293, 110–115).

4. Intellectual property rights in Iran

Enjoying vital support areas can be a practical incentive for foreign investment and technology transfer. The point that should not be ignored is that investment does not necessarily mean the transfer of up-to-date and successful technology to the host country and often leads to the transfer of outdated technology at a relatively high rate. However, the host country lacking such incentives can achieve this type of technology in other ways at a much lower cost.

The modern legal system governing intellectual property in Iran can be considered under the following rules.

1. National laws and regulations

- Patent law, industrial designs, and trademarks, 2007;
- The executive order of patents, patents, industrial designs, and trademarks;
- Law on the protection of geographical indications approved in 2004;
- The executive order of the geographical indicator protection act;

2. International rules and regulations

- Convention establishing the World Intellectual Property Organization;
- Paris convention for the protection of industrial property;
- Amendments to Paris convention for the protection of industrial property;
- Madrid agreement
- The Madrid protocol
- Lisbon agreement
- Agreement on commercial aspects of intellectual property rights, TRIPS;
- Iran's accession to the Madrid agreement for the repression of false or deceptive indications of source on goods;

What type of intellectual property right is at issue, and why and to what extent should the intellectual property right be constrained for competition law purposes?

Since no relevant organization related to the oil industry in Iran is specifically responsible for formulating and defining technology transfer goals and monitoring its implementation, practically creating interaction and balance between intellectual property rights and competition law in line with technology transfer goals in Iran, one should face a severe and ambiguous challenge. Because, when these goals are not defined by the relevant organizations in Iran and are not announced to the investing companies, how can one expect a balance in the two legal systems mentioned above? The use of upstream domestic documents and laws in Iran, regardless of the implementation methods and drafting of bills governing related industries, will practically remain within the definition of macro goals.

This work answers the question: Why treatment towards technology transfer contracts is also quite general and does not explain what type of technology transfer contracts should be prohibited or sanctioned under Iranian standards? Although numerous international instruments govern technology transfer, the technology recipient must create the capacity and conditions to receive the technology according to its short-term and long-term goals and follow the regulatory laws in that area. There is more room for reflection on Iran's oil industry. When this definition does not exist specifically in a country, it cannot be expected to be met by the international community.

5. Application of competition law to technology transfer

The goal of competition law is to maintain the process of competition in the market and avoid methods that cause inequality and exploitation (Fox, 1987). Therefore, these objectives can be categorized as follows.

Economic objectives include 1) economic efficiency and 2) consumer welfare, and non-economic objectives include 1) political objectives and 2) social objectives. Commercial competition policy is achieved when, in the markets where low-income individuals are purchasing, it improves the allocation of resources (suppliers of goods and services) by preventing the emergence of cartels and monopolies. Of course, competitive action does not constantly improve performance and revenue distribution (Samavatei, 2011).

6. Competition law in Iran's legal system

The most important law in this field can be considered the law amending the articles of the fourth economic, social, and cultural development plan of the Islamic Republic of Iran and implementing the general policies of Article 44 of the constitution.

While defining monopoly, the law clarifies the scope of governmental and non-governmental activities, and it has considered regulations and clarified the guarantee of their implementation to facilitate competition and prohibit monopoly.

However, the most critical and advanced provision in this law can be considered Article 51, according to which exclusive rights and privileges arising from intellectual property should not violate Articles (44) to (48) of this law, in which case the Competition Council Will have to make one or more of the following decisions:

A. The cessation of activity or non-exercise of exclusive rights, including limitation of the period of application of exclusive rights;
B. Prohibiting the party to the contract, agreement, or compromise related to the exclusive rights from fulfilling all or part of the terms and obligations contained therein;
C. Annulment of contracts, agreements, or understandings related to exclusive rights in case the measures subject to paragraphs *a* and *b* of this article are not effective.

The importance of this regulation is in creating a balance between the rules governing intellectual property rights and competition law, which provides an explicit criterion for violating the laws governing these two sections and has accepted the scope of intellectual property rights by applying this article to the extent that has no competition. The critical point is that this law is considered an upstream document, and other laws are silent on implementing this document in the field of the oil industry. Therefore, creating balance and interaction in different areas of law is associated with the development of relevant laws in related industries, from which further steps must be taken.

7. The rules of competition law applicable to the transfer of technology contracts

Generally, technology transfer contracts contain arrangements that impose restrictions on the parties, especially the technology recipients. These cases are often due to agreements between the parties. Indeed, these actions will generally face serious questions about competition law, but some of them are legitimate in law as follows (Zahedi, 2008):

- Restrictive business practices in connection with obtaining the technology to produce;
- Restrictions on the field of use;
- Use of competing technologies;
- Restrictions on the volume of productions;
- Exclusivity arrangements;
- Tying clauses;
- Duration of arrangements;
- Quality controls;
- Restrictive business practices in connection with the distribution of goods;
- Territorial restrictions;
- Restrictions on distribution channels;
- Export restrictions;
- Restrictive business practices in connection with the development of national technology and scientific capabilities;
- Restrictions on research and development;
- Grant back provisions;
- Restrictions on compulsory purchase of inventions or technological improvements;
- Restrictions on use and training of personnel;
- Other restrictive business practices;
- Restrictions after expiration of industrial property rights;
- Restrictions after expiration of arrangements;
- No challenge provisions;
- Price fixing.

8. Technology transfer and the matter of interaction of competition law and intellectual property

Although it is not possible to ignore the efforts of competition law to limit as much intellectual property rights as possible, the combination of laws protecting intellectual property and providing legitimate competition leads to the development of innovation (Anderson, 1998). The intellectual property law system brings technological innovation into its proper direction and prevents the market from controlling and directing the formation of monopolies and the emergence of illegitimate profitable practices by granting exclusive rights and the right to compete with the guarantee of legitimate competitive environments. Therefore, the two systems have taken steps to get closer and have maximum interaction. On the one hand, this process promotes consumer welfare by using products and services of the best quality and cost. On the other hand, it will have the potential to obtain the maximum legal interest to move in the direction determined by the competitive rules for the technology holder. For example, in the cooperation of intellectual property rights with competing rights, it is possible to issue compulsory licenses if exploitation is contrary to competition. Nevertheless, competition law should not be assumed to overcome the anticompetitive effects of technology transfer contracts. Generally, the technology transferor is in a better position than the transferee and determines the terms of the agreement, which is why the necessity of the existence of the indicators to differentiate the legitimate limiting procedures of the anti-trust measures is highly emphasized so that the parties' interactions in the framework of such bilateral arrangements and fair competition are guaranteed (Rahbari, 2013).

9. Period of concession contracts

In competition law, it is exciting that in Iran, contrary to the rules related to intellectual property rights, the legal system of competition law does not have any place in the concession contracts. Of course, the most basic of the new competition rules, for example, in the United Kingdom, dates back to 1948 (Samavatei, 2011).

Forming legal systems in which there is a high level of technology protection, capital holders will give them a dominant position in the absence of any criterion for adjusting their legal and commercial bargaining positions. Further, this contractual structure can pave the way for the abuse of the legal system of the oil industry. Another point is that this happened while under consideration in Iran. Instead of opening competitive markets to protect domestic and national interests, the issue of monopoly is legally established.

Following Article 3 of the Mines Act of 1938, the right to extract mines of oil and precious stones is exclusive to the state, and the rights of the owners of these mines will be determined by a special regulation with the consent of the state and the owners. However, this criterion is in a debate that does not support the protection of national and public interests. Thus, this legal system can be considered prone to abuse.

10. Joint venture contract period

An important step was taken in terms of the timing of the governance of cooperative contracts in protecting intellectual property rights, with the establishment of the Office of Registration of Signs in Iran and the establishment of the Office of Registration of Signs at the Ministry of National Economy and Printing of Signs in the National Economy Journal. Another point of note was Iran's accession to the Paris Treaty in 1959. Over time, however, the names of organizations active in this field changed in Iran. However, competition law still has its actual legal status.

Among the issues that can be found in the oil Act of 1957, mentioned in Article 3, is "No agent can assign any or all of the relevant operations to a contractor unless previously agreeing with the National Iranian Oil Company, and, in any case, this agreement will not preclude the contractor's liability. One of the issues arising from implementing that law is that the international oil company cannot, as in the past, create a market monopoly or, by assigning its contracts and rights and obligations, become a mere mediator. The same provision is also repealed in clause *m* of Article 12 of the same law. The agents cannot transfer the rights they have acquired according to the provisions of this law and the obligations accepted with the prior agreement of the National Iranian Oil Company and the approval of the Cabinet of Ministers and the House.

Another significant factor preventing unhealthy and unequal competition is Article 4 of the Oil Act of 1957. According to this article, in the case of foreign nationals, the permission to authorize or delegate operations to a contractor may only be given in some instances where, following the laws and economic organizations of the foreign country concerned, the Iranian nationals are allowed to perform in the country in general economic activities and especially for the subject matter of this law.

However, encouraging aspects were also included in the law mentioned above, which, while reducing costs and increasing incentives for investment, could have encouraged the transfer of applied technologies in concluded contracts. Following Article 11, taxes and rights include the public and are free of discrimination (such as a patent), and the contractors are not required to pay any government official, whether central or local.

11. Period of service contract

The era of concluding service contracts in Iran is not a short period, but it appears that many steps can still be taken to balance the two legal bases. Some provisions are being considered by looking at oil law, which is useful in their context.

In Article 5 of the Act of the articles of association of the National Iranian Oil Company, and in support of intellectual property rights, a statement has been made that could create the necessary ground for technology transfer, along with the encouragement. This regulation states that to provide for the purposes and carry out the operations referred to in Article 4, the company shall have the following rights and powers: the possession and registration of patents and the right to use any information about inventions and designs related to the oil industry and related industries.

In the oil Act of 1976, given that in the framework of concession contracts, international oil companies, and taking into account their high margin for profit, they practically owned and controlled the oil and gas market. In Article 21, the legislature has the following titles to rule out: The contracting party may not assign the rights it grants under the terms of the contract unless otherwise agreed by the National Iranian Oil Company and approved by the Cabinet of Ministers.

12. Period of IPC contracts

The terms of the competition law to meet the intellectual property rights obligations and standards in Iran are not as equilibrium as possible. Some of the requirements that partly return to these divisions can be expressed as follows:

Article 13 of the structure and pattern of upstream contracts of oil and gas of Iran states that before the delivery of information on oil and gas tanks to the companies negotiating with the National Iranian Oil Company or companies wishing to participate in tenders related to the implementation of the project, the subject matter of this letter of approval and its primary competence, with the approval of the National Oil Company, is to sign this information. By signing the document of confidentiality and maintaining confidentiality, these companies must undertake that managers, employees, experts, and other person signatories of the company signing this document and its subsidiaries should have access to this information if necessary. The information received following the provisions of this document will be kept entirely confidential and will not be disclosed to any third party without the permission of the National Iranian Oil Company and the arrangements specified in the document. If it is determined that this information is provided to unauthorized persons, the other party will be required to compensate for the non-fulfillment of obligations to the National Iranian Oil Company.

Moreover, in Clause 5 of Article 6 of the statute of the National Iranian Oil Company, the only regulation that is partly related to the discussion is described as one of the rights and duties of the company: registration of patents, industrial designs, signs, and brands owned by the company in the relevant authorities; the purchase and possession of the right to exploit inventions, industrial designs, and technical know-how of third parties in the field of the oil industry and its related industries; and, in Paragraph 6, assistance and support from Iranian companies of a knowledge base and Iranian people about the design and production of equipment needed for the operation of the company's activities inside the country.

Developing countries need clever, synchronized, legal, and economic strategies to build an "ecology of innovation" in general and develop the capacity to exploit technology, especially technological absorptive domestic skills and competencies. However, developing countries cannot produce technological output to serve domestic economic growth and development without technological input. Competition law can advance or hinder innovation and technology transfer in many ways. Applying it to technology transfer is a two-edged sword. It requires a very well-established, prudent, and flexible approach from each country, taking into account domestic interests, consumer welfare, and national economic development, as well as the incentives and legitimate benefits of right holders. The role of competition law in technology transfer should be neither overlooked nor over-estimated. On the basis of the experience of developed countries, developing countries should adopt and customize their domestic IPR-related competition law to make it fit the local context and local needs. Appropriately adopting and applying domestic competition law in IPRs/technology transfer is a fundamental necessity for developing countries wishing

to protect national interests and consumer welfare in a knowledge-based market economy. However, developing countries should set priorities, taking into account their limited competition law resources, which control IPR-related anticompetitive practices while promoting access to technology. Refusal to license, excessive pricing of IPR-embodied products, IPR-related tying, and IPR-related-use restrictions on downstream purchasers should focus on competition law enforcement in developing countries (Nguyen, 303–320).

13. Conclusions

Although several factors concern technology transfer, some of them, like attracting and retaining talents, are of organizations' concerns (Mirzaie et al., 2020). The root of Iran's legal system and its formation on the basis of oil contracts is a problematic factor in supplying the technological needs of this industry. Because the applied contracts in this industry were highly unilateral and in favor of oil companies at the beginning of the industry, over time, due to phenomena such as nationalization in oil-rich countries, attention to the oil industry has also been dramatically increased. This has substantially increased the demand from these countries to change the framework of international oil and gas contracts. The response to this demand was the emergence of different contractual frameworks, which were subject to constraints in accordance with fundamental rights in Iran. Increased contestability and improved development outcomes for the Middle East and North Africa (MENA) countries require credible institutions that permit newcomers to challenge the status quo and establish a more level playing field. (World Bank, 2017; Ait Ali Slimane, 2018). Well-performing competition authorities are a necessary part of such an institutional landscape. Nevertheless, if competition authorities are to dent anticompetitive practices, an independent judiciary is needed to uphold the game's rules (Khemani, 2007).

From the findings of this work, the following conclusions and suggestions can be drawn:

Like other developing countries, Iran needs internal harmonization of the legal systems governing intellectual property rights and competition law, and one should not expect the fulfillment of all the goals of each of the above-mentioned legal systems from the other because the goals of each of these two legal systems are fundamentally different. Hence, balance in both systems is the critical factor.

Paying attention to the cultural development of each of these two fields and paying attention to the achievements of other countries and using their experiences can be helpful in this field.

Alignment of the domestic law with the guidelines of international organizations according to the national interest can accelerate this coordination.

Last but not least is that the legal system of oil and gas in Iran has its unique characteristics. Although some basic similarities can be found in the domestic legal system and contractual frameworks governing this field, ignoring those unique characteristics can make all the effort in vain.

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