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TRANSFER OF TECHNOLOGY IN INDIA: INTERFACE OF IPRs AND COMPETITION POLICY

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ABSTRACT

Economic growth is increasingly being defined by the ability of a nation to provide an affirmative framework for marketing innovations. The role of the legal system, particularly that of IPRs and the Competition principles, in achieving this framework is extremely significant. In this regard, the author attempts to capture select challenges of multilateral relevance that require to be discussed to suitably enrich the Indian legal context.

Research and development programmes, activities and incentives, are gradually climbing the ladder of strategic importance, both at the firm-level as well as in the policymaking process. Technology-based innovations, and the dynamics of their commercialization, have been subjects of immense interest to entrepreneurs and the business community, government and public institutions, and scholars of economics, management and law. It is indeed an inherently multidisciplinary field, and thereby, also provides a unique insight to the interplay of the working of intellectual property rights (IPRs) and the objectives of the competition law and policy. The objective of this note is to highlight such critical aspects of any typical transactions involving technology transfers, which raise questions on the scope of enforcement of IPRs and the relevance of the applicable principles of competition policy. For the purposes of this note and the discussion hereinafter, the term 'transfer of technology' shall mean – any form of contractual license, including an assignment, of technology that may or may not be patented, being undertaken to enable and aid the production of goods and/or provision of services, either in the form of a joint collaboration, or for the exclusive use by the licensee. Therefore, any form of the actual product/service itself being licensed for use or sold is excluded, since it would only

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amount to be classified as a sale, and would be more in the nature of staid consumption without being able to demonstrate the inherent complexities of sharing and application of technological knowledge.

What then is truly at the core of any transfer of technology process is the ‘technical know-how’. It is variously termed as – trade secrets, confidential information, and proprietary knowledge and data. In India, the technical know-how and the confidential data is protected primarily on the basis of contractual relations. Such contracts are executed on the strength of clauses (sometimes detailed enough to occur as separate agreements in themselves) termed as ‘non-disclosure’ and ‘non-compete’, thereby referring to their inherently restrictive nature. For an offence of misappropriation of confidential information, it is also possible go beyond the contractual framework and seek equitable remedies on the basis of tortious principles of liabilities, and sometimes such offences could be grave enough to attract criminal punishments too.

‘Transfer of technology’, a much discussed and debated term, has come to bear the burden of two contentious issues: one, the obvious inequality in the relationship between, the developed nations that usually own and license innovative technology on the one hand, and on the other hand the developing and least-developed nations that have an ever growing demand for the widespread beneficial use of such technology; and two, it necessarily pits the exploitative potential of IPRs directly against the equitable restraint as advocated by the competition policy.¹ It is in this background that the development and use of innovative technology, especially in the cross-border context, has emerged to be a critical factor in guiding the content and direction of an emerging relationship between IPRs and the competition policy framework.

This note presents two distinct, but common, forms of transfer of technology in the Indian context, which highlight the need to explore the desired reciprocity between enforcement of IPRs and the fulfilment of competition policy objectives. While one instance deals with technology

¹ As commonly understood, IPRs are meant to guarantee a definite form of exclusivity, whereas, the competition regime seeks to focus on an equitable approach to the developmental, structural, and behavioural aspects of the local economy. While IPRs are designed to protect “innovators’ rights”, the competition policy is oriented to promote “competitive markets” and ultimately protect “consumer interests”. Economic development, efficiency, level of market integration, the active involvement of small and medium enterprises (SMEs), are some of the leading factors that constitute the comprehensive analysis required to implement the competition framework in any given context.

being imported into India, the other brings forth the concerns of taking indigenous technological innovations to the market, within India and beyond. As a prelude, it would be helpful to understand the current status in the multilateral framework pertaining to each of the domains relevant to our discussion – IPRs, Competition Law and Policy, and Transfer of Technology.

I. The Multilateral Framework

a) Intellectual Property Rights

IPRs originate within a country, but are recognized and registered across different nations and therefore need to also be enforced globally. However, as a matter of general principle the establishment and enforcement of IPRs are governed only by the legislations applicable within the territory of a country. The first-generation IPRs, namely, Patents, Copyrights, Trademarks and Industrial Designs, have been the subject of historical efforts to evolve multilateral frameworks regarding the criteria to recognize and enforce such rights across different countries.² Even the second-generation IPRs, which have come to be widely accepted and established only in the last couple of decades or so, namely, Geographical Indications, Semiconductor Layout Designs, and the Plant Varieties Protection, do not have a uniform legal framework across the world. While there are certain established international agreements and conventions that outline multilateral cooperation on specific forms and processes of IPRs, there is a manifest intention in these agreements not amounting to impose a uniform framework across different countries. Of course, this is to recognize the overarching claim of sovereign autonomy in tailoring the municipal legal regimes (on IPRs) to suit the promotion and protection of national interests. This reality fortifies the character of IPR as a private right bestowed upon an eligible individual/entity for the benefits and to the extent as decided by a particular nation. Therefore, IPR is as effective a right as that which governs any other form of property, to be enforced within the territory of a country.

² In this regard, the prominent international instruments are: Paris Convention for the Protection of Industrial Property, 1883 (the Paris Convention), the Berne Convention for the Protection of Literary and Artistic Works, 1886 (the Berne Convention), the Universal Copyrights Convention, 1952, and the Madrid Agreement concerning the International Registration of Marks, 1891.

IPRs are not only subjected to a plethora of legislations in each and every country, but in addition, to also a number of basic principles that are found in the various international agreements and treaties that are binding on the member countries. The question that arises is how are we to coordinate the different principles and procedures of law, interpretation and enforcement that prevail with respect to each form of IPRs? While understanding the basic and founding principles of forms of IPRs is a challenge in itself, employing such knowledge for strategic benefits and timely enforcement of the rights is an altogether different and an arduous task. It is this politico-legal reality that has also led to the formation of the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs) under the aegis of the World Trade Organization (WTO) in 1995.

The formation of TRIPs, in fact even the WTO itself, was faced with much resistance. One of the major grounds of such opposition, as expressed by many in the coalition of developing and least developed countries, was the lack of harmonious understanding on the nature and scope of different forms of IPRs. Firstly, there did not appear to be enough understanding of the issues to negotiate a multilateral framework on trade and IPRs, and secondly, even if there was an initial acceptance of the need for such a framework, it certainly did not merit an inclusion as a WTO agreement with immediate enforceable mechanisms. While there are far too many well documented debatable issues that surrounded the formation of TRIPs, and continue to be relevant in many implementation aspects even today, it must be noted that TRIPs is acknowledged as an international instrument prescribing the 'minimum standards' on IPRs. Its widespread acceptance and implementation could be attributed to primarily two reasons: firstly, it has adopted quite widely from the longstanding international agreements on IPRs, such as the Paris Convention and the Berne Convention; and secondly, TRIPs has certainly benefitted in being enforced as a part of the comprehensive multilateral system of the WTO, whose membership today stands at 156 countries (including its latest entrant, the Russian Federation).

In a sense, led by TRIPs under the WTO regime, IPRs have been an abiding subject of negotiations across various multilateral fora. A testimony of the growing relevance and dynamism of IPRs in shaping international relations, trade and otherwise, is the fact that IPRs

also figure quite significantly in most of the regional, inter-regional, and bilateral investment and trade negotiations and agreements.

b) Competition Law and Policy

The understanding of the term ‘competition’ is invariably grounded in the assessment of the relevant market factors as evident in the local economic conditions. One of the main objectives of a competition authority in a country is to prevent ‘anti-competitive’ business practices and remedy the implications, if any, within its territorial jurisdiction. While there are many complications in defining and identifying such anti-competitive practices, there are many other difficulties – mainly procedural and evidentiary in nature – that affect the working of a typical competition authority. What adds to the burden is the inherent subjectivity involved in ascertaining and applying standards that are based on “economic development of the country”; and relevant to “promote and sustain competition in markets”.

India has recently brought into operation a full-fledged competition law, the Competition Act, 2002, which has also established the Competition Commission of India (CCI). With the legislation becoming fully operational in the last couple of years, the CCI has rightly seized the initiative to put forth the content of a sound and enforceable competition policy in the Indian context.³ It is stated that there are presently over a hundred countries which have a dedicated legislation to govern the implementation of their competition policy.⁴ However, the goals, content and impact of such legislations would definitely vary according to the respective national interests and institutional maturity. Towards overcoming the obvious differences in the legislative and institutional apparatus governing competition policies across the world, there has been a consistent demand from a group of developed nations for a multilateral agreement on international trade related competition issues. Quite expectedly, this initiative was also sought to be discussed as potentially being a part of the WTO framework (also popularly termed as the “Singapore Issues” in the WTO since 1996).

³ The CCI has taken cognizance of more than 170 matters, and also disposed a majority of them, since 2010.

⁴ The use of the term ‘competition policy’ is preferable, even in such instances where a specific law is enacted, since the objectives of any law on competition expressly include, within its interpretative ambit, the social and economic policies of the particular country.

While there are bound to be issues of anti-competitive practices in the context of international trade, many countries, including India, have steadfastly objected to a multilateral framework on competition on the basic ground that it shall eventually supplant the national development agenda that the competition policy intrinsically promotes. Competition policy and its critical role in the development of the economy of a nation has been quite strongly asserted in the international fora, and to a large extent, established too.

c) Transfer of Technology

The true essence of technology, across any sector, is defined by its capacity to enable and endow proprietary, commercial and competitive advantage. While IPRs guarantee proprietary rights, the commercial value and competitive advantage are realized through firm-level contractual and licensing options and strategies. However, it is interesting to note that the nature, scope and mode of technology transfer, have also been a significant theme of multilateral negotiations and agreements.⁵ The context is that the developed nations generally are dominant in technology generation and ownership, and that there must be considerable efforts made to incentivize the transfer of such technology to the developing and the least-developed nations. The United Nations and its specific programme on trade, the UN Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the World Bank, and most significantly, the WTO, are the principal international institutions that have nurtured transfer of technology as part of their agenda. The Draft International Code of Conduct on the Transfer of Technology, which was being negotiated under the aegis of UNCTAD, between 1976 and 1985, seeks to lay emphasis on the ideals of “equitable standards” and “due recognition to special needs of developing countries”. The Preamble of the Draft Code quite even states – “Convinced, that an international legally binding instrument is the only form capable of effectively regulating the transfer of technology.”

Despite an elusive consensus on a definite framework, international negotiations on regulating transfer of technology have acknowledged two factual realities. Firstly, that the developed

⁵ There are over seventy-five international legal instruments that contain provisions which govern the process of transfer of technology across borders. Refer, *Compendium of International Arrangements on Transfer of Technology: Selected Instruments*, UNCTAD/ITE/IPC/Misc.5, United Nations publications, 2001.

nations have a considerable stronghold on technology, and the IPR regime has enabled them to seek enforcement of such ownership of innovative technology across the world. Secondly, and perhaps more persuasively, that there is an unprecedented demand, that is considered to be even legitimate in the light of having to cope with the impact of rapid climate change, for the wider transfer and empowered diffusion of technology on beneficial terms in the developing and least developed parts of the world.

The UNCTAD Draft Code (as it stands on 5th June, 1985) refers to the content of ‘technology’ through the definition of the process of ‘transfer of technology’, which states: “Transfer of technology under this Code is the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service and does not extend to the transactions involving the mere sale or mere lease of goods.” (Emphasis added) It is clear from the above definition, as well as the subsequent illustrative list of what nature of arrangements could constitute a sufficient transfer,⁶ that the focus is not on the end product or service, but on the transfer of the body of comprehensive, technical and systematic knowledge that enables not just the production of the intended output, but also a meaningful opportunity to explore any potential for further innovation.

II. Specific Forms of Transfer of Technology in the Indian Context

a) MNC driven transfer of technology

Transfer of technology by a developed country multinational corporation (MNC) to either an industrial cluster, or to a public sector undertaking, or to small and medium enterprises (SMEs) in India is quite archetypical, more so in the recent past with the rising growth of the economy, especially led by the services sector. However, an abiding concern of such transactions of transfer has been the prevalent forms of contractual and operational restrictions that are imposed

⁶ The definition is quoted from the UNCTAD Draft International Code of Conduct on the Transfer of Technology (1985), Chapter 1, Para 1.2. In Para 1.3, there are five illustrative requirements listed as being those that ought to be associated with a typical transaction of transfer of technology. An example is Para 1.3.d, which states “The provision of technological knowledge necessary to acquire, install and use machinery, equipment, intermediate goods and/or raw materials which have been acquired by purchase, lease or other means.”

by the MNCs on the Indian firm. It is well documented that the MNCs have been extensively undertaking restrictive practices as part of the 'foreign collaboration agreements' relied upon by many firms in India to build their technological capabilities. It has also been fairly established that the purported benefits of such foreign collaboration were undone by the severe forms of restrictive practices that were eventually imposed as part of such transactions. In comparison to the firms which were involved in foreign collaboration agreements, it has even been demonstrated that firms relying on indigenous, or government funded, or own limited resources for R&D investments, have fared better in the rate of development and adaptation of products.⁷

A sample of the restrictive conditions imposed in such foreign collaborations consisted of the following nature:⁸ Raw material/machinery, and related resources, is to be imported only from the foreign collaborator; raw material/machinery, and related resources, is to be imported only from the subsidiaries of the foreign collaborator, or any other source as directed by the foreign collaborator; after the expiry of the contract terms, the import of raw materials/machinery is permitted only with the prior permission of the foreign collaborator.

The degree of restrictiveness has only increased over the years. IPRs signify high commercial value, and in any typical license of a patented technology, there is a standard restriction that the licensee is subjected to in the form of a contractual clause to the effect – "The Licensor does not provide any warranty on the said Patent and the Licensee will have no claim whatsoever against the Licensor for any defect in the patent or otherwise. Under no circumstances shall the Licensee, directly or through any indirect means, challenge the validity of the said patent."⁹ While clauses of such nature have been extensively analyzed for their legality, also by the US Supreme Court,¹⁰ on the grounds of 'licensee estoppel', the context of the discussion here is different. The issue of 'restrictive clauses' found in typical technology transfer licenses needs to be evaluated on the implications of inhibiting the freedom of the licensee to explore alternative or improved forms of the licensed technology.

⁷ P.K. Chugan, (1995), Foreign Collaborations and Industrial R and D in Developing Countries – Case of Indian Automobile Ancillary Industry, Economic and Political Weekly, August 26, 1995, M-98.

⁸ Ibid., at M-107.

⁹ This is a sample clause constructed with due reference to similar clauses in various kinds of Patent licenses, with a MNC being the Patent holder and an Indian firm being the licensee.

¹⁰ MedImmune v. Genentech, 549 U.S. 118 (2007).

In the year 1985, while the UNCTAD initiative towards building an international consensus on transfer of technology was discontinued at the draft stage, China brought into effect a strong protectionist set of Regulations. ‘The *Regulations of the People’s Republic of China Governing Contracts for the Import of Technology*’,¹¹ expressly states that the licensor in a contract of technology import shall have to provide a comprehensive warranty, including to the effect that the licensed technology is “complete, free of error, effective and capable of achieving the agreed technological target.”¹²

It is not the issue here that MNCs are big, and therefore enjoy the economic and competitive business clout to flex their muscles in such instances. Competition law and policy across the world do not endorse the view that ‘being big is in itself bad’. What is worthy of note here is the highly sceptical approach that is evident in the manner a MNC seeks to transfer technology to a recipient in another country. We shall discuss a few ‘unreasonable’ implications of this in Part III.

b) An individual and independent innovator led transfer of technology

India’s economic growth story is incomplete without the mention of its steadily growing community of technology entrepreneurs. Credit must be given to the scores of individual and independent innovators across different regions of the country who, bearing a keen sense of entrepreneurship, strive to discover the innovative potential in the indigenous context. Problem solving aptitude demanded in the regional or local working conditions has increasingly endowed experienced individuals with sufficient motivation to embark upon the risky journey of innovation and entrepreneurship. There are many reasons attributed to the rise in the culture of innovations-led entrepreneurship in the Indian context, including the rapid change in the social and economic profile of the country. An aspect to note in this regard is also the impact of increased exposure to the international business practices and processes. With the ‘opening up of the Indian economy’, popularly associated with the structural reforms introduced in the aftermath

¹¹ 24 I.L.M. 801 (1985) – reprint based on an unofficial translation, c.f., Recent Developments, Foreign Investment: Foreign Economic Contract Law, 27 HARV. INTL. L. J. 275 (1986).

¹² Song Huang, Implied Warranties in a Technology Import Transaction, <http://www.chinalawandpractice.com/Article/1692232/Channel/9929/Implied-Warranties-in-a-Technology-Import-Transaction.html>

of the 1991 economic crisis, foreign investments and collaborations increased manifold, thereby providing an opportunity for the Indian partners and their affiliates to become aware of such innovation-friendly strategic business models. However, it is quite obvious that most of such foreign collaboration led partnerships were limited in their nature, mainly due to the web of restrictive conditions, imposed either expressly through contracts and specific memoranda, or through restraints in the operational conduct.

While exposure to the so-called ‘best practices’ across the globe have distinct advantages at an individual level, the lack of a mature policy and institutional environment severely constrain any potential for growth and innovation. Without going into any general discussion on the necessary conditions to orient the Indian business climate towards more innovations, the focus needs to be steered in the direction of what are the policy and legal initiatives available for those who do manage to innovate. Independent innovators, a term used to refer to those who are not employed with or mainly dependent on the resources of a corporate entity, are entirely on their own to further the commercial interests of their innovations. There are multiple forms of assistance required at the stage when an independent innovator is poised to market the innovation – technology-based support, evaluation and assistance, seed financing on sufficiently flexible terms, protection of data exclusivity and competitive advantage through appropriate legal and contractual measures, and facilitation of the process of commercialization. Especially in the context of India, where the governance in the regional States determine the policy ecosystem on any given issue, multiple factors that are critical need to be replicated across the country for creating the favourable climate for entrepreneurship.¹³

Owing to an apparent lack of technology transfer expertise or presence of any support mechanisms in this regard, there are many bright independent innovators who are failing to get the deserving attention and response for their efforts towards commercialization.¹⁴ A typical such instance is being reproduced here to highlight the serious concerns in this regard: “Y, a young

¹³ Some of the widely discussed factors in the Indian context are: Adequate and well directed R&D incentives; Intellectual Property protection and enforcement; Training and capacity building; Infrastructure; and Social and cultural support mechanisms.

¹⁴ According to the information provided by the Brain League IP Services, there are many such clients who are unable to proceed to commercialize their ‘strongly patentable’ ideas owing to lack of ready and effective ‘market access’ mechanisms.

independent inventor, developed a data processing unit in computers and embedded systems while he was still pursuing his bachelor's program in engineering. The invention particularly relates to hybrid semiconductor architecture for a processor which reduces power consumption without compromising on performance and a structure permitting high level of modularity to achieve flexibility. Realizing its business value, Y approached the Brain League IP Services and on their suggestion, based on extensive search and patent landscaping, a patent application was filed in India and later followed up with a Patent Cooperation Treaty (PCT) application to keep the opportunities for multiple national filings open. Y was even advised to form a separate private corporate entity with an objective of commercializing the invention. However, it has been over a year and yet there has not been any progress made by Y, neither on procuring funding options for taking this venture forward, nor in commercializing the technology in any manner. Y believes that lack of technology transfer expertise, especially given the niche background of this particular field of technology (design and manufacturing of processors), and the small size of the present business venture are perhaps the most difficult hurdles to overcome.”¹⁵

The concern is two-fold: firstly, the innovation does not have a platform to market its potential to such MNCs and corporate entities that would have the resources to fund the entire commercialization process; and secondly, there would be many SMEs and indigenous and dedicated industry clusters looking out to use such bright innovations, particularly for the reason that they could be licensed at far more economical terms than if they had to approach a MNC for it.

III. Pointers on Select Issues of IPRs and Competition

Given the above two dimensions of transfer of technology process, the following issues assume significance in the Indian context:

a) Recognizing and protecting the ‘intangibility’ in the technology

¹⁵ This instance is based on an interview with Dr. Kalyan C. Kankanala, CEO, the Brain League IP Services.

As stated earlier, the technical know-how is of immense value and assumes critical importance in any process based on ‘systematic knowledge’. The IPRs, in all the various forms, do protect the ‘intangible assets’ in a product and/or a process. However, what is at stake in a typical transfer of technology, which is not patented or protected otherwise by IPRs, is that there is a comprehensive body of associated information that comes along in any such license of technology. Added to this, such a collection of information is, in most instances, easily decipherable by the recipient of the technology. While the IPRs recognize the claimed and depicted ‘uniqueness’ or the ‘creativity’ element, it is the comprehensive body of information and knowledge that would actually endow competitive advantage, derived rightfully from its working experience.

There is an immediate need to recognize the varied forms of such ‘know-how’ and provide a framework that could guarantee the utmost level of legal protection. There has to be a two-pronged approach adopted by the legal framework:

- a. **Typology:** The typology of confidential data and technical know-how needs to be recognized. This is not to make it exhaustive, but to be able objectively assess the relevance of such vastly inclusive definitions. Typically, the term “confidential information” or “confidential data” would be designed to include – any techniques, business processes, configurations, system and network architecture, marketing plans and strategies, analyses, studies, reports, data, computer programs, inventions, strategies, samples, ideas, concepts, designs, specifications, customer or vendor names and lists, financial information, and other technical and business information. This would, of course, also include such information that is claimed as being ‘trade secrets’. Clarity in the legal framework would ensure that the list is kept to the relevant minimum, and also to preclude instances of such confidential information being misappropriated on the weak grounds that the source of such information has not been part of the defined list. Furthermore, there are some noted exceptions to this extensive list of information being classified as confidential. For instance, where the classified information is independently available in public domain, or it is rightfully possessed by a third

party and could be accessed by legal means, or if the information is ‘known’ to the receiving party. The scope of these relative exceptions need to be clearly laid out, since this could also be a source of discontentment, thereby precluding adequate and full disclosure by the entity owning ‘systematic knowledge’ of the licensed technology.

- b. **Inter-party obligations:** While clauses of a license are expected to deal fairly with the relationship of the parties inter-se, there are a few obligations that the legal framework could inject objectivity into. For instance, a standard clause that is found in any form of technology transfer agreement is that the recipient of confidential information agrees that such information shall not be reverse engineered, disassembled or decompiled. While this may appear to be a reasonable expectation, it may not be in consonance with certain statutory exceptions provided for the research and ‘fair use’ of such information, processes and designs that are protected by IPRs.¹⁶ An objective list of ‘permitted actions’ and ‘minimum obligations’ would not only be helpful in making the technology transfer agreements that a more fair and balanced in its effect, but also act as a guide to inform and enable a more reasoned exercise of discretion by the concerned parties.

b) Clarity on ‘Restrictive Business Practices’

No legal system would want to burden the business community and its interests by adopting a highly regulatory approach. Therefore, it is the unenviable responsibility of the competition law regime, and its institutional authorities, to undertake this delicate balance between allowing the business entities to enjoy their realm of decisional and contractual autonomy, while at the same time ensuring that such discretion is not threatening to or resulting in manipulative consequences. The evolving scope of the term ‘restrictive business practices’ reflects the arduous nature of this balancing task. There is an oft-quoted, and conceptually quite well established, economic policy rationale that lowering the barriers to investments, mainly foreign direct

¹⁶ For instance, in India, S.18(3) of the Semiconductor Integrated Circuits Layout-Design Act, 2000.

investments (FDI), would considerably accelerate economic growth in an economy. However, on the other hand, it is indeed possible to leverage the obvious benefits of higher investments, but only if they are made to completely disengage with the usual baggage of restrictive business practices that are found to be associated with any form of such investments, specifically those that are from across the border. Since multilateral decision-making is steadily moving towards a ‘zero-barrier’ regime even on investments, a robust competition regime is imperative for especially a developing and emerging economy like India.¹⁷

The Indian Competition Act, 2002, lays a clear emphasis on the term “an appreciable adverse effect on competition”. One of the forms of agreements that would be considered as ‘anti-competitive’ is which “limits or controls production, supply, markets, technical development, investment or provision of services.”¹⁸ All such agreements shall be presumed to have “an appreciable adverse effect on competition”. The proviso to this part of the legislation allows for the rule of “efficiency” to rebut this presumption, however, restricting this allowance to such agreements that are in the nature of a “joint venture”. It is interesting to note that the term “technical development” is not reproduced in the proviso. This would imply that the ‘gateway’ to forge agreements (in the form of joint ventures) on the basis of enhancing efficiency, would still not apply if such agreements are in any manner hindering technical development.

It could be contended that a so-called restrictive business practice could be found to be anti-competitive only if it is unreasonable in its terms. This is borne out of the historical evolution of principles of competition, wherein the essence of an anti-competitive practice is that which is prejudicial to ‘public interest’. This has been subject to much scrutiny and judicial interpretations over the years and across the world. This has led to the formation of the legendary ‘rule of reason’ in competition law, which seeks to exempt certain restrictions on trade on the ground of being ‘reasonable’ in a given context. Though heavily criticized, also for being quite subjective, the ‘rule of reason’ would readily apply to such restrictive practices that are based on the ground

¹⁷ Though, the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS), are both in operation under the WTO framework, there is still considerable scope of sovereign autonomy to structure investment priorities and policies. The prevalence of several Bilateral Investment Treaties (BITs) is also an evidence of the possible discretionary scope in this regard.

¹⁸ S.3(3)(b) of the Competition Act, 2002.

of protection of IPRs. In the Indian law, the application of this reason is also restrained on the ground of having to qualify as “reasonable conditions”.¹⁹ A point to note over here is the consequence of employing an ‘unreasonable condition’ to protect IPRs in a technology transfer license. Such an unreasonable condition is equated to being a restrictive practice amounting to having “an appreciable adverse effect on competition”. According to an advocacy booklet of the Competition Commission of India, any form of exclusive licensing of IPRs, which is quite common, could also be termed as anti-competitive. The manual also goes on to list about sixteen illustrative practices, which are related to exclusive licensing of IPRs and raise important concerns of competition law.²⁰ For instance – Patent pooling arrangements, restrictions on challenges to IPRs that are part of the licensed technology, any form of “grant-back” provisions, excessive quality controls – are some of the practices that are termed as anti-competitive.

c) Provision of public mechanisms for strategic and technical support

Policies and laws do achieve results in conditions of contextual interpretation and through strict implementation procedures. However, the content of such legal and policy measures are not always founded on experiential lessons in any given context. A comprehensive strategic outlook is vital for any framework of implementation. For instance, most independent inventors are not aware of how to objectively assess the business value of their inventions. This is a process that is inherently multidisciplinary and involves coordination of multiple professionals and their expertise. This is where an intervention by a public authority would add immense value to the processes of –any IPR filings, IPR licensing and enforcement, and specific guidance on transfer of technology related licenses. Technology transfer and commercialization resources and related infrastructure is an important area of public policy across the globe.²¹

Appropriate filing strategies to gain maximum commercial benefits from inventions are not the stated objectives of any legal procedures, or alternatively they do not even form a part of any

¹⁹ S.3(5)(i) of the Competition Act, 2002

²⁰ Advocacy Booklet on Intellectual Property Rights under the Competition Act, 2002, Competition Commission of India, found at <http://www.cci.gov.in/images/media/Advocacy/Awareness/IPR.pdf>. Please note the disclaimer that this is a “quick guide” and the views are not to be taken as an official interpretation by the Commission.

²¹ There is a wealth of country-level experiences on providing public systems for facilitating transfer of technology, available for reference at: <http://www.wipo.int/patent-law/en/developments/licensing.html>

relevant policies.²² Given that many inventors are scientific professionals, or public universities, or SME ancillaries operating in a very niche sector, their IP awareness levels are bound to be particularly low and the legal and procedural framework must be suitably fortified to include strategic management and decision-making approaches. In effect, this would bridge the inequitable difference that is obvious in most cross-border licensing of IPRs, thereby building a more competitive business environment.

d) Expectation of an efficient ecosystem

The rapid strides being made in global flow of IPR-based services and products, there are bound to be legitimate expectations of Indian systems of IPRs and their enforcement. The Indian business entities are bound to be severely evaluated on the integrity of protocols on data security and confidentiality requirements. The common concern of IPR licensors, which is simply stated as – “technology transferred, is technology lost!” – must be effectively addressed. It would not be sufficient to examine ‘fairness’ in a technology license, without any reference to the obvious systemic concerns of enforcement.

Multiple stakeholders need to play key roles for an innovation to be successfully commercialized and transferred, and there are formidable policy challenges at each of the various stages that constitute an innovation life cycle. It is imperative for countries like India to formulate clear policies to facilitate this multi-stakeholder process. Such a policy framework must necessarily draw upon the deepening relationship between enforcement of IPRs and application of competition principles across the world.

²² For instance, there is no counseling mechanism available for inventors on the feasibility of international filings in Patents. This is despite the Indian Patent Office being granted the status of an International Search Authority and International Preliminary Examination Authority by the World Intellectual Property Organization (WIPO).