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Key factors that explain the negotiating failures of developing countries are [] a myopic focus on single issues rather than the game in aggregate.

Peter Drahos

Governments of poor countries are being asked to co-operate in a redistribution of global income that will cost them hundreds of millions of dollars.

The Economist

Failure does not strike like a bolt from the blue; it develops gradually according to its own logic.

Dietrich Doerner

The Compliance with Intellectual Property Laws and their Enforcement in Jordan

A post-WTO Review & Analysis

Ferris K. Nesheiwat

Abstract

This thesis examines the implementation, enforcement and evolution of IP laws and regulations in the Hashemite Kingdom of Jordan. The period of interest includes the last decade of the twentieth century and the first decade of the twenty first century, with emphasis on the role played by Free Trade Agreements struck between Jordan and the United States, the European Union, and Jordan's accession to the World Trade Organization.

This thesis also examines the enforcement of the current set of IP laws in Jordan, and looks at their social and economic compatibility with the Jordanian societal norms and economic realities.

This thesis argues that Jordanian IP laws lack a meaningful social and economic texture, and have failed to be evenly enforced in Jordan, essentially because they do not fit the Jordanian culture and are not compatible with Jordan's economic stage of development. Additionally, the thesis argues that IP laws have had insignificant economic impact on the Jordanian economy as the majority of technologies used in Jordan, and the majority of foreign direct investments attracted to Jordan, are not IP related. Finally, the thesis argues that the current Jordanian enforcement model, which is built on coercion by donor countries, is serving the interests of foreign companies to the exclusion of the local citizens, and will not, in the long run, produce an enforcement model based on self-regulation by Jordanians, themselves. The laws, therefore, are unable to produce tangible results for the Jordanian people, or help meet their economic interests.

The last part of the thesis deals with recommendations and suggestions aimed at creating an integrated approach to the adoption of IP policies.

The Compliance with Intellectual Property Laws and their Enforcement in Jordan
A post-WTO Review & Analysis

By

Ferris K. Nesheiwat

A thesis submitted in fulfilment of the requirements for the degree of
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List of Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
ARPO	Author's Right Protection Office at the National Library
ASEZA	Aqaba Special Economic Zone Authority
CBJ	Central Bank of Jordan
CCPA	United States Court of Customs and Patent Appeals
CIF	Cost, Insurance and Freight
CRC:	United Nation's Committee on the Rights of the Child
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EFTA	European Free Trade Area
EU	European Union
FAO	UN Food and Agriculture Organization
FCIA	Federal Courts Improvement Act
FDI	Foreign Direct Investment
FOB	Free on Board
FTA	Free Trade Agreements
GAO	United States Government Accountability Office
GATS	General Agreement in Trade in Services
GCC	Gulf Cooperation Council
GCR	Global Competitiveness Report
GDP	Gross Domestic Product
GSD	General Statistics Department
ILO	International Labour Organization
IMF	International Monetary Fund
IP	Intellectual Property
IPIC	Treaty on Intellectual Property in Respect of Integrated Circuits
IPRs	Intellectual property rights
IPRS	Intellectual Property Rights Section within the Jordanian Customs
JAPM	Jordanian Association Of Manufacturers of Pharmaceuticals and Medical Appliances
JIB	Jordan Investment Board
JD	Jordanian Dinars
JEUAA	Association Agreement with the European Union
JFDA	Jordanian Food and Drug Administration
JIPA	Jordan Intellectual Property Association
JISM	Jordan Institute of Standards and Metrology
JUSFTA	Jordan-US Free Trade Agreement
MCA	Millennium Challenge Account
MENA	Middle East and North Africa
MERCOSUR	Mercado Comun del Sur
MNC	Multi-National Corporation
MoIT	Ministry of Industry and Trade
NAFTA	North America Free Trade Agreement
NGO	Non-governmental organizations

NL	National Library
OHCHR	United Nations Office of the High Commissioner for Human Rights
PCT	Patent Cooperation Treaty
PhRMA	Pharmaceutical Manufacturers Association
PLT	Patent Law Treaty
QIZ	Qualified Industrial Zones
QIZA	Qualified Industrial Zones Agreement
RBT	Regional and Bilateral Treaty
R&D	Research and development
SPLT	Substantive Patent Law Treaty
TPRB	Trade Policy Review Body
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
TRRM	Trade Policy Review Mechanism
UPOV	International Convention of the Protection of New Varieties of Plants
USAID	United States Agency for International Development
USPTO	United States through its Patent and Trademark Office
USTR	United States Trade Representative
WCO	World Customs Organization
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performance and Phonograms Treaty
WTO	World Trade Organization

Statement of Copyright

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Dedication

To my Family

1. CHAPTER I: INTRODUCTION

1.1 Background to Thesis

Prior to Jordan's amending its laws in preparation for its accession to the World Trade Organization (WTO) on 11 April 2000, there was not a substantive legal body that focused on issues of intellectual property (IP). IP was marginalized for the majority of the period from the creation of the Jordanian state in 1921 until the 1990's, but that changed with the increased prominence of IP in the early 1990's resulting from a major overhaul of laws and regulations in general, particularly those related to IP. The main two catalysts for that overhaul were Jordan's goal of securing membership in the WTO, and the new liberalized economic outlook, which focused on market liberalization, economic openness, and the attraction of foreign investments.

Pursuing WTO membership was mainly a political rather than an economic decision, and it was an outlook influenced by the principles advocated by the International Monetary Fund (IMF) during its support program of the Jordanian economy and currency, which began in 1989 and ended in 2004.¹ The economic impact and value of such decisions were not evaluated beyond the promises made by the developing countries of more access to world markets, increased foreign direct investment (FDI), and the improvement of the Jordanian standard of living.²

The adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) as part of the WTO accession resulted in sweeping changes to IP laws. A new patent law granting 20 years of patent protection was enacted in 1999, incorporating TRIPS-consistent standards into its language.³ A new copyright law was enacted in 1992,⁴ while the law on trademarks, which dates back to 1952,⁵ was amended several times throughout 2007.⁶ Additionally, in the span of three years (2000-2003), Jordan went from having only four IP laws before 2000 to having twelve such legislations. As a result, the traditional laws covering Copyright (Law No. 22 (1992)), Patent (Law No. 32 (1999)), Trademarks (Law No. 33 (1952)), and Service Marks (Law No. 19 (1953)), were joined by an additional eight legislations covering various aspects of IP.⁷

These developments were not made without controversy. The Parliament was suspended for the period when the IP new laws were enacted, thus the process was deprived of a full debate by the

¹ See, "Independent Evaluation Office (IEO) of the IMF -- Evaluation Report IMF Support to Jordan, 1989-2004", April 14, 2010, <http://www.imf.org/External/NP/ieo/2005/jor/eng/index.htm>; Mohammad Halaiqah, "Interview", August 9, 2011; Rula Madanat, "Interview", August 9, 2011; Hanan Sboul, "Interview", July 26, 2011; Ahmed Hammed, "Interview", August 18, 2011.,

² Halaiqah, "Interview"; Sboul, "Interview"; Hammed, "Interview."

³ *Patent Law No.32*, 1999. TRIPS stands for the "the Agreement on Trade Related Aspects of Intellectual Property"

⁴ *Copyright Law No.22*, 1992.

⁵ *Trademarks Law No.33*, 1952..

⁶ *Ibid.*, art. 40.

⁷ *Industrial Forms and Drawings Law No. 14*, 2000. *Integrated Circuits Law No. 10*, 2000. *Geographical Indications Law No.8*, 2000. *Unfair Competition and Trade Secrets Law No. 15*, 2000. *New Plant Varieties Law No. 24*, 2000. *Instructions for Border Points Regarding the Protection of Intellectual Property No.7*, 2000. *E-Transactions Law No.85*, 2002. *Competition Law No.49*, 2002; *National Products Protection Law No.50*, 2002.

legislative branch. Additionally, civil-society organizations were not involved in their enactment, which limited the input of economic and social costs associated with their implementation.⁸

Shortly after the WTO accession, Jordan embarked on negotiations with the United States to conclude the Jordan–US Free Trade Agreement (JUSFTA), and with the European Union (EU) to conclude the Jordan-EU Association Agreement (JEUAA). The JUSFTA which entered into force on December 17, 2001,⁹ and the JEUAA entered into force on May 1, 2002. Both the JUSFTA and the JEUAA have a strong IP component with a significant TRIPS-plus dimension.

1.2 Hypothesis

This thesis argues that IP laws have failed to be evenly enforced in Jordan, essentially because they do not fit the Jordanian culture and are not compatible with Jordan’s economic stage of development. Additionally, the thesis argues that IP laws have had an insignificant economic impact on the Jordanian economy, as the majority of technologies used in Jordan, and the majority of foreign direct investments attracted to Jordan, are not related to IP. Finally, the thesis argues that the current Jordanian enforcement model, which is built on coercion by donors and developed countries, is serving the interests of foreign companies to the exclusion of Jordanian citizens, and will not, in the long run, produce an enforcement model based on self-regulation by Jordanians themselves. The laws, therefore, are unable to either produce tangible results for the Jordanian people or help meet their economic interests.

1.3 Structure of the Thesis

Chapter II provides a literature review of the evolution of Intellectual Property Rights (IPRs), a critique of the current IPRs system and regional and bilateral treaties, and the literature pertaining to Jordan. Chapter III, presents the methodology used, and the results of the field interviews/questionnaire conducted to gauge the attitudes to IPRs in Jordan. Those field interviews and the questionnaire form the basis of the comments on the attitudes of the Jordanian people towards IPRs.

Chapter IV, provides a background for understanding the contemporary Jordanian legal system. It touches on the historical roots of the Jordanian legal system, covering major legislations including the constitution, the penal code, the civil code, and the legislative process. The judicial system is then examined, and the various types of regular courts are discussed. The discussion then turns to the place that IPRs occupy within the Jordanian legal system.

The process and drivers behind the existing legal framework for IPRs are addressed in Chapter V, which examines the factors behind the development and evolution of Jordanian IP legislations. The obligations and requirements of the treaties and international agreements that collectively impacted the development of the various laws affecting IP are examined and outlined. The treatment of IPRs under TRIPS is examined by first shedding some light on the historical roots of TRIPS and then discussing its basic principles. The types of IPRs discussed and covered by TRIPS are examined, as well as the specific requirements TRIPS has for each type. Also discussed are the enforcement mechanisms and administrative and remedial procedures allowed under TRIPS, including the dispute resolution mechanism.

⁸ Halim Abu Rahmeh, “Interview”, August 7, 2011; Sboul, “Interview.”

⁹ The Free Trade Agreement between Jordan and the United States (JUSFTA) was signed on October 24, 2000.

Chapter V also discusses the Jordan-United States Free Trade Agreement and provides a detailed discussion of the provisions governing IPRs under it. This includes four subsections discussing the most important provisions of the JUSFTA, and examining the treatment of IPRs under it. In each of these four subsections, which deal with trademarks and geographical indications, copyright, and patents and compulsory licensing, the compatibility of the current Jordanian laws with the text of the JUSFTA is discussed. The Jordanian-European Association Agreement is also discussed, and the IPRs and protections under it are examined. The JUSFTA and JEUA are used to discuss Jordan's progression from a TRIPS-based IPRs standard to a TRIPS-plus standard. Various features of the TRIPS-plus standard are outlined, and the additional legal responsibilities imposed by it are discussed in comparison to TRIPS standards.

Chapter VI focuses on the implementation of IPRs in Jordan from the enforcement agencies' point of view. The administrative framework that governs the enforcement of the Jordanian IP laws is discussed, including the administrative agencies within the Ministry of Industry and Trade (MoIT), the National Library (NL), and other agencies. Specific empirical data is provided and analysed for each enforcement agency, as well as, other general enforcement parameters, such as levels of overall piracy, IP caseloads, and training. An overview of the administrative enforcement of IPRs in Jordan is presented using data on the overall administrative and judicial enforcement. Next, the enforcement mechanism through MoIT is examined, including data on the patent and trademark applications as well as the patents and trademarks granted by the MoIT. The administration and enforcement of author's rights is discussed, and empirical data on the overall software piracy levels in Jordan are examined.

Chapter VI also discusses the role of the Customs Department as the agency in charge of enforcing IP laws at the Jordanian borders and examines data on the number of cases referred by the Customs Department to Jordanian courts. The effect and impact of both TRIPS and the JUSFTA are examined and analysed, and special attention is given to the claims made by the United States Trade Representative (USTR) that the JUSFTA requires the amendment of the Customs Law. Next, the enforcement role played by the Jordan Institute of Standards and Metrology (JISM) is examined, including an analysis of whether the JISM is actually overstepping its mandate in the enforcement of IP laws.

Chapter VI also examines the role played by courts in the enforcement of IPRs. The problem with the execution of verdicts in terms of the extensive backup of execution orders and the suitability of specialized IP courts are also discussed. The general correlation between IP standards and economic development in Jordan is discussed, as well as the relationship between those standards and Foreign Direct Investment (FDI) in Jordan, including the impact that FDI has had on the Jordanian pharmaceutical sector. The chapter concludes by presenting a list of impediments to the enforcement of IPRs in Jordan, including poor coordination between enforcement agencies, poor drafting and implementation, weak patent prosecution, poor public awareness and adverse economic conditions, inappropriate IP standards, and low levels of innovation.

Chapter VII brings together several threads from the thesis from the perspective of Jordan as a developing country to address some current issues in enforcement and compliance. This chapter argues that TRIPS and TRIPS-plus fail to work in Jordan because they are not consistent or compatible with Jordan's economic, social, and cultural conditions. First the economic cost of TRIPS and TRIPS-plus standards are put in perspective, and then historical roots of pre-TRIPS enforcement activities are explored, particularly the evolution of the Special 301 Report. The chapter then explains how Free Trade Agreements (FTAs) and Regional and Bilateral Agreements (RBAs) represent the continuation of the Special 301 Report by different means in

order to achieve the same end result of propagating high IP standards globally. Both the Special 301 Report and FTAs have significant IP enforcement factors, which are used in Chapter VII to introduce the discussion of the factors influencing the levels of IP protections on a global scale, such as forum shifting, the expanding connectedness of IPRs with other disciplines and fields of study, and access to pharmaceuticals. All three factors show a concerted effort by developed countries to relentlessly support increasingly stringent IP standards supported by international corporations and their lobbying bodies.

However, as a developing country dependent on foreign aid from developed countries and international organizations, Jordan is susceptible to economic pressures by developed countries and international corporations to adopt high IP standards. Such pressures are the primary explanation for the developing countries' eventual agreement to adopt TRIPS and TRIPS-plus standards. Developing countries use the WTO's Dispute Settlement Understanding (DSU) when it suits their needs, while simultaneously undermining it by incorporating separate dispute settlement mechanisms in FTAs to the exclusion of the DSU. Coupled with the enforcement of IP through coercion, however, Jordanian decision makers are led to believe that higher IP standards are essential for economic growth.

Chapter VII concludes by outlining specific factors that are impacting the enforcement of IP standards in Jordan: Framing, which shapes policy by helping to designate meanings, build understandings, and subsequently produce specific policy actions and solutions; Monitoring and Capacity Building, which presents a mutually supportive approach for influencing the enforcement of IP standards; Donor Funding, which heavily impacts Jordan's policy-making in the areas of interest to its donors, including IP; Levels of Adjustment, Technology Transfer and Societal Norms; and finally Policy Issues and Governmental Capacity.

2. CHAPTER II: LITERATURE REVIEW

This chapter provides a survey of IP literature. It identifies how international scholars perceived the effect of harmonized IP standards on access to common knowledge, and it provides a review of literature pertaining to Jordan. Areas of controversy and questions are identified.

2.1 Background

The advent of the twenty-first century brought dramatic changes to the global governance of IP. The seeds of this change were sown in the 1980s and 1990s, as the US and the EU championed the establishment of universal rules to govern IP practices. Their goal was and remains the globalization of OECD¹⁰-style IP regimes, which emphasise greater protection of IPRs at the expense of more public access to those rights. The most significant milestone towards harmonizing national IP standards with OECD-style IP standards was the inclusion of TRIPS in the WTO, which, as examined by various scholars, was the direct result of intense lobbying by corporate executives who gained full backing from the trade negotiators of the developed countries.¹¹

Assessments of TRIPS by scholars have concluded that, notwithstanding the limitations on setting national IPRs policies imposed by TRIPS, countries could exhibit diminished variations in their IP laws in accordance with their specific economic and social conditions.¹² Such early assessments, however, were prematurely optimistic, as they did not take into account the advent of multilateral and RBTs, which further pushed the pendulum towards higher IPRs protection. RBTs were introduced by the US and the EU because they realised that the ultimate goal of IPRs harmonisation was not fully achieved through TRIPS, and because they both became increasingly aware of the blocking power that developing countries enjoyed by virtue of the consensus requirement for any TRIPS amendment. As a result, the US and the EU moved to an RBT approach to achieve IPRs harmonisation outside the multilateral approach of the WTO.

RBTs were presented to developing countries as yet another piece of the contemporary landscape of trade agreements intended to provide them with a heightened degree of integration into the international economy. Specifically, they offered developing countries the trade-off of exclusive entry conditions to the US and EU markets in return for amending the legal and administrative frameworks, governing IPRs to become similar to those in the US and the EU. Thus, the price to be paid for increased market access under RBTs is the relinquishing of many of the very tools that historically were used by developing countries to attain the developmental benefits of integration in the international economy.

¹⁰ The Organization for Economic Cooperation and Development

¹¹ See for example, P. Drahos, "Global Property Rights in Information: The Story of TRIPS at the GATT," *Prometheus* 13, no. 1 (1995): 6–19; Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (London: Routledge, 2002); Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003); C. May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (Taylor & Francis, 2007).

¹² See for example, C. Correa, *Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries*, 2001; The Commission on Intellectual Property Rights (UK), *Integrating Intellectual Property Rights and Development Policy* (London, 2002); Kenneth Shadlen, "Exchanging Development for Market Access? Deep Integration and Industrial Policy Under Multilateral and Regional-Bilateral Trade Agreements," *Review of International Political Economy* 12.5 (2005): 750–775.

Many scholars are critical of TRIPS and the increasing integration of IP into RBTs, but much of that criticism is not country-specific; rather, it is focused on general rules and legal provisions.¹³ While the criticism of the increased integration of IP into RBTs was at times based on the RBTs' threat to eliminate the national capacity to tailor IP management to national conditions,¹⁴ it did not go further into an analysis of country-specific local political and cultural frameworks. I argue that without such an analysis, it is not possible to understand the tensions between technologically advanced countries' push for higher rights protections and less developed countries' resistance to the resulting increased cost of regulation. At stake is the significant impact that IP policies and laws can have on country-specific human development and allocation of limited resources.

Jordan, which is the focus of this thesis, is a prime example of such a situation as it has attached its strategies of IPRs integration to the multilateral framework of the WTO and RBTs with the US and the EU. However, one must not consider such a shift towards favouring IPRs as the final word in the overall historical discussion of IPRs, because the tension between the desire for maximum exclusivity and the desire for maximum access cannot be resolved for the benefit of one over the other. Such a one sided approach will result in either severely restricting access to knowledge or eroding the economic incentive to innovate. The discussion inevitably concerns the tension between the interests of right holders, who want to maximise the control they exert over their works in hopes of maximising the profits gained from such works, and the interests of those who are not right holders, but want to have access to these works and possibly use them to create other innovations. Instead, there must be a fair and balanced system of IP laws that provides limited exclusivity and sufficient access consistent with the public interest.¹⁵

A balanced system should be dynamic and adaptive to new technologies, as well as to economic shifts and global developments. An adaptive system is an open system that is able to alter its behaviour according to changes in its environment because it is closely linked to that environment. For IP systems, such a system necessitates that governments and legislators have closer reflection on and a better understanding of the local needs of the societies to which those IP systems are applied. This chapter presents a literature review, which concludes that the current literature is too focused on general rules and legal provisions at the expense of country-specific analysis, failing to provide an intimate comprehensive review of IP laws at the country-specific level.

2.2 Evolution of IPRs

The evolution of IP laws and standards that culminated in TRIPS is viewed by the literature as a shift in the direction of maximising private rights over public interests. Sell and May view

¹³ See for example, Peter Drahos, "Information Feudalism in the Information Society," *The Information Society* 11, no. 3 (July 1995): 209–222; Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner Pub, 2005); Sell, *Private Power, Public Law*; Keith Eugene Maskus, *Intellectual Property Rights in the Global Economy* (Peterson Institute, 2000); C. M Correa, *Intellectual Property Rights, the WTO, and Developing Countries: The TRIPS Agreement and Policy Options* (Zed books, 2000); Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement*; Shadlen, "Exchanging Development for Market Access? Deep Integration and Industrial Policy Under Multilateral and Regional-Bilateral Trade Agreements."

¹⁴ For example, Kenneth C Shadlen, "Intellectual Property, Trade, and Development: Can Foes Be Friends," *Global Governance* 13 (2007): 171. (Concluding that making the IP and trade regimes work for development is a challenging task and is not a direct result of either.)

¹⁵ Tzen Wong and Graham Dutfield, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge University Press, 2010).

TRIPS as the latest episode in a long process of expansion of IP protection.¹⁶ They argue that TRIPS has resulted in the shifting of IPRs towards monopolies of the right holders at the expense of the public interest.¹⁷

May takes this argument one step further by arguing that developed countries and multinational companies (MNCs) are pushing for the reification of IPRs in order to depoliticise the IP discourse, and to emphasis a technocratic policy-making approach to IPRs.¹⁸ In this context, May uses *reification* to refer to the process of transforming a an abstract idea or concept (in this case IP standards) into a concrete concept that is not subject to debate in terms of the reduction of its scope or limits.¹⁹ In other words reification will cause a discussion of decreasing the limits of protection of IPRs to be considered by society as unorthodox because it contradicts the reified/concrete concept of increased and not decreased protection of IPRs.²⁰ He argues that reification should be resisted if we are to establish a meaningful global politics of information and knowledge.²¹ He submits that IPRs are not natural, but the result of a historical process of political-legal developments, whereas their reification aims to place the harmonisation of IPRs in an ahistorical context.²²

The shift towards higher protection of IPRs is explained by Machlup and Penrose in the historical context of a decline in support for the idea of free trade.²³ While Shadlen attempts to explain that shift using political diffusion, which depicts policy-making as an interdependent and interactive process that results in developing countries' rush to harmonise IP standards similar to those adopted by the US and the EU.²⁴ Other important factors include framing, socialisation, and selective use of capacity development and trade dependency, all of which were shown by Shadlen, Schrank, and Kurtz to have statistically significant effects on shaping the level of protection provided through IPRs.²⁵ In addition to ideas from the US and EU, those factors were used by entities holding opposing views to the US and EU's official stand on IPRs, such as Oxfam and academic scholars.²⁶

¹⁶ Susan Sell and Christopher May, "Moments in Law: Contestation and Settlement in the History of Intellectual Property," *Review of International Political Economy* 8, no. 3 (September 2001): 467–500.

¹⁷ Ibid.

¹⁸ Christopher May, "The Denial of History: Reification, Intellectual Property Rights and the Lessons of the Past," *Capital & Class* 30, no. 1 (Spring 2006): 33–56. (Another consequence of reification is the cementing of the 'natural' status quo, such that criticism of the 'natural state' becomes unnatural, which can be portrayed by MNC's and developed countries as destabilizing and even dangerous)

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.; Christopher May, "The Hypocrisy of Forgetfulness: The Contemporary Significance of Early Innovations in Intellectual Property," *Review of International Political Economy* 14, no. 1 (2007): 1–25.

²³ Fritz Machlup and Edith Penrose, "The Patent Controversy in the Nineteenth Century," *The Journal of Economic History* 10, no. 01 (1950): 1–29.

²⁴ Kenneth Shadlen, "The Politics of Patents and Drugs in Brazil and Mexico: The Industrial Bases of Health Policies," *Comparative Politics* 42.1 (2009): 41–58.

²⁵ Kenneth C Shadlen, Andrew Schrank, and Marcus J Kurtz, "The Political Economy of Intellectual Property Protection: The Case of Software," *International Studies Quarterly* 49, no. 1 (2005): 45–71.

²⁶ See for example, Hamed El Said and Mohammed El Said, "TRIPS - Plus Implications for Access to Medicines in Developing Countries: Lessons from Jordan–United States Free Trade Agreement," *The Journal of World Intellectual Property* 10, no. 6 (November 1, 2007): 438–475; A. H Khoury, "'Measuring the Immeasurable' - The Effects of Trademark Regimes: A Case Study of Arab Countries," *Journal of Law and Commerce* 26, no. 1/2 (2006): 11; Mohammed EL-SAID, "From TRIPS-minus to TRIPS to TRIPS-plus: Implications of IPRs for the Arab World," *The Journal of World Intellectual*

The literature shows that such harmonisation of IP standards through TRIPS has the effect of restricting the space for national IP policy setting.²⁷ This is a significant departure from the traditional role of having national IP laws reflect levels of economic development. Developing countries, including Jordan, have traditionally made private ownership of knowledge difficult to obtain and had weaker IPRs than developed countries.²⁸ This has been evident in shorter patent terms, and Jordan's, refusal to patent pharmaceuticals and setting concurrent requirements for national registration for copyright and trademark protections. This variation in protection and enforcement standards was not uncommon in the pre-TRIPS era; for example, the Paris Convention for the Protection of Industrial Property (the principal international convention on IP for most of the 20th century) allowed countries a significant degree of flexibility in designing their patent regimes.²⁹ Under TRIPS, such variation and flexibility are no longer available, as all but the poorest countries are subjected to the same standards for IP management under a one-size-fits-all approach.³⁰

Harmonisation also is criticised for resulting in increased commodification of intellectual products and for emphasising proprietary usage at the expense of non-proprietary areas, such as fair use for copyright and compulsory licensing for patents.³¹ Halbert uses that criticism as the philosophical basis for opposing the harmonisation model, which she views as making the public good residual to the exercise of private rights with commodification given primary importance.³² Within the broad political economy debate, the commodification argument is specifically based on the assumptions that within the commodity culture, no one creates for free, and the assumption that culture is only created by professionals who, because they make a living from their work, always demand compensation.³³ Halbert rejects both assumptions and draws parallels between the unfair treatment of women in developed countries and the unfair treatment of developing countries by developed countries under the commodification model of IPRs.

Halbert argues that the commodification model has historically benefited developed countries and men. She believes the ultimate threat posed by the current commodification of IPRs is the further erosion of the value that can still be found in the types of creative endeavours that developing countries and women produce.³⁴ For example, Halbert views the introduction of copyright law into areas of creative activity for females (e.g., quilting) as commodification at the expense of the gift/sharing aspect of creative endeavours.³⁵ Halbert's articles while clearly preferential of IPRs model that allows for more sharing of the creative endeavour than currently allowed under the harmonisation model, never seems to define the borders of such an IPRs model.

Property 8, no. 1 (2005): 53–65; Oxfam, *All Costs, No Benefits: How TRIPS-plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines*, Briefing Paper (Oxfam, March 2007); F. K. Nesheiwat, "The Adoption of Intellectual Property Standards Beyond TRIPS—Is It a Misguided Legal & Economic Obsession by Developing Countries?," *Loyola of Los Angeles International and Comparative Law Review* 32 (2010).

²⁷ Kenneth C Shadlen, "Policy Space for Intellectual Property Management: Contrasting Multilateral and Regional-bilateral Arrangements," *Econômica* 10, no. 2 (2008): 55–81.

²⁸ Christopher May, *A Global Political Economy of Intellectual Property Rights*, 1st ed. (Routledge, 2000).

²⁹ Shadlen, "Policy Space for Intellectual Property Management."

³⁰ *Ibid.*

³¹ May, "The Denial of History"; Debora Halbert, "Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights," *Vanderbilt Journal of Entertainment and Technology Law* 11 (2009 2008): 921.

³² May, "The Denial of History."

³³ Halbert, "Mass Culture and the Culture of the Masses."

³⁴ Debora Halbert, "Feminist Interpretations of Intellectual Property," *American University Journal of Gender, Social Policy & the Law* 14 (2006): 431.

³⁵ *Ibid.*

Scholars like Halbert and Gill see the resistance of such forms of commodification as part of the global fight against IPRs, which has become part of the resistance to the neo-liberal form of globalisation.³⁶ In resisting this form of globalisation, Drahos and Braithwaite argue that developing countries' bargaining and negotiation position will be improved if they adopt a networked governance approach rather than rely on traditional coalition building.³⁷ Through networking, they argue that weak parties become connected to other pools of capacity and power pools that can then flow through the network to achieve the goals of the members of the network.³⁸ However, they do not explain how a country like Jordan, which is heavily dependent on foreign aid from developed countries, can create or participate in such a network without jeopardising its socio-economic stability.

May sees the commodification of IPRs as self-defeating, because increased commodification will cause rational people to reject the role of IPRs. He argues that such a rejection will occur because IPRs construct a scarcity model that is neither natural nor self-evidently beneficial to all, thus creating a non-efficient model of supply and demand focus on the protection of rights for the express purpose of raising prices.³⁹ This is a point that I build upon in this thesis, especially as I explore the levels of compliance in the methodology chapter.

2.3 Critique of the Current IPRs System

As a result of the increased harmonisation of IPRs, the theoretical criticism of harmonisation has escalated, and various critiques of the current IP system have emerged, including calls for new IP models. Halbert calls for the deconstruction of the current power/domination relationship that does not recognise reciprocity and treats IP standard setting as the domain of developed countries; in place of the current system, Halbert calls for IPRs to be based on mutual understanding and a social construction of knowledge, but she does not describe the limits for the scope of protection of IPRs, if any, under this scenario.⁴⁰

Drahos, on the other hand, has been especially active in elaborating a proposal for a new framework of IPRs grounded in a human rights framework, which does not circumscribe the freedom of developing countries to set efficient standards of IP protection.⁴¹ Drahos argues that the current IP regimes' monopoly rights actually fail to avoid the 'tragedy of the commons' for IPRs (i.e., that property held in common and not otherwise rationed through proprietary use is subject to over- and abusive use and subsequent ruin, because information cannot be depleted through use).⁴² However, he makes that leap without explaining what harm would result from monopoly rights even if they fail to avoid the tragedy of commons for intangible information. I

³⁶ Stephen Gill, *Power and Resistance in the New World Order* (Palgrave Macmillan, 2003); Francis Gurry and Debora Halbert, "Globalization, Development, and Intellectual Property: New Challenges and New Opportunities," *American Society of International Law Proceedings* 99 (2005): 298.

³⁷ Peter Drahos, "Four Lessons for Developing Countries from the Trade Negotiations Over Access to Medicines," *Liverpool Law Review* 28, no. 1 (May 2007): 11–39; John Braithwaite, "Responsive Regulation and Developing Economies," *World Development* 34 (2006): 884.

³⁸ Drahos, "Four Lessons for Developing Countries from the Trade Negotiations Over Access to Medicines"; Braithwaite, "Responsive Regulation and Developing Economies."

³⁹ Christopher May, "Between Commodification and 'Openness': The Information Society and the Ownership of Knowledge.," *The Journal of Information, Law, and Technology* (n.d.).

⁴⁰ Halbert, "Mass Culture and the Culture of the Masses"; Halbert, "Feminist Interpretations of Intellectual Property."

⁴¹ Peter Drahos, "An Alternative Framework for the Global Regulation of Intellectual Property Rights," *Austrian Journal of Development Studies*, no. 1 (October 2005).

⁴² Peter Drahos, "A Defence of the Intellectual Commons.," *Consumer Policy Review* 16, no. 3 (May 2006): 101–104.

have found both Halbert's and Drahos' arguments against the harmonisation model of IPRs to be morally appealing, but they have not provided me with tools to suggest what limits should be applied. In other words, should countries completely forsake IPRs, and, if not, what are the boundaries of a new system, and I think that such a query can only be answered through country-specific research similar to that undertaken by this thesis.

May, is more helpful in that regard, as he argues for jettisoning the globally harmonised IP standard model to allow social costs at the national level to play a larger role in determining global IPRs protections.⁴³ He argues for that approach because until there is a more equal global society, a global regime that attempts to treat access to knowledge in all countries and regions similarly cannot be justified.⁴⁴ I find the argument for using country-specific social costs to determine the limits of each country's IPRs system to be a sound basis for an alternative to the globally harmonised IP standard, and I have argued for it in the case of Jordan.

The globally harmonised IP regime has also been criticised for presupposing that third-world countries are more developed than they are in reality and, therefore, capable of generating and absorbing inventions at a rapid pace.⁴⁵ Shadlen finds that the IP regimes in general, and the patent systems advocated by TRIPS in particular, do not fit with developing countries' scientific and technological capacities.⁴⁶ The challenges of such a mismatch translate into less funds allocated to enforcement, because increased protection, and therefore benefit, accrues disproportionately to foreign right holders. Developing countries are learning that enforcement entails significant fiscal costs, and. Since the majority of IP is imported by developing countries and not developed by them, they are realising that IPRs protection is effectively the use of local resources to protect foreign right holders.⁴⁷

Specific to that disproportionate benefit Haunss and Shadlen fault the patent system because the majority of its benefits accrue to a tiny minority of foreign actors; they challenge the notion that patents serve the industry as a whole.⁴⁸ In addition to that fault, they argue that the US and EU patent systems are functionally unfit for developing countries because both systems are built around allowing litigation to correct for errors in patent examination and granting, whereas developing countries generally do not have a robust patent prosecution or litigation practice.⁴⁹ This thesis validates that point for Jordan, as field interviews done in the course of this thesis have concluded that, ten years after TRIPS, Jordan has no local patent law practice.

2.4 Critique of RBTs

⁴³ Christopher May, "Why IPRs Are a Global Political Issue.," Article, January 2003, <http://eprints.lancs.ac.uk/35544/>.

⁴⁴ Ibid.

⁴⁵ Kenneth C Shadlen, "Intellectual Property for Development in Mexico," in *The Future of North American Trade Policy: Lessons from NAFTA* (Boston University, Boston, 2009), 53–59.

⁴⁶ Kenneth C Shadlen, "The Puzzling Politics of Patents and Innovation Policy in Mexico," *Law and Business Review of the Americas* 16 (2010): 823.

⁴⁷ A. Schrank, "The Software Industry in North America: Human Capital, International Migration, and Foreign Trade," in *Industrial Agglomeration: Facts and Lessons for Developing Countries*, Edited by M. Kagami and M. Tjusi. Chiba (IDE, 2003); Shadlen, Schrank, and Kurtz, "The Political Economy of Intellectual Property Protection."

⁴⁸ Sebastian Haunss and Kenneth C Shadlen, "Introduction: Rethinking the Politics of Intellectual Property," in *Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information* (Edward Elgar Publishing Limited, 2009), 1–12.

⁴⁹ Ibid.

Drahos accuses RBTs of weakening the multilateral trading system,⁵⁰ and further criticises RBT drafting because it has differences in interpretation structured into the agreement, thus planting the seeds for future differences in expectations and obligations.⁵¹ This point is addressed in this thesis by examining the debate between the US and Jordan regarding the Jordanian Customs Law amendment under the Jordan-US Free Trade Agreement (JUSFTA).

Another problem with RBTs is that their dispute resolution mechanisms provide a forum-shifting opportunity, which weakens the multilateral WTO dispute resolution system. Because they are less legally sophisticated, developing countries are disadvantaged by RBT's' forum shifting because it takes them away from the legal precedents under the WTO's dispute resolution mechanism.⁵² Choice of forum provisions in RBTs does not strengthen the multilateral trading system under the WTO.

RBTs also restrict the flexibilities available under TRIPS. Shadlen notes that few countries take advantage of their rights under TRIPS and that, in combination with the proliferation of RBTs, the *de facto* opportunities for policy innovation in IP are significantly less than suggested by TRIPS.⁵³ Shadlen also argues that the proliferation of RBTs is a *de facto* (if not explicit) effort to create a TRIPS-plus system (i.e., an IPRs system that is even more protective of IP than TRIPS is).⁵⁴

Matthews supports the point that developing countries are slow to take full advantage of the full scope of TRIPS flexibilities, including those aimed at ensuring access to medicines, such as compulsory licensing, exceptions to exclusive patent rights, and parallel importation.⁵⁵ Reasons suggested for developing countries not taking advantage of the full TRIPS flexibilities include: (1) absence of institutional capacity and local technical expertise to put the TRIPS flexibilities into practice; (2) bilateral pressures, especially through RBTs that have IP provisions that go far beyond those under TRIPS; and (3) the prevailing form of technical assistance and capacity building in the area of IP.⁵⁶ This thesis validates the points made by Shadlen and Matthews as it concludes that Jordan effectively moved into a TRIPS-plus IP model, which greatly hindered Jordan's ability to benefit from flexibilities under TRIPS.

⁵⁰ Peter Drahos, "Assessing the Impact of the Australia-United States Free Trade Agreement on Australian and Global Medicines Policy," *Globalization & Health*, n.d., <http://www.globalizationandhealth.com/content/1/1/15>; Peter Drahos, "Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution," *Journal of World Trade* 41, no. 1 (2007).

⁵¹ Drahos, "Assessing the Impact of the Australia-United States Free Trade Agreement on Australian and Global Medicines Policy."

⁵² Drahos, "Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution."

⁵³ Shadlen, "Policy Space for Intellectual Property Management."

⁵⁴ Kenneth C Shadlen, "Resources, Rules and International Political Economy: The Politics of Development in the WTO," in *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Edward Elgar Publishing Limited, 2009), 109–132.

⁵⁵ Duncan Matthews, "TRIPS Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements," *European Intellectual Property Review* 27, no. 11 (2005).

⁵⁶ Christopher May, "Capacity Building and the Re-production of Intellectual Property Rights," *Third World Quarterly* 25, no. 5 (July 2004): 821–837; T. Pengelly, "Technical Assistance for the Formulation and Implementation of Intellectual Property Policy in Developing Countries and Transition Economies," *UNCTAD/ICTSD, Issue Paper* 11 (2005); Matthews, "TRIPS Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements."

RBTs also usually call for an increased level of technical assistance to the developed countries as an additional tool to support the commodification and harmonisation of IPRs. Drahos challenges the way technical assistance provided by the United States Patent and Trademark Office (USPTO), and the European Patent Office (EPO) has been used. He argues that instead of building local capacity, such assistance has focused on creating integration with developing countries' patent offices, which ultimately leads to reliance on the USPTO's and EPO's searches and granting decisions.⁵⁷

May criticises the WIPO for being a politicized organization that uses its capacity development and technical assistance programmes to engender, through socialisation, IPRs views similar to those under RBTs.⁵⁸ WIPO socialisation of policy makers through training and education is thought to produce advocates for enhanced IPRs protections among domestic policy decision makers.⁵⁹ Such local advocates are used to overcome local opposition for increased IPRs protections and to formulate public policy that increases the security of property owners while minimising the uncertainty of investors.⁶⁰

The UK Commission on Intellectual Property Rights, and Matthews and Tellez conclude that the design and delivery of IP-related technical assistance to developing countries is not integrated with the overall national development strategy of each individual developing country.⁶¹ Matthews finds that instead of being used to help remedy issues related to institutional capacity, technical assistance is used by developed countries to highlight the need to safeguard the interests of right holders and to achieve improved IPRs enforcement standards by emphasising the best practices to protect IPRs.⁶² For example, the 2002 WIPO-drafted patent law for Cambodia did not even take into account any TRIPS flexibilities in its mandate for the issuing of pharmaceutical patents, even though, as a least developed country, Cambodia was not expected to meet that requirement until 2016. This thesis validates the point that technical assistance provided to the Jordanian patent office was geared towards best enforcement practices and not towards the use of any flexibilities available under TRIPS .

2.5 Literature Pertaining to Jordan

Developing countries like Jordan would want to open US and EU markets to their products, but in return, are asked by the US and the EU to enter into RBTs and accept the regulatory norms that come attached to the RBTs.⁶³ As Shadlen points out, in the case of RBTs, in exchange for even

⁵⁷ Peter Drahos, "Trust Me: Patent Offices in Developing Countries," *American Journal of Law & Medicine* 34 (2008): 151.

⁵⁸ Christopher May, "The World Intellectual Property Organization," *New Political Economy* 11, no. 3 (September 2006): 435–445.

⁵⁹ May, "Capacity Building and the Re-production of Intellectual Property Rights"; May, "The World Intellectual Property Organization."

⁶⁰ Gill, *Power and Resistance in the New World Order*; May, "The World Intellectual Property Organization."

⁶¹ The Commission on Intellectual Property Rights (UK), *Integrating Intellectual Property Rights and Development Policy*; Duncan Matthews and Viviana Munoz - Tellez, "Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in Comparative Perspective," *The Journal of World Intellectual Property* 9, no. 6 (November 1, 2006): 629–653; Duncan N. Matthews, "NGOs, Intellectual Property Rights and Multilateral Institutions," *SSRN eLibrary* (December 2006).

⁶² Matthews, "TRIPS Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements."

⁶³ Shadlen, "Exchanging Development for Market Access? Deep Integration and Industrial Policy Under Multilateral and Regional-Bilateral Trade Agreements"; Stephan Haggard, *Developing Nations and the Politics of Global Integration* (Brookings Institution Press, 1995); Robert Z. Lawrence, *Regionalism*,

greater access to the developed countries' markets, developing countries relinquish yet more regulatory instruments.⁶⁴

Analysis of the effect of RBTs on the Arab world in general was previously presented by M. El Said,⁶⁵ but no detailed analysis has yet been performed for Jordan specifically. Malkawi provided an analysis of the JUSFTA, but only in the context of deciding if its terms can serve as a template for a proposed US-Middle East free trade agreement, not to examine the local context of those terms.⁶⁶

Similarly, El Said and El Said's examination of the terms of the JUSFTA and cautioning against the negative effects of TRIPS only related to access to medicines.⁶⁷ They challenged the claim that the RBTs bring general and specific benefits to developing countries and suggested that benefits from the JUSFTA have been largely exaggerated while the costs have been underestimated.⁶⁸ I agree with their analysis and build on it in this thesis, as they have only presented it within the context of access to medicines. Also, Malkawi and Haloush's review of Jordan's protection of plant variety law is limited to plants and not intended to address IPRs in Jordan from a broader perspective.⁶⁹ A contextualisation of the JUSFTA and the JEUA within Jordan is therefore missing from the literature.

Nawafleh's approach to IPRs enforcement in Jordan, on the other hand, sees the need for even stronger IPRs.⁷⁰ He argues that stronger IPRs will increase foreign direct investment (FDI) into Jordan as well as investment in the information technology (IT) sector.⁷¹ He basis his demands on foreign reports and reviews by agencies like the US Agency for International Aid (USAID); he does not provide any local analysis to support his conclusions. I disagree with his findings and provide the missing local analysis of FDI inflows to show that there has been little impact of IP laws on FDI inflows. Al-Dajani also makes the unsubstantiated link between increased FDI

Multilateralism, and Deeper Integration (Brookings Institution Press, 1996); Jeffrey A. Frankel, Ernesto Stein, and Shang-Jin Wei, *Regional Trading Blocs in the World Economic System* (Peterson Institute, 1997).

⁶⁴ Shadlen, "Exchanging Development for Market Access? Deep Integration and Industrial Policy Under Multilateral and Regional-Bilateral Trade Agreements."

⁶⁵ M.K. El Said, "The European TRIPS-Plus Model and The Arab World: From Co-Operation to Association—A New Era in the Global IPRS Regime?," *Liverpool Law Review* 28, no. 1 (2007): 143–174; M. El Said, "The Implementation Paradox: Intellectual Property Regulation in the Arab World," *Journal of International Trade Law and Policy* 9, no. 3 (2010): 221–235.

⁶⁶ Bashar H Malkawi, "The Intellectual Property Provisions of the United States–Jordan Free Trade Agreement: Template or Not Template," *The Journal of World Intellectual Property* 9, no. 2 (March 1, 2006): 213–229.

⁶⁷ H. El-Said and M. El-Said, "TRIPS-Plus Implications for Access to Medicines in Developing Countries: Lessons from Jordan–United States Free Trade Agreement," *The Journal of World Intellectual Property* 10, no. 6 (2007): 438–475.

⁶⁸ H. El-Said and M. El-Said, "TRIPS, Bilateralism, Multilateralism & (and) Implications for Developing Countries: Jordan's Drug Sector," *Manchester J. Int'l Econ. L.* 2 (2005): 59.

⁶⁹ B.H. Malkawi and H.A. Haloush, "Intellectual Property Protection for Plant Varieties in Jordan," *The Journal of World Intellectual Property* 11, no. 2 (2008): 120–138.

⁷⁰ A. Nawafleh, "Development of Intellectual Property Laws and Foreign Direct Investment in Jordan," *Journal of International Commercial Law and Technology* 5, no. 3 (2010): 142–153.

⁷¹ *Ibid.*

inflows into Jordan for a period of time with Jordan's upgrading of its IP laws to TRIPS standards.⁷²

In two separate works, Sirhan and Al Sharari follow Nawafleh's trend by recommending stronger IPRs enforcement in Jordan and the allocation of more human resources to such enforcement.⁷³ They both see weaker IPRs leading to fewer jobs, less research and development, and increased costs in all sectors.⁷⁴ Their work, however, does not provide any basis for such a conclusion other than citing foreign scholars who have written generally about the benefits of IPRs; because they fail to provide a local context for their conclusion, the reader is left wondering if a one-size-fits-all IPRs model is applicable.

This thesis addresses two weaknesses of the current literature. First, overgeneralisations have been made regarding the pros and cons of TRIPS and RBTs with too much attention paid to rules and legal provisions at the expense of country-specific analysis. Specifically there is no detailed examination of the effect of TRIPS, the JUSFTA, and the JEUAA on Jordan's IP policies and economic development. There is an abundance of literature on the origins of TRIPS and the integration of IP into RBTs;⁷⁵ however, there is a gap in the literature on country-specific analysis of IP policy-making. A second problematic weakness in the literature that arguably results from the first one is insufficient contextualisation of local political and cultural frameworks and how they do or do not influence IP policies. In this thesis, I argue that there are good reasons to assume that specific local knowledge and information is likely to lead to different set of policies within different countries.

Addressing the two mentioned shortcomings is important because it is not sufficient to discuss IPRs from a global perspective; rather, there must be a localised approach to resolving the tension between the competing social objectives of encouraging innovation by recognising private rights and encouraging diffusion of knowledge to a broad range of people. The next logical step is localised contextualisation, which will strongly complement all the work surveyed throughout this chapter. Localised analysis provides the required validation or refutation of the theory that a one-size-fits-all harmonised approach to IPRs can address the tension between the social objectives discussed. Competing interpretations of IP policies and the tensions and human consequences that arise from them can only be resolved locally and at the domestic level. Such local understanding can then, in turn, be used to influence the more general discussion of international IP and trade agendas.

This thesis also lends critical support from a country-specific perspective to the notions that true and proper enforcement should not be necessarily associated with changes in laws and policies, and that direct pressure to adopt IP laws from developing countries may lead to little change in

⁷² E.M. Al-Dajani, "Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan," *J. Marshall Rev. Intell. Prop. L.* 6 (2006): i.

⁷³ A.A. Sirhan, "Intellectual Property and Copyright Laws and Their Impact on Digital Resources in Jordan" (n.d.); S. Al Sharari, "Intellectual Property Rights Legislation and Computer Software Piracy in Jordan," *Journal of Social Sciences* 2, no. 1 (2006): 7–13.

⁷⁴ Sirhan, "Intellectual Property and Copyright Laws and Their Impact on Digital Resources in Jordan"; Al Sharari, "Intellectual Property Rights Legislation and Computer Software Piracy in Jordan."

⁷⁵ See for example, Drahos, "Information Feudalism in the Information Society"; May and Sell, *Intellectual Property Rights*; Sell, *Private Power, Public Law*; Maskus, *Intellectual Property Rights in the Global Economy*; Correa, *Intellectual Property Rights, the WTO, and Developing Countries*; Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement*; Shadlen, "Exchanging Development for Market Access? Deep Integration and Industrial Policy Under Multilateral and Regional-Bilateral Trade Agreements."

behaviour.⁷⁶ This thesis confirms that in the case of Jordan’s approach to IP enforcement, there is a strong element of acquiescence on paper, including amending existing laws and enacting new ones, to do just enough to free itself of US pressure—but not more.⁷⁷

⁷⁶ Susan K. Sell, “Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice,” *International Organization* 49, no. 02 (1995): 315–349. Finding that USTR pressure in the late 1980s and early 1990s was effective in getting countries to change their laws and policies (inputs), but not the actual IPP (outputs) provided, and that USTR pressure in the late 1980s and early 1990s, for example, Sell concluded that USTR pressure “largely has failed in IP protection”

⁷⁷ *Ibid.*, Marcus Noland, “Chasing Phantoms: The Political Economy of USTR,” *International Organization* 51, no. 03 (1997): 365–387.

3. CHAPTER III: GAUGING ATTITUDES TO IPRS IN JORDAN – BACKGROUND AND METHODOLOGY

3.1 Cultural Factors

Jordan and the Arab world can be described, according to the cultural indicators developed by Hofstede,⁷⁸ as conservative, masculine, power distant, and collective. Masculine cultures are more assertive than Feminine cultures and value achievement and materialism.⁷⁹ In power distant cultures, the authority of superiors is accepted, inequalities among people are both expected and desired, less powerful people are dependent on the more powerful, and the hierarchy in organizations reflects the inequality between higher-ups and lower-downs.⁸⁰ Collective countries have little personal freedom, because the groups and organizations to which one belongs invade one's private life.⁸¹

Hofstede's power distance index measures the extent to which the less powerful members of organizations and institutions (like the family) accept and expect that power is distributed unequally, resulting in inequality (those who have more versus those who have less). Hofstede suggests that the followers endorse a society's level of inequality as much as the leaders do. For example, Germany is positioned at 35 on Hofstede's scale.⁸² Compared to Arab countries where the power distance is very high (80) and Austria where it is very low (11), Germany falls somewhat in the middle. German society does not have a large gap between the wealthy and the poor, and German citizens have a strong belief in equality. German citizens have the opportunity to rise in society. By contrast, the Arab world has a large gap between the wealthy and the poor, and its residents do not have a strong belief in equality.

The strong collectivist culture of the Arab world, of which Jordan is part, results in little personal freedom, which leads to a weak individual assumption of responsibility. This collectivist orientation is expressed in ideals that scholars associate with Arab culture, such as solidarity, cooperation, commitment, mutual trust, support, and a sense of belonging.⁸³ The literature suggests that collectivist cultures place strong cultural restrictions on the self, resulting in a low

⁷⁸ S.S. Robbins and A.C. Stylianou, "A study of cultural differences in global corporate web sites," *Journal of Computer Information Systems* 42, no. 2 (2002): 3–9; SHIFRA SAGY et al., "Individualism and Collectivism in Two Conflicted Societies," *Youth & Society* 33, no. 1 (2001): 3–30; Vipin Gupta, Paul J. Hanges, and Peter Dorfman, "Cultural clusters: methodology and findings," *Journal of World Business* 37, no. 1 (Spring 2002): 11–15. Hofstede developed an empirically-based typology of cultural attributes by analyzing data obtained from surveys conducted among individuals in 53 nations in 1968 and 1972. Since all 116,000 respondents were employees of the same firm, IBM, Hofstede was able to hold constant the influence of industry and corporate culture. Based on the data obtained, he classified countries along four dimensions: power distance, uncertainty avoidance, individualism/collectivism, and masculinity/femininity. Hofstede rated each of the 53 countries in his study by these cultural dimensions. K. Bagchi, P. Hart, and M.F. Peterson, "National Culture and Information Technology Product Adoption," *Journal of Global Information Technology Management* 7, no. 4 (2004): 29–46.

⁷⁹ Ibid.

⁸⁰ S.S. Robbins and A.C. Stylianou, "A Study of Cultural Differences in Global Corporate Web Sites," *Journal of Computer Information Systems* 42, no. 2 (2002): 3–9.

⁸¹ Ibid.

⁸² "Power Distance Index", n.d., <http://www.clearlycultural.com/geert-hofstede-cultural-dimensions/power-distance-index/>.

⁸³ A. Cohen, "The Relationship Between Multiple Commitments and Organizational Citizenship Behavior in Arab and Jewish Culture," *Journal of Vocational Behavior* 69, no. 1 (2006): 105–118.

need for uniqueness and a strong motivation not to break away from the aforementioned values.⁸⁴ In such a collective society, where individuals sacrifice their personal ambitions for the good of the collective, the spread of IP piracy is more likely, as individuals motivated by solidarity, cooperation, trust, and support are likely to share property with others and expect them to do the same, without much regard for the notion of IPRs.⁸⁵

IP piracy is also related to power distance, which is high in Arab countries.⁸⁶ The greater a culture's power distance (i.e., the further individuals feel from their superiors, such as law enforcement officials), the greater the propensity to pirate IP products.⁸⁷ The Arab culture, therefore, scores high on collectivism and power distance, both of which have been correlated in the literature with increased piracy rates and low enforcement of IPRs. Overall, the literature does point to an effect of the cultural effects on perceptions of IP.⁸⁸ Specific nations have specific cultural traits that are difficult to change in their essentials, although they can often be superficially modified.⁸⁹

3.2 Religious Factors

In this section, religion is examined as a potential factor in shaping Jordanian attitudes to IPRs. Religion is an important moral and cultural force in Arab societies like Jordan, where 95% of the population is Muslim.⁹⁰ In Islamic countries, religion directs the citizens' behaviour⁹¹; however, due to contemporary Islamic views on IP, it is difficult to ascertain a clear position in Islamic jurisprudence towards IP concepts.⁹² On the one hand, those who adhere to the position of classical scholars reject the concept of IP, arguing that knowledge should be available for all humans to use and share with each other and that no one should be deprived access to

⁸⁴ J. Kurman, "Why Is Self-Enhancement Low in Certain Collectivist Cultures?," *Journal of Cross-Cultural Psychology* 34, no. 5 (2003): 496–510.

⁸⁵ Donald B Marron and David G Steel, "Which Countries Protect Intellectual Property? The Case of Software Piracy," *Economic Inquiry* 38, no. 2, *Economic Inquiry* (2000): 159–74. Trevor T Moores and Jasbir Dhaliwal, "A Reversed Context Analysis of Software Piracy Issues in Singapore," *Inf. Manage.* 41, no. 8 (November 2004): 1037–1042. Jia Lu, "Chinese Culture and Software Copyright," *New Media & Society* 11, no. 8 (December 1, 2009): 1372–1393; Fang Wang et al., "Purchasing Pirated Software: An Initial Examination of Chinese Consumers," *Journal of Consumer Marketing* 22, no. 6 (January 10, 2005): 340–351.

⁸⁶ Bryan Husted, "The Impact of National Culture on Software Piracy," *Journal of Business Ethics* 26, no. 3 (2000): 197–211. (Examined the impact of the level of economic development, income inequality, and cultural variables on the rate of software piracy at the country level. Found that software piracy is significantly correlated to GNP per capita, income inequality, and individualism. Implications for anti-piracy programs and suggestions for future research are developed.)

⁸⁷ C.A. Depken and L.C. Simmons, "Social Construct and the Propensity for Software Piracy," *Applied Economics Letters* 11, no. 2 (February 10, 2004): 97–100.

⁸⁸ Geert Hofstede, Michael H Bond, and Richard H Franke, "Cultural Roots of Economic Performance," *Strategic Management Journal* 12, no. S1 (1991): 165–173. (Finding that cultural values, measured from Western and Eastern perspectives, are factors in economic performance which explain more than half the cross-national variance in economic growth over two periods for samples of 18 and 20 nations.)

⁸⁹ Geert Hofstede and Michael Bond, "The Confucius Connection: From Cultural Roots to Economic Growth" 16, no. 4 (1988): 5–21.

⁹⁰ Quintan Wiktorowicz, *The Management of Islamic Activism: Salafis, the Muslim Brotherhood, and State Power in Jordan* (SUNY Press, 2001).

⁹¹ Ibid.

⁹² Salah Al-Fadhli, "The Ethical Dilemma of Software Piracy in Islamic Societies: The Case of Kuwait," *The Electronic Journal of Information Systems in Developing Countries* 39 (2009).

knowledge.⁹³ On the other hand, some Islamic scholars have accepted the premise that ideas and/or methods can be owned under the rubric of IP but have premised their prohibition of copying on the need to have a ‘legitimate ruler’ approve such a prohibition.⁹⁴ The issue of who is a legitimate ruler under Islamic law is not a clear one; *Sharia*, which is considered God’s law and supersedes the laws of the State, is expected to be the sole criterion of behaviour, and the authority of the temporal ruler as the representative of Allah is derived from and designed by that law.⁹⁵ The fact that all Arab countries, including Jordan, have adopted a hybrid legal system that takes *Sharia* law into account in certain areas but forsakes it in other areas, can be a key factor in leading observant Muslims to believe that laws pertaining to IPRs should not be observed from a religious point of view, because the ruler who approved them is not technically a ‘legitimate ruler’ according to *Sharia* law.

Thus, because there is not a single unified Islamic position on IP, any claims that Islam supports the enforcement of TRIPS-style IP are questionable. The problem of establishing a unified religious position on IP is further complicated by the fact that Islam does not acknowledge the role of a universal legal authority with the power and right to make laws applicable to *all* Muslims; rather, the authority of even a legitimate ruler is no greater than that of any other qualified *mujtahid*⁹⁶ (one who possess the power of *ijtihad*, the interpretation of problems not precisely covered by the *Qurān*, *Hadīth* (traditions concerning the Prophet’s life and utterances), and *ijmā* (scholarly consensus)).⁹⁷ Therefore, since the default position under Islamic jurisprudence is to allow an activity unless it is specifically prohibited, the position of one legal scholar opposed to piracy is considered only that scholar’s personal opinion and cannot be given any more weight than another scholar’s opinion which might contradict it. IPRs is addressed under the *Quran*, *Hadīth*, or *ijmā*; thus, it is an area that will likely never be treated uniformly by legal scholars, resulting in inconsistent approaches that allow for individual interpretation on how a Muslim should observe or not observe IPRs laws. One can also conclude that studies suggesting that Muslims will abide by IPRs laws if piracy is prohibited by Islam⁹⁸ should be interpreted within the context of (i) the lack of treatment of IPRs under Islamic law, and (ii) the fact that any Islamic legal opinion on piracy holds little or no universal jurisprudential weight.

Another potential rationalization for disregarding IPRs is that counterfeiting data provided by multinational companies is accused of being grossly overestimated; thus, some research concludes that piracy is an externality to MNCs, meaning that piracy has little to no negative monetary impact on MNC’s.⁹⁹ MNCs have been accused of making false claims of massive

⁹³ The main principles here are not a complete negation of IPRs rather (i) the rejection of plagiarism, and (ii) the permissiveness of personal use. See, for example, “حقوق التأليف والاختراع والابتكار محفوظة لأصحابها - إسلام - الفتوى مركز - ويب”, n.d., <http://www.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=161059>. (A fatwa stating that one should not claim to themselves that which they did not produce, but that personal use of knowledge is permissible.)

⁹⁴ “www.Sistani.org”, n.d., <http://www.sistani.org/local.php?modules=nav&nid=5&cid=131>.

⁹⁵ N. J. Coulson, “The State and the Individual in Islamic Law,” *The International and Comparative Law Quarterly* 6, no. 1 (January 1, 1957): 49–60.

⁹⁶ “Ijtihad (Islamic Law) -- Britannica Online Encyclopedia”, n.d., <http://www.britannica.com/EBchecked/topic/282550/ijtihad>.

⁹⁷ Coulson, “The State and the Individual in Islamic Law.”

⁹⁸ Al-Fadhli, “The Ethical Dilemma of Software Piracy in Islamic Societies.”

⁹⁹ See, for example, Simon Mackenzie, “Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,” *Crime, Law and Social Change* 54, no. 1 (July 2010): 21–38. (Suggesting that the current global problem of IP crime is an externality, and that it has not been recognized as such because corporations present product counterfeiting and piracy as crimes which reduce their revenue, rather than as predictable side effects of corporate production and merchandising, including branding

economic losses in order to divert attention from the real harms of counterfeiting, such as the use of IP piracy to fund organized crime, and the MNCs role in perpetuating these harms by aggressively marketing their expensive brands as status symbols.¹⁰⁰ The literature points out that people look for ways to rationalize their behaviour when considering decisions such as whether to pirate a copy of software.¹⁰¹ A monetary rationalization posits that most IP companies are large corporations that make large profits and can therefore afford the loss of a few pirated copies. A religious one might be based on any of the religious positions under Islamic law that oppose the enforcement of IPRs.

3.3 A Note on Empirical Data

This thesis is concerned with the implementation and enforcement of IP laws. Laws do not exist in a vacuum; rather, they derive their value and significance from the impact they have on their environment and surroundings. One of the guiding themes of this thesis is the idea that a law that does not have such an impact is destined to be no more than a passive text.

Thus, the researcher has endeavoured to use empirical data as part of the analysis to gauge the impact of IP laws. Obtaining data in Jordan is difficult for the following reasons:

1. There is no unified repository of information on most issues, including legal topics. In addition, statistics have not been made publicly available in all areas (including important economic information like FDI, as noted by the U.S. Government accountability office),¹⁰² and available information is usually overly general and lacking in detail. Even though Jordan has a General Statistics Department (GSD), statistics and data on several areas are compiled by other agencies and sources (e.g., Gross Domestic Product (GDP) and FDI numbers are compiled by the Central Bank of Jordan (CBJ)). Similarly, data on court activities are compiled and published by the Ministry of Justice and the Judicial Council, and data on specific enforcement agencies like the Customs Department and the MoIT are available almost exclusively through those agencies. This problem is not unique to the economic or legal sector and even extends to social sectors. For example, there are three different figures for the percentage of handicapped individuals in Jordan,¹⁰³ and unemployment numbers are similarly disputed. The end result is that in order to secure data or statistics on almost any social, legal, or economic area, one must perform a great deal of research to determine the source of those figures and to reconcile their disparate values, often

activity, which have considerable socially deleterious consequences). Daniel Chow, "Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries," *Virginia Journal of International Law* 51, no. 4 (2011). (Multinational companies (MNCs) are not really harmed by counterfeiting. MNCs cannot substantiate their claims of massive losses through credible evidence; instead, they use methods for calculating losses based upon dubious and spurious assumptions.)

¹⁰⁰ Chow, "Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries."

¹⁰¹ Robert A. Strikwerda and John Minor Ross, "Software and Ethical Softness.," *Collegiate Microcomputer* 10, no. 3 (1992): 129–36; Depken and Simmons, "Social Construct and the Propensity for Software Piracy."

¹⁰² U.S. Government Accountability Office, *International Trade: Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain*, 2009, <http://www.gao.gov/products/GAO-09-439>.

¹⁰³ The GSD estimates the percentage of handicapped persons on Jordan to be 1.2% (GSD 2004 census), the Higher Council for Handicapped Persons puts it at 4%, and the World Bank estimates that 4-6% of the population is handicapped.

by examining their differing definitions, areas of measurement, and measurement mechanisms.

2. The quality of the available data is not uniform. For example, the imports and exports numbers compiled and published by the CBJ are usually presented in the form of a press release that states the relative breakdown of a few major categories of imports and exports but stops well short of a detailed analysis or even a complete listing. FDI numbers as presented by the CBJ represent another major problem because they are not broken down by category, which meant that this researcher could not find a specific number for the IP component of FDI figures and instead had to deduce that component from other numbers pertaining to the sources of the FDI and the areas to which the FDI was targeted. In some instances, as with the numbers pertaining to investments benefiting from incentives by the investment promotion laws, which are compiled by the Jordan Investment Board (JIB), it was found that projects were counted more than once in order to artificially increase the value of projects benefiting from those incentives.¹⁰⁴ This researcher therefore relied on CBJ data rather than JIB data when examining the impact of IP laws on economic development and investment. This lack of uniformity, which continues to be perpetuated by the many competing sources of data and the absence of full statistical analysis is particularly dangerous because the public tends to be easily manipulated by statistics. An old adage describing the persuasive power of numbers rings true in the case of obtaining data in Jordan: “There are three types of lies – lies, damned lies, and statistics.”
3. The various agencies and departments are largely reluctant to offer any numbers on their work, especially if those numbers pertain to areas that are considered problematic or in which the official data could be used in potentially unflattering ways, such as IP laws.¹⁰⁵ Jordan does have an Access to Information Law,¹⁰⁶ which stipulates that citizens have the right to access written, recorded and photographed governmental information and basic government records. Actual access, however, is restricted by agencies’ obfuscation and by other laws like the Press and Publication Law and the Government Secrets Law, in addition to ten exceptions within the Access to Information law itself that place certain data outside its purview. It is worth noting that agencies’ reluctance seems to disappear when communicating with foreign governmental officials or local staff of foreign embassies. For this reason, the author corresponded with several ministries seeking information but did not receive written responses from the majority of them; this prompted him to seek field interviews instead, which are discussed in greater detail below. Correspondence between the GoJ and foreign agencies (an example of which is presented in Annex 5) and information released through Wikileaks demonstrate that Jordanian officials are very willing to share

¹⁰⁴ Hiba Issawi, “Values of Projects Benefitting from Investment Promotion Laws Do Not Reflect Improvement in Data,” *Alghad Daily Newspaper*, April 8, 2010, sec. Markets & Finance.

¹⁰⁵ “The Center for Defending the Freedom of Journalists (CDFJ) issue[d] a statement to the Jordanian government, calling for wider support of freedom of the press and its right of access to information. The statement comes after a news report posted on the Amman news website, which included a copy of a circular signed by Prime Minister Nader Dahabi warning public employees against handing over copies of documents to the media related to alleged administrative and financial corruption.” *Jordan: 2009* (Global Integrity, 2009).

¹⁰⁶ *Access to Information Law No.47*, 2007.

information with foreign agencies.¹⁰⁷ Additionally, the Access to Information Law Request Form demands that the seeker explain why the information is needed, thus allowing the request to be refused if the reviewer does not approve the intended use. There are no mechanisms to force the government to explain its denial of the request; while the law states that each denied request must be justified, the refusal to provide an answer to a request is considered an implied denial under the law which does not require justification.¹⁰⁸ It is not clear how would one exercise a judicial review option under such a *de facto* denial, as the requester is not provided with any reasons to include in its claim before a court of law. On the other hand, Jordan's willingness to provide information to international agencies was clearly indicated by considerable data often found by this researcher in filings by the Jordanian government to the WTO or the USTR and the US Congress, when attempts to obtain similar data from the local sources were futile.

As a result of the above issues, the researcher had to rely on information obtained first hand through interviews (explained in further detail below), data published in the news media, and data provided by the government to foreign agencies (often found on those agencies' websites).

3.4 Field Interviews

The political, economic and social attitudes of IPRs by the Jordanian governmental and private sectors presented in this thesis were based on field work carried out by the author throughout the period from the registration for the degree with Durham University, specifically from 26 July to 28 August 2011. A concise transcript of the interviews is provided in Annex 7 of this thesis.

Because the governmental agencies were not responsive to written requests for information, the author sought personal interviews instead. Securing such interviews was difficult, as the interviewees were initially reluctant to meet with the author, who had to rely on personal contacts to secure approval from the interviewees. Once the interview process started, however, the author was able to obtain further recommendations that led to additional interviews. Individuals in the governmental and private sectors were interviewed, including key members of the Jordanian team to the WTO and the JUSFTA negotiations, which provided good insight. Interviews with the governmental officials proved to be more difficult to conduct than those in the private sector, as they were more cautious and reluctant to share personal impressions or information beyond the official information usually available on the internet. The author assured them that they would be provided with a transcript of the interview in order to indicate any information they preferred to be cited anonymously. This approach facilitated the interview process, eased the atmosphere with the governmental employees, and helped in obtaining a more candid picture of the IP situation in their respective departments. Interviews in the private sector were easier to conduct; initial inhibitions were surmounted quickly as the interviewees engaged in a candid and open discussion of the implications of Jordan's adoption of TRIPS on their respective economic sectors.

Extensive interviews were conducted with Jordanian officials and Jordanian industry trade groups in the following organizations, offices, and departments:

- Ministry of Industry and Trade (MoIT),
- Jordanian Patent Office at the Department of Industrial Property within MoIT,

¹⁰⁷ "Wikileaks", n.d., http://wikileaks.org/origin/187_0.html.

¹⁰⁸ *Access to Information Law No.47*, art.9.

- Jordan Food and Drug Administration (JFDA)
- Jordan Customs
- Jordan Institute for Standards and Metrology (JISM)
- Former governmental officials including the head of the Jordanian delegation to the WTO and the JUSFTA negotiations
- Jordanian Association of Pharmaceutical Manufacturers (JAPM)
- Jordan Exporters Association

A complete list of the interviewees and their respective institutions is included, along with notes from the interviews, in Annex 7.

The interviewees who were government officials were cautious and reserved in their comments, with the exception of the officials from the JISM, who were asked by the JISM director to fully cooperate with the author. Officials from the MoIT were aggressive in editing their answers and comments and asked that the edited segments not be attributed to them, while they did not dispute the truthfulness of those parts.

(a) Questionnaire:¹⁰⁹

A questionnaire was created and used to gather the attitudes of students at Jordan University toward counterfeit products. A copy of the questionnaire can be found in Annex 8 of this thesis. The survey questions were formulated based on the literature.¹¹⁰ The questionnaire consisted of four sections. The first section contained questions on perception of the current prevalence of counterfeit products among university students. The second section contained questions on the respondents' attitudes towards counterfeit products based on their religious beliefs; these questions were intended to examine whether students' ethical orientation affected their behaviour towards counterfeit products. The third section, consisting of six items measured on a two point (yes or no) scale, contained questions on the respondents' ethical attitudes towards counterfeit products. The fourth section contained questions on the following demographic categories:

- Respondent's age
- Marital status:
- Monthly income of the respondent's family
- Respondent's College

¹⁰⁹ The questionnaire was designed, prepared, collected, tabulated and analyzed with the help of the staff of Jordan University's Center for Strategic Studies (CSS), under the supervision of Dr. Waleed Alkhateb the head statistician of the CSS.

¹¹⁰ Ramnath K. Chellappa and Shivendu Shivendu, "Managing Piracy: Pricing and Sampling Strategies for Digital Experience Goods in Vertically Segmented Markets," *Information Systems Research* 16, no. 4 (December 1, 2005): 400–417; T.C.H. Kwong and M.K.O. Lee, "Understanding the Behavioral Intention to Digital Piracy in Virtual Communities - a Propose Model," in *IEEE International Conference on e-Technology, e-Commerce and e-Service, 2004. EEE '04. 2004* (presented at the IEEE International Conference on e-Technology, e-Commerce and e-Service, 2004. EEE '04. 2004, Taipei, Taiwan, 2004), 223–226; Jih-Hsin Tang and Cheng-Kiang Farn, "The Effect of Interpersonal Influence on Softlifting Intention and Behaviour," *Journal of Business Ethics* 56, no. 2 (January 1, 2005): 149–161; Al-Fadhli, "The Ethical Dilemma of Software Piracy in Islamic Societies."

- Respondent's country of birth
- Respondent's place of residence (province)
- Source of respondent's tuition

Given the earlier discussion on the power distance and collectiveness of Jordanian society, the lack of a unified religious position on the issue of IPRs in Islamic jurisprudence and the monetary rationalization against MNCs, the results of the questionnaire were expected to indicate a high percentage of piracy, the non-conclusive role of religion in combating piracy and a general disregard for the alleged damages suffered by MNCs as a result of piracy among university students.

(b) Sample

Jordan University students from several colleges outlined in Table 3.1, below, were chosen as the sample for the questionnaire because college students represent a large segment of copyright violators.¹¹¹ Jordan University is the oldest and largest campus in Jordan, and its location in Amman attracts students from various parts of the country, unlike provincial universities where the student composition tends to be more localized.

The total sample was 381 students. Of the 362 valid responses, 177 (46.5%) of respondents were male, and 199 (52.2%) were female, with 5 (1.3%) not reporting their gender. The respondents represented a cross section of majors taught at the university.

The sample was representative of the various colleges at the University of Jordan and was distributed as follows:

¹¹¹ Steven Lysonski and Srinivas Durvasula, "Digital Piracy of MP3s: Consumer and Ethical Predispositions," *Journal of Consumer Marketing* 25, no. 3 (2008): 167–178.

Table (3.1) Sample Distribution:

Faculty	Frequency	Per cent
Engineering	109	28.6
Education	35	9.2
Science	43	11.3
Islamic Law (<i>Sharia</i>)	17	4.5
Agriculture	4	1.0
Information Technology	33	8.7
Business Administration	71	18.6
Arts	50	13.1
Total	362	100

(c) Analysis and Findings

In the following section, the responses are explained according to the three groups of questions. A full listing of the frequency tables for the results obtained from the sample can be found in Annex 9 of this thesis.

The first group of questions explored the current state of digital piracy among Jordan University students. A total of 89.9% of the respondents had knowingly engaged in buying counterfeit products or using cracked software on at least one occasion. This finding confirms the high level of use of counterfeit goods among young people in Jordan.

Table (3.2) Have you engaged at least one time in knowingly buying counterfeit products?

	Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid 1 Yes	342	89.8	89.8	89.8
2 No	39	10.2	10.2	100.0
Total	381	100.0	100.0	

When respondents were asked if they had any original software installed on their computers, the responses were: none (26.5 %), one to two software products (59.6%), three or more software products (13.1%); none of respondents claimed that all of their software was original. When asked if they were likely to continue buying counterfeit products or using cracked software, 53% said they would, indicating that the buying of counterfeit products is an acceptable social norm for the majority of the respondents. The economic factor was a major incentive to buy counterfeit products, as 64.3% of the respondents said that they would not buy counterfeit goods if they could afford to buy the original versions. It is a measure of the inappropriate pricing levels of original products that even in rich countries like Kuwait, with a GDP nine times that of Jordan,¹¹² the economic

¹¹² Kuwait's GDP in 2010 was \$48,900 compared to Jordan's \$5,400.

factor played an essential role in the purchase of counterfeit products for 51.9% of respondents to a similar question.¹¹³

Dedicated shops were the source for buying counterfeit products for 24.7% of the respondents, while 55.9% of the respondents said they bought the counterfeit products from dedicated shops as well as other places, and 19.2% of the respondents indicated that friends and relatives were their source of counterfeit products.

The second group of questions explored the respondents' attitudes towards counterfeiting based on their religious beliefs. This question examines whether students' ethical orientation affects their choice to buy counterfeit products.

In the questionnaire, the ethical orientation was tested using responses to the scales measuring ethical cases. A majority of the respondents (65.9%) believed that counterfeit products are not prohibited by religion, while only 28.6% of the respondents thought that religion prohibited counterfeit products, and 4.7% did not know whether such a religious prohibition existed. A majority of the respondents (81.1%) indicated that they would not continue to buy counterfeit products if prohibited by religion the majority of the respondents answered in the negative, while a smaller majority of the respondents (64.8%) indicated that they would stop buying counterfeit products if prohibited by state law. Tables 3.3 and 3.4 show the results.

¹¹³ Al-Fadhli, "The Ethical Dilemma of Software Piracy in Islamic Societies."

Table (3.3): If you knew that counterfeit products were prohibited by religion, would you continue to buy and use such products?

		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	1 Yes	66	17.3	17.3	17.3
	2 No	309	81.1	81.1	98.4
	6 I don't know	4	1.0	1.0	99.5
	9 Missing	2	.5	.5	100.0
	Total	381	100.0	100.0	

Table (3.4): If you knew that state law prohibited counterfeit products, would you continue to buy and use such products?

		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	1 Yes	132	34.6	34.6	34.6
	2 No	247	64.8	64.8	99.5
	6 I don't know	1	.3	.3	99.7
	9 Missing	1	.3	.3	100.0
	Total	381	100.0	100.0	

Results from Table 3.3 show that the majority of the respondents (81.1%) would stop buying counterfeit products if they knew that Islam prohibits it, while 64.8% of them said that they would stop buying counterfeit products if prohibited by state law. But given that IP is not a matter dealt with directly by religion, and given the decentralised and non-hierarchical nature of the Islamic faith practiced by the vast majority of Jordanians,¹¹⁴ it is misleading to take answers based on religious belief without further scrutiny. In the interest of further scrutiny, two questions were posed. First, respondents were asked to identify what they considered their source of religious authority, and then they were asked to identify the degree to which they were inclined to follow the opinion of that religious authority on matters related to counterfeit goods. Tables 3.5 and 3.6 show the results for both questions, respectively.

The Mufti (a Muslim legal expert and adviser on the law of the Quran¹¹⁵) was considered the source of religious authority by (41.2%) of the respondents; however, interestingly enough, only 52.8% said they would always follow the guidance of the main religious authority on the prohibition of counterfeit products, while 46.7% said they would either never or only sometimes follow such guidance, indicating that the effect of religion on the respondents' choice to

¹¹⁴ "Guide: Christians in the Middle East," *BBC*, December 15, 2005, sec. Middle East, http://news.bbc.co.uk/2/hi/middle_east/4499668.stm. (Estimating that only 3-4% of Jordanians are Christian).

¹¹⁵ "The Definition of Mufti," *Dictionary.com*, n.d., <http://dictionary.reference.com/browse/mufti>.

use counterfeit products may not be as strong as it first appeared. This validates the earlier conclusion that the suggestion that Muslims will abide by IPRs laws if piracy is prohibited by Islam should be interpreted within the context of (i) the lack of treatment of IPRs under Islamic law, and (ii) the fact that any Islamic legal opinion on piracy holds little or no universal jurisprudential weight.

Table (3.5): What is the main source of your Islamic actions and decisions?

		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	1 The Mufti	157	41.2	41.2	41.2
	2 The Cleric in my neighbourhood	60	15.7	15.7	57.0
	3 Parents	65	17.1	17.1	74.0
	4 Other	96	25.2	25.2	99.2
	6 I don't know	2	.5	.5	99.7
	9 Missing	1	.3	.3	100.0
	Total	381	100.0	100.0	

Table (3.6): If the source of your religious guidance deemed counterfeiting to be prohibited by religion, to what extent would you abide by such an edict?

		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	1 Always	201	52.8	52.8	52.8
	2 Sometimes	148	38.8	38.8	91.6
	3 Never	30	7.9	7.9	99.5
	6 I don't know	1	.3	.3	99.7
	9 Missing	1	.3	.3	100.0
	Total	381	100.0	100.0	

The third group of questions focused on the respondents' ethical attitudes towards counterfeit products. The results showed that 71.9% of the respondents believed that buying counterfeit products is an ethical act, because counterfeit products provide people with limited income access to goods, software and books, while only 27.3% of respondents believed that buying counterfeit products is an unethical act. Oddly, 75.1% of the respondents believe that counterfeit products infringe on the rights of companies, while 63.5% indicated that they personally did not care about the companies' losses because of counterfeiting, which shows that a majority of the respondents do not see the intrusion on the rights of companies because of counterfeit products as a personal issue for them to care about. To the probable satisfaction of the IP scholar and IP reification opponent Christopher May, the reification of IPRs in Jordan has a long way to go.

Although 27% of the respondents indicated that they would continue to buy counterfeit products even if they could afford to buy the original, 49.3% indicated that they felt uncomfortable when buying counterfeit products. It is worth noting that 45.5% of the respondents did not believe that buying counterfeit products

causes any harm to Muslim people, likely because the companies that produce the original goods are located in the West.

3.5 Conclusion

Results indicate that piracy percentages are high and that religious beliefs, while not decisive deterrents against IPRs infringement, are stronger deterrents than legal measures. Price is also very important in consumers' decision of whether to pirate or legally purchase IP-protected products. Monetary rationalization was significant, and the results indicate a general indifference to damages incurred by MNCs as a result of piracy, which can be interpreted as an indication of the disregard of MNCs' allegations that piracy is harmful to the local economy or that it is a form of theft. Cultural and social backgrounds are found to be influential factors in consumers' decision to buy counterfeit products, as a significant percentage do not view counterfeit products as harmful to Muslim people.

While a majority of the respondents are aware of the economic cost of piracy to companies, a strong majority is not sympathetic to those losses. Moral relativism is clearly involved in respondents' claim that they considered counterfeit products infringement yet did not care personally about the issue. This is a strong indication that a majority of Jordanian youth do not concern themselves much with counterfeiting notions, which the Jordanian IP laws have embraced. This is clear from the fact that the majority of the respondents indicated that they would continue to buy counterfeit products even if prohibited by state law.

The ethical attitude of consumers is important in addressing the purchase of counterfeit products because it may complement legal actions against piracy. Legal actions alone are therefore insufficient in confronting this problem, especially in developing countries like Jordan.

This questionnaire's finding that most respondents would not follow their religious leader or guide if that leader prohibited counterfeit products does not support the call made by some scholars to concentrate efforts on the media to spread Muslim *fatwas* forbidden buying counterfeit products.¹¹⁶ Further, the finding that the majority of the respondents would continue to buy counterfeit products even if prohibited by state law, in addition to the apathy shown toward the infringement of MNCs' rights, indicates that more public awareness of IPRs will not serve to stem the tide of consumers buying counterfeit products. Instead, following the finding that a substantial percentage of software users would buy original software if they could afford to do so, an alternate pricing model should be adopted by MNCs.

3.6 Limitations

Some limitations of this study are as follows:

1. First, statistical analysis can be used to provide evidence to support causal relationships between constructs, but it cannot be used alone to infer causality.¹¹⁷
2. Second, full statistical analysis was not employed. The data could be further mined for statistical inferences with a chi-square test, which tests a null hypothesis stating that the frequency distribution of certain events observed in a sample is consistent with a particular theoretical distribution. Therefore, one

¹¹⁶ Al-Fadhli, "The Ethical Dilemma of Software Piracy in Islamic Societies."

¹¹⁷ Joseph F. Hair et al., *Multivariate Data Analysis*, 6th ed. (Prentice Hall, 2005).

venue for future research could be to employ such designs to test various null hypotheses based on causal models of piracy.

3. Third, the statistical analysis was performed on data collected from undergraduate students at eight colleges at one university. The sample was statistically representative of the university's populations, as it was a random sample intended to ensure that each member of that population had an equal probability of being selected. The sample, however, did not include members of the society outside of the university, which may restrict the generalization of the findings to larger populations.

4. CHAPTER IV: AN OVERVIEW OF THE JORDANIAN LEGAL SYSTEM

The Jordanian legal system is based on a civil law approach. *Stare Decisis* – the legal principle under which precedent plays a significant role in the creation of legal facts – is not well-defined or a forceful element in the formulation of legal code or in the code's interpretation by the courts, as it is in the common law tradition.¹¹⁸ Consequently, courts of the same level are generally not bound by one another's rulings, and the rulings of the highest (Cassation) court are binding only if issued *en banc*.¹¹⁹

Under the colonial effects of Great Britain, elements of the common law were introduced to the various legal areas, most notably the first Jordanian Commercial Code.¹²⁰ In the midst of all those legal traditions that affected or influenced the Jordanian legal system, Islamic law's most notable impact was in the area of personal status, such as family affairs and inheritance. Islamic law does not have any impact on IP laws in Jordan.

This chapter will highlight the foundations of the Jordanian legal system, and the judicial system and its components. The laws governing IPRs and their various elements will then be discussed.

4.1 Foundations of the Jordanian Legal System

(a) Historic Roots of the Jordanian State

From the fourteenth century until the end of the First World War, greater Syria, which consists of present-day Jordan, Lebanon, Syria, Palestine, and Israel, was under the rule of the Ottoman Empire.¹²¹ After the end of the First World War, the Ottoman Empire lost its political control over the region, partly because of a

¹¹⁸ In the United States, which uses a common law system in its federal courts and most of its state courts, the Ninth Circuit Court of Appeals has stated:

“Stare Decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et quia non movere — “to stand by and adhere to decisions and not disturb what is settled.” Consider the word “decisis.” The word means, literally and legally, the decision. Nor is the doctrine stare dictis; it is not “to stand by or keep to what was said.” Nor is the doctrine stare rationibus decidendi — “to keep to the rationes decidendi of past cases.” Rather, under the doctrine of stare decisis a case is important only for what it decides — for the “what,” not for the “why,” and not for the “how.” Insofar as precedent is concerned, stare decisis is important only for the decision, for the detailed legal consequence following a detailed set of facts.” *United States Internal Revenue Serv. V. Osborne (In Re Osborne)* 76 F.3d 306 (9th Cir. 1996).

¹¹⁹ The issues of disseminating the holdings of the Cassation Court, and the introduction of modern technology, including the posting of past and present holdings on a dedicated website for the court, are among the most urgent, yet easily achievable, modernization requirements of the Jordanian legal system.

¹²⁰ The first Companies Law in Jordan was enacted with British experts' assistance in 1964 and reflected many Common law ideas. More recently there is a clear effect of the Common law on procedural laws and those dedicated to create alternative dispute settlement mechanisms.

¹²¹ See William L Cleveland, *A History of the Modern Middle East*, 2nd ed. (Westview Press, 1999). “For the Arab people who have lived within the [Ottoman's] domains, the dismemberment of the Ottoman Empire marked more than just the end of a particular state; it also marked the end of a political, social, and religious order that had shaped their patterns of public behavior for 400 years. Ottoman rule had applied with differing degrees of intensity in various regions of the Arab provinces. That kind of adaptability was the very essence of the Ottoman system: It governed directly the areas that could be efficiently controlled and allowed a certain degree of latitude to chieftains and feudal amirs in more remote locations.” Cleveland, *A History of the Modern Middle East*, at 157-158..

revolution led by Hussein bin Ali, the Sharif of Mecca.¹²² The revolution was supported by Britain to undermine the Ottoman Empire's rule in Hejaz, the western part of modern-day Saudi Arabia.¹²³ In return, the Sharif asked the British for a pledge of financial and political support for his movement, with the ultimate goal of establishing an independent Arab government in the Arabian Peninsula and most parts of greater Syria.¹²⁴

The revolt never fulfilled its ultimate goal of a pan-Arab state headed by the Sharif. While Great Britain was promising the Sharif independence should he continue to press his revolt against the Turks, Great Britain and France entered into the 1916 Sykes-Picot agreement, dividing the region into political bodies representing their respective spheres of influence.¹²⁵ Hence, Great Britain and France assumed the Ottoman Empire's control of the region. The current geopolitical map of the Middle East was drawn as a result of this process and has remained practically unchanged ever since.

One of the Sharif's sons, Abdullah, headed the newly created political entity, called Trans-Jordan.¹²⁶ Trans-Jordan proclaimed its independence from the British Crown on May 25, 1948, and was re-named the Hashemite Kingdom of Jordan.¹²⁷

A modernization movement was created in the nineteenth century due in greater degree to the contact between the Islamic world and the West.¹²⁸ Such movement was initiated by two factors; the Ottoman government's adoption of the French Commercial and Penal Code and the establishment of a system of secular courts.¹²⁹ The *Majalla*, a publication issued between 1869 and 1876, encompassed the newly created Ottoman civil law, which was an amalgam of French law and the Hanafi School of Islamic law.¹³⁰

(b) Classification and Branches of Law

¹²²See Cleveland, *A History of the Modern Middle East*, at 148.. The Sharif of Mecca, was an honorary title granted by the Ottoman Caliph to his representative in Arabia. Usually it was awarded to the head of a family that claims to be a direct descendant of the Prophet Muhammad.

¹²³See Arthur Goldschmidt and Lawrence Davidson, *A Concise History of the Middle East*, 9th ed. (Westview Press, 2009)..

¹²⁴See *Ibid.*, at 187. The roots for these conditions are in the controversial McMahon-Hussein letters, exchanged between Hussein and the British high commissioner of Egypt and Sudan in 1915-1916. Cleveland, *A History of the Modern Middle East*, at 149.

¹²⁵. See *Sykes-Picot Agreement*, Avalon Project, available at "The Avalon Project: The Sykes-Picot Agreement : 1916", April 20, 2010, http://avalon.law.yale.edu/20th_century/sykes.asp.

¹²⁶.See Goldschmidt and Davidson, *A Concise History of the Middle East*, at 193-194., see also Cleveland, *A History of the Modern Middle East*, at 157.

¹²⁷. "No one expected this Emirate of Trans- Jordan to last long, but it did. While the rest of [greater Syria] was seething with Jewish-Arab strife, Trans-Jordan became an oasis of tranquil politics and economic development." Goldschmidt and Davidson, *A Concise History of the Middle East*.

¹²⁸.See Matthew Lippman, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (Praeger Publishers, 1988), at 100. "The first sectors affected by the modernization movement were criminal and civil justice, the economy, and the military. In these fields the deficiencies of traditional Islam were most apparent to modernists. The gap between new conditions and traditional law was unbridgeable, and thus the rulers opted for the Western approach."

¹²⁹.*Ibid.*

¹³⁰.Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1995), at 151-152.

Below is a review of the major governing laws in Jordan.

(i) The Constitution

Enacted in 1952, the Jordanian constitution was a novelty in the Middle East in its time because it explicitly granted rights to the citizens (citizenship, property, assembly, travel, etc.) and instituted a parliamentary monarchy.¹³¹ It has a clear delineation between the executive, legislative and judicial branches, and a minimal role for the monarch as the head of state, guardian of the constitution and enforcer of the separation of powers.¹³² As mentioned earlier, and in line with the accepted practice for Arab and Islamic nations, the constitution declares Islam as the state religion and Arabic as its official language.¹³³

(ii) Criminal Code

The Criminal Code enacted in, and continuously amended since, 1960 addresses the basic concepts of criminal liability, crimes and sanctions. The law outlines various elements for any crime and for criminal liability. There can be neither a crime nor punishment unless specifically stated in the code – *Nulla crimen sine lege*.¹³⁴ For criminal liability, the code requires an act – *actus reus*, which can be a commission or an omission, and a guilty mind or intention – *mens rea*.

The code provides for three classes of crimes: felonies, misdemeanours and offences. This classification rests on the type of punishment associated with each crime. A felony is any crime punishable by more than three years; a misdemeanour is punishable by one week to three years in prison; and an offence is punishable by less than one week of imprisonment or a fine. The procedural arm of the Criminal Code is the Criminal Procedure Law, which organizes all issues related to procedures before police, public prosecutors and courts.

(iii) The Civil Code

The Jordanian Civil Code was 22 years in the making, from February 4, 1952, when the initial draft was submitted to parliament, until the 1964 royal letter requesting the drafting of a “Civil Code based on Islamic law

¹³¹ *Jordanian Constitution*, 1952, art. 1.

¹³² Parliamentary monarchy is a constitutional monarchy or limited monarchy is a form of government established under a constitutional system, which acknowledges an elected or hereditary monarch as head of state, as opposed to an absolute monarchy, where the monarch is not bound by a constitution and is the sole source of political power. Most constitutional monarchies take on a parliamentary form, like the United Kingdom, Canada, Japan and Malaysia where the monarch may be regarded as the head of state but the prime minister, whose power derives directly or indirectly from elections, is head of government.

¹³³ *Jordanian Constitution*, art.2.

¹³⁴ *Jordanian Penal Code*, 1960, art.3. stated that courts should not impose any sanction unless the law stated that sanction.

and broad enough to govern the various areas of daily life”, culminating in the Code’s actual enactment in 1976.¹³⁵

The Civil Code contains rules, which mainly organize private financial relations, and types of rights – personal rights that include, *inter alia*, contracts and injurious acts, and real rights like property rights. It also organizes contracts.¹³⁶ The Civil Code is the primary source for all private laws in Jordan, and its clauses are binding when a private law does not address a specific point that is addressed by the Code.

(iv) Commercial Laws

Commercial laws in Jordan encompass several laws and legislations all revolving around the same concept of organizing the commercial sector. The most important commercial laws in Jordan are the Trade Law, Companies Law, Banking Law, Securities Law, and Trading in Foreign Exchanges Law. The Civil Code has rules to be applied in commercial cases, particularly in the interpretation of contracts; however, as stated earlier, such rules are of a general nature and are pre-empted by any specific laws where applicable.¹³⁷ Trade Law, being the oldest of the group, reflects a more traditional perspective of commerce. The other legislations are more modern, as they were either promulgated or updated after Jordan’s accession to the WTO in 2000.¹³⁸ They also reflect the constant evolution of the legal framework of doing business in Jordan, and in that sense share the features of evolution and development with IP laws in Jordan.

4.2 The Legislative Process

Jordan’s legislative branch is represented by the Parliament, to which legislative authority is vested by the Constitution.¹³⁹ The Parliament consists of two chambers, often referred to as the upper and lower houses. The lower house of Parliament, also referred to as the House of Representatives, consists of elected members whose term is for four years. The upper house of Parliament, also known as the Senate. There are twice as many seats in the House of Representatives as in the Senate, and the Senate seats are appointed by the King for two year terms..¹⁴⁰

¹³⁵ Royal letter to then Prime Minister of Jordan Hussein Bin Naser, dated April 1964. The committee that delivered the law in January 5, 1976 stated that is based its work on four resources 1) Islamic jurisprudence in all its schools, 2) effective Jordanian legal code, 3) draft Civil Code law presented by the upper house of parliament, 4) all modern legislations, which are based on Islamic law.

¹³⁶ The Jordanian Civil Code recognized the freedom of contractors in establishing any legitimate contracts.

¹³⁷ The general rule is that all the articles of the Civil Law can be applied on commercial cases provided they are consistent with the basic principles of the Law of Commerce.

¹³⁸ The most recent of the commercial laws is the *Trading in Foreign Exchanges Law No.50*, 2008., which came into effect as a result of the increased sophistication of dealers and middlemen attempting to market and promote investments in foreign exchanges. As it became clear that a substantive portion of those investment opportunities were nothing more than Ponzi schemes, the law was enacted in late 2008 in an attempt to regulate an area that was as of that time unregulated.

¹³⁹ *Jordanian Constitution*, art.24.

¹⁴⁰ *Ibid.*, arts.62 and 63.

In addition to laws, which can be passed only through the Parliament, Jordan also has other types of regulative documents, including Systems, which are promulgated by the council of ministers, and Regulations, which are promulgated by a minister and impact only that specific ministry. This hierarchy is further illustrated in Table 4.1, below. Any legislation proposed to the Parliament must be approved by both houses and then ratified by the King.

Table (4.1) The Hierarchy of the Jordanian Regulative Documents

<p style="text-align: center;">The Constitution</p> <p>The law of the land and the foundation upon which all other legislations must be based and with which they must conform.</p>
<p style="text-align: center;">Laws</p> <p>Enacted exclusively by the Parliament based on drafts from the government, members of the House of Representatives, or the Senate. Provisional laws can be passed by the government but must be confirmed by Parliament once reconvened. Must be in compliance with the Constitution.</p>
<p style="text-align: center;">Systems</p> <p>Enacted by the Council of Ministers to clarify, augment, or execute a law or portions thereof. Can be mandated sometimes by the law itself, which can request that one or several clauses be further detailed by a system to be issued by the government. Must comply with the text of the law they are meant to clarify, augment, or execute, as well as with the Constitution.</p>
<p style="text-align: center;">Regulations</p> <p>Are issued by the Minister or by a senior official of the ministry who is empowered by the Minister. Enforceable only on the executive agency for which they were issued and must comply with relevant systems and laws, as well as with the Constitution.</p>

4.3 The Judicial System

Civil and criminal conflicts in Jordan can be legally resolved through the court system or through arbitration. Courts consist of several tiers with laws outlining the duties and responsibilities of each tier, as well as the limits of their jurisdiction.¹⁴¹ This multi-tier system applies to the three types of courts in Jordan, namely regular, religious, and special courts.¹⁴² Table (4.2) illustrates the three types of courts and their different tiers, along with a brief description of each. Of special importance to IP conflicts and disputes is Jordan's Supreme Administrative Court.¹⁴³

(a) Regular Courts

These courts handle commercial, civil, and criminal cases. Regular Courts are classified into three different types: courts of first review, the Court of Appeals and the Court of Cassation.

(i) Courts of First Review

There are two types of courts within this category: the Small Claims Court and courts of First Instance. Small Claims Courts have jurisdiction over in which the claim is for less than 7000 Jordanian Dinars (JD)¹⁴⁴ and criminal cases in which the penalty does not exceed two years the imprisonment.¹⁴⁵ Verdicts from Small Claim Courts can be appealed to courts of First Instance if their value is less than JD 1000 or if the penalty is less than three months' imprisonment. Original jurisdiction is vested in the courts of First Instance over all cases, but jurisdiction for Small Claims Courts is carved out and specifically provided for in the law creating First Instance Courts.¹⁴⁶

(ii) Courts of Appeal

¹⁴¹ Article 27 of the constitution vests the judicial authority in the courts and authorizes them to issue verdicts in the name of the King. Article 100 of the constitution states that the way and manner that all types of courts are to set up will be outlined in a special law, which must include the formation of a Supreme Court. It is not clear if the term 'supreme court' as used in the constitution is meant to be the Supreme Administrative Court in the format currently exists as a review of administrative law, or the creation of the Cassation court.

¹⁴² Article 99 of the constitution authorizes the creation of three types of courts: 1) regular, 2) religious, and 3) special. Article 110 of the constitution stated that special courts would be organized based on laws to be passed for that purpose.

¹⁴³ The Supreme Administrative Court's jurisdiction over final copyright, trademark, and patent administrative decisions is based on article 9(9) of the *Supreme Administrative Court Law No.12, 1992.*, giving the court jurisdiction over the appeal of final administrative decisions issued by governmental agencies. The origins of the Supreme Administrative Court are in Article 100 of the constitution, which calls for the creation of the courts and specifically mentions a "Supreme Court" by name. Pursuant to that constitutional mandate, the first law organizing courts was issued in 1952 – *Courts Formation Law No. 26, 1952*. It, however, did not include a designation for a Supreme Court. This constitutional oversight was rectified when the Cassation Court exercised its role as a final arbiter for judicial opinions in its capacity as a Cassation Court, and for administrative opinions in its capacity as a Supreme Administrative Court. This dual-hat anomaly continued till the enactment of the *Supreme Administrative Court Law No.12.*, which created a separate court named the Supreme Administrative Court to be formed.

¹⁴⁴ \$1.3 = 1 JD.

¹⁴⁵ *Small Claims Courts Law No.15, 1952*, arts 3 and 5, as amended in 2008.

¹⁴⁶ *Courts Formation Law No.17, 2001*, art. 3 as amended in 2008.

There are three Courts of Appeal in Jordan, located in the cities of Amman, Irbid, and Ma'an. They have appellate jurisdiction over certain decisions by Small Claims Courts, all decisions by the courts of First Instance.¹⁴⁷ An appellate panel usually consists of three judges, whereas First Instance and Small Claims Courts consist of one judge (or two in some criminal cases).¹⁴⁸ Evidence Law governs the type of evidence that may be used before the courts as well as the method by which it can be used.¹⁴⁹

(iii) Cassation Court

This is the highest non-administrative court in Jordan. It usually sits in panels of five judges, but it can sit in panels of eight judges to review novel legal points, to review decisions that represent a split between the courts of appeal.¹⁵⁰ Monetary thresholds also govern the appellate process; cases not exceeding JD 10,000 in value require written permission from the Cassation Court to file an appeal. If this written permission is denied, cases are deemed settled and decided by the Appellate Court that last reviewed them. This makes Appellate Courts the final arbiter in IP cases if valued at less than JD 10,000 and denied written permission by the Cassation Court.

¹⁴⁷ *Ibid.*, art. 8.

¹⁴⁸ *Ibid.* art. 7.

¹⁴⁹ *Evidence Law No. 30, 1952.*

¹⁵⁰ *Small Claims Courts Law No.15*, art. 9 as amended in 2008.

Table (4.2): Courts in Jordan

<p><u>Specialized Courts</u> Have jurisdiction over issues specifically outlined in the laws creating them. Have the narrowest jurisdiction of all types of courts.</p>	<p><u>Regular Courts</u> Have general jurisdiction over all civil, commercial and criminal cases.</p>	<p><u>Religious Courts</u> Have jurisdiction over issues related to personal status such as marriage, divorce and inheritance.</p>
<p><u>Supreme Administrative Court</u> Primarily reviews final procedural and administrative rules issued by the various governmental agencies. Is the final arbiter for administrative law.</p>	<p><u>Court of Cassation</u> The country's highest court for all non-administrative law issues. Reviews appeals from all lower courts as the jurisdictional rules allow. Automatically reviews certain criminal rulings, regardless of whether an appeal is filed, if the penalty is more than ten years imprisonment or capital punishment.</p>	
<p><u>Various Appellate Courts</u> - Court of Appeals for the Customs Department: Receives appeals from the Customs Court of First Instance. Its decisions may be appealed to the Court of Cassation. - Court Appeals for the Tax Department Receives appeals by and against the department of income tax in income tax issues. Its decisions may be appealed to the Court of Cassation - State Security Court: Deals with issues related to terrorism, threats to security and narcotics trafficking. Its decisions may be appealed to the Court of Cassation.</p>	<p><u>Courts of First Review</u> Include the courts of First Instance as well as the Small Claims Courts. Have jurisdiction over commercial, civil and criminal cases. Municipal Courts: Deal mainly with traffic violations.</p>	

(b) Arbitration and other Alternative Methods of Dispute Resolution

The first Arbitration law was enacted in 1952 and amended in 2001.¹⁵¹ To further facilitate the proceedings of trials and to maximize settlement possibility, the Civil Procedure Law was amended to create a Case Management position to be held by a judge within the lower courts. The Case Management judge is charged with ensuring speedy legal notice to the parties, completeness of the docket, and (failing settlement) transferring the complete docket to the assigned trial judge.¹⁵²

4.4 IPRs under Jordanian Laws

The notion of what constitutes a “right” under Jordanian law is delineated by the Civil Code, which allows for three types of rights: personal, material and incorporeal.¹⁵³ The Code defines a personal right as a legal bond between a debtor and a creditor.¹⁵⁴ That bond must relate to transferring a material right, executing an act or abstaining from one. The reference to abstinence from certain acts as one of the components of personal rights refers to injurious acts, or torts.¹⁵⁵

A material right, which can be original or subsidiary, is the direct authority given by the law to an individual.¹⁵⁶ An original material right arises out of legal, direct, physical control over personal or real property. A subsidiary material right is one that is derived from an original right¹⁵⁷ (e.g., a building owner’s secondary material right to collect rent arises out of the original material right of ownership).

The Civil Code defines incorporeal rights as those rights exercised over intangible or non-material things.¹⁵⁸ IPRs including copyrights, patents, and trademarks, are explicitly mentioned as examples of incorporeal rights.¹⁵⁹

Overall, there are twelve laws regulating aspects of IP under Jordanian law.¹⁶⁰ The Civil Code laid the theoretical foundation for IPRs by incorporating them within incorporeal rights.¹⁶¹

(a) Patents

The first Jordanian Patent law was enacted in 1953.¹⁶² A new Patent law extending the protection period to 20 years was enacted in 1999, incorporating

¹⁵¹ *Arbitration Law No. 31*, 2001.

¹⁵² *Civil Procedure Law No. 24*, 1998, as amended by law No. 16 (2006).

¹⁵³ *Civil Code No. 43*, 1976, art. 67.

¹⁵⁴ *Ibid.*, art. 68.

¹⁵⁵ Anis Al-Qasem, “The Injurious Acts under the Jordanian Civil Code,” *Arab Law Quarterly* 4, no. 3 (August 1989): 183-198.

¹⁵⁶ *Civil Code No. 43*, art. 69.

¹⁵⁷ *Ibid.*, arts. 69 and 70.

¹⁵⁸ *Ibid.*, art. 71(1).

¹⁵⁹ *Ibid.*, art. 71(2).

¹⁶⁰ *Copyright Law No.22; Patent Law No.32; Trademarks Law No.33. Servicemarks Law No. 19, 1953.Industrial Forms and Drawings Law No. 14. Integrated Circuits Law No. 10. Geographical Indications Law No.8. Unfair Competition and Trade Secrets Law No. 15. New Plant Varieties Law No. 24; Instructions for Border Points Regarding the Protection of Intellectual Property No.7; E-Transactions Law No.85; Competition Law No.49; National Products Protection Law No.50.*

¹⁶¹ It also laid down the rules governing civil liability and contracts.

¹⁶² *Patent Law No. 22*, 1953.

TRIPS-consistent standards into its language.¹⁶³ The 1999 law clarified the criteria for awarding a patent, areas outside patentability domain, and the rights and obligations of a patent holder. It also outlined some specific sanctions that can be requested by a patent holder in case of a patent infringement. The law was amended in 2001 and 2007 to reflect ever-evolving concepts and to synchronize it with Jordan's obligations and international best practices. It puts forth patentability conditions that include novelty, non-disclosure to the public, non-obviousness, and industrial utility.¹⁶⁴

The first patentability requirement, novelty, is set forth in article 3(a). It represents a codification of the doctrine of anticipation (i.e., whether a claim is anticipated if each and every element in it was shown, described, organized, and functioned in substantially the same way as in prior art).¹⁶⁵ Essentially, article 3(a) requires the applicant for the patent to demonstrate that the invention is new and is different from prior art in the sense that they are not identical. It has yet to be tested in a court of law, as there have not yet been any cases addressing it.¹⁶⁶

Claim analysis and determination of obviousness, which are key aspects of patent prosecution and litigation, are non-existent because Jordan lacks a developed patent prosecution mechanism/apparatus.¹⁶⁷ A clear sign of the embryonic stage of development of patent prosecution in Jordan is that legally it is the patentee's responsibility to assure patentability,¹⁶⁸ whereas this would be the responsibility of the governmental agent in charge of issuing the patent (i.e. the Patent Registrar) in a developed patent prosecution system.

Non-obviousness, set forth in article 3(b) of the Patent Law, requires the applicant to show that the invention is not trivial. In order to determine whether an invention is trivial it is necessary to investigate whether any prior art contains the exact same elements, or whether a number of sources would combine to produce the claimed invention.¹⁶⁹ A patentable invention is required to have non-obvious differences from prior art; in other words, it is necessary that a person with ordinary skill would not have thought the subject matter of the invention to be obvious at the time the invention was made.¹⁷⁰ This makes this area of examination highly factual and technical. There is also a very strong element of subjectivness in this test, and combining fact-based examination with a deep technical knowledge of the subject area is key for its fair and balanced application.¹⁷¹

¹⁶³ *Patent Law No.32*.

¹⁶⁴ *Ibid.*, art.3.

¹⁶⁵ *Ibid.*, sec. 3(a).

¹⁶⁶ *Patent Law No.32*.

¹⁶⁷ Lina Haddad, "Interview", July 31, 2011; Zain Alawamleh, "Interview", August 2, 2011.

¹⁶⁸ *Patent Law No.32*, art. 16.

¹⁶⁹ *Ibid.* art. 3(b).

¹⁷⁰ *Ibid.* art. 3(b).

¹⁷¹ T.J. Chiang, "Cost-Benefit Approach to Patent Obviousness, A," *John's L. Rev.* 82 (2008): 39; M. Astorino, "Obviously Troublesome: How High Should the Standard Be for Obtaining a Patent," *J. Pat. & Trademark Off. Soc'y* 89 (2007): 239; G.N. Mandel, "Patently Non-Obvious: Empirical Demonstration That the Hindsight Bias Renders Patent Decisions Irrational," *Ohio St. LJ* 67 (2006): 1391.

Technical knowledge in the invention's subject area is key because it allows the examiner to differentiate between the prior art and the proposed claims, to assess what level is considered *ordinary skill* in the field, and to determine what would be considered obvious based on that level of ordinary skill.¹⁷² A combination of all of the above is the only guarantee that the examiner will be able to produce reasonable and objective evidence of obviousness or non-obviousness. It is the level of technical expertise in the patent's subject area that allows a seemingly purely subjective test to be made objectively.¹⁷³

The third patentability requirement, industrial utility, is set forth in article 3(c). It requires the patentee to demonstrate that the claimed invention is "useful" for some purpose.¹⁷⁴ It is not clear whether this statement of utility has to be made explicitly or implicitly. Typically, for a claimed invention to violate the utility requirement it must be incapable of achieving a useful result, which could occur if the inventor fails to disclose enough information to convince an examiner of the claimed invention's utility or makes a demonstrably non-credible utility claim.¹⁷⁵

Nondisclosure is not a strict requirement. Disclosure occurring up to 12 months prior to the filing date is tolerated, as long as it is either made by the inventor or erroneously or maliciously made by others.¹⁷⁶ Although the law grants the right to a patent to the inventor or his or her successor(s) and allows joint ownership in the case of joint efforts, it is clearly a first-to-file system, and priority can be established either by directly filing with the Jordanian patent office or by proving that a patent was filed with a foreign patent office within the past 12 months.¹⁷⁷

The patent protections provided under the law are twofold. If the subject of the patent is a product, the holder is granted the right to exclude others from making that product.¹⁷⁸ If the subject of the patent is a method, the holder is granted the right to exclude others from utilizing that method.¹⁷⁹ This exclusionary power is in line with the classical protections granted to patent holders under Western laws, especially the United States patent code. The Jordanian law also grants the right to use a patent without a license for purposes of research and development; however, the law does not specify whether such a purpose is insufficient if there is a commercial objective in mind, nor is any case law available to illuminate that point.¹⁸⁰ The law also gives the Minister of Industry and Trade the right to issue a compulsory license in the following four situations:¹⁸¹

¹⁷² Astorino, "Obviously Troublesome."

¹⁷³ Ibid.; Chiang, "Cost-Benefit Approach to Patent Obviousness, A."

¹⁷⁴ *Patent Law No.32* art. 3(c).

¹⁷⁵ N. Machin, "Prospective Utility: A New Interpretation of the Utility Requirement of Section 101 of the Patent Act," *Cal L. Rev.* 87 (1999): 421. A perpetual motion machine is a classic and often cited example.

¹⁷⁶ *Patent Law No.32*, art. 3(a)(2).

¹⁷⁷ Ibid., art. 10(a)(1).

¹⁷⁸ Ibid. art. 21.

¹⁷⁹ Ibid., art. 21.

¹⁸⁰ Ibid. art. 22.

¹⁸¹ Ibid., art. 22. According to the TRIPS Agreement, foreign patentees are not obliged to provide their patents locally, thus, compulsory licenses could have a limited application. Article 31 of the TRIPS Agreement permits compulsory license if the patentee refuses to authorize the use of the invention on

1. For national security purposes,
2. If the patent is not exercised or is not sufficiently exercised by the patent holder within three years of the patent issuance or four years from the date of filing,
3. If a court of law decides the patent is being used in a way that restricts competition, or
4. if the compulsory license will be used to export the subject of the patent to disease-plagued regions to fulfil Jordan's obligations under the World Trade Organization.

The language is broad enough to create a compulsory license when the state deems it necessary, yet narrow enough to protect the patent holder from haphazard governmental decision making. To add a layer of judicial supervision, the minister's decision is not absolute and is subject to review by the Supreme Administrative Court.¹⁸²

A summary of the main elements of the protections provided under the Jordanian Patent law is illustrated in Table (4.3) below.

reasonable commercial terms. In other words, a compulsory license shall be allowed only when negotiating a license on fair commercial terms has failed.
¹⁸² Ibid., art. 26.

Table (4.3): Patent Protections

Element	When Element is Effective	Components of the Element
Pre-award Protection	Prior to issuance of a patent	Temporary protection can be granted to an item that can be patentable in Jordan, for the purpose of protecting the item during an exhibition. Temporary protection license is granted, officially registered, and is valid for 6 months from the start date of the exhibition. ¹⁸³
Criminal Penalties	After granting the patent	Jail terms and/or monetary fines are imposed for: <ol style="list-style-type: none">1. Replicating a patented invention for commercial or industrial purposes.2. Selling, offering for sale or importing products patented in Jordan.3. Labelling or documentation for a product that leads the public to believe that a patent was issued for the product.
Injunctive Relief	In case of an infringement civil or criminal action	If the patent holder provides a bank guarantee, he or she can ask a court for: <ol style="list-style-type: none">1. An injunctive order to stop the allegedly infringing activity.2. Precautionary seizure of the allegedly infringing products.3. Preservation of all evidence related to the alleged infringement.
Foreign Patents Registration	Upon approval by the patent Registrar at the MoIT	The holder(s) of the foreign patent can file for a Jordanian patent. If the Jordanian patent is granted, the holder has all the rights and responsibilities of a Jordanian patent.

¹⁸³ *Patent Law Regulations No. 97, 2001.*

To summarize the discussion on Jordanian patent law, the table below provides a brief characterization of other laws related to patentable subject matter, including the Industrial Forms and Drawings Law No. 14 (2000), the Integrated Circuits Law No. 10 (2000), the Geographical Indications Law No. 8 (2000), the Unfair Competition and Trade Secrets Law No. 15 (2000), and New Plant Varieties Law No. 24 (2000).

Table (4.4) Other Patentable Subject Matter Laws

Law	Elements
Industrial Forms & Drawings Law No. 14 (2000)	<ul style="list-style-type: none"> • Provides protection for designs and models related to the aesthetic appearance of a product, which are registered at the Ministry of Industry and Trade. • Requires novelty, non-disclosure, and a purely aesthetic function for registration. • Period of protection is 15 years from the date the application is filed. • Provided the registration holder provides a bank guarantee, he or she can ask a court for: <ul style="list-style-type: none"> • - An injunctive order to stop the allegedly infringing activity. • -Precautionary seizure of the allegedly infringing products. • - Preservation of all evidence related to the alleged infringement.
Integrated Circuits Law No 10 (2000)	<ul style="list-style-type: none"> • Provides protection for three-dimensional designs of integrated circuits registered in the Integrated Circuits Register at the Ministry of Industry and Trade. • Requires novelty and non-obviousness for registration. • Provides for an R&D use exception. • Grants protection from the date a request for registration is filed. The duration of protection after registration is 10 years from the date of first use anywhere in the world, but the total period of protection cannot exceed 15 years. • Provides for compulsory licensing for national security reasons, public non-commercial use, or to counter an emergency. The registration holder is entitled to fair compensation, and can challenge the compulsory license before the Supreme Administrative Court. • Right holder can ask a court for: <ul style="list-style-type: none"> • -An injunctive order to stop the allegedly infringing activity. • -Precautionary seizure of the allegedly infringing products. • - Preservation of all evidence related to the alleged infringement.
New Plant Varieties Law No. 24 (2000)	<ul style="list-style-type: none"> • Provides protection for plant varieties registered in the New Plant Varieties Register at the Ministry of Agriculture. • Requires the plant variety to be novel, non-disclosed, distinguished, homogenous, and stable.

(b) Copyright

Prior to the copyright law enacted in 1992,¹⁸⁴ Jordan used the Ottoman-era copyright law, and the Supreme Administrative Court confirmed such usage in opinions.¹⁸⁵ In cooperation with the World Intellectual Property Organization (WIPO), Jordan amended the law twice, in 1998 and 1999, to bring it in line with the requirements of accession to the World Trade Organization.¹⁸⁶ One of the most significant changes made in these amendments was the automatic grant of copyright protection to any published work, whether or not it was registered with the Jordanian National Library.¹⁸⁷

Currently the Copyright Law provides protection to the following works:¹⁸⁸

1. Any written documents
2. Any verbally delivered words like sermons, lectures, and speeches
3. Any theatrical productions, including musicals and mime acts
4. Any musical productions, whether accompanied by words or not
5. Any cinematic, audio-visual, or broadcasted productions
6. Paintings, photography, carvings, sculptures, and architectural and ornamental works
7. Maps, designs, blueprints, and 3-D models, including those related to geography
8. Computer programs in any programming language
9. Titles, except those which have other common usages
10. Compilations of any sort

Moral rights granted exclusively to the author include the right to:¹⁸⁹

1. Be identified as the author on all produced copies.
2. Modify the work in any form.
3. Prevent any change to the work.
4. Remove the work from circulation altogether, provided equitable restitution is made to the entities that would otherwise have financial rights to the work.

¹⁸⁴ *Copyright Law No.22.*

¹⁸⁵ *Opinion No. 76/81* (n.d.).

¹⁸⁶ Amending Laws No. 14 (1998) and No. 29 (1999).

¹⁸⁷ *Copyright Law No.22*, art. 45. The National Library (NL) is the governmental agency in charge of registering copyrightable material.

¹⁸⁸ *Ibid.*, art. 3..

¹⁸⁹ *Ibid.*, art. 8..

The financial rights granted to the author under the law clearly identify areas of exploitation that are exclusively within the author's purview, which include the right to:¹⁹⁰

1. Duplicate and reproduce the work in any form, including photographic, cinematic, or digital reproduction.
2. Translate the work to any other language, quote it, or produce it musically.
3. Lease or rent copies of the work to the public.
4. Distribute the work, give permission for copying it, or any other form of action that would otherwise create ownership rights in copies of the work.
5. Import the work.
6. Offer the work in a public form such as reading, projection, acting, audio-visual broadcasting, or any other form.

The law also grants licenses for the unauthorized use of the work (e.g., translation of the work with official approval from the Minister of Culture), provides for financial compensation to the copyright holder, and limits the use of the translated work to educational or research-related activities.¹⁹¹

The duration of protection granted under the law varies with the type of work protected, as illustrated by table 4.5 below.

¹⁹⁰ Ibid., art. 9..

¹⁹¹ Ibid., art. 45..

Table (4.5): Copyright Protection Periods¹⁹²

Type of Work	Duration of Protection
Audio Performance	50 years
Audio Producers	50 years
Audio Broadcasters	20 years
Author's Financial Rights	Duration of author's life plus 50 years after death of all authors
Cinematic and TV works, works authored under a pseudonym, and works not authored by individuals	50 years from the year of publication
Applied Arts (paintings, manuscripts, sculptors, photos, architectural, topographical, or geographical maps, computer programs)	25 years from the year of completion
Author's Moral Rights	Not specifically mentioned in the law, but a Cassation Court decision stated these rights continue with the heirs after the author's death, presumably for the duration of the financial rights ¹⁹³

¹⁹² Ibid.

¹⁹³ *Opinion No. 2003/2648* (n.d.).

While the law is notable for providing universal protection without a requirement for registering the work with the National Library, it does mandate such registration for works published in Jordan and/or by a Jordanian author,¹⁹⁴ with failure to register resulting in a monetary fine.¹⁹⁵ Jordanian publishers are also required to file a bi-annual report with the National Library of all titles published during that six-month period.¹⁹⁶

The mandatory registration requirement before distribution gives the National Library implicit authority to exercise a pocket veto over any work should the author decline to register it. Article 38 extends that authority to any work published or distributed in Jordan even if the author is not Jordanian.¹⁹⁷ The overall effect is the limitation of the right to legally distribute foreign works in Jordan without a National Library registration number.

(c) Trademarks

Trademarks occupy a significant place in the Jordanian IP jurisprudence because the trademark law was created in 1952. It has since been amended several times¹⁹⁸

Along with the 1952 trademark legislation, regulations were enacted that outlined in considerable detail the mechanism and process by which a trademark can be registered as well as how a registration can be renewed, disputed, amended, or revoked.¹⁹⁹ The law and the regulations give the office of the Trademark Registrar the responsibility to perform those tasks.²⁰⁰ Disputes with the Registrar's decision can be appealed to the Jordanian Supreme Administrative Court.²⁰¹ A more recent addition to the panoply of trademark-related laws is the Trade Names Law of 2006, which covers the actual names used with goods and services.²⁰² Similar to trademarks, the law for Trade Names creates a Registrar at the Ministry of Industry and Trade and gives that office the duty of approving and officially recording Trade Names. Decisions by the Trade Names Registrar can be appealed to the Supreme Administrative Court.²⁰³

In the interpretation of the trademark law, the courts established certain tests for examining whether a common, non-distinguishing mark can be registered. The trademark law explains that a mark can be registered if it has a distinguishing feature (e.g., a name, letter, number, shape, colour, etc.) such that the feature can distinguish the goods or services from those provided by others.²⁰⁴ The Supreme

¹⁹⁴ *Copyright Law No.22*, arts. 38-41.

¹⁹⁵ *Ibid.*, arts. 38-41..

¹⁹⁶ *Ibid.*, arts. 38-41.

¹⁹⁷ *Ibid.* art. 38.

¹⁹⁸ *Trademarks Law No.33*.

¹⁹⁹ *Trademarks Regulations No. 1*, 1952.

²⁰⁰ *Trademarks Law No.33*.

²⁰¹ *Ibid.*

²⁰² *Tradenames Law No. 9*, 2006.

²⁰³ *Ibid.*

²⁰⁴ *Trademarks Law No.33*. Article 8 of the law also lists several features that would render a mark non-registrable, including:

Marks similar to monarchy, governmental, official, religious, foreign and international symbols, slogans and flags.

Administrative Court held that if a suggested mark was common and used by many people, then it lacked distinct associative value and could not be registered.²⁰⁵

Another area where the courts helped clarify the legislative text was in the area of defining “similarity” as a condition for registration. The court asked the Registrar of Trademarks to consider the:²⁰⁶

1. General idea of the mark
2. General features of the mark as more important than its detailed parts
3. Kind of goods for which the mark is intended
4. Possibility that the consumer will not carefully examine the mark and compare it to other similar marks to establish their distinctiveness
5. Possibility of visual or auditory confusion between the mark being examined and other similar marks.

The courts’ have upheld the Registrar’s refusal to register marks which contravened public order,²⁰⁷ promoted unfair competition and confused the public,²⁰⁸ or were similar or identical to registered marks.^{209,210}

The law only protects marks registered in Jordan, but it does provide for some protection to non-registered foreign trademarks by denying registration in Jordan for the same type of goods or services by someone other than the holder of the

Marks containing any word or number which may cause the public that the goods enjoy a privileged position with an entity, which it does not have actually, or because these words and numbers are used in trade to distinguish that kind of goods from other similar kinds.

Marks containing a person or entity’s name or image without the consent of that person or entity.

Marks that contravene public order and public morals and confuse the public or encourage unfair competition.

Marks which are identical or very similar to other registered marks such that it might confuse the public.

²⁰⁵ *Opinion No. 6/53* (n.d.).

²⁰⁶ *Opinion No. 108/65* (n.d.).

²⁰⁷ *Opinion No. 87/72* (n.d.). *Opinion No. 6/53*.

²⁰⁸ *Opinion No. 163/84* (n.d.).

²⁰⁹ *Opinion No. 128/88* (n.d.).

²¹⁰ But the court’s refusal to link a trademark to the distinctiveness of the good or service for the sake of avoiding confusion in the mind of the public, led it sometimes to issue opinions that came across as parochial, and lack the broad economic understanding of the value of the mark as property, albeit an intangible one. This was clear in the courts’ decision to waive the criteria for similarity (listed above) for pharmaceutical products. The court’s rationale was that the dispensing of pharmaceuticals is the purview of physicians and pharmacists who are not likely to confuse pharmaceutical products even if they have similar trademarks or trade names. It is important to note, though, that this opinion of the court predates the accession of Jordan to the World Trade Organization, and the subsequent IP rights obligations that were part of that accession, including the protection of foreign trademarks. It also predates the amendment of the trademark law, which prohibited the registration of a foreign-registered trademark in Jordan for a similar product, by other than the owner of the foreign trademark. It is expected, therefore, that should the court revisits this issue again that the distinctiveness and non-similarity criteria will be applied.

foreign mark.²¹¹ In the case of famous foreign trademarks, the law denies registration for all goods or services, even if not of the same type as the famous mark.²¹² Famous marks do not need to prove that their foreign registration predates the registration requirement in Jordan by someone other than the famous mark owner, and can, therefore, obtain registration in Jordan even if their application is contested by a similar non-registered mark in Jordan.²¹³ The law considers the letter of registration of a trademark to be *prima facie* proof that the holder of the letter is the owner of the mark, unless evidence to the contrary can be presented, thus shifting the burden of proof to the person challenging the registration.²¹⁴ The table below outlines the main steps for trademark registration.

²¹¹ *Trademarks Law No.33.*

²¹² *Ibid.*, art. 8.

²¹³ *Ibid.*

²¹⁴ *Ibid.*, art. 28.

Table (4.6): Trademark Prosecution and Appeal

Step	Procedure	Appeal
Application ²¹⁵	<ul style="list-style-type: none"> File a written request with the Registrar of trademarks at the Ministry of Industry and Trade. Acceptance of the filed application does not mean the trademark registration is approved. 	
Application Prosecution ²¹⁶	<ul style="list-style-type: none"> Registrar can accept the application, accept the application with modifications, or deny registration. Acceptance of the trademark must include the clear delineation of any restrictions or conditions of use associated with the acceptance. 	Applicant can appeal Registrar's final decision to the Supreme Court, but the law does not set a time for filing the appeal.
Opposition ²¹⁷	<ul style="list-style-type: none"> Opposition to the registration of a trademark can be filed within 90 days of the registration's announcement.²¹⁸ The Registrar resolves the opposition after soliciting responses from the holder of the registration and allowing the entity opposing the registration to respond accordingly. 	<ul style="list-style-type: none"> The Registrar's resolution of the opposition can be appealed to the Supreme Administrative Court within 20 days. Points other than those presented to the Registrar cannot be presented to the court without the court's permission.
Post-registration	<ul style="list-style-type: none"> Trademark is registered for 10-year intervals, which can be renewed indefinitely. If the owner of the trademark does not request its renewal then it expires within 1 year of the end of the ten years for which it was originally registered. Others can register an expired trademark. Requests can be filed to remove the registration of trademarks not used for 3 consecutive years. Owner can amend a registered trademark if the Registrar approves. 	Registrar's decision to remove a trademark can be appealed to the Supreme Administrative Court.
Rights of Trademark	<ul style="list-style-type: none"> Exclude others from using the 	

²¹⁵ Ibid., art. 11.

²¹⁶ Ibid., art. 13.

²¹⁷ Ibid., art. 14.

²¹⁸ The Supreme Administrative Court had a role in expounding on who has standing to file a trademark opposition claim by decreeing that such a claim can be filed by any person, even if that person does not have a direct economic interest in the trademark. The court's rationale was based on the indirect economic interest all citizens have to prevent confusion between brands, and to promote the distinctiveness of high-quality trademarks.

Holder	<p>registered trademark.</p> <ul style="list-style-type: none">• Exclude others from using an un-registered famous trademark for the same products.	
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Jordanian trademark law also recognizes collective registration, which allows the Registrar to grant a registration for a single trademark to one or more entities or individuals at the same time if they were using the trademark for the same services or products; the Registrar can impose any conditions it sees fit to guarantee equitable use of the trademark by all.²¹⁹ The Registrar's decision on this issue can be appealed to the Supreme Administrative Court within 30 days.²²⁰

The law provides for civil and criminal remedies and outlines several punishable violations, including counterfeiting a registered trademark, illegal use of a registered trademark, and knowingly selling goods with a counterfeit registered trademark.²²¹

The owner of a registered trademark can file a civil or a criminal case against the alleged infringer(s), and, subject to the provision of a financial bond, can ask the court for injunctive relief, including a cease and desist order against the infringer, the placing of all goods under protective custody, and/or the safeguarding of any related evidence.²²² If the injunctive relief is granted, the moving party must file a lawsuit against the alleged infringer within eight days from the date of its approval.²²³ Failure to file a lawsuit within the eight-day window results in the automatic termination of the injunctive relief measures instituted by the court, thus allowing the accused party to claim equitable compensation for damages caused by the terminated injunctive relief.²²⁴

The trademark law allows for a trademark to be transferred or sold in conjunction with or separately from the entity that holds it.²²⁵ Alternatively, the Registrar can, without affecting the corporate registration of the trademark holder, cancel a registration if it is not used or if the registration process was found to contain violations of the necessary requirements.²²⁶

(d) The Protection of New Plant Varieties Law

This law is the result of the accession to the World Trade Organization, which required a specific law that gives clear and comprehensive protections to this area of technology.²²⁷ The Ministry of Agriculture is the entity charged with maintaining a public register of the protected plant varieties, which can only include "varieties" of plants, which occupy the lowest ring in plant taxonomy.²²⁸ The law, therefore, does not protect any element of plant taxonomy other than a variety, which the law defines as a plant group with specific and reproductively

²¹⁹ *Trademarks Law No.33*, art. 18.

²²⁰ *Ibid.*

²²¹ *Ibid.*, art. 37.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ The Court of Cassation in *Opinion No. 72/56* (n.d.). opined that for a criminal prosecution against a trademark infringer to move forward, the trademark should be registered and it should be used on the same type of goods associated with the registered trademark. The court effectively added an extra dimension to the requirements of the trademark criminal or civil claim.

²²⁵ *Trademarks Law No.33*, art. 19.

²²⁶ *Ibid.* art. 19.

²²⁷ *New Plant Varieties Law No. 24*.

²²⁸ The law follows the accepted plant taxonomy of group, rank, family, genus, species, and variety.

stable genetic characteristics distinguishing it from other plant groups.²²⁹ The main features of the law are outlined in the table below.

²²⁹ *New Plant Varieties Law No. 24.*

Table (4.7): Elements of the Protection of New Plant Varieties Law

Action	Requirement	Notes
Registration ²³⁰	<ul style="list-style-type: none"> • A new variety not sold for more than one year inside Jordan or four years outside Jordan prior to the date of filing. • An uncommon variety that clearly differs from any other known variety. (Any filing for any variety, inside or outside Jordan, makes it a common variety as of the date of filing, if a registration is eventually given.) • A variety whose main characteristics are homogenous. • A variety whose main characteristics are stable throughout repeated reproduction and breeding. 	<ul style="list-style-type: none"> • The right to register belongs to the breeder(s) or to the employer if the work was done as part of an employment or contractual duty. • All Registrars' final decisions can be appealed to the Supreme Court.
Priority ²³¹	<ul style="list-style-type: none"> • The date of filing with the Jordanian Ministry of Agriculture is the priority date in Jordan. • The foreign filing date is accepted as a priority date in Jordan, if the foreign country and Jordan are part of a treaty that stipulates such action and the filing in Jordan is done within 12 months of the foreign date. 	The applicant has up to two years if filed based on a foreign priority date, and six months if filed based on a Jordanian priority date, to meet all the technical examining requirements set forth in article 10 of the law.
Opposition ²³²	Any person can oppose the registration of a new plant variety within 90 days of the grant of the preliminary registration.	If no opposition is filed after the preliminary registration is announced in the official gazette, or if an opposition is rejected, a final registration is issued.
Duration of Protection ²³³	<ul style="list-style-type: none"> • Period of protection for registered varieties is 20 years from date of filing. • Period of protection is 25 years for trees and grapevines. 	
Cancellation of Registration ²³⁴	<ul style="list-style-type: none"> • If variety is common, not new, not homogenous, or not stable at the time of filing for registration. • If filing for registration is made 	All Registrar's decisions on cancellation of registration can be appealed to the Supreme Administrative Court.

²³⁰ Ibid., , arts. 4–8.

²³¹ Ibid., sec. 8–9.

²³² Ibid., sec. 12–14.

²³³ Ibid., sec. art. 18.

²³⁴ Ibid., sec. 22-25.

	<p>by someone other than the true breeder.</p> <ul style="list-style-type: none">• If variety is initially stable but later becomes unstable.	
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The variety's stability is regarded as the salient feature for continued registration, and any evidence that would call into question the variety's stability is cause for cancellation of the registration, even if the variety was stable at the time of filing.²³⁵

The breeder has the power to sell, transfer, or place a lien on the registration; all such actions must be recorded with the official Registrar at the Ministry of Agriculture.²³⁶ Furthermore, the registration grants the holder the power to exclude all others from using or cultivating the registered variety for commercial purposes.²³⁷ However, the law does provide for a fair-use exception for research and development and other non-commercial purposes.²³⁸ In the same vein, compulsory licensing is allowed for the public good, and the Minister of Agriculture can make such a determination based on a recommendation from the Registrar.²³⁹ Compulsory licensing does not negate the registration holder's right to equitable compensation for the duration of the compulsory licensing.²⁴⁰ The law contains an interesting omission in that it does not subject the Minister's decision to grant compulsory licensing to judicial review, though it does subject the Registrar's recommendation to judicial review by the Supreme Administrative Court.

This law does not provide for any criminal penalties for the unauthorized use of a registered variety. It does, however, provide for procedural protections, which allow the holder of the registration, subject to the provision of a bank guarantee, to ask the court for one or all of the following measures²⁴¹:

1. Injunctive order to stop the allegedly infringing activity,
2. Precautionary seizure of the allegedly infringing products, or
3. Preservation of all evidence related to the alleged infringement.

The owner of a registered variety can obtain injunctive relief without serving notice to on the potential infringer if the owner proves to the court that there is a high probability of immediate and significant damage.²⁴² The court's approval of injunctive relief must be followed within eight days by case filing; otherwise, the injunctive relief measure will automatically terminate, thus allowing the accused party to claim equitable compensation for any damages caused.²⁴³

(e) Trade Secrets and Unfair Competition

Prior to the enactment of the Unfair Competition & Trade Secrets Law No. 15 (2000), Jordanian laws did not address unfair competition and trade secrets in a

²³⁵ *New Plant Varieties Law No. 24.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.* art. 21.

²⁴⁰ *Ibid.*, sec. 21.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *Ibid.* art. 29.

specific legislation. Table 4.8 below outlines the main elements of the relevant components of the law.

Table (4.8): Elements of the Trade Secrets & Unfair Competition Law²⁴⁴

Unfair Competition	Trade Secrets
<p>Definition: Any act that contravenes fair commercial and industrial practice, including acts leading to:</p> <ul style="list-style-type: none"> • confusion as to the origin of goods • false accusations against another facility or product • false labelling as to nature, method of manufacturing, properties, quantities, or expiration dates of products <p>Protections: A court can, upon the request of an allegedly injured party and the provision of a bank bond:²⁴⁵</p> <ul style="list-style-type: none"> • stop that allegedly illegal practice • order the precautionary seizure of related products • preserve all related evidence <p>If the allegedly injured party does not file a lawsuit within 8 days, the court orders automatically expire and the accused party is entitled to file for equitable restitution for any incurred damages.</p>	<p>Definition: Any information:</p> <ul style="list-style-type: none"> • whose final form or detailed components are not known to the public, or are not readily available to those who usually handle such information • that has commercial value by virtue of not being publicly known • that has had reasonable precautions taken by its owner to prevent its disclosure <p>Acts that result in violating this law:</p> <ul style="list-style-type: none"> • divulging contractual information • divulging information one under a fiduciary duty to keep secret • obtaining information from a third party that one knows, or could have known, was obtained against fair commercial and industrial practice <p>Acts that are not in violation of this law:</p> <ul style="list-style-type: none"> • independently arriving at the information • reverse engineering <p>Protections: A court can, upon the request of an allegedly injured party and the provision of a bank bond²⁴⁶</p> <ul style="list-style-type: none"> • stop that allegedly illegal practice • order the precautionary seizure of related products • preserve all related evidence <p>If the allegedly injured party does not file a lawsuit within 8 days, the court orders automatically expire and the accused party is entitled to file for equitable restitution for any incurred damages.</p> <p>If an official entity requests, for the purpose of approving pharmaceutical or agricultural products, information pertaining to a trade secret, that entity must:</p> <ul style="list-style-type: none"> • agree to protect the trade secret from use by others for up to 5 years from the date the approval is granted • Not divulge the information unless necessary to protect the public

²⁴⁴ *Unfair Competition and Trade Secrets Law No. 15.*

²⁴⁵ The law does not restrict the ability to file a complaint with the court to an economically injured party; rather the language refers to any “interested” party injured by the unfair competition. This implies that any concerned citizen can file such a request.

²⁴⁶ The law does not restrict the ability to file a complaint with the court to an economically injured party; rather the language refers to any “interested” party injured by the unfair competition. This implies that any concerned citizen can file such a request.

	<ul style="list-style-type: none"> • If divulged, prevent others from commercially exploiting the trade secret.
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While the law provides protections to the holders of trade secrets, it also seems to penalize them for not filing a patent. The period of protection for a trade secret for a pharmaceutical or agricultural product, once shared with a governmental agency, is five years, compared to the 20-year protection period provided under the patent law.²⁴⁷ The law declares as null and void any clause in an IP licensing agreement that might negatively impact commerce or impede the spread of technology.²⁴⁸ Three situations are mentioned and specifically prohibited:²⁴⁹

1. Preventing the licensee from sharing improvements on licensed technology except with the licensing party,
2. Contractually prohibiting the licensee from litigating or administratively disputing the right to the licensed IP, and
3. Forcing the licensee to accept, through an adhesion licensing agreement, a package of licensed products, instead of individually selected ones.

(f) Geographical Indications Law

The law creates a central registry for the approved geographical indications, located at the Ministry of Industry and Trade.²⁵⁰

The main criterion for gaining entry into the registry is whether the product exhibits a trademark that correctly indicates the geographical origin of the product and is not misleading to the public.²⁵¹ The law, therefore, requires the geographical reference used to be technically correct and not misleading as to what the geographical region actually is known for internationally. The law emphasizes that the geographical reference for wines and spirits must be technically correct regardless of whether confusing the public is a concern, effectively reducing the test, in the case of wines and spirits, to only its first element.²⁵²

The law adds another dimension to the analysis by listing two actions that are not considered to be violations of its provisions; namely:²⁵³

1. The filing of an application, in good faith, for a trademark that matches a geographical indication or
2. The use, in good faith and prior to the geographical indication's registration in its home country, of a trademark that matches the geographical indication.

²⁴⁷ *Unfair Competition and Trade Secrets Law No. 15.*

²⁴⁸ *Ibid.* art. 9.

²⁴⁹ Intellectual property covered by these prohibitions in article 9, include copyright, trademarks, geographical indications, industrial forms and designs, patents, integrated circuits, trade secrets, and new plant varieties.

²⁵⁰ *Geographical Indications Law No.8.*

²⁵¹ *Ibid.* art. 4.

²⁵² *Ibid.* art. 4(c).

²⁵³ *Ibid.* art. 7.

A Registrar's final decision can be appealed within 60 days to the Supreme Administrative Court, and a registration's revocation does not impart any criminal liability to the violators.²⁵⁴ Instead, the law provides for a range of administrative and procedural protections under which a court can, upon the request of an allegedly injured party and the provision of a bank-bond, stop the allegedly infringing practice, seize related products, and preserve all related evidence.²⁵⁵ If the allegedly injured party does not file a lawsuit within 8 days, the court's order automatically expires and the accused party is entitled to file an action for equitable restitution.²⁵⁶

(g) Protection of Integrated Circuits Designs Law

An integrated circuit design to be registered in the designated central registry at the MoIT must be novel and non-obvious to practitioners of the art, and an application must be filed within two years of its first commercial exploitation anywhere in the world.²⁵⁷

Once all formalities are presented to the Registrar at the MoIT, a decision can be made as to the eligibility to a license, and then other rules are applied to sort out situations like joint ownership of a design and the effect of employer-employee relationship.²⁵⁸ Final decisions by the Registrar can be appealed to the Supreme Administrative Court within sixty days.²⁵⁹

Protection for the design begins from the application's filing with the Registry; the protection duration is 10 years from the date of the design's first commercial use anywhere in the world, not to exceed 15 years from the date of its invention.²⁶⁰ The law emphasizes that all legal dispositions over the protected design should be registered at the Registry at the Ministry of Industry and Trade.²⁶¹

The law also provides for compulsory licensing if required by national security, emergency, or public non-commercial use, which can be based on a judicial or administrative order after a showing that the right holder's rights are being exercised in a way that stifles lawful competition.²⁶² Such compulsory licenses are, non-exclusive, non-assignable and must afford the owner of the original license equitable compensation, and each application must be dealt with separately.²⁶³

There are no criminal penalties to violations of the integrated circuits law, but the law allows for injunctive relief measures. It gives a range of administrative and procedural protections under which a court can, upon the request of an allegedly

²⁵⁴ Ibid.

²⁵⁵ Ibid., sec. 8.

²⁵⁶ *Geographical Indications Law No.8.*

²⁵⁷ *Integrated Circuits Law No. 10* art. 4.

²⁵⁸ Ibid. art. 5.

²⁵⁹ Ibid., sec. 7.

²⁶⁰ Ibid., sec. 12, art 12.

²⁶¹ Ibid., sec. 14–15.

²⁶² Ibid., sec. 17.

²⁶³ Ibid.

injured party and the provision of a bank bond, stop the allegedly infringing practice, seize related products, and preserve all related evidence.²⁶⁴ If the allegedly injured party does not file a lawsuit within 8 days, the injunctive relief expires automatically, allowing for claims of compensatory damages by the accused party.²⁶⁵

4.5 Conclusion

The Jordanian legal system evolved throughout the 20th century from the Ottoman and Civil Law legal traditions. The IP system has been tangential to the Jordanian legislative landscape; and while patents, trademarks, and copyright were acknowledged as distinct areas of jurisprudence in the Civil Code, the small role they played in practice reflected their generally minor economic roles. Nonetheless, Jordan had the necessary legal infrastructure in place, with various levels of courts, including a Supreme Administrative Court dedicated to challenges of the governmental administrative decisions, and legislations that covered the basic areas of IP. Intellectual property areas not covered in specific legislations were dealt with, if needed, under the general principles of civil liability in various other codes such as the Civil and Commerce Codes.

Trademarks were the most legally defined IP area as the courts produced a sizable body of jurisprudence. On the other hand, the lack of research and development within the Jordanian commercial and industrial environment gave patent law little practical relevance. Copyright protection was linked to actual registration at the National Library, automatically placing any foreign-registered material outside the scope of protection in Jordan.

This situation, however, changed with the WTO accession talks and Jordan's growing openness to the global economy. In the span of a half a decade, Jordan transformed its IP legal framework into one that is in compliance with the requirements of accession to the WTO. Areas of protection that had previously existed were augmented and modernized, and areas like integrated circuits, plant breeding, and geographical indications were provided with their own specific legislations with explicit protections.

²⁶⁴ *Ibid.*, sec. 22.

²⁶⁵ *Integrated Circuits Law No. 10.*

5. CHAPTER V: DEVELOPMENT OF THE JORDANIAN IPRS SYSTEM – A TREATY-BASED PERSPECTIVE

5.1 Introduction

The previous chapter discussed the main elements of the Jordanian legal system and the current Jordanian laws governing IP. Now we turn our attention to an examination of the factors that have caused the evolution of those legislations. In particular, we will examine and outline the obligations and requirements of the treaties and international agreements that, collectively, have impacted the development of the various laws affecting IP. Those agreements and treaties form the framework of the current Jordanian IP protection system.

This chapter starts by examining the treatment of IPRs under the TRIPS agreement. This is followed by discussion on the historical roots of the TRIPS agreement, its basic principles, the main criteria it requires to assure equitable and uniform application for its provisions, the types of IPRs it covers and its requirements for each type, and the enforcement of IP under it. The chapter also examines the agreement's administrative and remedial procedures, including the dispute resolution mechanism proposed.

Part of the chapter is dedicated to a general discussion of the JUSFTA, followed by a detailed discussion of its provisions governing IPRs. Throughout, the compatibility of the current Jordanian IP laws with the text of the JUSFTA is discussed.

The chapter concludes with a discussion of the evolution of IPRs beyond those outlined by TRIPS into what is known as the TRIPS-plus standards. The main features of a TRIPS-plus standard are outlined along with several examples.

5.2 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS Agreement, which is annex 1C of the Marrakech Agreement Establishing the World Trade Organization, was signed in Marrakech, Morocco on 15 April 1994.²⁶⁶ The initial concerns about TRIPS focused on its potential effect on access to medicine in developing countries, especially given the direct involvement of pharmaceutical multinationals in the drafting of TRIPS.²⁶⁷ The different repercussions of the globalization of patent protection, the associated extension of monopolization, and the subsequent developments are global issues that continue to colour any discussion of the economic role of the WTO and TRIPS.²⁶⁸

5.3 Basic Principles of the TRIPS Agreement

²⁶⁶ TRIPS is one of 28 agreements that make up the Final Act of the Uruguay Round of Multilateral Trade Negotiations, the negotiations that had begun in Punta del Este in 1986 and culminated in 1994 with the signing of the Final Act and the creation of the WTO.

²⁶⁷ See Peter Drahos, "Expanding Intellectual Property's Empire: The Role of FTAs", April 22, 2010, <http://ictsd.org/i/ip/24737/>.

²⁶⁸ See Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement..* See also, Drahos, "Expanding Intellectual Property's Empire: The Role of FTAs."

The historical roots of the TRIPS Agreement can be traced back to the Paris Convention of 1883,²⁶⁹ which dealt with the protection of industrial property, and the Berne Convention of 1886,²⁷⁰ which dealt with copyright protection. Several countries did not ratify the Berne Convention until much later, with the US in 1989 being one example.²⁷¹ In the area of trademarks, the framework that governed their international treatment was the Madrid System for the International Registration of Marks.²⁷²

Article 72 of the TRIPS agreement effectively mandates those principles to be treated as one bundle that must be taken as a whole.²⁷³ The main elements of those principles are discussed below.

(a) National Treatment

Article 3 of the TRIPS agreement requires member states to “accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of IP.”²⁷⁴ The drafters of the TRIPS agreement alluded to this principle with slightly different wording in article 1, stating, “Members shall accord the treatment provided for in this Agreement to the nationals of other Members.”²⁷⁵

Article 3 is intended to mitigate the possibility that the legislations of a member state are not yet in full compliance with the TRIPS standards, which would make the requirements of article 1 inapplicable. Such inapplicability continues pending the state’s compliance with article 3’s assurances of a “minimum” standard of

²⁶⁹ “Paris Convention for the Protection of Industrial Property”, April 23, 2010, http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html, March 20, 1883. Last amended September 28, 1979.

²⁷⁰ “Berne Convention for the Protection of Literary and Artistic Works”, April 23, 2010, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. September 9, 1886. Last amended September 28, 1979.

²⁷¹ Orrin G Hatch, “Better Late Than Never: Implementation of the 1886 Berne Convention,” *Cornell International Law Journal* 22 (1989): 171.

²⁷² Established in 1891 functions under the Madrid Agreement (1891), and the Madrid Protocol (1989). The International Bureau of WIPO located in Geneva, Switzerland administers it.

²⁷³ “Agreement on Trade Related Aspects of Intellectual Property Rights”, 1994, art. 72. “Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.”

²⁷⁴ See *Ibid.*, art. 3.

1. Each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of IP, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

²⁷⁵ See *Ibid.*, art. 1.

equal treatment based on whatever levels of IPRs protections exist at the time. The principle ensures that equal treatment is in place from the date of accession without the customary one-year amnesty period granted to the applicability of other provisions.²⁷⁶

Nevertheless, the application of this principle is restricted by some exceptions applied through treaties approved by the TRIPS agreement; namely, the Paris Convention for the Protection of Industrial Property, the Treaty on Intellectual Property in Respect of Integrated Circuits, the Berne Convention for the Protection of Literary and Artistic Works, and the Treaty of Rome.²⁷⁷

(b) Most-Favoured-Nation Treatment

Article 4 of the TRIPS agreement mandates that a member state must immediately and unconditionally confer on citizens of other member states any advantage, favour, privilege or immunity granted to any other member state.²⁷⁸ The goal is to assure that varying levels of IPRs protection would not exist within and between individual member states.

Certain exceptions, derived or accorded under certain international agreements, are applicable to this principle as well, affecting advantages, favours, privileges, or immunities accorded by a member state.²⁷⁹

(c) Minimum and Maximum Levels of Protection

Article 1 of the TRIPS agreement mandates a minimum level of intellectual rights protection equal to that provided by its provisions, thus creating a “floor” for acceptable levels of protection for any of its members.²⁸⁰ The requirement to

²⁷⁶ See *Ibid.*, art. 65.

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

²⁷⁷ See *Ibid.*, arts. 1 and 3.

²⁷⁸ See *Ibid.*, art. 4.

²⁷⁹ *Ibid.* Exempted from this obligation are any advantage, favor, privilege or immunity accorded by a Member:

- (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of IP;
- (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
- (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
- (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

²⁸⁰ *Ibid.*, art. 1.

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the

meet those minimum standards is the main driver behind the modification of national IPRs legislations. At the same time, while the language of article 1 suggests preference for even stricter and higher levels of IPRs than the required minimums, it is clear that members are not obligated to seek or implement such levels.

Therefore, from a compliance point of view, the obligatory minimum and maximum levels of protection under the TRIPS agreement are one and the same. Unlike the one-size-fits-all approach applied under the circumstances of the WTO accession talks, this allows the member states, primarily those with developing economies, the benefit of tailored approaches based on an actual cost-benefit analysis when considering any extra IPRs protection.²⁸¹

(d) Effective Dates

Article 65 of the TRIPS agreement discusses effective dates and outlines the transitional arrangements for the application of the TRIPS provisions. Member states must apply the provisions “before the expiry of a general period of one year following the date of entry into force of the WTO agreement”.²⁸² Thus, the agreement grouped the countries into three areas, with each group having a legal standard commensurate with its economic status and its level of development (i.e., developed, developing, or least developed). The TRIPS agreement provided further consideration for countries moving from centralized to free market economies.²⁸³

Those transitional arrangements, which were the biggest concessions accorded by the developed countries to the developing and least developed ones, represent one of the major negotiating successes for both parties. They allowed the developing countries more time to meet the IPRs standards under the agreement. Accordingly, “grace periods” were created, throughout which the terms of the agreement are suspended, except for the national treatment and the most favoured nation principles.²⁸⁴

Under the first grace period (outlined in article 65(1) of the TRIPS agreement), member states, in general, have up to one year from the date of entry into the WTO agreement to apply its provisions.²⁸⁵ The WTO agreement came into force on January 1, 1995, at which time member states were expected to be in full compliance with TRIPS provisions no later than January 1, 1996.²⁸⁶ Developing countries, on the other hand, were permitted to delay the application of TRIPS provisions for a period of five years, also commencing from January 1, 1995, and

appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

²⁸¹ See *Ibid.*, art. 72.

²⁸² *Ibid.*, art. 65(1).

²⁸³ *Ibid.*, art. 65(3).

²⁸⁴ See L. Peter Farakas, “Trade-Related Aspects of Intellectual Property,” in *The World Trade Organization: Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation* (American Bar Association, 1996).

²⁸⁵ “TRIPS” art. 65(1).

²⁸⁶ El-Said and El-Said, “TRIPS-Plus Implications for Access to Medicines in Developing Countries.”

set to expire on January 1, 2000.²⁸⁷ The same grace period was granted to countries transitioning from a centrally-planned economy to a market-based economy, undertaking structural reform of their IP system, and facing special problems in the preparation and implementation of IP laws.²⁸⁸

Under article 65(4) of the TRIPS agreement, developing countries are provided with the option of delaying the application of the provisions on product patents of section 5, part II, of the TRIPS agreement for an additional period of five years, if product patents were not protected in their territory on the general date of application of the agreement for the member state.²⁸⁹ The most common candidates for this exception were patents covering pharmaceuticals and chemicals, and developing countries had to fulfil certain administrative requirements for patent filing and were subject to certain marketing concessions in their territory.²⁹⁰

Article 65(5) provides that any country availing itself of a transitional period under paragraphs 1, 2, 3 or 4 has an obligation to ensure that any changes in its laws and regulations during that period do not result in a lesser degree of consistency with the provisions of the TRIPS agreement, than the degree of consistency when they first entered the agreement. This can be described as “a standstill clause” because it requires that IP protection may not deteriorate beyond the levels present.²⁹¹

Since Jordan was not a member of the WTO prior to January 1, 1995, it did not benefit from the grace provisions under the TRIPS agreement; accordingly, it had to adjust its legal and legislative framework governing IPRs prior to joining the WTO. Therefore, all current Jordanian IP laws, which were covered in chapter 2, had to be *a priori* compliant with the requirements of the TRIPS agreement.

5.4 Intellectual Property Coverage Under the TRIPS Agreement

The TRIPS agreement provided protection for eight types of IP in addition to emphasizing the continued validity of several previous international treaties. Below is a brief description of the eight types. This summary is not meant to be exhaustive, but simply to provide a road map to the various areas of protection under the agreement.

(a) Copyright and Author’s Rights

This area of IP is discussed in articles 4 through 19 of section II of the TRIPS agreement, which also emphasizes the need for member states to abide by articles 1 through 21 of the 1971 Berne Convention.²⁹² This seems to be the TRIPS agreement’s attempt to create a common denominator and a starting point for its

²⁸⁷ “TRIPS”, art. 65(2).

²⁸⁸ *Ibid.*, art. 65(3).

²⁸⁹ Product patents refer to the chemical structure defining a chemical compound, or composition, which is the product, consumed by consumers, whereas process patents are directed at protecting the means or the method of obtaining an end result.

²⁹⁰ “TRIPS”, art. 70(9).

²⁹¹ Farakas, “Trade-Related Aspects of Intellectual Property.”

²⁹² “TRIPS,” sec. II, art. 4–19.

treatment of the subject.²⁹³ The protection period for copyright and author's rights is set to no less than 50 years from the end of the calendar year of authorized publication.²⁹⁴ The term of protection granted for broadcasts was set to at least 20 years from the end of the calendar year in which the broadcast took place.

An important distinction between the TRIPS agreement and the Berne Convention is the introduction of copyright protection for computer programs and databases, two types of work that emerged after the 1971 update of the Berne Convention.²⁹⁵ Under the TRIPS agreement, both types were granted international protection, which they had not previously enjoyed. The consideration of computer programs and the associated code as literary works did not create an obvious implementation problem. As for databases, which are selections or arrangements of existing works, more specificity was needed to clarify that the protection granted to the database does not affect the copyright protections, or lack thereof, of the works arranged or selected in the database. To be accorded protection, therefore, a database should provide added value by bringing the selection or the arrangement together in a way that "constitutes [an] intellectual creation",²⁹⁶ (i.e., the originality of the structure and comprehensiveness of the selection or arrangement were accorded protection but not the data or material itself).

Additionally, the TRIPS agreement creates rental rights for at least two types of works: computer programs and cinematographic works.²⁹⁷ For the latter, such an obligation arises only if there is widespread copying of the cinematographic works that is "materially impairing the exclusive right of reproduction" of the right holder.²⁹⁸ The rental right for computer programs, on the other hand, does not apply if the programs are not the subjects of the rental. From the perspective of developed countries, the language of article 11 is a minimum standard that most of them have surpassed in their national legislations by creating broader rental rights (e.g., the European Union's Council Directive 92/100/EEC).²⁹⁹

²⁹³ "TRIPS", art. 9.

²⁹⁴ *Ibid.*, art. 12.

²⁹⁵ *Ibid.*, art. 10.

²⁹⁶ *Ibid.*, art. 10(2). reads:

Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

²⁹⁷ *Ibid.*, art. 11. reads:

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

²⁹⁸ *Ibid.*, art. 11.

²⁹⁹ The Council of the European Communities, *Council Directive 92/100/EEC*, 1992., on rental right and lending right and on certain rights related to copyright in the field of intellectual property, amended by The Council of the European Communities, *Council Directive 2001/29/EC*, n.d.

(b) Trademarks

The TRIPS agreement's treatment of trademarks also encompasses service marks, and it uses the terms 'well-known trademarks' and 'collective trademarks', which are also used in the current Jordanian trademark law. The protection period for such marks was set to a minimum of seven years,³⁰⁰ and the TRIPS agreement embraced the notion of the trademark as a contractual object.³⁰¹ While copyright protections under the TRIPS agreement built on the Berne Convention, the sections related to trademarks relied on the Paris Convention of 1967 as their foundation.

Unlike the Paris Convention, the TRIPS agreement did define what makes a mark a protectable subject matter;³⁰² in article 15(1), it lists two requirements for a trademark to meet the standard for registration: a sign or combination of signs (names, letters, numerals, figurative elements and/or combination of colours) and distinctiveness that can be acquired through use of the goods or services.

Article 16 of the TRIPS agreement outlines the rights conferred through the registration of a trademark.³⁰³ Under those rights, the right holder is given exclusive right to *exclude* others from using the mark if that usage involves 1) the use of similar or identical signs, 2) in the course of trade, 3) for goods identical or similar to those used with the registered sign, and 4) that will likely result in confusion in the mind of the consumer.³⁰⁴ This very broad definition raises more questions than it answers; for example, what is meant by "similar," and under what standard is such a concept of similarity to be judged, with the understanding

³⁰⁰ "TRIPS", art. 18.

³⁰¹ *Ibid.*, art. 21.

³⁰² *Ibid.*, art. 15(1), reads:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

³⁰³ *Ibid.*, art. 16., reads:

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.
2. "Paris Convention for the Protection of Industrial Property", art. 6bis. shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.
3. Article 6bis of the Paris Convention shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

³⁰⁴ "TRIPS" art. 16.

that the boundaries of such a definition will determine if the right holder's exclusionary rights can be exercised? Further, there is considerable confusion as to the meaning of "likelihood of confusion" and whether it should be defined from the perspective of the government employee, the consumer, or some other criterion.

It is also not clear whether the concept of confusion, as intended by that language, also encompasses the notion of dilution of the mark or whether it is simply restricted to confusion as to the mark's origin. Since joining the WTO, the Jordanian trademark jurisprudence has yet to settle these issues, and it remains to be seen how it will interpret the language discussed above.

Two issues that arise in the international use of trademarks, involving mark termination and cross-border exploitation of foreign marks, were also covered under the TRIPS agreement. Article 19 mandates a minimum term of three years before a registered trademark can be cancelled for non-use, and even such cancellation can be challenged if the right holder shows a good reason for the non-use.³⁰⁵

The unhindered exploitation of foreign trademarks in the global market was ensured by article 20 of the TRIPS agreement, which abolished statutory requirements to associate the foreign trademark with local trademarks or limit its use to a special form or manner before it can be marketed locally.³⁰⁶ However, the TRIPS agreement still allowed for such restrictions if they were made in a contractual form when licensing or assigning the trademark.³⁰⁷ That unhindered exploitation was further complemented with article 21, which restricted compulsory licensing of trademarks. Marks, therefore, were considered a transferable commodity that can be contractually arranged independent of the business with which they are associated.

(c) Geographical Indications

Articles 22 through 24 of the TRIPS agreement covered the rights arising from the association of a product with a certain geographical area in one of the member states.³⁰⁸ The protections and exceptions provided under the TRIPS agreement are reflected in the Jordanian law protecting geographical indications (which did not exist prior to WTO membership).³⁰⁹

The TRIPS agreement provides a minimum standard for the protection of geographic indications, which it defines as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."³¹⁰ The basic standard of protection is presented in a negative form, requesting that member states prevent "the use of any means in the designation or presentation of a good that indicates or suggests

³⁰⁵ Ibid. art. 19.

³⁰⁶ Ibid. art. 20.

³⁰⁷ Ibid.

³⁰⁸ Ibid. art. 22-24.

³⁰⁹ *Geographical Indications Law No.8.*

³¹⁰ "TRIPS", art. 22.

that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good”, as well as “any use which constitutes an act of unfair competition within the meaning of the Paris Convention (1967).”³¹¹ The reference to unfair competition under the Paris Convention effectively extends the notions of confusion, false allegations and the misleading of the public to goods whose use of a geographical indicator that, while “literally true as to a territory, region or locality in which goods originate, falsely represents to the public that the goods originate in another territory.”³¹²

Article 23 is devoted exclusively to geographical indications for wines and spirits, indicating the significance of IP for that industry.³¹³ The article grants protection to each indication in the case of homonymous geographical indications for wines and establishes a multilateral system of notification and registration of geographical indications for wines eligible for protection in participating member states.³¹⁴ Member states are requested to enter into negotiations aimed at increasing the protection of individual geographic indications under article 23, while they are prohibited from diminishing their protection of geographical indications that existed immediately prior to joining the WTO.³¹⁵ In other words, if a member state’s standard of protection is less than that required by the TRIPS agreement provisions, it must be raised to meet the TRIPS standards, but if its standard already exceeded the TRIPS agreement protections before joining the WTO, that standard must not regress to a lower one.

There is still, however, some question as to the value of providing protection for geographical indications. Economic benefits for geographical indications have been suggested, such as the enhancement of geographical reputation, increased publicity for the localities, and more effective competition through enhanced capability to sell directly to final demand.³¹⁶ Other evidence, however, suggests geographical indications have adverse effects on competition and market entry and that their overall economic benefits are suspect at best.³¹⁷ Several competition law cases from the European Union, for example, found that geographical indications were used to create barriers to market entry, control total supply through the imposition of production quotas, and impose price controls through various anti-competitive measures.³¹⁸

(d) Industrial Designs

The terms and provisions of the Jordanian law protecting industrial designs reflect the provisions of articles 25 and 26 of the TRIPS agreement, which cover this specific type of IP.³¹⁹ Thus, the Jordanian law also reflects the TRIPS agreement’s approach to industrial designs as having a dual IP right nature. First,

³¹¹ Ibid., art. 22(2)(a)-(b).

³¹² Ibid., art. 22(4).

³¹³ Ibid. art. 23.

³¹⁴ Ibid. art. 23.

³¹⁵ Ibid. art. 23.

³¹⁶ See W. Moran, “Rural Space as Intellectual Property,” *Political Geography* 12, no. 3 (1993): 263–277.

³¹⁷ See Felix Addor and Alexandra Grazioli, “Geographical Indications beyond Wines and Spirits,” *Journal of World Intellectual Property* 5, no. 6 (2002): 865-897_

³¹⁸ Meir Perez Pugatch, *The Intellectual Property Debate*, Edward Elgar, 2006

³¹⁹ *Designs & Industrial Models Law No. 14*, 2000.

there is the utilitarian aspect of the industrial design, which is protected under the notions of industrial design law, and second, there is the aesthetic aspect, which the TRIPS agreement explicitly places under copyright protection.³²⁰

Protection is provided for “independently created industrial designs that are *new* or *original*”; thus, the patent concept of novelty is used. Such novelty is determined if the new designs “significantly differ from known designs or combinations of known designs”, thus introducing the patent concept of non-obviousness.³²¹ The concepts of copyright law demanding “independent creation” and “originality” are also part of the analysis to determine the eligibility for protection.³²² As to the duration of protection, the length granted to industrial designs seems more in line with the shorter periods granted to patents than the much longer durations granted to copyrighted material.³²³

(e) Patentable Subject Matter

The Paris Convention, which is the pre-TRIPS international convention on patents, suffered from a problem similar to the Berne Convention’s regarding trademarks: it did not provide patentability requirements or a definition of what constitutes a patentable invention. The lack of a specific definition beyond simply meeting the granting criteria allows for flexibility but at the same time results in a very broad range of potential subject matter for inventions. The TRIPS agreement addressed this issue in article 27, which provides both patentability requirements (newness/novelty, an inventive step, and industrial applicability)³²⁴ and a description of those inventions that can be excluded from patentability by member states.³²⁵

³²⁰ “TRIPS”, art. 25(2)., states:

Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. *Members shall be free to meet this obligation through industrial design law or through copyright law.* [emphasis added]

³²¹ *Ibid.*, art. 25(1).

³²² See Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs* (Kluwer Law International, 2006).

³²³ “TRIPS”, art. 26(3). states: The duration of protection available shall amount to at least 10 years.

³²⁴ *Ibid.*, art. 27(1). states in part:

Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.

The article proceeds to add in a footnote, in acknowledgment of the terminology used in the United States patent system, that “the terms “inventive step” and “capable of industrial application” may be deemed by a Member to be synonymous with the terms “non-obvious” and “useful” respectively.”

³²⁵ *Ibid.*, arts. 2 and 3. state:

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by

The newness/novelty requirement is intended to ensure that the information pertaining to the invention is not already in the public domain.³²⁶ The requirement of inventiveness or non-obviousness is aimed at assuring that the invention makes a contribution to the field of knowledge, which is to be judged by someone trained in the art.³²⁷ The industrial applicability, or usefulness, requirement should eliminate one-hit wonders, (i.e., inventions that cannot be duplicated or replicated at an industrial scale).³²⁸ Of equal importance is the requirement that patent rights should be available for any invention, which effectively expanded the field of patentability and removed patentability barriers that existed primarily in developing countries (e.g., the distinction between process and product patents, which led to the exclusion from patentability of inventions in fields like pharmaceuticals).³²⁹

The TRIPS agreement acknowledges exclusions to patentability for inventions that disturb the *ordre public* and morality.³³⁰ However, the fact that this optional exception comes after the demand that “patents shall be available for any inventions”³³¹ indicates that it is not automatic and that a case-by-case review of each is warranted.

The rights conferred upon a patent holder can vary based on whether the type of patent granted is a product or a process patent.³³² The right holder’s full disclosure of the patent to the public is the requirement for complete disclosure of the invention in a manner “sufficiently clear and complete for the invention to be carried out by a person skilled in the art, and may require the applicant to indicate the best mode for carrying out the invention known to the inventor”, in return for the patent right.³³³ For a product patent, the right holder can prevent others from making, using, offering for sale, selling, or importing for these purposes that product.³³⁴ For a process patent, the right holder can prevent unauthorized parties from using, offering for sale, selling, or importing for these purposes the product obtained directly by that process. Those conferred rights also have some exceptions that can be applied by member states, provided that “such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”³³⁵

any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

³²⁶ J.A. Ordovery, “A Patent System for Both Diffusion and Exclusion,” *The Journal of Economic Perspectives* 5, no. 1 (1991): 43–60; S. Scotchmer and J. Green, “Novelty and Disclosure in Patent Law,” *The RAND Journal of Economics* (1990): 131–146.

³²⁷ Scotchmer and Green, “Novelty and Disclosure in Patent Law.”

³²⁸ *Ibid.*

³²⁹ Ordovery, “A Patent System for Both Diffusion and Exclusion”; Scotchmer and Green, “Novelty and Disclosure in Patent Law.”

³³⁰ “TRIPS” art. 27(2).

³³¹ *Ibid.*, art. 27(1)

³³² *Ibid.* art. 28

³³³ *Ibid.* art. 29

³³⁴ *Ibid.* art. 28(1)(a)

³³⁵ *Ibid.* art. 30

The Jordanian law allows for a research and development exception, which falls under compulsory licensing (defined by TRIPS as the “use without authorization of the right holder”), an area that developed countries must have been keen to place under tight regulation.³³⁶ The main elements used by TRIPS to regulate compulsory licensing are as follows:

1. Case-by-case consideration
2. “Prior efforts” requirement to obtain authorization from the right holder
3. Limited scope and duration
4. Non-exclusiveness and non-assignability of the issued license
5. “Domestic market” requirement
6. Automatic termination upon the change of circumstances causing the licensing
7. Fair and equitable compensation to right holder
8. Judicial review of the licensing decision, as well as the amount of compensation offered in return, is permitted

Exceptions to some of the requirements were allowed in the case of a domestic emergency, public non-commercial use, and the need to correct anti-competitive practices.

The TRIPS agreement guarantees the right holder a judicial review if the patent was revoked or forfeited³³⁷ and set a minimum patent term of 20 years from the date of filing.³³⁸ In the case of infringements of process patents, the TRIPS agreement shifts the burden of proof to the alleged infringer by requiring the infringer to prove, if the two products are identical, that the process used was different from the patented one. Thus, TRIPS makes the initial assumption that the identical product was produced using the patented process, unless the alleged infringer proves otherwise.³³⁹

(f) Topographies and Integrated Circuits

The TRIPS agreement references the protections presented in the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC).³⁴⁰ However, the IPIC’s incorporation by reference into the TRIPS was subject to some modifications, which included the following changes:

³³⁶ Ibid.; *Patent Law No.32*. art. 31

³³⁷ “TRIPS” art. 32

³³⁸ Ibid. art. 33

³³⁹ Ibid. art. 34

³⁴⁰ “Treaty on Intellectual Property in Respect of Integrated Circuits,” 1989. Also known as the Washington Treaty - adopted by the conference held in Washington, D.C., in 1989. The Treaty is open to member states of the World Intellectual Property Organization (WIPO) or the United Nations and to intergovernmental organizations meeting certain criteria.

1. The term of protection was set for at least 10 years (rather than eight years under IPIC) from the date of filing an application, or of the first commercial exploitation, but Members may provide a term of protection of 15 years from the creation of the layout design;³⁴¹
2. The right-holder's exclusive rights are extended to articles incorporating integrated circuits in which a protected layout-design is incorporated, insofar as it continues to contain an unlawfully reproduced layout-design without the prior authorization of the right holder;³⁴²
3. The circumstances in which layout-designs may be used without the consent of right-holders is more restricted subject to the same conditions set forth earlier for patents. That restriction was also reflected in the Jordanian Integrated Circuits Law No. 10 (2000)³⁴³;
4. Certain acts, when committed unknowingly, would not constitute infringement.³⁴⁴

(g) Protection of Undisclosed Information

TRIPS characterized trade secrets as information considered valuable as a result of its non-disclosure.³⁴⁵ The context for providing such protection was within the provision of trade secrets to governmental agencies during the course of product licensing.

TRIPS incorporated the Paris Convention's treatment of unfair competition³⁴⁶ and added criteria to determine whether information would qualify for protection, including:³⁴⁷

³⁴¹ See "TRIPS", art. 38

³⁴² Ibid. art. 36 outlines the scope of protection and states:

"Subject to the provisions of paragraph 1 of Article 37, Members shall consider unlawful the following acts if performed without the authorization of the right holder: importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design."

³⁴³ Ibid. art. 37(2)

³⁴⁴ Ibid. art. 37(1) states:

"Notwithstanding Article 36, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, that person may perform any of the acts with respect to the stock on hand or ordered before such time, but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated license in respect of such a layout-design."

³⁴⁵ Ibid. art. 39

³⁴⁶ Ibid. art. 39(1) states:

"In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3."

1. The information is a secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
2. The information has commercial value because it is secret; and
3. The information has been subject to reasonable measures under the circumstances, by the person lawfully in control of the information, to keep it secret.

Article 39(3) focuses on the non-disclosure requirement for protected information exclusively from the perspective of pharmaceutical and agricultural chemical products.³⁴⁸ The drafting of article 39(3) is a direct result of the lobbying by the major pharmaceutical and agricultural corporations to secure more precise language for the protection of their trade secrets,³⁴⁹ which they must share with governmental agencies in the course of regulatory or other government-related dealings.³⁵⁰ The Jordanian statute of Unfair Competition and Trade Secrets Law No. 15 (2000) picked up on those issues and mandated that governmental agencies requesting confidential information for the purpose of approving pharmaceutical or agricultural products must:³⁵¹

1. Agree to protect the trade secret from use by others for up to 5 years from the date the approval of the pharmaceutical or agricultural product is granted, and
2. Not divulge the information unless necessary for protecting the public and, if necessary, prevent others from commercially exploiting the trade secret.

Thus, member states are mandated to protect undisclosed information provided to them in the course of regular governmental work.

(h) Control of Anti-Competitive Practices in Contractual Licenses

The TRIPS agreement outlines an approach to the control of anti-competitive practices in IP licenses.³⁵² This is supported in article 7, which states that the “protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology.”³⁵³

³⁴⁷ Ibid. art. 39(2)

³⁴⁸ Ibid. art. 39(3).

³⁴⁹ See Matthews, Duncan, *Globalising Intellectual Property Rights: The TRIPS Agreement* (Routledge, 2002).

³⁵⁰ “TRIPS”, art. 39(3) states:

“Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.”

³⁵¹ *Unfair Competition and Trade Secrets Law No. 15.*, art. 8

³⁵² “TRIPS”, art. 40

³⁵³ Ibid. art. 7.

Similarly, article 8(1) authorizes member states to “adopt measures necessary...to promote the public interest in sectors of vital importance to their socio-economic and technological development.” Article 8(1)’s broad language is tempered by the requirement that such measures be “consistent with the provisions” of the TRIPS agreement.³⁵⁴

While TRIPS recognizes the general right to “conclude licensing agreements” as part of the patent grant,³⁵⁵ it nonetheless moves to limit certain uncompetitive practices that might arise under licensing and would “have adverse effects on trade and may impede the transfer and dissemination of technology”.³⁵⁶ The explicit right of member states to legislate against such practices is explicitly mentioned, and each country is further allowed to explicitly legislate certain practices that constitute “in particular cases an abuse of IPRs having an adverse effect on competition in the relevant market.”³⁵⁷

Article 40(2) lists three examples of licensing practices that member states may move to limit:³⁵⁸

1. Exclusive grant-back conditions,
2. Conditions preventing challenge to validity, and
3. Coercive package licensing.

The Jordanian Unfair Competition and Trade Secrets Law No. 15 (2000) explicitly prohibits all three.³⁵⁹ Those examples seem to have been the result of a compromise, as the drafting history had a much longer and more detailed list of practices that might be subject to regulation.³⁶⁰ The collective language on this issue seems to be more of a policy statement without actual substantive impact, leaving the trans-national dispute resolution mechanisms of the WTO to settle any ambiguous points and practices. The remaining provisions of article 40 deal with such a mechanism.

The Doha Declaration of 2001 presented a significant development regarding the clarification of the ambiguities surrounding the implications of the TRIPS agreement on developing countries, particularly the concerns about possible restrictions on access to affordable medicines in developing countries.³⁶¹ The Declaration affirmed that “the TRIPS Agreement does not and should not prevent

³⁵⁴ Ibid. art. 8(2)

³⁵⁵ Ibid. art. 28(2).

³⁵⁶ Ibid. art. 40(1).

³⁵⁷ The “relevant market” in the realm of intellectual property could mean a physically defined market, or one that is marked by non-physical boundaries. Examples of the later include the Technology Markets, where saleable goods are the ownership and/or licensing of intellectual property, and Innovation Markets, where nothing is sold or bought, but preparations are made to sell innovation at a later time. The TRIPS agreement’s lack of a specific definition has spawned controversy.

³⁵⁸ “TRIPS”, art. 40(2)

³⁵⁹ *Unfair Competition and Trade Secrets Law No. 15.*, art. 9

³⁶⁰ See Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* (Aspen Publishers, 2001).

³⁶¹ “Doha Declaration on the TRIPS Agreement and Public Health”, 2001.

Members from taking measures to protect public health.”³⁶² It emphasized, with certain conditions, the right of member states to grant compulsory licenses. The declaration also granted the member states the freedom to determine the grounds upon which these licenses can be granted.³⁶³

Article 31 of TRIPS sets forth a number of conditions for granting a compulsory license, including a case-by-case review of applications and the payment of equitable remuneration to the patent holder.³⁶⁴ The Declaration allowed, however, in the case of national emergency or other circumstances of extreme emergency, the waiver of certain requirements, such as the need for prior negotiations to obtain a voluntary license from the patent holder, a need that was already provided for under article 31 of TRIPS.³⁶⁵ Parallel importing and the principle of exhaustion can be important tools enabling access to affordable medicines that are sold at different prices in different markets, because there can be substantial differences in cost for a pharmaceutical product in different markets.³⁶⁶ Article 6 of the TRIPS Agreement explicitly states that practices related to parallel importation cannot be challenged under the WTO dispute settlement system. The Doha Declaration reaffirmed that member states are free to establish its own regime for such exhaustion without challenge. The Doha Declaration also adopted decisions clarifying the obligations of developing member governments with respect to issues including agriculture, subsidies, textiles and clothing; technical barriers to trade; trade-related investment measures; and rules of origin.³⁶⁷

These were important developments for Jordan, because by the time the Doha declaration was announced, Jordan was already a member state of the WTO. Its pharmaceutical sector, which is the most developed and vibrant in the Middle East and North Africa, particularly stood to gain from the easing of restrictions on the exhaustion principle.³⁶⁸ However, around the same time, Jordan was about to conclude a separate Free Trade Agreement with the United States, which imposed further restrictions on compulsory licensing. The Jordan–European Union Free Trade Agreement had similar restrictions as well.

³⁶² Ibid.

³⁶³ “Doha Declaration on the TRIPS Agreement and Public Health,” 2001., para. 5/b and 5/c.

³⁶⁴ “TRIPS” art. 31.

³⁶⁵ “Doha Declaration on the TRIPS Agreement and Public Health.”

³⁶⁶ The principle of exhaustion states that once patent holders, or any party authorized by them, have sold a patented product, they cannot prohibit the subsequent resale of that product since their rights in respect of that market have been exhausted by the act of selling the product.

³⁶⁷ The Doha Declaration on the TRIPS Agreement and Public Health further extended the transition period for least developed countries until January 1, 2016 with respect to the TRIPS obligations concerning pharmaceutical product patent protection and the protection of undisclosed pharmaceutical test data against unfair commercial use (Sections 5 and 7 of Part II of the TRIPS Agreement). In 2002, the WTO’s Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) agreed to grant a waiver to least-developing countries concerning the obligation to provide exclusive marketing rights for pharmaceutical products (TRIPS article 70(9)) until January 1, 2016. This waiver is subject to approval by the WTO’s General Council. There is no waiver of the obligation to adopt “mail box” provisions (TRIPS article 70(8)) for pharmaceutical product patent applications.

³⁶⁸ Abdel-Aziz Ahmad Sharabati, Shawqi Naji Jawad, and Nick Bontis, “Intellectual Capital and Business Performance in the Pharmaceutical Sector of Jordan,” *Management Decision* 48, no. 1 (September 2, 2010): 105–131.

5.5 Enforcement of IPRs Under the TRIPS Agreement

TRIPS provided for a framework for IP, and an implementation mechanism for that framework. The following sections will address the various general commitments, as well as the civil and administrative procedures and remedies, set forth in the TRIPS agreement.

5.6 General Obligations under TRIPS

The TRIPS agreement outlines the general commitments that must be provided for to assure that all the procedures within the agreement's framework are equitable and fair and provide for a deterring effect against the infringement of IPRs.³⁶⁹ The member states should ensure that enforcement procedures are available under their laws, so as to permit effective action against infringement of IPRs, and that such procedures are designed so as "to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse."³⁷⁰

How invasive such affirmative requirements can be to national sovereignty is not yet clear.³⁷¹ Meeting the affirmative requirements presents a challenge for many developing countries, which are hoping to reduce their technological gap.³⁷² Some of the approaches proposed include integrating IP laws into the national development goals, the using competition law to curb monopolistic abuse, designing of an IP regime aimed at supporting local innovation, resisting the drive towards stronger international IPRs, and strengthening the national infrastructure for knowledge dissemination and acquisition.³⁷³

Jordan has not been effective in using the right, guaranteed under article 8 of the TRIPS agreement, to adopt certain measures consistent with the TRIPS agreement in order to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development.³⁷⁴ Developed countries have benefited from Jordan's non-affirmative approach to IP laws by placing their own favourable interpretation on the terms of the TRIPS agreement, allowing them to focus their assistance quite narrowly.³⁷⁵ Such assistance is requested by TRIPS to provide technical and financial cooperation in favour of developing countries in implementing the provisions of the agreement.³⁷⁶

Jordan would do well to give closer attention to the Dispute Settlement mechanism under TRIPS in order to understand its rights and obligations and tools offered to it under the WTO agreement.³⁷⁷ But perhaps one should not be harsh on Jordan on this issue, as current evidence suggests that is a problem common to most developing countries as the majority of cases before the WTO dispute panels come from a handful of developed countries who are therefore

³⁶⁹ "TRIPS", art. 41

³⁷⁰ Ibid. art. 41(1)

³⁷¹ Samahon, Tuan, "TRIPS copyright dispute settlement after the transition and moratorium: Nonviolation and situation complaints against developing countries," *Law and Policy in International Business*, Spring 2000

³⁷² TRIPS: Background, Principles and General Provisions, in Carlos María Correa and Abdulqawi Yusuf, *Intellectual Property and International Trade* (Kluwer Law International, 2008).

³⁷³ Jerome H. Reichman, "From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement," *New York University Journal of International Law and Politics* 29 (January 1, 1996): 11–93.

³⁷⁴ Sboul, "Interview"; Haddad, "Interview"; Laila Jarrar, "Interview", July 26, 2011.

³⁷⁵ Enad Uqlah, "Interview", August 4, 2011.

³⁷⁶ "TRIPS" art. 67.

³⁷⁷ Halaiqah, "Interview"; Madanat, "Interview."

presumably controlling the interpretation of the terms of the WTO agreement.³⁷⁸ Another dimension to the interpretation of the WTO agreement comes from some members granting their national courts the right to interpret WTO law, as is the case with the United States, which might create “an international law with an American accent.”³⁷⁹

A better understanding of the WTO Dispute Settlement Understanding (DSU) is a key factor in helping developing countries impact the implementation of the TRIPS agreement.³⁸⁰ The DSU offers developing countries a new venue for solving some of their difficulties in trade issues, including IPRs.³⁸¹ Furthermore, because the DSU brings disputes under a multilateral mechanism, thus assuring that developing countries will not be threatened by unilateral actions by developed countries, it should provide a valuable venue for disputing unfavourable conditions or even for testing ambiguous legal positions, especially since precedents set through the DSU can be as binding as the TRIPS agreement itself.³⁸²

RBTs provide for alternative dispute mechanisms other than the DSU, thus impacting its global effectiveness.³⁸³ They also introduce higher levels of IP protections (TRIPS-plus), thus countering the harmonizing role of the TRIPS agreement.³⁸⁴ Thus, the intended cohesive impact of the WTO agreement on international trade law is undermined by regional and bilateral agreements that splinter the interpretation of international law.³⁸⁵ Dispute settlement mechanisms outside the DSU create the potential for forum shopping, forum shifting, and the creation of “separate islands” of legal rules, interpretation, and institutions that further contribute to the splintering of international trade law, leading to the weakening of the global dispute settlement forum envisioned by the DSU and thus of the WTO itself.³⁸⁶ This also creates a ‘back door’ to challenge a verdict by the DSU (if that point is even reached), whereby the losing party could choose to go to the bilateral dispute settlement forum to reargue its case; there is no double jeopardy doctrine here.³⁸⁷

(a) Civil and Administrative Procedures and Remedies under TRIPS

TRIPS requires member states to make available to right holders civil judicial procedures concerning the enforcement of any IP right covered by the TRIPS

³⁷⁸ The United States and the European Union seem to be the heaviest users of the system. The United States also pursues parallel tracks to achieve the same end result of guarding the intellectual property rights of international corporations. Among such tracks was the creation of the special 301 program, which enables the United States Trade Representatives (USTR) to make a watch-list for countries that are not protecting American intellectual property rights, which might result in trade sanctions against those countries. Additionally, the United States is pursuing international agreements that should be binding and contain enforcement provisions.

³⁷⁹ Jeffrey Dunoff, “Free Trade or Fair? The Softwood Lumber Dispute and Beyond,” *Alberta Law Review* 45 (2007): 319–356.

³⁸⁰ David Gantz, “Dispute Settlement Under The NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties,” *American University International Law Review* 14 (1999): 1025.

³⁸¹ Carvalho, *The TRIPS Regime of Trademarks and Designs*.

³⁸² *Ibid.*

³⁸³ Both the JUSFTA and the JEUA have such clauses.

³⁸⁴ Mohammed EL-SAID, “From TRIPS-minus to TRIPS to TRIPS-plus: Implications of IPRs for the Arab World.”

³⁸⁵ Kenneth Shadlen, “Globalisation, Power and Integration: The Political Economy of Regional and Bilateral Trade Agreements in the Americas,” *Journal of Development Studies* 44, no. 1 (January 2008): 1–20.

³⁸⁶ Drahos, “Expanding Intellectual Property’s Empire: The Role of FTAs.”

³⁸⁷ *Ibid.*

agreement.³⁸⁸ These procedural rights guarantee an international minimum standard for nationals of other member states within the meaning of article 1.3 of the TRIPS agreement.³⁸⁹

The TRIPS agreement also reemphasizes the need for the protection of confidential information obtained in the course of evidence gathering and requests that courts have the authority to order the reproduction of evidence, given that there must be in place measures to assure the protection of confidential information.³⁹⁰

The right of national courts to issue injunctions is granted in cases where such an injunction is necessary to “desist from an infringement,” such as for the prevention of the entry of imported goods that involve the infringement of an IP right.³⁹¹ But such authority is not required if the protected subject matter is ordered by a person who does not know that “dealing in such subject matter would entail the infringement of an IP right.”³⁹² Courts must also have the authority to dispose of infringing goods without compensation and to order “that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements, but proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.”³⁹³

The judicial authorities in a member state will have the authority to order the knowing infringer to compensate the right holder for the injury incurred as a result of the infringement of the right holder’s IPRs.³⁹⁴ Additionally, the courts must have the authority to order the infringer to pay the right holder’s expenses, which may include appropriate attorney’s fees.³⁹⁵ In appropriate cases, members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.”³⁹⁶

The TRIPS agreement, however, does not discuss the basis for estimating damages, which is a key missing detail. That issue was addressed in the JUSFTA, which stated that damages will be calculated on the retail value of the legitimate product that is infringed rather than the street value of the pirated or

³⁸⁸ “TRIPS” art. 42.

³⁸⁹ John T. Masterson, *International Trademarks and Copyrights* (ABA Web Store, 2004).

³⁹⁰ “TRIPS”, art. 43

³⁹¹ *Ibid.* art. 44

³⁹² *Ibid.*

³⁹³ *Ibid.* art. 46

³⁹⁴ *Ibid.* art. 45.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*, art. 45(2)

counterfeit products,³⁹⁷ resulting in the maximization of the value of the infringed goods and the damages incurred.

Indemnification for wrongfully enjoined or restrained parties is provided for through compensation for the injury suffered, including appropriate attorney's fees.³⁹⁸ The civil and administrative procedures and the remedies presented in TRIPS are reflected in the Jordanian IP laws.

(b) Dispute Settlement Understanding Under the TRIPS Agreement

The Dispute Settlement Understanding (DSU) under TRIPS is not limited to issues related to IP disputes; rather, it governs the whole multilateral trading system that is governed by the WTO. With clearly defined rules and timetables for completing a case, the WTO's procedure presents a binding, legitimate and objective conflict-resolution mechanism, complete with an appeal process. The whole process is not dissimilar to the legal rules and procedures in a domestic judicial process, and while a precedent system is not written into the DSU itself, the appeal panels have been careful to consider past decisions. It is therefore important to understand such a mechanism as it impacts the interpretation and application of the TRIPS provisions. The de facto precedents set by the DSU are key to clarifying ambiguous procedures, concepts, duties and rights that TRIPS did not expounded upon with sufficient detail and specificity.

³⁹⁷ "Jordan-United States Free Trade Agreement", 2000., art. 4(24): "Injury to the right holder shall be based upon the value of the infringed-upon item, according to the suggested retail price of the legitimate product, or other equivalent measures established by the right holder for valuing authorized goods."

³⁹⁸ "TRIPS", art. 48

Table (5.1): Approximate time for a dispute settlement procedure under TRIPS³⁹⁹

60 days	Consultations, mediation, etc.
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeal Report
30 days	Dispute Settlement Body adopts appeals report
Total = 1 year and 2-3 months	(with appeal)

The Dispute Settlement Body (DSB), which is composed of representatives of member states, administers the DSU's rules and procedures.⁴⁰⁰ The DSB establishes panels, adopts reports by those panels and by the appellate bodies, maintains surveillance of implementation of rulings and recommendations, and authorizes suspension of concessions and other obligations under the covered agreements. Only member states that are signatories to a specific plurilateral trade agreement can present a complaint before the DSB, which makes its decisions by consensus (i.e. no member state shall officially object to the proposed decision).

5.7 Jordan-United States Free Trade Agreement (JUSFTA)

The Free Trade Agreement between Jordan and the United States was signed on October 24, 2000, and entered into force on December 17, 2001. It marks a milestone in the economic relationship and history of bilateral trade agreements for both countries, because it was only the second such bilateral agreement between the United States and any other country (the first being with Israel). Previously, the United States had entered into the North American Free Trade Agreement (NAFTA), which is technically a multilateral agreement, as it included three countries: Canada, Mexico and the United States. The JUSFTA was designed to achieve significant and extensive liberalization across a wide spectrum of trade issues. Its major provisions include:

1. Tariffs: The JUSFTA eliminates duties and commercial barriers to bilateral trade in goods and services originating in the United States and Jordan.

³⁹⁹ Source http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited April 25, 2010).

The periods are approximate and the countries can settle their dispute themselves at any stage.

⁴⁰⁰ "Dispute Settlement Understanding" (World Trade Organization, 1994), art. 2

2. IPRs: The JUSFTA includes the most up-to-date international standards for copyright, patent, and trademark-related commitments.
3. Electronic Commerce: The JUSFTA promotes a liberalized trade environment for electronic commerce (e-commerce).
4. Trade-Related Environment: The JUSFTA includes provisions to implement environmental protection laws.
5. Labour Provisions: The JUSFTA includes provisions to protect the worker's rights.
6. Services: The JUSFTA provides liberalization in certain sectors of trade.
7. Consultation and Dispute Settlements: The JUSFTA provides for a dispute settlement panel that will issue legal interpretations of the JUSFTA after consultation of both countries.

In order to limit access to the benefits of the agreement, Rules of Origin were specifically applied to the JUSFTA in order to determine from what country a product is imported, especially when two or more countries contribute to its production. Since the United States already has a Bilateral Investment Treaty (BIT) with Jordan, the JUSFTA does not include an investment chapter.

Since the signing of this treaty, the United States has made similar agreements with other countries in the Middle East and North Africa (MENA) region, such as Bahrain and Morocco, as well as countries outside the MENA regions like Singapore, Australia and Vietnam. The JUSFTA's inclusion of terms on labour and the environment became standard language for all future FTAs signed by the United States. However, despite its ground breaking nature, there since has been a growing concern that the JUSFTA carries imbalances in the area of IPRs, resulting from the Jordanian policy makers' lack of familiarity with that subject and a lack of internal consultation when Jordan acceded to the WTO and negotiated the JUSFTA.⁴⁰¹

Further, the JUSFTA's inclusion of international standards higher than those under TRIPS ushered Jordan into an era of what is now known as the TRIPS-plus standard; that is, a standard of protection for IPRs higher than that demanded or contemplated by the TRIPS agreement itself.⁴⁰² The consequences and implications of the TRIPS-plus standard are discussed in more detail later in this chapter. Additionally, the JUSFTA grants evidentiary presumption for the owners of copyright and related rights for the purpose of ownership of the copyright-related rights, in both civil and criminal cases.⁴⁰³ That presumption is not contemplated under the TRIPS

⁴⁰¹ "The Challenge of Political Reform: Jordanian Democratisation and Regional Instability" (International Crisis Group, 2003)., page 7.

⁴⁰² Mohammed EL-SAID, "From TRIPS-minus to TRIPS to TRIPS-plus: Implications of IPRs for the Arab World."

⁴⁰³ "JUSFTA", art. 4(27) states:

"In civil cases involving copyright or related rights, each Party shall provide that the natural person or legal entity whose name is indicated as the author, producer, performer or publisher of the work, performance or phonogram in the usual manner shall, in the absence of proof to the contrary, be presumed to be the designated right holder in such work, performance or phonogram. It shall be presumed, in the absence of proof to the contrary, that the copyright r related right subsists in such subject matter. Such presumptions shall pertain in criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright or related right."

agreement, which nonetheless grants member states considerable latitude in designing their evidentiary systems and the presumptions that flow from them.

(a) Overview of the JUSFTA

The JUSFTA requires that all tariff barriers shall be lifted for the majority of goods traded between Jordan and the US within 10 years of the JUSFTA's entry into force.⁴⁰⁴ Strict rules of origin apply to the goods benefiting from that tariff elimination. The JUSFTA provides for an elaborate and detailed schedule to assign a large number of goods into varying categories, with duties removed for each category according to a separate timeline.⁴⁰⁵

The JUSFTA emphasizes the inappropriateness of encouraging "trade by relaxing domestic environmental laws."⁴⁰⁶ As such, both countries are asked to strive to ensure that they do not "derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with" one another. Interestingly enough, however, there is no demand for higher environmental standards for both parties similar to those demanded for IPRs. Instead the JUSFTA recognizes the right of each party to "establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws."⁴⁰⁷ Actions of either party are in compliance if they reflect a "reasonable exercise of such discretion," as self-regulation and monitoring were considered satisfactory.⁴⁰⁸

Customs administration was also addressed by the JUSFTA in very broad terms, along with the rules regarding the eligibility for the preferential tariff treatment provided under the JUSFTA, including the list included in Annex 2.2 of the JUSFTA.⁴⁰⁹ But the main dispute for customs and borders issues was related to IPRs and article 4(26), which stipulates that "[e]ach Party shall provide, at least in cases of copyright piracy or trademark counterfeiting, that its authorities may initiate criminal actions and border measure actions *ex officio*, without the need for a formal complaint by a private party or right holder."⁴¹⁰ The current Jordanian Customs Law only grants the authority to prevent the entry of counterfeit goods, leaving the initiation of legal action to the right holder. This issue continues to threaten that Jordan might be included on the list of US Trade Representatives (USTR) not fulfilling their trade obligations. Because the USTR list is linked to the level of aid given by the United States government to the respective countries, it is a major concern for developing countries like Jordan.

The dispute resolution mechanism under the JUSFTA is separate and distinct from the WTO's DSU; while the JUSFTA procedure encompasses the same steps used under the DSU (i.e. consultation followed by panel adjudication), they have little else in common. The JUSFTA envisions the creation of a three-member

⁴⁰⁴ JUSFTA, art. 2

⁴⁰⁵ Ibid. Annex 2.

⁴⁰⁶ JUSFTA, art. 5

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ JUSFTA, art. 14

⁴¹⁰ JUSFTA, art. 4(26)

Joint Committee to “supervise the proper implementation of the JUSFTA and to review the trade relationship between” the United States and Jordan.⁴¹¹

Section 4, which covers the issues related to IP in the JUSFTA, is its longest and most detailed section. The section’s goal of establishing a high standard of IP right protection is evident from its first sentence, which declares that the protection levels provided under the JUSFTA are a “minimum.” It addresses several areas ranging from copyright, patents, trademarks and geographical indications to enforcement of IP and transition periods. It also sets standards for IPRs protection that exceed the limits demanded by the TRIPS, thus setting in motion a TRIPS-plus standard. The subsections below will address some of these elements.

(i) Initial Provisions

In addition to the IPRs protections, the JUSFTA also calls on both parties to adopt the following provisions from other international IPRs treaties:⁴¹²

1. Articles 1 through 6 of the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999) adopted by the Assembly of the Paris Union for the protection of industrial property and the General Assembly of WIPO, which deals with the definition of well-known marks;
2. Articles 1 through 22 of the International Convention of the Protection of New Varieties of Plants (UPOV convention, 1991), which provides recognition of the rights of plant breeders;
3. Articles 1 through 14 of the WIPO Copyright Treaty (WCT, 1996),⁴¹³ with the exception of Articles 1(4) and 6(2) of the treaty, provided that this exception should not prejudice the obligations to the WCT treaty itself;
4. Articles 1 through 23 of the WIPO Performance and Phonograms Treaty (WPPT, 1996),⁴¹⁴ with the exception of Articles 5, 8(2), 12(2) and 15 of the WPPT treaty, without prejudice to each party’s rights and duties under the WPPT, the Berne Convention and TRIPS.

Additionally, each party is required to use its best efforts to ratify the Patent Cooperation Treaty (PCT, 1984) and the Madrid Protocol Concerning the International Registration of Marks (1989). Jordan is not yet a member of either.

⁴¹¹ Ibid. art. 15.

⁴¹² JUSFTA, art. 4(1)

⁴¹³ “WIPO Copyright Treaty”, 1996. Jordan acceded to this treaty on 27/1/2004 and it came into force on 27/4/2004.

⁴¹⁴ “WIPO Performances and Phonograms Treaty”, 1996. Jordan acceded to this treaty on 24/2/2004 and it came into force on 24/5/2004.

(ii) Trademarks and Geographical Indications

The JUSFTA expands the definition of trademarks by encompassing geographical indications, even though under the TRIPS trademarks and geographical indications are treated separately. Furthermore, the JUSFTA introduced several new obligations in this area, including⁴¹⁵:

1. The commitment to join the Protocol Relating to the Madrid Agreement Concerning International Registration of Marks.
2. The requirement to give effect to articles 1 through 6 of the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999) adopted by the Assembly of the Paris Union for the protection of industrial property and the General Assembly of WIPO.
3. The requirement not to require recording of trademark licenses to establish the validity of the license or to assert any rights in a trademark.
4. The requirement to raise the maximum criminal fine to JD 6000, which was included in paragraph 3 of the Memorandum of Understanding between Jordan and the United States.⁴¹⁶

In response to requirements (b) through (d), the Jordanian government presented several amendments to its Trademark Law, which were approved by the Parliament in 2008 to bring the law into compliance.

(iii) Copyright and Related Rights

The JUSFTA added significant requirements to this area, including:

1. Giving performers and producers of phonograms the right to prohibit unauthorized broadcasting of their works
2. Giving right holders control over allowing or denying the importation of the protected work(s), whether the work is pirated or an authorized version.⁴¹⁷
3. Asking the signatories to combat technology that is intended to circumvent the effective technological measures that are used by performers or producers in connection with the exercise of their

⁴¹⁵ “JUSFTA.”

⁴¹⁶ “Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area”, 2000, www.jordanusfta.com/documents/memo_property.pdf.

⁴¹⁷ JUSFTA, art. 4(11): “Each Party shall provide to authors and their successors in interest, to performers and to producers of phonograms the exclusive right to authorize or prohibit the importation into each Party’s territory of copies of works and phonograms, even where such copies were made with the authorization of the author, performer or producer of the phonogram or a successor in interest.”

rights in accordance with article 11 of the WCT⁴¹⁸ and article 18 of the WPPT.^{419,420}

4. Asking governmental agencies to only use authorized computer software. Both parties must actively regulate the acquisition and management of software for government use.⁴²¹
5. Requiring “that statutory maximum fines are sufficiently high to deter future acts of infringement with a policy of removing the monetary incentive to the infringer.”⁴²²

The Jordanian Copyright law was amended first in 1999 to comply with the TRIPS agreement requirements and then again in 2001, 2003, and 2005 to bring it into closer compliance with the JUSFTA requirements. The criminal fines were increased to a maximum of JD 6000,⁴²³ and provisions were added to protect performers.⁴²⁴ Further, technologies used to circumvent anti-coping measures were prohibited.⁴²⁵

(iv) Patents

A new Patent Law was enacted in 1999 to comply with the TRIPS agreement obligations. In 2001, new patent regulations were introduced to help facilitate the process of filing for a patent. While the 1999 law is in compliance with the TRIPS agreement obligations, the JUSFTA introduced several new requirements in the filing of patents and regulated products, including⁴²⁶:

1. Making available an extension of the patent term to compensate the patent holder for unreasonable curtailment of the patent term as a result of the marketing approval process.⁴²⁷ Jordan has yet to meet this requirement.
2. Committing to joining the Patent Cooperation Treaty (PCT). Jordan has yet to meet this requirement.

⁴¹⁸ “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

⁴¹⁹ “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.” The Jordanian Prime Minister issued an executive order to that effect.

⁴²⁰ JUSFTA, art. 4(13)

⁴²¹ JUSFTA, art. 4(15)

⁴²² JUSFTA, art. 4(25). Jordan increased the criminal fines to JD 6000.

⁴²³ *Copyright Law No.22.*, art. 51.

⁴²⁴ *Ibid.*, arts. 53 and 56(d).

⁴²⁵ *Ibid.*, art. (55)

⁴²⁶ “JUSFTA” art. 4.

⁴²⁷ JUSFTA, art. 4(23)

3. Clarifying that the exclusion from patent protection of “mathematical methods” in article 4(b) of Jordan’s Patent Law does not include such “methods” as business methods or computer-related inventions.⁴²⁸ The Jordan Patent Office is now accepting business methods patent applications in light of this commitment.

5.8 The Jordanian-European Association Agreement (JEUAA)

The European Union signed an Association Agreement with Jordan on November 24, 1997, which was ratified by the Jordanian Parliament in September 1999 and came into effect on May 1, 2002, after being ratified by European Union countries. In November 2010, after its accession to the World Trade Organization and the signing of the Free Trade Agreement with the United States, which highlighted the country’s commitment towards trade liberalization, Jordan was accorded advanced status with the EU. The JEUAA gave Jordan preferential treatment in terms of the entrance of goods to the European Union.

The political and security issues within the JEUAA focused on the creation of a common ground for future cooperation, including areas of human rights, personal and public liberties, and rule of law. It emphasized dialogue and the movement towards peace, security, democracy, human rights and regional development as an engine for change.

(a) IPRs under the Jordan-EU Association Agreement

While the IP component of the JEUAA is not as sweeping as that of TRIPS or article 4 of the JUSFTA, it does nonetheless require Jordan to fulfil the following IPRs requirements:⁴²⁹

1. The Berne Convention for the protection of literary and artistic works (Paris Act, 1971);
2. The Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961);
3. The Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks (Geneva Act, 1977, amended 1979);
4. The Madrid Agreement concerning the International Registration of Marks (Stockholm Act, 1967, amended 1979);
5. The Protocol relating to the Madrid Agreement concerning the International Registration of Marks (Madrid, 1989);
6. The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the purposes of Patent Procedure (1977, modified 1980);

⁴²⁸ “Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area.”, paragraph 5.

⁴²⁹ JUSFTA, annex VII.

7. The International Convention for Protection of New Varieties of Plants (UPOV, Geneva Act, 1991).

Furthermore, the JEUAA requires Jordan to join the Patent Cooperation Treaty within seven years of the ratification of the association agreement.⁴³⁰ Within the JEUAA itself, article 56 and Annex VII are the provisions related to IP.

Article 56 states:

1. Pursuant to the provisions of this Article and of Annex VII, the Parties shall grant and ensure adequate and effective protection of intellectual, industrial and commercial property rights in accordance with the highest international standards, including effective means of enforcing such rights.
2. The implementation of this Article and of Annex VII shall be regularly reviewed by the Parties. If problems in the area of intellectual, industrial and commercial property affecting trading conditions were to occur, urgent consultation shall be undertaken, at the request of either Party, with a view to reaching mutually satisfactory solutions.

The term “highest international standards” effectively requires Jordan to adopt the highest standards available regardless of their suitability to its needs or circumstances. This could also have a direct impact on Jordan’s ability to exercise its sovereignty in deciding which international treaties it will or will not join, as it is debatable whether this language obligates Jordan to ratify new treaties (e.g., ACTA) as soon as they are introduced.

Annex VII of the JEUAA stipulates the need to accede to the seven treaties listed earlier, as well as the Patent Cooperation Treaty. It also requires Jordan to provide “adequate and effective protection of patents for chemicals and pharmaceuticals in line with Articles 27 to 34 of the WTO Agreement on Trade Related Aspects of IPRs, by the end of the third year from the entry into force of this Agreement or from its accession to the WTO, whichever is the earliest.”

The Annex VII language is broad enough to include language that might bind Jordan to the provisions of “other multilateral conventions” in the field of intellectual, industrial and commercial property. That broad language is in line

⁴³⁰ The “Patent Cooperation Treaty”, 1970. (PCT), is an international patent law treaty, concluded in 1970. It provides a unified procedure for filing patent applications in each of its Contracting States. A PCT patent application is called an international application or PCT application.

The PCT operates by allowing a single filing of an international application with a Receiving Office (RO) in one language. A search is then performed by an authorized International Searching Authority (ISA), accompanied with an International Search Report (ISR) and a written opinion regarding the patentability of the subject of the application. International Preliminary Examining Authority (IPEA) can do an optional preliminary examination for certain states, called Elected or Designated Offices. The international search report can help the applicant to decide whether it would be worth to go ahead and seek national protection, what is called 'entering the national phase' and if so, in how many countries. The PCT does not lead to the grant of an "international patent", which does not exist. The PCT member states, i.e. the Contracting States, constitute the International Patent Cooperation Union.

with the JEUAAs earlier reference to the term “highest international standards” of article 56. It assures that the JEUAAs language does not need to be constantly amended to reflect changes in IPRs standards. By virtue of the current Annex VII language, The Association Council may decide that the need to accede to IPRs treaties and provide effective protection of patents for chemicals and pharmaceuticals shall apply to other multilateral conventions in the IPRs field.⁴³¹

5.9 Jordan and the Effect of TRIPS-plus on IPRs Protection

As Jordan moved away from an IP system that was non-compliant with international standards, it became engaged at two levels: first, through its involvement in multilateral treaties such as the WTO and the associated TRIPS agreement, and second, through its involvement in the bilateral framework, as demonstrated by the JUSFTA and the JEUAAs.

(a) TRIPS-plus

There is no legislative history evidence to suggest that Jordan adopted TRIPS with an adequate understanding of TRIPS’ suitability to the local social and economic environment.⁴³² That conclusion is supported by the very short time it took to negotiate, sign and ratify the JUSFTA (less than one year) as well as by the lack of public debate and input.⁴³³

The end result was an underestimation of the burdens and requirements of enforcement, and the latter ballooned with the shift to TRIPS-plus standards under the bilateral treaties framework.⁴³⁴ Thus, Jordan faced actual implementation and enforcement issues accentuated by the move from a TRIPS-minus standard to TRIPS and then to a TRIPS-plus standard in a speedy transition.⁴³⁵

While there isn’t a standard definition of what constitutes a TRIPS-plus system, it is generally agreed that it encompasses any obligations above and beyond the requirements set forth in the TRIPS agreement itself.⁴³⁶ The components of a TRIPS-plus system, therefore, while common in demanding standards higher than TRIPS, differ in what exactly constitutes those higher standards. Under the JUSFTA, for example, Jordan committed to providing protection to plant patents, even though TRIPS allows member states to exclude those types of patents. Additionally, Jordan is required under the JEUAAs to implement shorter transition periods than those demanded by TRIPS.⁴³⁷ Both the JUSFTA and JEUAAs demanded that Jordan join specific international agreements covering specific

⁴³¹ The Association Council, established under Title VIII of the JEUAAs, shall consist of the members of the Council of the European Union and members of the Commission of the European Communities, on the one hand, and members of the Government of Jordan, on the other. See “Jordan-European Union Association Agreement”, 1999., Title VIII Institutional, General and Final Provisions, article 90(1).

⁴³² Madanat, “Interview”; Halaiqah, “Interview.”

⁴³³ Abu Rahmeh, “Interview”; Sboul, “Interview.”

⁴³⁴ Sboul, “Interview”; Uqlah, “Interview.”

⁴³⁵ Sboul, “Interview”; Uqlah, “Interview.”

⁴³⁶ El-Said and El-Said, “TRIPS-Plus Implications for Access to Medicines in Developing Countries.”

⁴³⁷ “JEUAAs”, Annex VII, para. 3, states “Jordan undertakes to provide for adequate and effective protection of patents for chemicals and pharmaceuticals in line with Articles 27 to 34 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, by the end of the third year from the entry into force of this Agreement or from its accession to the WTO, whichever is the earliest.”

areas of IP, such as the WIPO's Internet Treaties,⁴³⁸ the International Convention for the Protection of New Varieties of Plants (UPOV Convention), the Patent Cooperation Treaty (PCT), and the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks.

As additional examples of the added enforcement requirements, the JUSFTA stipulated that the level of IPRs penalties be adjusted, which obliged Jordan to raise the criminal penalty for copyright and trademark counterfeiting and piracy to JD 6,000.⁴³⁹ It also demanded that the customs authorities initiate criminal charges in the case of copyright piracy and trademark counterfeiting, without the need for either a formal complaint by the right holder or a court order.⁴⁴⁰ Additionally, the JUSFTA obliges Jordan to treat geographical indications as trademarks for the purposes of protection, registration and implementation, even though they are distinctly treated as separate from trademarks under TRIPS.⁴⁴¹

Stronger protections for famous and well-known trademarks were expanded to include goods not similar to but identified by the famous and well-known trademarks.⁴⁴² Stronger protection also applied to new uses for old chemicals, such that protection for "new chemical entities" shall also include protection for new uses for old chemical entities for a period of three years.⁴⁴³ The meaning of "new uses" is not clear; it is not explicitly stated whether it refers to the use of the chemical entity alone or in combination with others, nor whether "use" refers only to a means to produce something or whether the new use of the material can be the desired end in itself. The Supreme Administrative Court had held in one of its earliest patent decisions that the use of a known material (the Arabic word for 'material' also encompasses 'chemical entities') to produce a known product was not considered patentable subject matter, unless the production involved an inventive step.⁴⁴⁴

(b) TRIPS-plus and forum shifting

The JUSFTA and the JEUA A introduced dispute resolution mechanisms separate from those proposed by the WTO.⁴⁴⁵ Article 17 of the JUSFTA, which is devoted to dispute settlement, presents an elaborate scheme for handling disputes, from consultation to referral to a dispute settlement panel. Under the JEUA A

⁴³⁸ These include the "WCT." and the "Jeuaa" art. 97.

⁴³⁹ "Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area.", art. 3 states "with respect to article 4(25) of the Agreement, Jordan shall raise its criminal penalties to JDs 6000, so as to meet its obligation to ensure that statutory maximum fines are sufficiently high to deter future acts of infringement."

⁴⁴⁰ JUSFTA, art. 4(26) states that "each party shall provide, at least in cases of copyright or trademark counterfeiting, that its authorities may initiate criminal sanctions amid border measure actions *ex officio*, without the need for a formal complaint by a private party or right holder."

⁴⁴¹ JUSFTA, art. 4(6)

⁴⁴² JUSFTA, art. 4(7)

⁴⁴³ JUSFTA, art. 22

⁴⁴⁴ *Opinion No. 3/1954* (n.d.). The court's holding is limited to the use of a known material to produce a known commodity, and does not touch on other scenarios such as the use of the known material in a new way either to produce something new, or to create a new use for the material itself.

⁴⁴⁵ Such as the International Center for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce, and the UN Commission on International Trade Law (UNCITRAL).

each party is given the option to refer “to the Association Council any dispute relating to the application or interpretation of this Agreement.” The arbitrators’ decisions, which are taken by a majority vote, are binding on all parties, and steps must be taken by Jordan and the European Union to implement them.⁴⁴⁶

Both of the previously discussed dispute resolution mechanisms bypass the WTO’s dispute resolution mechanism, and that arguably weakens the multilateral dispute settlement framework of the WTO.⁴⁴⁷ This fragmentation and splintering of international trade law is a worrisome aspect. Developing countries, with their limited legal expertise, stand to lose the most from a bilateral dispute resolution mechanism that carries its own rules and regulations outside the scope of the WTO.

(c) Ever Higher Standards

The term “highest international standards”, as used in the JEUA, carries with it an intrinsic and continued threat of ever-evolving requirements that can make IP standards compliance a moving target, especially since the JEUA does not define what is meant by “highest international standards”. Most likely, this ambiguity will affect not only IPRs but also related areas such as FDI and foreign aid because the inflow of aid can be potentially linked to meeting such “highest international standards”.

The inclusion of the ‘highest international standard’ language further restricts the negotiation options of developing countries because it creates a base in trade negotiations with other countries, thus ensuring that the ‘highest international standard’ perpetuates itself.⁴⁴⁸ This has major consequences not only to the country’s own ability to determine the levels of IPRs that it deems necessary and suitable, but also potentially to other countries with whom a bilateral trade agreement is contemplated. The high standards of protection can lead neighbouring countries to compete in applying those high levels of IP protections to enhance their perceived chances in attracting foreign investments.⁴⁴⁹

It is not uncommon, therefore, for group of countries to urge a neighbouring country not to join an FTA that imposes higher IPRs because it might hinder regional cooperation among them. The Gulf Cooperation Council (GCC), for example, called on Bahrain to denounce or drop its FTA with the United States

⁴⁴⁶ “JEUA”, art. 97(4)

⁴⁴⁷ Drahos, “Expanding Intellectual Property’s Empire: The Role of FTAs.”

⁴⁴⁸ For example, the JUSFTA was the first trade agreement to incorporate provisions related to labor and environment, making it a template for future free trade agreements. See Mohammed EL-SAID, “From TRIPS-minus to TRIPS to TRIPS-plus: Implications of IPRs for the Arab World.”

⁴⁴⁹ I say perceived because economic gains from bilateral agreements are not certain at best, and overestimated at worst. A simulation study in a World Bank Report estimates that a broad global trade agreement, *a la* WTO, could increase world income by US\$ 263 billion by 2015, of which US\$ 109 billion would go to poor countries. If developing countries all had bilateral agreements with big, rich trading partners (the European Union, the United States, Canada and Japan), global income would rise by much less: US\$ 112 billion. The rich will scoop all this and more: US\$ 133 billion. Although a handful of developing countries, such as Brazil and China, would gain a bit, poor nations as a group would be worse off than they are today. World Bank, *Global Economic Prospects 2005: Trade, Regionalism, and Development* (World Bank, 2004), page 149.

because of its negative effect on future cooperation within the GCC countries.⁴⁵⁰ As such, higher international standards within an FTA with a willing country in a particular region could turn out to be a force multiplier for the whole region, because higher standards applied by a neighbouring country will set the standard for all. An FTA thus becomes an economic and political tool – both a building block and a forceful negotiating and pressuring tool.⁴⁵¹ Thus, the real effect of an FTA’s higher IP standards has yet to be fully recognized and realized.

The adoption of TRIPS-plus standards and the pursuit of their enforcement, however, is a controversial approach that can backfire if it becomes associated with economic and technological repression and control. In light of the fact that one of the main features of the TRIPS agreement is its relative flexibility in providing opportunities for creative and individualistic interpretation, the damaging effect of the TRIPS-plus standard and its circumvention of the WTO’s DSU mechanism become more contrasted.

Coping mechanisms for developing countries that follow the bilateral trade agreements are severely restricted, as significant legal and international experience is necessary to ensure that the interpretation is in line with the accepted norms. The Jordanian Customs department’s wholesale buying of the United States’ interpretation of the clause related to treatment of IP products at the border is another example of the lack of initiative.⁴⁵²

To reduce the monopolistic tendencies that can be fuelled by higher IPRs, Jordan should also activate its tools to combat economic concentration, including available governmental controls on the prices of commodities and products.⁴⁵³ Current laws allow for such controls if a commodity or product is considered a basic material as per the directions of the MoIT,⁴⁵⁴ or in the case of exceptional circumstances or an emergency,⁴⁵⁵ Such provisions would not be in contravention of either TRIPS or the JUSFTA, as both of them allow for compulsory licensing as a remedy for uncompetitive activities.⁴⁵⁶

5.10 Conclusion

The WTO accession resulted in the updating of IP laws and the introduction of several new ones. An example of those modifications is the provision of IP protection to computer programs and databases that up to that point had not been protected. Jordan also became bound by the WTO’s DSU, thus giving IP disputes the same clout as other trade-related disputes.

⁴⁵⁰ “Bahrain Defends Right to Sign FTA with US,” *Khaleej Times OnLine*, November 29, 2004, http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/business/2004/November/business_November412.xml§ion=business. See also, David Price, “The U.S.—Bahrain Free Trade Agreement and Intellectual Property Protection,” *Journal of World Intellectual Property* 7, no. 6 (2004): 829-850..

⁴⁵¹ A clear example of this is the U.S. suspension of negotiations of an FTA with Egypt in response to Egypt’s decision not to join the United States in a WTO complaint against the EU ban on genetically modified food. Cited by Mohammed EL-SAID, “From TRIPS-minus to TRIPS to TRIPS-plus: Implications of IPRs for the Arab World.”

⁴⁵² Wasfi Tawahiah, “Interview”, August 4, 2011; Enad Uqlah, “Interview”, July 28, 2011.

⁴⁵³ *Competition Law No.49*.

⁴⁵⁴ *Ibid.*, art. 4(a)

⁴⁵⁵ *Ibid.*, art. 4(b)

⁴⁵⁶ “JUSFTA.”, art. 4(20)(a)

The JUSFTA, which was signed shortly after the WTO accession, introduced TRIPS-plus elements into Jordanian IPRs laws. It emphasized the enforcement-end of the IP equation by asking, among other things, for higher financial penalties for violations, stricter compulsory licensing requirements, and easier filing of legal action against violators starting at the borders. The JEUAAs reinforced the TRIPS-plus components of Jordanian IPRs laws by mandating that Jordan be in compliance with the “highest international standards” for IP laws.

Both the JUSFTA and the JEUAAs also introduced bilateral dispute settlement forums separate and distinct from the WTO’s DSU, which undermined the effectiveness of DSU as a global clearinghouse for international IP disputes and splintered the efforts for the development of international law jurisprudence.

Additionally, the dispute settlement mechanisms under the JUSFTA and the JEUAAs are more restrictive in the venues they propose and the appeal options they provide, and, because the mechanism is collaborative and essentially unique to the needs and requirements of each dispute, there is not a clear timeline as to how long a dispute can take to be resolved, unlike the much clearer DSU process. There is also little chance that the body of DSU decisions, which carries some precedential weight under the DSU process, will carry any weight under the bilateral dispute settlement mechanism. This adds a considerable dimension of unpredictability to the dispute resolution process and places an added premium on superior legal and dispute settlement expertise, which usually are lacking for developing countries like Jordan. The DSU process creates a more coherent and standardized interpretation of the TRIPS agreement provisions, which is undermined by the bilateral dispute settlement panels created under the bilateral trade treaties.

The Jordanian government should, endeavour to estimate and clarify the costs associated with higher IP standards. This is an important starting point towards the development of a national IP policy, which must be incorporated into the country’s development goals. For that to happen, the debate on IP must move beyond the cliché that IP is indispensable to spur innovation and instead examine its socio-economic role. Without such understanding, Jordan will not be able to ascertain the proper levels of IP protection that actually are suitable for Jordan, and will continue to be beholden to the one-size-fits all approach espoused under TRIPS and RBTs.

6. CHAPTER VI: THE ADMINISTRATIVE FRAMEWORK FOR THE ENFORCEMENT OF IPRS IN JORDAN

Even though Jordan had an IP legal framework prior to the turn of the century, up to its joining of the WTO, the JUSFTA and the JEUA, the Jordanian IP laws owe all of their major developments to those three treaties. Moreover, even though all the Jordanian IP laws are TRIPS compliant, not all the provisions in the JUSFTA and the JEUA agreements are codified. The overall result was that right holders entering the Jordanian market in the past decade saw rapid changes to the legal structure of IPRs and considerable growth in the perceived role of those rights.

As a result of these developments, the issue of IPRs enforcement gained considerable importance, especially with the enactment of the DSU, which handles disputes among WTO nations, including those dealing with TRIPS. The DSU raised the sceptre of trade and aid sanctions for IPRs violations, but it was not the only tool in the compliance toolbox. The US, for example, initiated through the USTR its own monitoring of IPRs, with potential violators facing reduction of US aid or trade sanctions. Thus, substantive rights and legal codes are not enough; enforcement is also a major issue.

This chapter will discuss the administrative framework that governs the enforcement of the Jordanian IP laws. It will discuss the administrative agencies within the Ministry of Industry and Trade (MoIT), the National Library (NL) and other agencies.

6.1 Overview of Administrative Enforcement of IPRs in Jordan

For a developing country like Jordan, enforcement is a balancing act between two competing concerns. On the one hand, there is the need to show ample and sufficient compliance with obligations and commitments resulting from the international agreements and treaties it had signed. On the other hand, there is the significant challenge of limited resources and ever increasing economic pressures, which makes it difficult to allocate limited financial and economic resources to enforcement. This balancing act is further complicated by the governmental realization that pirated products, especially in the audio-visual field, may represent the only financially feasible way for the majority of the Jordanian population to have access to those works.

Unfortunately, one cannot assume a direct link between the level of expertise in IPRs enforcement and the body of legislation covering IPRs. It is the case for Jordan that there is not a direct link between these two things. The Jordanian public never viewed IPRs seriously until Jordan joined the WTO in 1999 and the laws of IP were overhauled.⁴⁵⁷ Prior to that point, the paucity of the judicial opinions pertaining to IP opinions (with a notable exception in the area of trademarks) reflected a lack of attention to the area of IP and, thus, a lack of experience in developing and enforcing modern laws. That weakness was carried over into the negotiations phase of the WTO, JUSFTA, and JEUA, all of which were signed within the span of a few years.⁴⁵⁸

Many of the enforcement and regulatory agencies that exist today, such as the Food and Drug Administration, did not exist a decade ago, nor did the registrars for the various IPRs, and they

⁴⁵⁷ Mohammad Halaiqah, "Interview", August 9, 2011; Lina Haddad, "Interview", July 31, 2011; Rula Madanat, "Interview", August 9, 2011.

⁴⁵⁸ Madanat, "Interview."

have yet to fully mature into capable regulators.⁴⁵⁹ The same can be said of the court system regarding IPRs, as it has yet to develop a level of sophistication that signals the maturing of the IP legal practice.⁴⁶⁰ Ten years after TRIPS, Jordan does not have a patent litigation practice, and the extent of the legal work done in the IPRs arena is largely limited to filing trademark registrations.⁴⁶¹ This trend is likely to continue, as inventors demonstrate a lack of knowledge of the elements of patent drafting and are largely unwilling to pay for its services, especially as they do not anticipate much economic gain from the patents filed as the patented product/process are generally of poor quality.⁴⁶² The private sector lacks a research and development base to justify the establishment of a patent prosecution legal practice, as the majority of the private sector companies either focus on using imported technology, which is protected by IPRs and therefore cannot be imitated or improved, or simply use outdated technology and see no need to invest in research and development.⁴⁶³

The number of IP cases referred to courts by the Jordanian administrative agencies exceeds those filed by private citizens or companies, which suggests that either the Jordanian citizens do not have enough economic interest in IPRs to justify litigation, or they find the cost-benefit analysis for litigation not favourable.⁴⁶⁴ Keeping a close eye on the involvement of the judicial branch in enforcement is one way of measuring the future significance of IPRs in the Jordanian economy, because judicial involvement is an indicator of how much emphasis the business entity places on IPRs to justify litigation costs. To affirmatively speak of an ascendancy of IPRs for Jordanian businesses one must, among other things, be able to point to a growth of IP litigation both in volume and, more importantly, in sophistication.

On the administrative side, the Jordan Institution for Standards and Metrology (JISM) primarily deals with trademark enforcement, and it does not refer cases to court on its own; rather, it destroys counterfeit goods after confiscation.⁴⁶⁵ A court case will be filed only if the owner of the alleged counterfeit goods goes to court in order to stop the JISM from destroying the goods or to seek restitution. This explains the low number for trademark enforcement in table 6.1, below. It should be noted that the JISM Law⁴⁶⁶ does not explicitly address counterfeit trademarks; rather, the JISM interprets article 30(c) of that law to allow for the destruction of counterfeit goods. Article 30(c) of the JISM law actually addresses the destruction of goods only if they do not meet the JISM standards, and the JISM seems to have adopted a *prima facie* presumption that counterfeit goods fall under the category of goods to be destroyed.⁴⁶⁷

Pharmaceutical enforcement falls to the Jordanian Food and Drug Administration (JFDA), and the number of pharmaceutical enforcement cases in table (6.1) below reflects the cases associated with IP violations.⁴⁶⁸ The majority of the cases are for copyright infringement, which reflects the increased importance authors are giving to asserting their copyright. Whereas the total number of

⁴⁵⁹ Yaseen Khayyat, "Interview", August 7, 2011.

⁴⁶⁰ Zain Alawamleh, "Interview", August 2, 2011; Haddad, "Interview."

⁴⁶¹ Haddad, "Interview"; Alawamleh, "Interview."

⁴⁶² Haddad, "Interview"; Alawamleh, "Interview."

⁴⁶³ Halim Abu Rahmeh, "Interview", August 7, 2011; Hanan Sbouh, "Interview", July 26, 2011.

⁴⁶⁴ Mohammed Jabali, "Interview", August 4, 2011.

⁴⁶⁵ Khayyat, "Interview."

⁴⁶⁶ *Institute of Standards & Metrology Law No. 22, 2000.*

⁴⁶⁷ *Ibid.*, sec. 30(c). "If the product or material is found not to be in compliance with the applicable technical regulation issued by the Institution, the Director General shall issue a written order to seize, dispose of, or re-export the product, or alter its manufacture in such a way as to bring it into compliance with the technical regulation."

⁴⁶⁸ Laila Jarrar, "Interview", July 26, 2011.

cases referred in 2008 by the JFDA was actually 66. The total number of violations since 2004 show a dramatic drop in the number of cases referred by the JFDA since 2008. The main catalyst for that change seems to be the Public Health Law, which criminalized, with up to five and no less than three years imprisonment, the sale, importation or smuggling of counterfeit drugs.⁴⁶⁹

Table (6.1): Number of cases dealing with IPRs enforcement in 2008⁴⁷⁰

Copyright Enforcement	Pharmaceutical Enforcement	Trademark Enforcement	Custom Enforcement ⁴⁷¹	Cases Filed by Private Entities
354	14	5	109	216 ⁴⁷²

⁴⁶⁹ See *Public Health Law No. 47, 2008*, sec. 65.

⁴⁷⁰ Jordanian Judicial Council, *Annual Courts Report - 2008* (Jordanian Judicial Council, 2008).

⁴⁷¹ Jabali, "Interview."

⁴⁷² Because the number of cases filed reflects the total number of cases filed through administrative and private entities, the number of judicial enforcement cases comes from subtracting the number of all cases referred to Jordanian courts by the administrative agencies from the total number of cases filed.

Table (6.2): Number of Cases Referred by JFDA (2004-2008)⁴⁷³

Year	2004	2005	2006	2007	2008
Total No. of Cases	11	75	100	144	66
IP Cases	NA	NA		61	14

In order to discuss the administrative enforcement system, it is important to recognize the numerous different administrative agencies that handle different types of IP. These are as follows:

Patents: Regulated by the Industrial Property Protection Directorate (IPPD), within the MoIT, which is responsible for supervising the registration and classification of trademarks, designs, and layout designs of integrated circuits and patents.

Trademarks: Regulated by the IPPD department, which is in charge of trademark registration; however, the JISM is in charge of the actual implementation of enforcement against counterfeit trademarks.

Copyright: Regulated by the Author's Right Protection Office (ARPO) at the National Library (NL), which is responsible for protecting copyright rights.

Customs: Regulated by the Customs Department, which established a special section to deal with IP issues called the Customs Procedures Section (CPS). The CPS enforces only copyright and trademarks.

Product-specific agencies: In addition to the state agencies and departments listed above, several other agencies play a role in IP enforcement. The Jordanian Food and Drug Administration (JFDA), for example, deals with IPRs related to pharmaceuticals.

6.2 Administrative Enforcement of IPRs within the Ministry of Industry and Trade (MoIT)

The MoIT founding dates back to the 1950s. According to its law,⁴⁷⁴ it is in charge of regulating the industrial activity in Jordan and preparing the programs aimed at improving its competitiveness.⁴⁷⁵ It also takes on the responsibility for the regulation of internal and external trade through monitoring and the preparation of the studies and agreements that serve those purposes.

The scope of the MoIT's significant role in IP administration and enforcement revolves around the IPPD and the JISM. The IPPD is responsible for supervising the registration and classification of trademarks, designs, layout designs of integrated circuits and patents. The JISM works through the border points to inspect and validate goods bearing a specific trademark to assure their authenticity. Nonconforming goods with counterfeit trademarks are confiscated and destroyed.

The IPPD registers trademarks and maintains records of active ones in accordance with the requirements of the Trademark Law, which stipulates that a trademark registrar be established to

⁴⁷³ Jarrar, "Interview."

⁴⁷⁴ *MoIT Law*, 1998.

⁴⁷⁵ *Ibid.*

carry out those duties.⁴⁷⁶ Similarly, the IPPD houses the registration function for patents, designs and industrial models, and layout designs of integrated circuits as mandated by those respective laws.⁴⁷⁷

By virtue of being the registrar for trademarks, patents, designs and industrial models, and integrated circuits, the IPPD is responsible for managing the opposition to trademarks, patents, industrial design and integrated circuits, as well as, handling trademark cancellation requests. Tables 6.3 and 6.4 reflect the limited numbers of patent applications and patents issued, respectively. Table 6.3 shows that the majority of patent applications are international, while national patent applications are a minority. The small number of patents filed and granted raises questions about the feasibility for resource allocation for the development of a patent administration and enforcement system, which would require considerable resources and expertise, especially if it includes the highly technical patent prosecution phase. Currently, it seems that Jordan had opted not to allocate considerable resources to a patent administration and examination system, as it is relying on the WIPO and its technical integration into the network of Western world patent offices for the examination and searches of patents.⁴⁷⁸

For patents filed outside Jordan, a Jordanian patent award is almost automatic, which explains the surge in the number of international patent applications, as Jordan has become an easy and inexpensive patenting venue. But filing and award times can vary, likely due to the dependency on foreign agencies for patent examination, as the Jordanian patent office has only four examiners.⁴⁷⁹ The discrepancy between the number of national and international patent filings, with the latter far outstripping the former, can be the result of the weak local research and development spending.

Table (6.3): National and International Patent Applications⁴⁸⁰

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Nat'l App's	71	52	21	25	42	49	75	59	50	60	43
Int'l App's	127	147	117	157	141	169	428	507	535	446	431

Table (6.4): National and International Patents Granted⁴⁸¹

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Nat'l Patents Granted	12	0	13	8	4	9	10	23	10	11	22
Int'l Patents Granted	59	0	16	39	56	46	50	40	11	40	64
Total Patents Granted	71	0	29	47	60	55	60	63	21	51	86

⁴⁷⁶ See *Trademarks Law No.33*, 1952, sec. 3; *Tradenames Law No. 9*, 2006, sec. 3.

⁴⁷⁷ See *Patent Law No.32*, 1999, sec. 7; *Integrated Circuits Law No. 10*, 2000, sec. 3. *Designs & Industrial Models Law No. 14*, 2000, sec. 3.

⁴⁷⁸ Haddad, "Interview."

⁴⁷⁹ Ibid.

⁴⁸⁰ "Ministry of Industry & Trade Website", n.d., <http://www.mit.gov.jo/Default.aspx?tabid=571>.

⁴⁸¹ Ibid.

Trademarks have the highest number of registration requests and court filings, as shown by table 6.5 below, which shows that the number of filings for trademark registration is much higher than that for patents registration. The majority of the national filings come from foreign companies in Jordan.⁴⁸²

Table 6.6 shows the number of trademarks granted preliminary and final approvals, respectively, and, since the majority of the trademark filings were done by non-Jordanian entities, the same applies to the trademarks awarded. This discrepancy in the number of local versus foreign trademark filed and approved, ten years after accession to the WTO, poses questions as to the success of the trademark law amendments in spurring the growth of Jordanian trademarks.⁴⁸³ Furthermore, there is no clear indication that even the existing local trademarks amount to a critical economic mass, as the level of franchising of Jordanian trade or service marks is extremely low, with only a handful of brands reaching beyond the Jordanian borders. This is further supported by the fact that the major Jordanian exports come from mining industries (potash and phosphate) as well as exporting garments, vegetables and fruits,⁴⁸⁴ without a significant input from the service sector, which usually holds the highest weight in trade and service marks.

Table (6.5): Trademark Applications⁴⁸⁵

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Natl. Apps	3307	2352	2353	2690	3206	3638	4163	4512	4484	3992	1904
Intl. Apps.	3266	2623	2279	2386	3051	3078	3850	4633	4956	3741	4056

Table (6.6): Trademark Preliminary and Final Approvals⁴⁸⁶

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Prelim. Aprvl.	3622	5220	3720	4226	4940	4665	6490	6845	7500	5471	5715
Final Aprvl.	2612	2175	4190	5277	4444	4538	5792	6824	6710	6359	4286

6.3 International vs. National Trademark and Patent Applications

An international patent or trademark application is one that is filed under either the Patent Cooperation Treaty (PCT)⁴⁸⁷ or the Madrid Protocol,⁴⁸⁸ respectively. The Madrid Protocol offers

⁴⁸² A. H Khoury, "Measuring the Immeasurable"-The Effects of Trademark Regimes: A Case Study of Arab Countries," *Journal of Law and Commerce* 26, no. 1/2 (2006): 11.

⁴⁸³ Khoury, "Measuring the Immeasurable"-The Effects of Trademark Regimes."

⁴⁸⁴ This despite the fact that Jordan is one of the poorest countries in the world when it comes to water resources, thus it is effectively exporting water through vegetables and fruits. See, <http://www.irinnews.org/Report.aspx?ReportId=61829> (last visited July 4, 2009)

⁴⁸⁵ "Ministry of Industry & Trade Website."

⁴⁸⁶ Ibid.

⁴⁸⁷ The PCT is an international treaty, administered by the World Intellectual Property Organization (WIPO), between more than 125 Paris Convention countries.

a trademark owner the opportunity to have a trademark protected in several countries by simply filing one application directly with his or her own national or regional trademark office. An international mark so registered is equivalent to an application for a registration of the same mark made directly in each of the countries designated by the applicant. If the trademark office of a designated country does not refuse protection within a specified period, the protection of the mark becomes effective as if that office had registered it.⁴⁸⁹

The PCT, meanwhile, makes it possible to seek simultaneous patent protection by filing a single “international” patent application instead of several separate national or regional patent applications. The granting of a patent license remains under the control of the national or regional patent offices in what is called the “national phase.”

The use of the term “international application” under either a patent or a trademark application therefore effectively means a filing under the PCT or the Madrid Protocol as described above. Jordan, however, is not a member of either the PCT or Madrid Agreement; therefore, the term “international application” in this context refers to applications filed by foreign companies directly with the Jordanian patent or trademark registrars rather than to a PCT or Madrid Protocol filing. A more appropriate and accurate description, therefore, would be “foreign application,” but the use of the term “international application” is consistent with the term used by the Jordanian authorities.

Many local practitioners in Jordan still confuse the foreign applications made directly with the Jordanian patent and trademark registrar with those made under the PCT and Madrid Protocols.⁴⁹⁰ To a certain extent, this misplaced presumption is justified, because both the Jordanian trademark and patent laws have several articles that allow for the process of filing a trademark and a patent application under the PCT and the Madrid Protocol.

Trademark law, for example, defines an international application as one that is filed under the Madrid Protocol and designates articles 42, 43, 44, and 45 to cover such a filing.⁴⁹¹ Article 46 of the trademark law, however, states that those articles shall not come into effect until three months after Jordan’s joining the Madrid Protocol.⁴⁹² Since Jordan has yet to join the Madrid Protocol, none of those articles are yet in force, even though they are incorporated into the text of the law. Local practitioners usually assume that Jordan has already joined the Madrid protocol without checking the validity of that assumption and, as a result, wrongly advise as to the possibility of filing an international trademark application.

The situation under the Jordanian Patent Law is equally confusing. Similar to the trademark law, the patent law defines an international application as one filed under the PCT and has several articles that explain the process for filing such an application.⁴⁹³ It does not have the language that prevents such articles from coming into effect until Jordan joins the PCT (i.e., language similar to article 46 of the trademark law discussed above). This is a glaring omission, and discussions with Jordanian officials indicate that it was an inadvertent omission by the legal team

⁴⁸⁸ The Madrid system for the international registration of marks (the Madrid system) established in 1891 functions under the Madrid Agreement (1891), and the Madrid Protocol (1989). The International Bureau of WIPO located in Geneva, Switzerland administers it.

⁴⁸⁹ <http://www.wipo.int/madrid/en/> (last visited September 3, 2009)

⁴⁹⁰ Alawamleh, “Interview.”

⁴⁹¹ *Trademarks Law No.33*.

⁴⁹² *Ibid.*, sec. 46.

⁴⁹³ *Patent Law No.32*.

that drafted the patent law. The Jordanian law, therefore, allows for the filing of an international patent application under the PCT, even though Jordan is not party to that agreement.

Under the PCT, an application can be filed with the WIPO or the national office, but the Jordanian patent registrar currently refuses to accept such applications. The author recommends that the Jordanian government should remedy this issue soon by introducing an amendment to the patent law that excludes the articles on international patent applications from coming into effect until Jordan joins the PCT. The fact that such a mistake occurred, however, is indicative of the haste with which the legal code on IP was amended to accommodate the requirements of joining the WTO, thus resulting in many of these laws being translated into Arabic from English.⁴⁹⁴

6.4 Administration of Author's Right

The Jordanian copyright law⁴⁹⁵ came on the heels of the Ottoman copyright law, which was in effect until 1992. The copyright law, embraced computer programs and compiled works as protected by author's rights. The copyright law designates the NL as the repository for authors' works seeking registration in Jordan. The NL still plays an important role even though the current law no longer requires that a work be registered with it in order to attain protection,⁴⁹⁶ as the law grants the NL the authority to prevent a work, not previously registered with the NL, from being commercially circulated in Jordan. Similarly, no work can be printed in Jordan until it is registered with the NL.⁴⁹⁷ Therefore, while the foreign work is protected from infringement in Jordan, even if it is not registered with the NL, the NL has veto power over its commercial circulation in Jordan. Similarly, the NL controls the right to publish works in Jordan by asserting its right to approve those works ahead of publication.

Both the NL and the Department of Press and Publications (DPP), can confiscate a publication and remove it from circulation.⁴⁹⁸ Recently, the Department of Press and Publications has also referred to religious authorities for their opinions on the content of certain books, indicating that if the Mufti (the religious authority charged with interpreting religious texts to create religiously acceptable solutions to modern problems) does not approve or condone the content of the books, they will be banned from circulation. This unofficial veto power by the Mufti is not codified in any of the laws governing the work of the DPP or the NL, including the copyright law.⁴⁹⁹

Within the NL, ARPO is charged with the registration of works, as well as the enforcement of the Author's rights against infringement. Its members are vested under the copyright law with law enforcement officer powers, enabling them to carry out inspection and search activities related to the enforcement of author's rights, if there is probable cause to suspect that such rights were violated or infringed.⁵⁰⁰

(a) Software Piracy

Table 6.7 show that software piracy has been steadily declining in Jordan for the past 10 years.

⁴⁹⁴ Alawamleh, "Interview."

⁴⁹⁵ *Copyright Law No.22*, 1992.

⁴⁹⁶ *Ibid.*, sec. 45.

⁴⁹⁷ *Copyright Law No.22*.

⁴⁹⁸ *Press and Publications Law No. 8*, 1998, sec. 35.

⁴⁹⁹ Ranah Al-Amer, "Poet Samhan Sentenced to One Year and His Poetry Collection Referred to the Mufti," *Alghad Daily Newspaper*, June 22, 2009. *Alghad Daily Newspaper*, June 22, 2009

⁵⁰⁰ *Copyright Law No.22*, sec. 36.

Table (6.7): Software Piracy Per Centage⁵⁰¹

Year	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2010
Software Piracy %	87	87	83	80	80	75	71	67	64	65	64	63	61	60	58	57

This author argues that the economic boom witnessed between 2004-2008, encouraged many Jordanian businesses to shed pirated software in exchange for original copies with warranties, technical support and customer service. The economic returns from the increased economic activity from 2004-2008 justified the extra cost of original business software. This theory will be tested by the global economic downturn, which, if the above rationale is correct, may cause the Jordanian businesses to reconsider their software compliance options and result in an upswing in the percentage of business software piracy in Jordan. Additionally, the general attitudes of Jordanian college students, as demonstrated by the questionnaire results in chapter 3, indicate a significant level of apathy towards the piracy issue and the alleged losses of MNCs. The piracy issue is not viewed as a moral or legal problem by a large segment of the Jordanian college students, who are typically the largest users of pirated products, especially software.

(b) Litigation and Author's Rights

The number of cases referred by the NL to the Jordanian courts in the 2000-2008 period is reflected in table 6.8.⁵⁰² Within the NL, the ARPO, which was established in 2000, is in charge of making those referrals to the courts. The numbers show that it was quick to the task, as the number of cases sharply increased from 2000 to 2003; since then, the numbers have slightly fluctuated but have largely stayed within the same general range since 2005. It is not clear why these numbers fluctuate or why they are not increasing, as data are not readily available and often hard to obtain. One reason might be that enforcement by the NL takes into consideration the economic and social aspects of Jordanian society. In other words, while the NL is technically charged with fighting copyright infringement, it is also aware of its limited resources and the particularities of Jordanian society. Therefore, the NL might be striking a balance between fighting piracy and accommodating the needs of citizens to have access to copyrighted material.

Table (6.8): Cases Referred by the National Library 2000-2008⁵⁰³

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008
Cases	6	149	298	384	218	296	285	357	354

⁵⁰¹ BSA, "Business Software Alliance - IDC Study," *Global Software Piracy Study*, April 27, 2010, <http://global.bsa.org/idcglobalstudy2007/>.

⁵⁰² Source: The National Library

⁵⁰³ "National Library", n.d., <http://www.nl.gov.jo/AR/Pages/OnlineServices.aspx>.

The NL has yet to produce any analyses for the piracy situation in Jordan.⁵⁰⁴ This situation is further compounded by the difficulty of obtaining data in Jordan.⁵⁰⁵

Table 6.9 shows the number of IP cases decided by Jordanian courts from 2000 to 2008. The numbers clearly reflect a gap between the cases filed, as demonstrated in part by the numbers in table 6.8, and the courts' ability to resolve the disputes. Generally, though, cases will not be resolved in the same year they were filed. The numbers indicate that the number of cases resolved in 2007 and 2008 exceed the number of cases filed by the NL for the same period, which could reflect increased efficiency on behalf of the courts in handling cases turned over from previous years, as well as the increase in the number of judges appointed during that period.⁵⁰⁶

Table (6.9): Intellectual Property Cases Decided by Jordanian Courts 2000-2008⁵⁰⁷

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008
Cases	10	9	15	31	49	133	172	656	584

Table (6.10): Intellectual Property Cases Per Type of Court⁵⁰⁸

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008
Small Claims Courts	9	8	12	25	33	76	58	264	122
First Instance Courts	1	1	3	6	16	57	114	392	462

Available statistics allow for these aggregate numbers to be further broken down into the number of cases filed with each type of court, as demonstrated by table 6.10.⁵⁰⁹

Under Jordanian Civil Procedure Rules, the splitting of jurisdiction between Small Claims and First Instance courts is made on two grounds.⁵¹⁰ The first is the general rule of monetary threshold, which specifies that general jurisdiction for cases with an estimated value of JD 7000 (\$10,000) or less falls to Small Claims Courts.⁵¹¹ Second, some types of cases are assigned jurisdiction based on case type, regardless of the monetary value.⁵¹² For example, labour disputes are always assigned to Small Claims Courts regardless of their value.⁵¹³ Intellectual

⁵⁰⁴ Ibid.

⁵⁰⁵ Please see the section on obtaining empirical data in chapter 3,

⁵⁰⁶ The total number of working judges in Jordanian courts increased from 630 in 2006 to 676 in 2008, a 7.3% increase (Source: the 2008 Annual Court Report, issued by the Ministry of Justice).

⁵⁰⁷ Ministry of Justice, *Number of Intellectual Property Cases Sorted by Year & Court Type.*, Compiled for the author upon a written request, 2010.

⁵⁰⁸ Ibid.

⁵⁰⁹ Source: Ministry of Justice.

⁵¹⁰ *Civil Procedure Law No. 24, 1998.*

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ Ibid.

property cases are not pre-designated by type; as such, the court’s jurisdiction is primarily based on the monetary threshold.

While the number of Small Claims Court decisions on IP issues steadily increased from 2000 to 2007, it dropped in 2008 by almost 53% from the previous year. This is in contrast to the steady increase in the number of IP cases decided by the First Instance courts, which increased by 18% during the 2007-2008 period. Given the monetary threshold rules for jurisdiction between small claims and First Instance courts, those numbers clearly point to the increased value of IP claims in excess of JD 7000 and thus explain the continued increase in the number of cases reviewed by First Instance courts.

6.5 The Customs Department

Similar to other laws and regulations affected by the WTO accession, the Jordanian Customs Law was amended in 1998. Further, a new unit, the Intellectual Property Rights Section (IPRS) was established to deal specifically with enforcement of IPRs.

Generally, the Jordanian Customs’ authority to deal with IP infringements stems from article 41 of the Customs law, which states that “The entry of foreign goods which do not meet the terms incorporated in the Laws and regulations for the protection of origin and ownership, shall be forbidden unless the relevant authorities agree to remove such prohibition.”⁵¹⁴ Based on that language, non-complying foreign goods cannot be admitted unless a waiver is granted. Table 6.11 presents the number of cases filed by the official commercial agent with the Jordanian courts as a result of letters from Customs to the official commercial agent informing it that it temporarily holds suspected counterfeit goods. For the years 2009 and 2010, the number of cases filed by right holders represented 27% of the number of reports filed by the Jordanian Customs.⁵¹⁵ In other words, in 73% of instances, once notified by Customs that suspected counterfeit goods were impounded, the right holder chose not to file a court action. The Customs attribute the high percentage of right holders choosing not to file an action to the small size of the Jordanian market as well as the small size of some of the confiscated goods.⁵¹⁶

Table (6.11): Number of Cases Filed by Right Holders After Notification of Counterfeiting by the Jordanian Customs⁵¹⁷

Year	2003	2004	2005	2006	2007	2008	2009	2010
No. of Cases	1	5	23	17	145	109	87	96

Article 41 allows for two mechanisms to prevent counterfeit goods from entering into Jordan. First, a right-holder can file a temporary injunction request for the suspension of the suspected goods’ clearance.⁵¹⁸ The rules and regulations governing the request for an injunctive order include the posting of a security, the need to show a *prima facie* case of infringement, and the possibility of being sued by the importer if he or she is unrightfully damaged. The second

⁵¹⁴ *Jordan Customs Law No 20*, 1998, sec. 41.

⁵¹⁵ Jabali, “Interview.”

⁵¹⁶ *Ibid.*; Enad Uqlah, “Interview”, July 28, 2011; Enad Uqlah, “Interview”, August 4, 2011.

⁵¹⁷ Customs Department, “Intellectual Property Cases Referred to Court,” No. 104/4/8/45549, July 29, 2009; Uqlah, “Interview.”

⁵¹⁸ *Jordan Customs Law No 20*, sec. 41(a), (b) and (c).

mechanism allows the Customs to suspend the clearance procedure.⁵¹⁹ Unlike private right holders, the Customs is not required to post a security, and the department is protected from any claims for damages by the importer.⁵²⁰

Once the Customs has temporarily impounded any goods and suspended clearance, it contacts the authorized legal representative of the right holder, informing him or her of the impounded goods.⁵²¹ The temporary impounding by the Customs is tantamount to a temporary injunctive order, and the legal representative of the right holder has eight days to file a legal action otherwise, the suspected goods will be released.⁵²² The Customs, by law, bears no legal responsibility for any claims for damages by the importer of the allegedly infringing goods.⁵²³

(a) The Customs Law and TRIPS

The above discussion corresponds with the requirements presented under TRIPS Section 4.⁵²⁴ Table 6.12 below represents a comparison of the corresponding requirements in article 41 and TRIPS section 4, which shows that the existing law meets all of the requirements under TRIPS, including those that deal with notifying the right holder when there is belief that goods are pirated and allowing ample time (10 days under TRIPS and 8 days under Jordanian law) to start legal proceedings against the alleged infringer. Article 41 also grants the alleged infringer the right to remove the goods once the right holder declines to press legal charges, and gives the alleged infringer the right to challenge the infringement charge before a court of law.⁵²⁵

⁵¹⁹ Ibid., sec. 41(d).

⁵²⁰ *Jordan Customs Law No 20.*

⁵²¹ *Instructions Governing Border Measures for IP Protection, No. 7, 2000.*

⁵²² *Jordan Customs Law No 20.*

⁵²³ Ibid., sec. 41(g).

⁵²⁴ “Agreement on Trade Related Aspects of Intellectual Property Rights”, 1994, sec. 4. Special Requirements Related to Border Measures.

⁵²⁵ *Jordan Customs Law No 20 art. 41.*

Table (6.12): JUSFTA Article 41 vs. TRIPS' Section 4

Article 41 Requirements	Section 4 Requirements
Based on personal belief that goods are pirated, customs agents can suspend the clearance on the suspected goods and temporarily impound them. The importer of the goods and the legal representative of the right holder are notified of the impoundment.	Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories. ⁵²⁶ The importer and the applicant shall be promptly notified of the suspension of the release of goods. ⁵²⁷
Alternatively, the right holder can <i>sue sponte</i> file a temporary injunction with the proper court requesting, upon <i>prima facie</i> showing, the impoundment of the suspected goods, provided a security is posted and a suit is filed within eight days. Otherwise, the injunction is automatically lifted and the right holder is subject to damages claim by the importer.	Members shall adopt procedures to enable a right holder to lodge an application in writing with competent authorities, for the suspension by the customs authorities of the release into free circulation of such goods. ⁵²⁸ The right holder shall be required to provide adequate evidence that there is <i>prima facie</i> infringement. ⁵²⁹ The applicant should provide a security to protect the defendant. ⁵³⁰
If within eight days the right holder has not filed a suit, then the impoundment is lifted and the goods are cleared if there are no other issues related to the goods.	If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings have been initiated by a party other than the defendant, the goods shall be released. ⁵³¹
The importer of the suspected goods may challenge the temporary impoundment within eight days of being informed of the impoundment decision. The court must rule on the importer's challenge to the customs' decision within three days.	If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. ⁵³²
The Customs Department does not bear legal responsibility for damages claimed by the importer as a result of the temporary impoundment decision, or does it post any security.	Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith. ⁵³³

⁵²⁶ “TRIPS,” sec. 51.

⁵²⁷ *Ibid.*, sec. 54.

⁵²⁸ *Ibid.*, sec. 51.

⁵²⁹ *Ibid.*, sec. 52.

⁵³⁰ *Ibid.*, sec. 53.

⁵³¹ *Ibid.*, sec. 55.

⁵³² *Ibid.*

⁵³³ *Ibid.*, sec. 58.

(b) The Customs Law and JUSFTA

Article 41 of the Customs law does not require that a right holder's case be presented before a court to obtain a temporary injunction order; rather, the right-holder can ride on the coattails of the Customs Department's impoundment order and proceed to file a legal action.⁵³⁴ Article 4(26) of the JUSFTA requests that Jordan "provide, at least in cases of copyright piracy or trademark counterfeiting, that its authorities may initiate criminal actions and border measure actions *ex officio*, without the need for a formal complaint by a private party or right holder."⁵³⁵ This requirement is turning into a yearly sticking point in the USTR's review of Jordan's compliance with the JUSFTA. Jordan claims that its Customs Department has prepared a draft amendment to article 41, "which is in line with Jordan's international obligations and aimed at providing additional protection for [IPRs]."⁵³⁶ The language used by the Jordanian government in describing the proposed amendment is very broad. This vague and non-committal language reflects the general internal struggle occurring within the various governmental agencies regarding IPRs compliance requirements.

The current official Jordanian position, however, does not challenge the analysis proffered by the US, which is supported by compliance reports prepared by local attorneys funded by the US Agency for International Development (USAID). One such report concluded that the current text of article 41 does not satisfy JUSFTA obligation for the following reasons⁵³⁷:

1. It is an *ex officio* authority to suspend clearance and release of infringed goods, and does not therefore provide the right to seize goods; if the right holder fails, within eight days after being notified of the decision to suspend release and clearance procedures, to notify the JCD that a court case has been instituted, the suspended goods are released even if JCD is aware that they are in fact counterfeit.
2. This *ex officio* authority does not include powers to initiate criminal actions.
3. This *ex officio* authority does not apply to transit goods, for which the right holder must file a petition.

Point one refers to the inability of the Customs Department to "seize goods", however, there is no mention in the language of article 4(26) of the JUSFTA that such an indefinite seizure should occur in the first place. Indeed, the language mentions authorities initiating criminal actions and border measures without a formal complaint by the right holder, which is what article 41 provides for, as it

⁵³⁴ *Jordan Customs Law No 20* art. 41.

⁵³⁵ "Jordan-United States Free Trade Agreement", 2000, sec. 4(26).

⁵³⁶ See, MoIT, "Official Letter No. 19/2/23/5610, Annex 5", February 18, 2009. Regarding Jordan's responses to the USTR's Special 301 report.

⁵³⁷ Tawfiq Tabbaa, *Update on Compliance with Intellectual Property Rights in Jordan*, Improved Economic Opportunities For Jordanians (USAID-Sustainable Achievement fo Business Expansion And Quality (SABEQ), February 14, 2007).

allows for the impoundment of suspect goods either through a direct action by the right holder, or, *sue sponte*, through the Customs Department.

The main cause of concern for the USTR, it seems, is the release of the goods if the right holder does not file any charges.⁵³⁸ However, this course of events is not in violation of any of the requirements of article 4(26) of the JUSFTA and is in direct compliance with article 55 of the TRIPS agreement, which actually mandates such an outcome.⁵³⁹ What the USTR and the USAID-funded report fail to explain is why the language of article 41, which seems to be in line with JUSFTA and TRIPS, would need to be amended to force the Jordanian State to initiate a legal proceeding when the right holder does not want to file a claim.

Point two states that article 41 is not in compliance with JUSFTA because the Custom Department's *ex officio* authority does not include "powers to initiate criminal actions", but that is not technically true; while their language itself does not specify a criminal action *per se*, the copyright and trademark laws specifically provide for criminal and civilian penalties.⁵⁴⁰ The extent of the penalty should be determined by the court. It is not clear how any amendment to article 41 would force a court to mete out criminal punishment rather than civilian fines; in fact, to do so would violate the principle of judicial independence and compromise the court's discretion, thus dangerously affecting the constitutional principle of the separation of powers. It is also a question of common fairness that not all prosecutions should be criminal, especially if the law itself allows for such a variation. The current language of article 41, which allows for a legal action, clearly includes the possibility of a criminal punishment if the court so chooses; thus, it meets the JUSFTA requirement. Furthermore, the setup of the copyright and trademark laws specifically allows for criminal or civilian penalties.

The third point in the USAID-funded report finds fault with the "ex officio authority" not applying to transit goods, yet there is no mention of such a requirement in the language of 4(26); in fact, that requirement is completely out of the scope of article 4(26).

The previous discussion raises questions as to whether some elements within the Jordanian bilateral trade agreements are turning out to be more stumbling blocks than building blocks for economic development. The JEUA specifically calls for the applications of the "highest international standards", and while the EU and Jordan have yet to go to the negotiating table to debate what exactly this means, it is not unlikely that their interpretations will differ. Jordan, it seems, has approached its trade agreements' IP commitments with the assumption that constant harmony will forever govern its relationship with its counterparties, whereas those counterparties have relied on calculated and enforceable rules carrying the burdens of legal liability through enforcement mechanisms.

Under the current mechanism, the customs agents have the *ex officio* authority to suspend the clearance and release of infringing goods. If a case is not filed within eight days, then the suspended goods should be released. The current mechanism is based on the presumed right holders' vested interest in confirming that the

⁵³⁸ Jabali, "Interview"; Wasfi Tawahiah, "Interview", August 4, 2011; Uqlah, "Interview."

⁵³⁹ "JUSFTA" art. 55.

⁵⁴⁰ *Trademarks Law No.33; Copyright Law No.22.*

confiscated goods are counterfeit and preventing their entry into the country by filing a legal action, which is logical and fair. Conversely, the request to amend the Customs Law to grant customs agents' *ex officio* authority to initiate criminal actions does not make economic or legal sense. On the one hand, the Jordanian Customs should not act as a private enforcement agency for right holders, because the Customs Department would then have to shoulder the administrative, legal and financial burden to investigate and prosecute the alleged counterfeit goods. On the other hand, by bypassing the need to have the right holder present his or her case before a court within the eight-day window, the owner of the alleged counterfeit goods is denied the right to due process and to present his or her case before a court. The court's role in weighing all the evidence before allowing the legal action to move forward is denied, in favour of a *sue sponte* decision by the Customs Department.

6.6 Jordan Institute of Standards and Metrology

The Jordan Institute of Standards and Metrology (JISM), which was created pursuant to Standards and Metrology Law⁵⁴¹, has four stated objectives:⁵⁴²

1. Adopting a national system for standardization and metrology based on accepted international practices.
2. Keeping pace with scientific and technical developments in the fields of standards, metrology, conformity assessment and laboratory accreditation.
3. Ensuring the health and safety of the Kingdom's citizenry and protection of the environment by making sure that products approved are in compliance with the technical regulations adopted by the Institution for that purpose.
4. Raising the quality of local products through the adoption of appropriate Jordanian Standards in order to enhance their competitiveness in the local and international markets and thus support the national economy.

Administratively, the JISM has four divisions: Border Control, Factories Surveillance, Market Surveillance, and the Inspection Division. The main tasks and duties of the four divisions are:⁵⁴³

1. Controlling all imported materials (except for pharmaceuticals, veterinary medicines and vaccines) to assess their conformity to Jordanian Standards and Technical Regulations and labelling requirements.
2. Controlling local products and assessing their conformity with Jordanian Standards, technical regulations and labelling requirements.
3. Inspecting electrical elevators prior to usage to ensure that they meet the JESS safety requirements.
4. Participating in preparing and modifying Jordanian Standards.
5. Following up with customer complaints regarding non-conforming products.

⁵⁴¹ *Institute of Standards & Metrology Law No. 22.*

⁵⁴² <http://www.jism.gov.jo/> (last visited August 2, 2009)

⁵⁴³ <http://www.jism.gov.jo/> (last visited August 2, 2009)

6. Issuing export conformity certificates.
7. Issuing tender conformity certificates for governmental institutions upon request.

None of the previously listed duties contain any specific reference to enforcement of any IPRs. The JISM's mandate explicitly exclude pharmaceuticals and medicines – they fall under the purview of the Jordan Food and Drug Administration. However, the JISM has exercised enforcement authority over trademarks, including the confiscation and destruction of fake and forged products and goods.⁵⁴⁴ For example, in association with customs, the JISM systematically destroys large volumes of non-compliant foreign goods on a yearly basis, even though its governing law does not grant it any such authority.⁵⁴⁵

The newly proposed amendments to the current JISM law seem to acknowledge this lack of authority by proposing new language to grant the JISM authority to “confiscate or condemn to destruction goods bearing fake or forged trademarks.”⁵⁴⁶ Until that language is officially approved, however, there is little or no legal support for the role the JISM is currently playing in enforcing IPRs. This is not to say that JISM is never within its rights when it confiscates or condemns for destruction a counterfeit product; by law, it is allowed to do so if the product is not in compliance with an existing Jordanian standard.⁵⁴⁷ Under the language of the current JISM law, there is no legal basis for confiscating goods bearing a fake trademark if they are in compliance with the specific Jordanian standard.

This debate about the extra authority claimed by the JISM, however, is not taking place in Jordan, and it is not clear why. Potentially its absence is the quickest and easiest way of destroying possibly infringing goods and showing the US that the Jordanian government is fighting pirated goods. The Jordanian government is actually relying on figures drawn from the JISM's “enforcement” statistics to demonstrate to the USTR and other international agencies its efforts in combating piracy.⁵⁴⁸ Stretching the law to cover areas it actually does not cover undermines the legislature's will and, by extension, the will of the people. Further, it weakens the concept of the orderly and reasoned progression of laws through discourse and public debate.

6.7 The Courts and Enforcement of IPRs

This section will look at the current setup of the courts and judges, examine the level of IP disputes handled by them, and consider the issue of establishing specialized IP courts.

(a) Judicial Reform in Jordan

The judicial sector in Jordan continues to go through a modernization and development phase, which affects the structure and functions of the Ministry of Justice and the Courts. While the judicial branch, in theory, is a separate branch of the government and should be managed exclusively by the head and members of the Judicial Council, the Ministry of Justice still plays a role in the organization and setup of courts, as well as the appointment and transfer of

⁵⁴⁴ Khayyat, “Interview.”

⁵⁴⁵ MoIT, “Official Letter No. 19/2/23/5610, Annex 5.”

⁵⁴⁶ Proposed draft – Standards, Metrology and Product Safety Law, article 32(a)(15). There is no indication when this proposed draft would be presented to the Jordanian parliament.

⁵⁴⁷ *Institute of Standards & Metrology Law No. 22.*

⁵⁴⁸ MoIT, “Official Letter No. 19/2/23/5610, Annex 5.”

judges. This symbiotic, albeit odd, relationship seems to have been deployed thus far for the benefit of the judicial system as a whole.

The overall effect of this trend has been a move towards expanding the authority of Small Claims Courts by expanding the financial limit that would bring a case under their purview from JD 3000 (\$4250) to JD 7000 (\$9900).⁵⁴⁹ This has led to the lessening of the load on the First Instance courts, while at the same time allowing citizens to benefit from the more facilitated approach to adjudication allowed under the Small Claims Courts system. In accordance with international conventions on human rights, the court fees on criminal appeals were abolished. The impact of those reforms on IP enforcement should be tangible, as cases under an IP claim will benefit from any improvements in the litigation and adjudication process that these changes will bring about.

The number of judges has also been steadily increasing, including the number of female judges.⁵⁵⁰ In 2007, 38 new judges were appointed, including five female judges; this raised the total number of female judges to 42, accounting for 6% of the total number of judges.⁵⁵¹ Recently, the Ministry of Justice initiated the Future Judges Program aimed at recruiting judges; it targets high school graduates and law school students.⁵⁵² The program intends to recruit qualified candidates and fast-track them into the judiciary by the time they are 28-30 years old.⁵⁵³ The Ministry of Justice and the Judicial Council promote the program as key to recruiting bright, young, educated judges, especially since the program involves scholarships to obtain undergraduate or graduate degrees in law.⁵⁵⁴

It is not clear, however, how recruiting high school and law school students will actually help enrich the level of experience of the Jordanian judicial system. Rather, the Future Judges Program threatens to make the role of the judge as that of a functionary who meets the requirements of the job by simply obtaining the requisite legal education, greatly discounting the importance of experience, which must be obtained by working in the legal profession.

(b) Progression of Claims and Execution of Verdicts

Registration decisions for patents, trademarks, and other registerable types of IPRs are considered final governmental decisions, and as such are reviewed by the Supreme Administrative Court. First Instance courts, on the other hand, address rights and privileges arising from owning an IPRs. Decisions by the Supreme Administrative Court are final.⁵⁵⁵

When it comes to resolving disputes, the Jordanian legislation does not set time limits on the court action, but Civil Procedure law does include some rules meant to limit prolonged litigation by setting time limits on presenting defences and

⁵⁴⁹ *Small Claims Courts Law No. 30, 2008*, sec. 3.

⁵⁵⁰ Jordanian Judicial Council, *Annual Courts Report - 2008*.

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Supreme Administrative Court Law No.12, 1992*, sec. 26(b).

responses.⁵⁵⁶ Generally, a case cannot be postponed more than 15 days, except in extreme situations, and a case cannot be postponed more than once for a reason related to the circumstances of one of the parties. Also, a judge must render a verdict no more than 30 days after the conclusion of the trial. Overall, the Annual Courts Report for 2008 points to a very high percentage of cases being resolved by the courts less than one year from filing. The average percentage of cases resolved per the annual load of every type of court (small claims, First Instance, appeals, cassation, and special courts) exceeds 93%.⁵⁵⁷ The real problem, however, lies with the execution of court orders, which poses a serious challenge for any enforcement effort in general, and for the enforcement of IP in particular.

Judicial civil orders are executed pursuant to Execution Law No. 36 (2002), whereupon execution departments in each First Instance Court carry out judicial orders within their respective jurisdictions. Every execution unit is headed by a judge who is assisted by one or more other judges as need be. The Judicial Council's statistics indicate that in 2008, there were 177,909 execution cases carried over from the year 2007, and an additional 70,289 were added in 2008, raising the total number of execution orders to 248,198 orders, of which only 66,164 were executed in 2008.⁵⁵⁸ That left a total of 182,034 execution orders still outstanding, which means that 73% of the total number of execution orders in 2008 were carried over to 2009. The Amman Governorate execution units, which are the place for filing and executing the majority of the IP cases, suffer from a significant back-log in execution, with 51,560 pending execution orders, amounting to 29% of all execution orders for all of Jordan.⁵⁵⁹ In Amman, 65% of the execution orders are carried over, annually.

While it is not clear what percentage of those cases relate to IP disputes, because the existing numbers are not broken down by case type, it is clear that execution should be a significant concern for any entity seeking resolution through judicial channels in Jordan. The numbers point to a possible systematic problem with the execution system as a whole, the mechanism by which court orders get shuffled back and forth between appellate and lower courts, and the process of giving notice to various parties in the legal dispute.

The execution of judicial criminal orders according to article 353 of the Criminal Procedure Law falls to the prosecutor at the court that issued the criminal order or verdict. In courts that do not have their own designated prosecutor, criminal execution is the responsibility of the small claims judge. The problems with civil execution seem to be shared with criminal executions, as shown in table (6.13) below.

⁵⁵⁶ *Civil Procedure Law No. 24.*

⁵⁵⁷ Jordanian Judicial Council, *Annual Courts Report - 2008.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

Table (6.13): Execution of Criminal Orders⁵⁶⁰

Unit	Rotated from 2006	Incoming 2007	Total 2006-2007	Executed in 2008	Rotated from 2008	Per Centage of execution in 2008
Criminal Court Prosecutor ⁵⁶¹	637	234	871	211	660	25%
First Instance Prosecutors	163699	70734	234433	75939	158494	32%
Small Claims Prosecutors	37866	24748	62614	24843	37771	40%

As to the specific issue of courts dealing with IP, Jordan shares a similar burden with other developing countries of not having the judicial system contribute much to the evolution of IP systems. This is due to several factors, primarily:

1. The limited role of *stare decisis*, which greatly hampers the courts' ability to influence legal interpretation,
2. The lack of experience and knowledge of the judicial staff in the area of IPRs, and
3. The limited scope of application of IPRs within the judicial system, which seems mainly concerned with trademarks to the detriment of other branches of IP.

Although a considerable amount of training is taking place for judges and Ministry of Justice staff, as indicated by the number of training seminars and conferences devoted to IPRs,⁵⁶² there does not seem to be an integrated approach towards IP enforcement, as evidenced by the number of enforcement agencies with overlapping responsibilities and duties. There is also no IP strategy other than the obligatory, but notional, governmental reference to the need to abide by and respect IP laws.

Of course, the absence of even a semi-sophisticated IP practice contributes to the lack of such an integrated approach by the legal profession and continues to sap the energy of any efforts to elevate the practice in the area of IP.⁵⁶³ Without a more sophisticated IP practice, the role that patents play in Jordan will be marginal.

⁵⁶⁰ Ibid.

⁵⁶¹ The Criminal Court, also known as the Serious Crimes Court, is one of a recent vintage that was created by law No. 19 (1986), and has exclusive first instance limited jurisdiction in crimes involving murder, rape, kidnapping, and sexual assault. In effect it was envisioned to take over cases that were considered blood or honor crimes under the tribal law in Jordan, which theoretically is no longer applicable since 1976, but still has a significant role in such crimes, in instances like forcing the relatives of the perpetrator of murder crimes to be evacuated from their homes to other areas.

⁵⁶² Jordanian Judicial Council, *Annual Courts Report - 2008*; Ministry of Justice, *First Annual Ministry of Justice Book* (Ministry of Justice, 2008).

⁵⁶³ Haddad, "Interview."

(c) Specialized Courts

The main argument presented for specialized courts is that the role played by them can help bridge the judges' IP knowledge gap, and thus provide a more efficient administration of justice. Furthermore, it is argued that specialized courts will provide for speedy and swift adjudication of claims. The USA's Federal Court of Appeals (Federal Circuit) is often cited as an example supporting both of these contentions. Closer scrutiny, however, reveals that the claims presented by these arguments are not necessarily supported either by the history of that court or by the particularities of the Jordanian situation.

The history of the Federal Circuit began with its historic predecessor, the US Court of Customs and Patent Appeals (CCPA), which began as the US Court of Customs Appeals, created in 1909 and officially operational on April 22, 1910. In 1929, the US Court of Customs and Patent Appeals was created and vested with appeals from the US Patent Office. In 1982, the Federal Courts Improvement Act (FCIA) abolished the CCPA and transferred its jurisdiction, docket and judges to the Federal Circuit. The IPRs appeals reviewed by the Federal Circuit, which are often cited as the reason behind the call for an exclusive IP court in Jordan, are only one of sixteen areas over which the Federal Circuit has appellate jurisdiction. Thus, despite the fact that patent practice in the US is among the most vibrant and developed in the world, the Federal Circuit is not solely dedicated to patent appeals. By contrast, the IP practice in Jordan is in an embryonic stage, and patent litigation is almost non-existent. Under these circumstances, it is hard to argue that there will be any practical justification for the creation of judicial panel to exclusively review IP claims.

A more useful suggestion is the creation of a judicial body to review claims on corporate and commercial issues in general, including IP issues. The creation of such a panel or court makes practical sense because the number of cases in that area is large enough to justify the allocation of the needed resources. It also makes legal sense because it will help to create a unified body to review commercial and corporate issues, thus creating a unified body of jurisprudence that will go a long way towards the stability of the corporate and commercial environment as a whole, including IPRs.

Another argument presented to support the call for an exclusive IP judicial panel is to help bridge the judges' IP knowledge gap and thus provide a more efficient administration of justice. However, this argument does not acknowledge the reason there is an IP knowledge gap to begin with, which is the limited scope and negligible volume of the IP practice. A judge's practice and judicial knowledge are directly linked to the legal areas he or she reviews and to the type of cases presented before him or her. For example, the Federal Circuit judges can be expected to have a knowledge gap regarding tribal law in general and Jordanian tribal law in particular. Such a shortcoming will not be remedied by creating an independent judicial panel for tribal law, but rather by the independent education of those who might need such knowledge. The same, I argue, applies to the issue of Jordanian judges' knowledge gap in the area of IP law, which can be remedied by the selective training of judges in that area.

6.8 Impact of Intellectual Property Standards Compliance on Economic Development

IPRs and their enforcement do not exist in a vacuum; rather, they are tightly linked to existing and prospective economic factors. A key question from a socio-economic perspective is whether any benefits are reaped from the cost of enforcement and compliance. The direct overall effect for foreign corporations from the introduction of uniform IP systems/standards has been the expansion of the number of foreign territories in which Western corporations can consider doing business. The introduction of uniform IPRs, therefore, made large exporting companies the clear winners in the early phase of introduction of the TRIPS agreement.⁵⁶⁴ The relationship between IPRs systems and the other modernization factors (e.g., GDP, health care and electricity) were explored by researchers,⁵⁶⁵ but those factors link IPRs relative to existing infrastructure-related aspects, which might, or might not, be caused by strong IPRs systems.⁵⁶⁶

(a) Intellectual Property Standards and Foreign Direct Investments

The discourse on the link between IPRs and major economic indicators has certain noteworthy anomalies. When it comes to measuring the economic effects of higher IPRs and the level of compliance with IPRs, it is easy to be side lined by a generalized discussion that centres around an increase in the levels of Foreign Direct Investment (FDI) without considering whether such an increase actually had any impact on the level of welfare. Another point often missed concerns what percentage of the FDI increase was actually contributed by intellectual-property-sensitive products, goods, or services. Similarly, general FDI numbers do not tell much about the impact of IPRs on increasing FDI flow into any country or region; this means that, while useful inferences can be extracted from comparative or multi-country studies, any actionable conclusions based on the economic impact of IP standards must be country-specific. In Jordan, the general discourse about the effect of IPRs on economic development suffers from all these shortcomings; general numbers for FDI, for example, are commonly cited as an indication of the impact of IPRs on attracting investment into the country without providing a breakdown for those numbers. Additionally, there is a negative stigma attached to any dissenting opinions on the value of excessive IPRs.⁵⁶⁷ The former tendency to term such voices anti-progressive has been tempered by the recent global economic turmoil and by the increased realization that the economic liberalization plans did not deliver the sustainability or the growth promised.

⁵⁶⁴ Su, Evelyn, "The Winners and the Losers: The Agreement on the Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries," *Houston Journal of International Law* 23 (2003): 169.

⁵⁶⁵ See for example, Rozek, R.P. Rapp, R.T., "Benefits and Costs of Intellectual Property Protection in Developing Countries" (National Economic Research Associates, Inc., White Plains, N.Y., 1990), Working paper No. 3. The paper finds a strong statistical relationship between IPR and modernization factors, but there is no indication of causality.

⁵⁶⁶ Park, W.G. Ginarte, J.C., "Determinants of Patent Rights; A Cross National Study," *Research Policy* 26 (n.d.): 283–301. Arguing that in less wealthy countries most R&D is done by the public sector, which is less inclined to use strong IPR. The corollary being that less developed countries with low levels of R&D stand to benefit less of Stronger IPR, and should lessen the institutional cost of strong IPR through cooperation.

⁵⁶⁷ Jordan's gross domestic product (GDP) in 2008 was estimated at \$30.8 billion (purchasing power parity, PPP) and per capita GDP is estimated at \$5,000 (PPP). Jordan's official unemployment rate for 2008 was estimated to be 12.9 percent, although unofficial estimates range up to 30 percent. While about 86.3 percent of Jordan's GDP is from the services sector, such as tourism, 3.6 percent is from agriculture, and about 10.1 percent is from other industries including garment and clothing, phosphate mining, fertilizers, and pharmaceuticals.

Jordan's top exports are garments, vegetables, phosphate, pharmaceuticals, potash (fertilizers), and transportation equipment. Of these items, only pharmaceuticals fall within a major area of IPRs. If economic development is judged based on the increase in levels of FDI, then imports should present an equally important insight. Data released by Jordan Central Bank reveal that 40% of Jordan's imports for 2009 were transportation equipment, crude oil, iron and steel, electrical machinery, raw material for the garment industry, and heavy equipment for industry and agriculture.

Closer examination of those items further reveals that the raw material imported for the garment industry is used almost exclusively by the garment industry for re-exportation to the United States in accordance with the Qualified Industrial Zones Agreement (QIZA) and the JUSFTA. Such imports, therefore, present very little added value to the national economy.⁵⁶⁸ Also, two thirds of the employees in the garment industry are foreign workers,⁵⁶⁹ and the garment industry, valued at \$1 billion in 2008, secured an exemption from Jordan's monthly minimum wage requirement of JD 150 (\$210); thus, it is allowed to pay its workers JD 120 (\$170). Similarly, exported transportation equipment represents an almost exclusive use of Jordan as a transit zone for re-exporting transportation vehicles to surrounding countries, especially Iraq. So there isn't an IP component to either of these segments. Such mediocre labour standards are actually common wherever the US advocates it transnational labour protections, which are characterized by legal weaknesses – in particular, their failure to institutionalize the minimal rudiments of modern formal legality.⁵⁷⁰

As to correlating the standards of IPRs with FDI and imports, the literature offers only empirical evidence supporting the expectation that the relationship is positive. The results vary according to factors such as degree of industrialization (the more industrialized the nation, the more positive the response to strong IPRs), the sector (the more technically advanced the sector, the more sensitive it will be to IPRs), and even the level of existing FDI (the more FDI a country has, the more likely it is that it will get more).⁵⁷¹ Other studies point to a picture that

⁵⁶⁸ Even when it comes to employment of local work force, the benefits are not clear in the garment sector, as only 10,000 Jordanians are among the 45,000 employed by the garment exporting industry. This researcher's discussions with the factory owners revealed that local workers require up to 12 months training and therefore, it makes more economic sense for the factories to import skilled labor from Bangladesh and elsewhere. The garment industry also suffers from discrimination against married female local employees, because the industry prefers unmarried female workers who will work the various shifts, and not be constrained by the demands of their families.

⁵⁶⁹ This extensive use of foreign labor, along with the fact that many FDI funds are not targeting production or job-generating projects helps explain why despite the steady increase in FDI for over nine years the overall "official" rate of unemployment has remained unchanged hovering around 14%. Of course, unemployment rates within certain age groups are much higher, as for example the age group 20-24 with unemployment rate of 28%; and for women in general it is around 27%.

⁵⁷⁰ William E. Scheuerman, "False Humanitarianism?: US Advocacy of Transnational Labour Protections," *Review of International Political Economy* 8, no. 3 (2001): 359–388.

⁵⁷¹ See, Lesser, W., "The Effects Of TRIPS-Mandated Intellectual Property Rights on Economic Activities in Developing Countries" (WIPO, 2001), www.wipo.int. Finding that there is compelling evidence that stronger IPR does provide some domestic benefits for developing nations, and hypothesizing that the protection and legal enforcement aspect that comes hand-in-hand with stronger IPR is a key factor that enables IPR to have a positive impact on FDI.

too complex to assume a simple and direct correlation between increased trade and higher IP standards.⁵⁷²

As to levels of FDI, Jordan has not historically had a concerted strategy to attract FDI based on a strategic placement of IP standards; it did not matter where the money came from, as long as a significant portion was channelled into the kingdom's economy. Data supports this contention. In 2002, FDI totalled only \$186 million, whereas in 2006 it totalled \$1.5 billion, with more than 90% from Arab sources⁵⁷³ and with the US, Canada and Europe investing a shockingly low combined total of \$42.9 million in new projects.⁵⁷⁴ Those figures shed light on the minuscule role IPRs played in attracting FDI to Jordan. Since more than 90% of the 2006 FDI came from Arab countries, which do not have much of an IP base to speak of, it is safe to assume that the majority of those funds neither had an IP component nor were influenced by IP standards in Jordan. In fact, this increase in the inflow of FDI probably reflects the excess of petro-dollars that needed to be invested and did not reflect any intrinsic advantage for Jordanian economy. This is clear from the collapse in FDI inflows to Jordan at the start of the global economic crises, which plummeted by more than 80% and then started to rise again as oil prices moved upwards in 2010.⁵⁷⁵

The 2006 FDI data shows that 80% of the FDI was poured into the industrial sector, with 14% earmarked for the country's growing tourism industry.⁵⁷⁶ Yet when it comes to measuring the impact of IPRs on FDI levels, there is little evidence that any relationship exists between the two. Effectively, for Jordan, the importance of IPRs for FDI should not be overstated. The above analysis supports the opinion that the "evidence that maximum enforcement of all sorts of IP law – especially patent law – will stimulate investment should not remain unchallenged".⁵⁷⁷ What is equally important for developing countries is "to take into account the costs and benefits of protection in the context of their unique economic situation" and even to consider minimal compliance.⁵⁷⁸

(b) Intellectual Property Standards and the Pharmaceutical Sector

The pharmaceutical sector, which for Jordan is economically the most significant intellectual-property-sensitive sector, had minimal technology transfer until

⁵⁷² See, The Commission on Intellectual Property Rights (UK), *Integrating Intellectual Property Rights and Development Policy* (London, 2002)..

⁵⁷³ See U.S. Government Accountability Office, *International Trade: Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain*, 2009, <http://www.gao.gov/products/GAO-09-439>. It states "while Jordan does not maintain official detailed statistics of FDI, aggregate inflows of registered capital tracked by the Central Bank indicate that the main source countries for foreign investment are Middle Eastern (Iraq, Kuwait, United Arab Emirates, Saudi Arabia, Egypt, and Bahrain) or European (Denmark, Belgium, and the United Kingdom)."

⁵⁷⁴ November 2006 figures reported by AMEinfo at <http://www.ameinfo.com/103831.html> (last visited September 21, 2009)

⁵⁷⁵ Mohammad Ghazal, "Investments Benefiting from Incentives Hit Record High in First Two Months," *Jordan Times*, February 28, 2010.

⁵⁷⁶ November 2006 figures reported by AMEinfo at <http://www.ameinfo.com/103831.html> (last visited September 21, 2009)

⁵⁷⁷ Heald, Paul J., "Misreading a Canonical Work: An Analysis of Mansfield's 1994 Study," *Journal of Intellectual Property Law* 10 (2003): 318.

⁵⁷⁸ *Ibid.*

2003.⁵⁷⁹ Evidence further points to heavy dependence on generics, with no discernible effect of joint ventures on the growth of the assets, capital profit, sales, weighted assets, weighted capital, weighted profit and weighted sales of the pharmaceutical industry.⁵⁸⁰ The minimal technology transfer comes about despite the fact that the surveyed pharmaceutical companies agreed that joint ventures are the most important method of technology transfer.⁵⁸¹ Another review that covers the period until early 2007 indicates that there are only three companies out of the 17 in the pharmaceutical sector with strategic alliances, licensing agreements, or production facilities outside Jordan.⁵⁸²

The recent global recession has the growth projections for the Jordanian pharmaceutical industry, with a 19% decline in the 2009 export volume compared to the 20% increase originally projected, representing a 39% gap.⁵⁸³ Further, the Jordanian pharmaceutical industry remains fundamentally without a research and development base and a prime candidate for acquisition by larger foreign pharmaceutical companies.⁵⁸⁴ There is little evidence of well-defined benefits that would not have materialized for the pharmaceutical sector had Jordan not acceded to the WTO or signed the JUSFTA.⁵⁸⁵

It is important to point out, however, that there is no evidence, either in the literature or in the data reviewed, of a concerted effort to prevent the Jordanian pharmaceutical sector from achieving those goals. In the areas of licensing and technology transfer, for example, analysis indicates that the Jordanian pharmaceutical failure is a result of misguided assumptions that western pharmaceuticals will overlook economies of production in favour of Jordanian companies. As to exporting to the Western markets, Jordanian pharmaceuticals were slow to understand the importance of acquiring and implementing the regulatory and quality standards of the American Food and Drug Administration (FDA) and its EU counterpart.

Even though the public debate about the value of the JUSFTA among the industrialists and their lobbying group in Jordan – the Jordanian Association Of Manufacturers of Pharmaceuticals and Medical Appliances (JAPM) – has focused on unequivocal positive results, it seems their conversations with US government officials carried a different slant.⁵⁸⁶ A report by the US Government Accountability Office (GAO) noted that for generic medicine producers there was

⁵⁷⁹ Laswi, Rasha, “Effect of Technology Transfer Contracts on the Growth of the Pharmaceutical Sector (Jordan-Case Study)” (Degree of Master in International Trade, Jordan Institute of Diplomacy, 2002); Jarrar, “Interview”; Sboul, “Interview.”

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid.

⁵⁸² Dana Baradei, “The Right Prescription,” *Jordan Business*, January 10, 2007.

⁵⁸³ “Pharmaceutical Exports Rise by 15% in 10 Months,” *Alghad Daily Newspaper*, January 17, 2009, 1607 edition.

⁵⁸⁴ Sboul, “Interview”; Jarrar, “Interview.”

⁵⁸⁵ Sboul, “Interview”; Abu Rahmeh, “Interview.”

⁵⁸⁶ U.S. Government Accountability Office, *International Trade: Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain*. “As far as IPR (intellectual property rights), the majority of Jordanian pharmaceutical businesses manufacture generic medicines, and there are concerns that the IPR provisions of the FTA are hurting the generic industry. Report issued July 2009, and can be found at <http://www.gao.gov>

some frustration with IPRs related to data exclusivity that dealt with a lack of transparency in rights and obligations.⁵⁸⁷ The GAO report cites a 2007 study by Oxfam on Jordan's pharmaceutical industry, stating that as a result of the TRIPS provisions of the WTO and the TRIPS-plus provisions of the JUSFTA, many Jordanian generic pharmaceuticals are precluded from the market through the acceptance procedure of "data exclusivity." Data exclusivity means that, for market approval of a generic drug that had already been shown to be equivalent to the original one, drug regulatory agencies are prevented for a period of 5 years from using the clinical trial data developed by the originator company to establish the safety and efficacy of the medicine. These delays, according to Oxfam, impede or prevent generic competition and can lead to higher prices than would otherwise be the case.⁵⁸⁸

Rebuttals to the Oxfam report, including the one cited by the GAO, mention exceptions to Oxfam's assertions of that lack of a Jordanian pharmaceutical research and development (R&D) base, but they are so few (two companies specializing in drug delivery systems) that they end up proving Oxfam's point. Rebuttals to the lack of pharmaceutical production facilities and agreements are aspirational in nature (using language like "Multinational managers expect that manufacturing deals will be struck as Jordanian companies come into compliance"), and lack sufficient numbers to show a trend.

Some of the more outrageous claims of purported positive effect of increased IPRs include linking IPRs to improvements in public health and to medical tourism. Yet the share of medical tourism as a percentage of the total tourism sector has been more or less constant throughout the past decade and it mainly focuses on the expertise of the medical professionals rather on the availability of medical drugs. Jordan relies on medical tourism that is supported by hospitals and trained medical staff not because it has any reputation as a centre for pharmaceutical research. If anything, medical trials have negative connotations in the minds of Jordanians, as they associate them with abuse of third-world citizen by pharmaceutical companies that use them to conduct experiments that are otherwise prohibited in the Western world.

IPRs cannot take any credit for continued improvements in public health statistics either, as those mainly result from improvements in general hygiene and the use of vaccination and other affordable and accessible medications, which are not related to high-end pharmaceutical research or patented drugs. This is especially the case in Jordan and other MENA countries since HIV-AIDS does not register as a national health issue, and thus the patented drugs required for its treatment are not a priority as is the case in sub-Saharan African countries or in South America.⁵⁸⁹

(c) The Diminishing Returns of Higher Intellectual Property Standards

⁵⁸⁷ Ibid.

⁵⁸⁸ Oxfam, *All Costs, No Benefits: How TRIPS-plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines*, Briefing Paper (Oxfam, March 2007).

BSA, "Business Software Alliance - IDC Study."

⁵⁸⁹ At 0.2% the MENA region has the lowest HIV/AIDS adult prevalence percentage globally. See World Bank, *Preventing HIV/AIDS in the Middle East and North Africa: A Window of Opportunity to Act* (World Bank, 2005).

Overall, a sufficient level of IPRs which provides an adequate level of protection is an essential, but not sufficient, component of increased trade and FDI flow into intellectual-property-sensitive goods and services in countries above a certain economic development threshold. But IP legislation is not sufficient for such promised benefits to materialize; an economic plan is needed. Essential to such a plan is a definition of what constitutes a sufficient, yet not excessive, level of protection; otherwise, the rush to adopt the latest IPRs will continue to be “out of touch with the existing problems in the countries concerned”.⁵⁹⁰ Poor countries like Jordan may find IPRs useful, provided those rights are customized to their needs by deciding what level of IP protection is best for their development and basing governmental decisions on those needs.⁵⁹¹ The application, therefore, of IP policies and laws must involve an understanding of the dynamic that drives the economic and technological domains. Otherwise, the country stands to gain little from the application of such standards and laws, and they might actually act to hamper development and innovation.⁵⁹²

As suggested by the data discussed above, Jordan must do more than engage in regulatory compliance to assure an equitable return on their investment in IPRs, because the rewards are not guaranteed, let alone instantaneous. It should definitely make more of an effort to define protection levels and strike a balance between its economic realities and its international obligations. In that regard, Jordan faces a particularly difficult task, as it is further restricted in its use of the policy flexibilities afforded under TRIPS by the more stringent standards required under JUSFTA and JEUA, discussed before.

In the absence of a national IP strategy, however, Jordan and other developing countries stand to benefit little from maximum enforcement of TRIPS and TRIPS-plus IP standards that protect content those countries neither produce nor possess.

6.9 Impediments to the Enforcement of IPRs in Jordan

Jordan’s thrust into the IPRs arena has been remarkable in its intensity, consistency, and scope. One would be hard pressed to think of another country that has moved into TRIPS standards and then TRIPS-plus standards with such speed. Yet as admirable as Jordan’s drive might have been, such sudden progress must inevitably have side effects and unintended consequences, especially given Jordan’s speedy transition into TRIPS and TRIPS-plus IP standards combined with its lack of experience in the drafting and enforcement of IPRs legislation.

Given the declining levels of software piracy, reaching around 66%,⁵⁹³ one can argue that the Jordanian market now provides users with both original and pirated products, and the choice of one or the other is an economically rational one. Additionally, while Jordan is not oblivious to its challenges with IPRs enforcement and compliance,⁵⁹⁴ any negative impact of IPRs infringement

⁵⁹⁰ Assafa Endeshaw, *Intellectual Property Policy for Non-Industrial Countries* (Dartmouth Publishing Group, 1996).

⁵⁹¹ The Commission on Intellectual Property Rights (UK), *Integrating Intellectual Property Rights and Development Policy*.

⁵⁹² See Khoury, “‘Measuring the Immeasurable’-The Effects of Trademark Regimes.”. Provides a detailed analysis of the value the current trademark regimes in selected Arab countries, Jordan included, and concludes that the current trademark regimes do not benefit Arab countries to the extent portrayed by the proponents of such regimes.

⁵⁹³ BSA, “Business Software Alliance - IDC Study.”

⁵⁹⁴ MoIT, “Official Letter No. 19/2/23/5610, Annex 5.”

on Jordanian businesses and welfare is anything but clear, and equally opaque are any economic benefits generated by TRIPS and TRIPS-plus standards.

The points below, which were culled from the discussion throughout this chapter, are presented here in a more condensed and direct form in order to more clearly address the main impediments to the enforcement of IPRs in Jordan.

(a) Multiple Enforcement Teams and Poor Coordination

The enforcement of IPRs is particularly problematic because of the poor coordination between the various enforcement agencies; for copyright, for example, these are the National Library, the Public Security Department, and the Department of Press and Publications. Overlapping responsibilities further compound the problems caused by the poor coordination. For example, all of the above-mentioned departments claim authority to handle counterfeited audio-visual products. Similar issues arise regarding counterfeited trademark products between the Customs Department, the Jordan Institute of Standards and Metrology (JISM), and the Public Security Department. Rather than having IP cases dealt with expeditiously, overlapping responsibilities among the multitude of agencies lead to poor cooperation and coordination.

Jordanian authorities' efforts to harmonize the workings of its various governmental agencies are, as a result, a work in progress. A contributing factor to the confusion is the pressure exerted by various international community agencies and donor countries to ratchet up the enforcement of IPRs.

Jordan should be more aware of the adverse effects of weak coordination among its multiple agencies, and the world community should be aware that its constant demands for enforcement can backfire if issued without considering the roles played by the various governmental agencies. Those roles should be revised, and the enforcement of IPRs should be streamlined in the interest of quality rather than quantity.

(b) Poor Drafting by the Legislator and Weak Governmental Perspective

There is a split between the legislative language and intent and the actual implementation, caused by the inexperience of both the legislative drafters and the implementers of the IP legislation.⁵⁹⁵ The discussion below will outline several examples.

Poor drafting of IP legislation is evident from the inclusion of the Madrid and PCT clauses into the Jordanian trademark and patent laws, even though Jordan is not a signatory to either.⁵⁹⁶ For trademark law, the inclusion of the clauses was somewhat mitigated by the inclusion of language stipulating they come into force only after the Madrid Protocol is actually signed. Yet in light of Jordan's lack of progress in signing the Protocol, there is no clear justification for the addition of the language in the first place. In the meantime, the current de-activated portion

⁵⁹⁵ Halaiqah, "Interview."

⁵⁹⁶ *Patent Law No.32; Trademarks Law No.33.*

of the Trademark law is left at the risk of becoming obsolete should the Madrid Protocol guidelines be revised.

The inclusion of the PCT language in the patent law presents a more extreme example of poor drafting because the patent law does not even include language postponing its activation until Jordan's signing of the PCT.⁵⁹⁷ Jordan, has yet to sign the PCT, yet its Patent law contains language that allows for immediate filing of international patent applications under the PCT.

The weak governmental implementation perspective is evident from the dispute over the interpretation of the JUSFTA's article 4(26), which requests that Jordan "shall provide, at least in cases of copyright piracy or trademark counterfeiting, that its authorities may initiate criminal actions and border measure actions *ex officio*, without the need for a formal complaint by a private party or right holder."⁵⁹⁸ The US government's position has been to request the amendment of the Jordanian Customs law to comply with this language. The Jordanian Customs Department accepted this argument and did not present an opposing point of view (even though several are available).⁵⁹⁹ As discussed earlier, however, the current language of article 41 of the Jordanian Customs Law allows the Customs Department to initiate the first step in a legal proceeding, which can result in civil or criminal prosecution. This indicates that the current Customs Law is in compliance with the language of JUSFTA article 14(26) and, therefore, no amendment of the Customs law is necessary.

Jordan's acceptance of the US' position, however, hampers Jordan's ability to formulate workable solutions on implementation and enforcement issues. Proffering a second view on the interpretation of article 14(26) of the JUSFTA, even if it fails, will help expand institutional legal thinking and capacity. But maybe Jordanian governmental officials in charge of interpreting IPRs are confined to the US interpretation, because the majority of training seminars and their funding sources occurred in the US.⁶⁰⁰

Weak governmental interpretation is also evident in JISM's destroying counterfeit goods after confiscating them, even though that is not allowed under its current law. It is up to the owner of the alleged counterfeit goods to file a claim with the court to stop the JISM from destroying the goods or to seek restitution. The work of the JISM in the area of IP enforcement is outside the scope of its law, which does not explicitly address counterfeit trademarks. The JISM interprets article 30(c) of its law to allow for the destruction of counterfeit goods, but article 30(c) actually only addresses the destruction of goods that do not meet the JISM standards.⁶⁰¹ The JISM seems to have adopted a *prima facie* presumption that counterfeit goods always fall under that category, which is not necessarily true.⁶⁰² The JISM understands that its position is not legally supported, and consequently has declared that it is, under pressure from

⁵⁹⁷ *Patent Law No.32.*

⁵⁹⁸ "JUSFTA," sec. 4(26).

⁵⁹⁹ Tawahiah, "Interview"; Jabali, "Interview."

⁶⁰⁰ Jordanian Judicial Council, *Annual Courts Report - 2008*; Alawamleh, "Interview"; Haddad, "Interview."

⁶⁰¹ *Institute of Standards & Metrology Law No. 22 art. 30(c).*

⁶⁰² *Ibid.*, sec. 30(c).

international donors, in the process of amending its law to reflect a clearer mandate to pursue counterfeit products.⁶⁰³

(c) Weak Patent Prosecution

The Jordanian patent prosecution system is centred on outsourcing the patent examination and prosecution process to the WIPO.⁶⁰⁴ The patent prosecution process governs the interaction between applicants, their representatives, and the patent office and is divided into two parts. The pre-grant prosecution refers to negotiations with the patent office for the grant of a patent, and the post-grant prosecution refers to the amendment of a patent and any opposition filed against it. Both the pre-grant and the post-grant parts of the prosecution process represent important elements of the national patent system. They are vital for the development and cultivation of local technical and legal talent and the building of necessary skills for local examiners. A sophisticated and developed local patent prosecution staff will inevitably cause the legal practice of IP law to evolve and develop accordingly.⁶⁰⁵

The current outsourcing of patent examination to the WIPO allows the Jordanian patent office (which is located within the Industrial Property Department of the MoIT) to benefit from the technical capabilities of the WIPO and helps reduce the costs associated with providing the same service by full-time staff in Jordan.⁶⁰⁶ However, this is being done at the expense of developing Jordan's own patent examination and prosecution capabilities. If Jordan is to take the enforcement of patent rights seriously, it must be willing to develop its own technical and human resources for patent prosecution. In order to do so, it has to train legal-technical individuals along the same path as patent prosecutors in the US and Europe.

(d) Escalating IPRs Protections

One of the key assumptions behind promoting the implementation of TRIPS and TRIPS-plus standards has been the promised economic development and innovation resulting from such implementation.⁶⁰⁷ Some have denounced that point of view as patently false because it ignored the necessary balance between the public domain and private property to produce the desired innovation.⁶⁰⁸ Too much IP protection is argued to be just as harmful and distorting as too little protection.⁶⁰⁹

By constantly attempting to extend, by both direct and indirect means, the initial IPRs protection under TRIPS, TRIPS-plus is placing further restrictions on the dissemination of knowledge and delaying the eventual placement of proprietary knowledge and know-how in the public domain. Such attempts create an

⁶⁰³ Khayyat, "Interview."

⁶⁰⁴ Haddad, "Interview."

⁶⁰⁵ Ibid.

⁶⁰⁶ Ibid.; Alawamleh, "Interview."

⁶⁰⁷ Halaiqah, "Interview"; Abu Rahmeh, "Interview"; Madanat, "Interview."

⁶⁰⁸ James Boyle, "Manifesto on WIPO and the Future of Intellectual Property," *Duke Law and Technology Review*, no. 9 (2004).

⁶⁰⁹ Ibid.

atmosphere that encourages the culture of infringement because they undermine the basic tenet of the IP system, which is based on offering a *limited period* of exclusivity, after which the protected knowledge eventually reverts to the public domain.⁶¹⁰

TRIPS standards, for example, resulted in the near-universal adoption of patents for pharmaceutical products, an area traditionally excluded from patent protection in developing countries, where only process patents were allowed.⁶¹¹ TRIPS also assured extended protection beyond the designated 20-year patent period by introducing data exclusivity periods. Under data exclusivity pretences, drug regulatory agencies can for a limited time prevent the use of data presented to them to approve a pharmaceutical product from being used for the registration of a generic version of the same product.⁶¹² That exclusion period is five years in Jordan, which effectively grants pharmaceutical companies a five-year protection period in addition to any patent protection they might have.⁶¹³

Similarly, the JUSFTA adds more time to the 20-year patent period by granting an ill-defined protection to new uses of old chemicals.⁶¹⁴ It is not clear what “new uses” means in this context, whether it refers to the use of the chemical entity alone or in combination with others, whether the use must be to produce something else that is desirable, or whether the new use of the material can be the desired end in itself.

In the area of copyright, the JUSFTA added significant requirements and thus higher standards of protection, giving right holders the power to allow or deny the importation of the protected work(s), whether the work is pirated or an authorized version.⁶¹⁵

The above examples represent a trend in the application of IP standards that seems to deviate from the notion of IPRs as a limited and finite privilege granted to the right holder for a limited period of time and meant to enhance public knowledge, not to engender monopolistic activity. This trend will ultimately serve as a catalyst for the escalation of infringing activity, because it provides an argument for the circumvention of IPRs.

(e) Low Levels of Innovation

⁶¹⁰ Hamed El Said and Mohammed El Said, “TRIPS-Plus Implications for Access to Medicines in Developing Countries: Lessons from Jordan’s;United States Free Trade Agreement,” *The Journal of World Intellectual Property* 10, no. 6 (2007): 438–475.

⁶¹¹ A product patent refers to the chemical structure of a drug, regardless of its method of manufacturing. Process patents, on the other hand, offer protection for the method used to make the final product, and how the product is specifically used to reach certain goals. A process patent is most useful if there is but one technically and financially sound way to produce the product in question.

⁶¹² M. El Said, “The Implementation Paradox: Intellectual Property Regulation in the Arab World,” *Journal of International Trade Law and Policy* 9, no. 3 (2010): 221–235.

⁶¹³ *Patent Law No.32*, sec. 36(d).

⁶¹⁴ JUSFTA, article 22

⁶¹⁵ JUSFTA article 4(11): “Each Party shall provide to authors and their successors in interest, to performers and to producers of phonograms the exclusive right to authorize or prohibit the importation into each Party’s territory of copies of works and phonograms, even where such copies were made with the authorization of the author, performer or producer of the phonogram or a successor in interest.”

Jordan's companies fall in the bottom 20% (ranked 108 out of 133) in spending on research and development according to the Global Competitiveness Report (GCR).⁶¹⁶ This is indication that companies have little incentive to abide by or push for the enforcement of IPRs, as they have little at stake and little to gain from such enforcement. Yet, Jordan's low ranking is rather at odds with its 26th position out of 133 on the GCR's ranking for the availability of scientists and engineers, the so-called innovation enablers, which is measured based on the number of academic degrees awarded.⁶¹⁷ This lopsided result is even more puzzling when one considers the case of Vietnam, which the GCR ranks as 27 in company spending and 62 on availability of scientists and engineers.⁶¹⁸ The GCR also gives Jordan a low ranking (68 out of 133) on the cooperation between industries and universities in research and development.⁶¹⁹ Contrasting the lack of Jordanian innovation against the large supply of Jordanian engineering and science graduates indicates that most university studies are theoretical in nature. The low number of Jordanian patents filed on a yearly basis substantiates this conclusion.

The lack of funds should not be blamed, because Vietnam, which is ranked lower than Jordan in the number of engineering graduates, is ranked higher than Jordan on company R&D spending, even though it has a per capita GDP of \$1,040 compared to Jordan's \$5,421.⁶²⁰ The problem, rather, seems to lie with the institutional and cultural response to the need for innovation, which apparently is lacking and/or deeply misunderstood by the Jordanian official planners and their counterparts in the private sector.⁶²¹

6.10 Conclusion

Although Jordan's economy has seen large strides forward over the last decade, Jordan will remain a developing country for the foreseeable future, plagued by infringement and enforcement issues of IPRs. How to reap the full potential of administrative and judicial protection while sustaining and improving economic growth is still an open question for Jordan. Even though Jordan has an IPRs legal framework that is in compliance with the international standards under TRIPS and other bilateral agreements, the resulting enforcement and implementation regime has many shortcomings. Clear delineation of lines of responsibility and better-defined roles for each of the administrative agencies involved are still needed. In some cases, as with the JISM, such clarification will require amendment of existing legislation that governs the scope of its work.

Better and more developed approaches are needed for interpreting the legal texts governing IPRs in bilateral treaties, as evidenced by the case of the Customs Department's lack of ability to present an alternative point of view to the US government's interpretation of the IP clauses of the JUSFTA. This observation leads us to consider the broader need for better and more competent IP training of relevant officials in both the administrative and judicial agencies. Only when those officials have a sufficient grasp of the elements of IP law and how they interact with the various areas of the Jordanian legal code will they be able to present cogent, independent, and reasonable interpretations of such laws.

⁶¹⁶ World Economic Forum, *Global Competitiveness Report 2009-2010* (World Economic Forum, 2010).

⁶¹⁷ Ibid.

⁶¹⁸ Ibid.

⁶¹⁹ Ibid.

⁶²⁰ Ibid.

⁶²¹ Halaiqah, "Interview"; Abu Rahmeh, "Interview"; Haddad, "Interview."

Weak implementation needs to be considered; policy-makers should remember, and should formulate policy based on, the fact that the strongest possible IPRs protection should not always be pursued. In the absence of such a reasoned formulation, there is increased risk that IP will be viewed by Jordanians as hostile to their interests and needs. As such, IPRs varying standards should be welcomed as long as they meet the needs of the local economy, at reasonable social and economic costs. The current maximum-protection model is bad not only for developing countries but also, in the long run, for developed countries, yet short-sighted corporate pressures and lobbying will assure the dominance of maximum-protection models for the foreseeable future.

Given the above, one can conclude that piracy rates will not decrease until the pricing for original products starts to make economic sense, at which point the price gradient that drives the demand for pirated products will shrink significantly. Ultimately, that point will not be reached until right-holders realize that pricing schemes designed for the developed countries do not make economic sense for developing countries like Jordan. An alternative pricing model must be introduced. Western publishing corporations have already reached that conclusion; for years now, they have offered original products at significantly lower prices for students in developing countries, with the caveat that the copies cannot be shipped in bulk outside designated geographical areas. While the application for audio-visual works might not be as straightforward, the principle is still valid, because enforcement models and mechanisms that do not make economic sense are not effective and will invariably create an underground market for the controlled product.

Overall, there is also an absence of economic solutions, and an over reliance on judicial (civil and criminal) ones. Taking economic considerations into account will reduce an enforcement model that is based on balancing the economic interests of the infringer and the right holder. Such a model would emphasize the introduction of original products at rates reasonable to the local community thus undercutting the economic incentive for infringers. Until this occurs, the Jordanian government should not continue to act as the enforcement agent for the interests of MNCs, often at the expense of the economic realities of its own people.

If Jordan continues to fail to raise its efficiency and effectiveness and thus its innovation levels, it will not place much emphasis on IP standards except to the extent necessary for window dressing. Continuing to define acceptable standards downwards might provide some easy comfort for the short term (and can generate some cheap publicity as well), but in the long run it is nothing short of burying one's head in the sand. Instead, there must be a moment of reckoning when the Jordanian economic and political decision-makers must answer the key question of whether they realistically see Jordan as an international, or even a regional, technological innovator and powerhouse. If they do not, then they must explain why Jordan has such stringent IP laws. Given the positive link between the use of imitation and increased innovation, stringent IP standards are actually hampering any chance that an innovative technical critical mass will ever germinate in Jordan. Right holders will need to focus not only on standards adopted elsewhere, but also, and primarily, on standards that accommodate the specifics of the Jordanian economic, social and legal context. Such a novel approach will be a good start for the whole region.

7. CHAPTER VII: CURRENT ISSUES IN ENFORCEMENT AND COMPLIANCE

7.1 TRIPS, TRIPS-plus and Enforcement

It is justifiable to wonder why any developing country, or any developed country that is a net IP importer like Canada, would agree to join and implement TRIPS standards. After all, the World Bank – an organization not known for anti-globalization tendencies – estimated in 2002 that TRIPS implementation would cause annual losses of \$530 million for Brazil, \$5.1 billion for China, \$903 million for India, and \$15.3 billion for South Korea.⁶²² The view presented by some scholars that stronger IP protection is not a prerequisite for technology transfer adds one more layer to the argument.⁶²³ The history of TRIPS actually belies the concerns of developing countries that they do not stand to gain much from TRIPS implementation. Yet as the promises of global trade and economic empowerment through globalization took root, TRIPS became a reality, and, despite any dissatisfaction with TRIPS they might have had, developing countries within the WTO embarked on IP reforms of varying magnitude and scope.

Broadly speaking, TRIPS implementation went through two distinct phases. Some countries embarked on a path that involved enacting new laws and amending older ones to be consistent with TRIPS, thus meeting the minimum standards under TRIPS, while others went beyond the minimum standards by taking a TRIPS-plus approach. Jordan falls in the latter category; it amended its laws to conform to TRIPS standards and further undertook more stringent amendments through its various bilateral treaties with the US and other governments.

Jordan's accession to TRIPS and the varying levels of amendment to IP laws can be attributed to two major and broad drivers. At one level, Jordan's economy is subject to international power dynamics. Its attempt to shift to a knowledge-based economy could not go far without attracting input from multinational companies who are the purveyors of knowledge and innovation, who in turn requested tighter and more stringent protections for their IP assets. Jordan did not have much negotiating power or leverage to deny such requests. The economic bubble of the first decade of the 21st century simply meant that there were many countries standing in line to comply with the multi-national companies' requests for IP assets protection in return for their investment in the local economy. In addition, Jordan's heavy dependence on foreign aid became increasingly linked to meeting the commercial and legal guidelines imposed by the donors. Those two dynamics are built around meeting certain goals and so-called growth and development criteria, mainly focused on the existence of sufficient IP laws, the availability of enforcement agencies, and a minimum statistical indicator of raids and confiscations of pirated and counterfeit products. Little attention was paid to the actual compatibility of those measures and indicators with Jordan's local economic, social, and developmental needs. The USTR Special 301 Report is but one example of how those pressures have played out into a veritable arm-twisting carrot and stick scenario, which made the enforcement of IP laws a coercion-driven process.

Those ideas and policies became infused into the aid culture within Jordan. Whole programs and projects are now vetted for their compliance with the IP politics of the developed countries, including TRIPS and TRIPS-plus standards.⁶²⁴ Capacity development is the new gateway for the penetration of developing countries' decision making circles and the creation of a monolithic

⁶²² Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, 2008).

⁶²³ See for example, M. Binley, "IPRs: A Strategic Instrument for Developing Countries" (Working Paper No. 46, University of Toronto, 1992).

⁶²⁴ Hanan Sbouh, "Interview", July 26, 2011; Halim Abu Rahmeh, "Interview", August 7, 2011.

point of view, mainly that of the donor country, on IP's role and importance.⁶²⁵ For example, US government-financed technical assistance programs were designed explicitly to implement TRIPS-plus standards.⁶²⁶

Additionally, the haste with which IP laws were introduced and approved into the Jordanian legal framework calls into question the Jordanian government's intent to actually comply with them.⁶²⁷ Jordan currently has thirteen laws that deal directly or indirectly with IP. Some of them, like the patent and trademark laws, have drafting mistakes. One can assume that Jordan calculated that the reputational rewards and economic favours far outweighed any concrete thinking on the possibility and economic feasibility of enforcing them. Unfortunately, the overall factors influencing enforcement of IP laws show that was a misguided calculation.

Developing countries, particularly in the Middle East, fully understand the importance of window-dressing and lip service to donors in the areas of so-called sustainable economic development, democratization and human rights.⁶²⁸ At the same time it is important to understand the domestic politics and setup of the enforcement agencies, as well as the socio-economic factors impacting compliance. Without understanding those factors, one will not understand the variations in the implementation of IP laws and, consequently, will be unable to offer ways to enhance enforcement. An analytical approach based on empirical data, like the approach adopted in the previous chapter, is necessary for piecing together the variations in the enforcement picture. Another key factor is an understanding of the role of the various IP enforcement agencies and how they interact. The unifying aspect of these factors is that unless there is value to be exerted from the use of national resources for enforcement efforts, there is no national incentive to exert such an effort.

Governmental sectors such as the JISM, the JFDA and the Patent Office clearly view the heightened enforcement of IPRs in Jordan as important to their capacity-building and their ability to continue to attract funding and support from the US and the EU.⁶²⁹ The private sector, including the pharmaceutical sector, feels it is left without any benefits from this rush to heightened enforcement and additional IP standards, especially since there is no research and development expenditure, and the ability to imitate and copy to help innovate is restricted by the very IPRs that are supposed to spur innovation.⁶³⁰ The main policy-making failure in Jordan is the inability to reconcile the two sides. When discussing the issue of acceding to the ACTA, the MoIT projects an image of haplessness. It protests the suggestion that it is unable to formulate a policy position because there aren't sufficient studies about the effect of IPRs in third-world countries, and because it cannot support such a study on its own because of the lack of funds.⁶³¹

⁶²⁵ See Benjamin Fordham and Victor Asal, "Billiard Balls or Snowflakes? Major Power Prestige and the International Diffusion of Institutions and Practices," *International Studies Quarterly* 51, no. 1 (2007): 31–52; Kristian Skrede Gleditsch and Michael D. Ward, "Diffusion and the International Context of Democratization," *International Organization* 60, no. 04 (2006): 911–933; Beth Simmons and Zachary Elkins, "The Globalization of Liberalization: Policy Diffusion in the International Political Economy," *American Political Science Review* 98, no. 01 (2004): 171–189.

⁶²⁶ See, Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*.

⁶²⁷ Mohammad Halaiqah, "Interview", August 9, 2011; Sboul, "Interview."

⁶²⁸ Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," *American Journal of Sociology* 110, no. 5 (March 1, 2005): 1373–1411.

⁶²⁹ Laila Jarrar, "Interview", July 26, 2011; Yaseen Khayyat, "Interview", August 7, 2011; Rula Madanat, "Interview", August 9, 2011; Lina Haddad, "Interview", July 31, 2011.

⁶³⁰ Sboul, "Interview"; Abu Rahmeh, "Interview."

⁶³¹ Ahmed Hammed, "Interview", August 18, 2011.

Disregarding the need for broad policy analysis, the Ministry is basing its support of Jordan's accession to the PCT on limited input and data.⁶³²

7.2 RBTs and the Attrition of the Unified Global Trade System

The most important development in IP standard setting since the adoption of TRIPS has been the advance of the RBT system. Though this system predates TRIPS in its conception, it has taken a whole different role with the adoption of TRIPS. This section provides an overview of the evolution of the role of IP laws and standards in the interaction of developed countries with the developing countries, which underpins the developed countries' current stance on enforcement issues.

(a) Pre-TRIPS Unilateral Activities

From the mid-1970's to the early 1980's, both the US and the EU made efforts to strengthen their trade laws, which included stronger IP protection. As their trade relations expanded into the developing countries, it was only natural that stronger protections were pushed on those developing countries. The 1974 amendment of section 337 of the US Trade Law allowed the US government to take unilateral action against foreign products in ways that violated the IPRs held under US laws.⁶³³ This unilateral approach had its drawbacks, not the least of which were the conflicts that arose between the language of section 337 and the requirements under the GATT. Reports were issued finding that certain aspects of section 337 violated the national treatment provision contained in Article III of GATT, thus prompting subsequent amendments.⁶³⁴ In 1984, the US Congress authorized the US administration, through Sections 301 and 305 of the US Trade and Tariff Act, to link the benefits it offers its trading partners to their performance in the area of IP protection, and to link US trade negotiations objectives with its IP interests.

Section 301 and its so-called Special Provisions specifically authorized the USTR to specify priority countries that failed to make sufficient progress in negotiations with the USTR and to initiate investigations that could lead to remedial action, which ranged from the use of monitoring to the threat of actual imposition of trade sanctions. The USTR's Special 301 Report reflects the annual review of the IP practices of the US trade partners, identifying countries that, in the USTR's opinion, failed to provide adequate IP protection or fair and equitable access to markets for US nationals relying on IP.

Given the broad scope of authority assumed by the Special 301 Report provisions, as well as their explicit extraterritoriality, it is little surprise that their legality has been intensely debated by trade scholars. Such extraterritoriality, they argue, is "highlighted by the fact that it does not refer to any sense of norm or principles in order to define adequate IP protection among US trade partners – the implicit assumption being that any level of protection inferior to that provided

⁶³² Zain Alawamleh, "Interview", August 2, 2011.

⁶³³ Section 337 of the Tariff Act of 1930 is a unique provision in U.S. trade law permitting the U.S. International Trade Commission (ITC) to investigate complaints brought by private parties in order to determine whether imported articles should be barred from entering the United States.

⁶³⁴ Bryan Schwartz, "The Fate Of Section 337 Litigation After The Uruguay Round Agreements Act," *Law and Policy in International Business* 27 (1995); Lisa Barons, "Amending Section 337 To Obtain GATT Consistency And Retain Border Protection," *Law and Policy in International Business* 22 (1991).

by US law is unfair trade practice.”⁶³⁵ The absence of any set of standards according to which IP protection is defined has drawn criticism because it implies that standards can be assigned according to the wishes of the reviewer (i.e., the USTR) and quite possibly can be judged against the levels of protection provided under US law.⁶³⁶ The resulting outcry does not seem to have caused the USTR to revise its approach in preparing the Special 301 Report. In effect, this means that there is no set definition of applicable standards for the Report except those under the Report itself. The end result is that “non-compliant” countries continue to be threatened with retaliatory action, including aid reduction.

As a result of this approach, IP compliance has become a moving target for Jordan that gets shifted and focused based on the requirements of the Special 301 Report, as Jordan annually attempts to avoid being listed as a non-compliant country. The absence of objective standards in the Special 301 Report and the resulting ad-hoc governmental reaction to its pronouncements have also had the negative effect of draining the energy out of the calls for a national IP strategy.⁶³⁷ Because the goal of avoiding getting listed on the Special 301 Report has become the main drive for shaping the national policy on IP, Jordan has had little policy incentive to think about the long-term implications of IP on its economic and developmental goals.⁶³⁸

(b) RBTs as the Continuation of Special 301 Report by Other Means

The expansive approach of the Special 301 Report regulations is further augmented by the US’ approach of incorporating IP standards and provisions in its RBTs. The EU has followed the same route, but it thus far lacks a platform similar to the USTR’s Special 301 Report that allows it to bring to the fore, on an annual basis, countries that are not in compliance with those provisions. In the EU’s RBTs, IP provisions are less prominently featured than those typically used by the U.S., which tend to be much more detailed. Yet the language used by the EU is equally effective. The JUSFTA and the JEUA both exemplify that approach.

Section 4 of the JUSFTA, which covers IP, is the longest section of the agreement and touches upon several areas of IPRs, as well as enforcement measures and transition periods. The JEUA, on the other hand, devotes less space to IP provisions but states that Jordan and the EU shall abide by the “highest international standards” to ensure the adequate and effective protection of IPRs. The JEUA’s IP provisions, therefore, are more subtly inserted but are no less significant in scope, and actually are more open-ended by virtue of the use of terms like ‘highest international standards’, thus creating an open ceiling for enforcement and implementation efforts. More often than not, the EU has ridden the coattails of aggressive IP provisions introduced by the US, “sometimes sending in negotiators to conclude a bilateral agreement on IP with a developing

⁶³⁵ M. J. Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge, 2005).

⁶³⁶ Ibid.

⁶³⁷ Alawamleh, “Interview”; Sboul, “Interview.”

⁶³⁸ Alawamleh, “Interview”; Sboul, “Interview.”

country after US negotiators had brought that country to the negotiating table using the 301 process.”⁶³⁹

Therefore, the overall result of the US and EU’s bilateral trade agreements with Jordan is making IPRs standards more stringent and moving Jordan into the TRIPS-plus area. The progression from pre-TRIPS to TRIPS to TRIPS-plus standards exemplifies a “take and demand” approach by the developed countries. On the one hand, TRIPS was supposed to represent the universe of IPRs regulation. On the opposing hand, developing countries are asked to sign RBTs with TRIPS-plus provisions, when most of them have yet to fully implement the TRIPS standards in the first place.

The consequences of this assault on TRIPS provisions from an enforcement point of view could not be more distorting and confusing, as TRIPS-plus encroaches on the flexibilities allowed under TRIPS. An additional consequence of the expanding universe of RBT’s IP provisions is the limiting of the developing countries’ ability to tailor their IP laws to national priorities at a reduced cost.⁶⁴⁰ The adoption of country specific IP regulations and enforcement models simply became more difficult as a result of Jordan’s speedy move from TRIPS to TRIPS-plus. By signing an RBT with the US and the EU shortly after adopting TRIPS, Jordan was robbed of the opportunity to obtain a sound understanding of the economic and social effects of the somewhat flexible TRIPS provisions before embarking on the more rigid TRIPS-plus provisions.

RBTs negotiated by the US and the EU indicate that they both view the ‘minimum standards’ of TRIPS as the beginning, rather than the end, of the road towards higher standards.⁶⁴¹ The U.S., it seems, has altogether abandoned the WTO forum as a venue for accomplishing a more stringent IP standards goal and instead shifted to the forum provided through the bilateral and multilateral RBTs.⁶⁴² The direct consequence from an economic perspective is the ability of MNCs to further cement the ‘original’ status of their products in foreign markets by using the local legal system to pursue infringers. Furthermore, TRIPS-plus brought added protections above and beyond those under TRIPS, which would otherwise have been impossible to negotiate through the WTO into TRIPS. From an enforcement perspective, the end goal of meeting the compliance requirements for TRIPS is made into a moving target by virtue of TRIPS-plus standards. The developing economic status of the majority of countries that have entered into RBTs with the US since 2000 (Jordan 2001, Singapore 2003, Australia 2004, Chile 2004, Bahrain 2006, Morocco 2006, Oman 2006, Peru 2007, Dominican Republic-Central America Free Trade Agreement 2005), brings into question the value of higher IP standards when these countries have yet to identify the value gained from the TRIPS standards.

⁶³⁹ Peter Drahos and R. Mayne (Editors), “Negotiating IPRs: Between Coercion and Dialogue,” in *Global IPRs: Knowledge Access and Development* (Basingstoke: Palgrave Macmillan, 2002), 161–182.

⁶⁴⁰ Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003).

⁶⁴¹ Ken Shadlen, “Globalisation, Power and Integration: The Political Economy of Regional and Bilateral Trade Agreements in the Americas,” *Journal of Development Studies* 44, no. 1 (January 2008): 1–20.

⁶⁴² The US signed two FTA’s before 2000 (Israel and NAFTA), and nine FTAs as of that year (Jordan 2001, Australia 2004, Chile 2004, Singapore 2004, Bahrain 2006, Morocco 2006, Oman 2006, Peru 2007, Dominican Rep.- Central America Free Trade Agreement 2005)

(c) The Battle for Influencing IP Standards

In this section, we will discuss factors that continue to make the global IP system more complex and, as a result, add to the enforcement burdens.

(i) Forum Shifting

Developed countries, aware of the developing countries' growing attempts to counter the strengthening of TRIPS, shifted the debate to where the developing countries' ability for collective, and therefore, effective action was weakest. This "forum-shifting" occurred as the developed countries pushed their expansive agenda across multilateral organizations that were less resistant to it. For patents, that agenda has three components: (i) ratification of the Patent Law Treaty (PLT), (ii) amendment of the Patent Cooperation Treaty (PCT), and (iii) a new Substantive Patent Law Treaty (SPLT) to supplement the substantive obligations contained in TRIPS.⁶⁴³ All three components would place considerable compliance requirements on Jordan, forcing it to more readily accept foreign patents and give them equal protection under Jordanian law, without having the necessary infrastructure to properly examine them, as Jordan currently relies on WIPO to review patent applications.

The developed countries' frustration with the level of progress on those issues prompted them to intensify their efforts towards substantive patent harmonization by bypassing more experienced representatives in Geneva and going directly to the capitals of developing countries,⁶⁴⁴ as well as by seeking former developing country officials to participate in the advancement of that agenda.⁶⁴⁵ For Jordan, the top political leadership often met with the USTR during its visits to Jordan, and the USTR often pays annual visits to Jordan during which it tours various facilities and meets high ranking officials.⁶⁴⁶ Jordan has been under intense pressure by the USTR to amend its Customs Law to give border agents the capacity to initiate legal action *sue sponte* even if the right holder does not.⁶⁴⁷

The proliferation of international organizations and forums that deal with, and aim to impact, the level of IP standards regulation has resulted in the growing complexity, and therefore the weakening, of the global IP

⁶⁴³ C. Correa and S. Musungu, "The WIPO Patent Agenda: The Risks for Developing Countries" (South Center, November 2002).

⁶⁴⁴ "Clash Continues On U.S.-Central America Trade Deal," *Intellectual Property Watch*, March 1, 2005.

⁶⁴⁵ "India Joins Opposition To Casablanca Patent Meeting Outcome," *Intellectual Property Watch*, April 10, 2005, <http://www.ip-watch.org/weblog/2005/04/10/india-joins-opposition-to-casablanca-patent-meeting-outcome/>.

⁶⁴⁶ Office of the United States Trade Representative, "USTR Team Holds Meetings in Jordan", September 30, 2009, <http://www.ustr.gov/about-us/press-office/press-releases/2009/september/ustr-team-holds-meetings-jordan-discuss-labor-ri>.

⁶⁴⁷ Tawfiq Tabbaa, *Update on Compliance with IPRs in Jordan*, Improved Economic Opportunities For Jordanians (USAID-Sustainable Achievement fo Business Expansion And Quality (SABEQ), February 14, 2007).

system. This is because the ability of international organizations to extend harmonized IP standards has been decreased, and therefore the likelihood of their global adoption has been weakened.⁶⁴⁸ Even when such adoption took place, the added complexity made the enforcement and compliance process at the national level more difficult.

As a result, the developing countries have sought assistance from international donors and NGOs to meet their compliance requirements, creating a major conflict of interest; most of those international donors and some of the NGOs had vested interests in promoting right holder's positions and therefore influenced the developing countries' policies to that effect. Jordan is one of the examples where such conflicts existed for both international donors and NGOs like the Jordan IP Association (JIPA), which is funded or sponsored by right holders. In contrast, NGO work on IPRs in developed countries has advocated a more cautious approach to IP standard setting and often called for a full review of TRIPS to address its impact on development.⁶⁴⁹ Questioning the claimed economic benefits of the increased IP standards is one of the glaring omissions of the economic and legal discussion in Jordan over the past decade.

(ii) IP's Expanding Connectedness

The branching out of the IP standard-setting battles ultimately led to making IP a component in areas traditionally beyond the realm of the classic IP laws, including patent, copyright, and trademarks. This has made the definition of IP more expansive, made the negotiations in those newer areas more complex, and added enforcement requirements where previously there were none. For example, IP debates arose during the efforts to finalize a treaty for the management of plant genetic resources at the UN Food and Agriculture Organization (FAO).⁶⁵⁰ Similarly, the US tried and failed to derail a UNESCO document on cultural diversity that the US alleged "could be used by other countries to construct trade barriers to US exports of film, music or other cultural products."⁶⁵¹ Along the way, the US sought to include in the UNESCO document more than a dozen references to IPRs but was prevented from doing so by developing countries.⁶⁵²

This intermingling of IP standards within areas that would usually not have been associated with them is a tool that, in the case of Jordan, was used to influence changes in policy on several fronts. Whereas the

⁶⁴⁸ Carolyn Deere-Birkbeck, "Reforming Governance to Advance the WIPO Development Agenda," *Wilfred Laurier University Press/Centre for International Governance Innovation/International Development Research Centre* (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325045.

⁶⁴⁹ An example of that trend is the work done by the South Center and the Center for International Environmental Law (CIEL).

⁶⁵⁰ Geoff Tansey and Tasmin Rajotte, *The Future Control of Food* (Earthscan, 2008).

⁶⁵¹ "US 'Pulls Out All Stops' As UNESCO Backs Culture Treaty," *Intellectual Property Watch*, October 17, 2005, <http://www.ip-watch.org/weblog/2005/10/17/us-pulls-out-all-stops-as-unesco-backs-culture-treaty/>.

⁶⁵² *Ibid.*

enforcement of the JUSFTA's IP standards is a mainstay of the discussions between the US and the Jordanian governments, the JUSFTA also included articles on labour and environmental policy – the first of their kind in any RBT signed by the US government.⁶⁵³ Over the past decade since the signing of the JUSFTA, not only have IP issues arisen between the two countries, but disputes on the issues of rights of workers and the quality of environmental standards have also surfaced. In an example of strategic manipulation, the US has shifted pressure for compliance and enforcement from one area to another (labour to environment to IP); as a result, an enforcement dispute in one area is swiftly linked to enforcement issues in other areas. For example, the issue of better working circumstances for workers within Jordanian industrial areas allowed to export to the US market, known as QIZ (Qualified Industrial Zones), was linked to the enforcement of a prohibition on the sale of knock-off products in the local market by the same QIZ entities.⁶⁵⁴ Similarly, the push for the enforcement of environmental standards is often coupled with calls to regulate low-cost factories that also produce what are considered infringing goods.⁶⁵⁵

The relationship between IP and human rights, similar to the QIZ situation discussed above, has also been steadily growing globally. In 1998, to commemorate the 50th anniversary of the proclamation of the Universal Declaration of Human Rights, WIPO, in collaboration with the United Nations Office of the High Commissioner for Human Rights (OHCHR) Mary Robinson, organized a Panel Discussion that linked IP and human rights. The OHCHR remarks linked the concepts of 'non-discrimination' and 'national treatment' to concepts of human rights, thus asking that indigenous peoples and local communities are consulted and notified by companies and researchers, and their consent sought.⁶⁵⁶ That ushered in the increased interest of the international human rights community in IP issues, and several NGOs subsequently highlighted areas of conflict between TRIPS and human rights as part of their examination of the human rights implications of the different facets of economic globalization.⁶⁵⁷ In 2001, the OHCHR issued a report on the impact of TRIPS on human rights, with special attention to access to medicine.⁶⁵⁸ Other UN bodies, like the United Nation's Committee on the Rights of the Child (CRC), also followed suit and issued recommendations regarding the impact of Free Trade Agreements and TRIPS on public health, emphasizing the need to assure that

⁶⁵³ JUSFTA, article 5 deals with the environment and article 6 deals with labor issues.

⁶⁵⁴ International Labour Organization, "Forced Labour and Trafficking In Jordan - A Pilot Programme on the Qualified Industrial Zones," Project, March 1, 2009, http://www.ilo.org/sapfl/Projects/lang--en/WCMS_104023/index.htm.

⁶⁵⁵ "Ministry of Environment Signs MoU with U.S. Embassy," *Alghad Daily Newspaper*, October 23, 2008.

⁶⁵⁶ Mary Robinson, "Opening address by Mr. Brian Burdekin on behalf of Mrs. Mary Robinson, United Nations High Commissioner for Human Rights," *WIPO*, 1998.

⁶⁵⁷ The Report was titled "Globalization and human rights" and the NGO's were The Lutheran World Federation, Habitat International Coalition and the International Commission of Jurists

⁶⁵⁸ UNHCHR (2001)

implementation does not impact the health of the poor or their access to medication.⁶⁵⁹

The growing prominence of the social and economic effects of IP standards turned the question of controlling the international IP organizations into a major issue in its own right and further influenced the developed countries' push for forum shifting to avoid places where their ideas were strongly challenged. One of the first victims of this approach was WIPO, which was increasingly attacked by developing countries and civil society activists who accused WIPO of not providing sufficient technical assistance on the issue of flexibilities within TRIPS and called upon WIPO to abandon its current culture of expanding monopoly privileges without regard to social cost.⁶⁶⁰ WIPO was criticized for its 'faith-based' approach for ever-stronger IP protection driven by special interests and right holders.⁶⁶¹ The implication was that WIPO was no longer regarded as a neutral arbiter but rather as an institution with its own agenda,⁶⁶² which further intensified the call by developing countries for a new WIPO Development Agenda, first advocated in 2004 by Argentina and Brazil, who were later joined by thirteen other Friends of Development developing countries.

At the centre of that Development Agenda was the call to decelerate the continued push for ever-stronger IP standards and to address the Development Agenda's co-sponsors' needs.⁶⁶³ The Development Agenda sought to re-orient WIPO towards a more development-focused set of concerns, and set out the argument that the effort to protect and enforce IPRs cannot be seen as an end in itself.⁶⁶⁴ The Development Agenda also detailed a list of complaints that were supported by NGOs and other civil society institutions, including poor recruitment practices of IP technical cooperation providers, conflicts of interest, low-quality seminars, and biased content training programs.⁶⁶⁵ The Development

⁶⁵⁹ See for example "Access to Affordable Drugs: Victims of HIV/AIDS Should Not Suffer From Trade Rules, Press Release", October 2004, and "Access to Affordable Drugs: A Right no FTA Can Ignore," Press Release, May 2004. For a more comprehensive list of such and other publications see: <http://www.3dthree.org/en/page.php?IDpage=26&IDcat=5>, and also <http://www.3dthree.org/en/page.php?IDpage=13&IDcat=5>

⁶⁶⁰ Lawrence Kogan, "Brazil Challenges the Established Global IPR Framework", 2006, http://findarticles.com/p/articles/mi_qa5479/is_1-2_8/ai_n29431940/pg_26/.

⁶⁶¹ James Boyle, "Manifesto on WIPO and the Future of Intellectual Property," *Duke Law and Technology Review*, No. 9 (2004).

⁶⁶² Christopher May, "The World Intellectual Property Organization," *New Political Economy* 11, no. 3 (September 2006): 435-445.

⁶⁶³ WIPO (2004), *撤* Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO •

⁶⁶⁴ May, "The World Intellectual Property Organization."

⁶⁶⁵ "Geneva Declaration on the Future of the World Intellectual Property Organization" http://en.wikipedia.org/wiki/Geneva_Declaration_on_the_Future_of_the_World_Intellectual_Property_Organization., Medecins Sans Frontieres, "MSF: Doha Derailed: Technical 'Assistance' - A Case of Malpractice?" (2004); Sisule Musungu, *Designing Development-oriented Intellectual Property Technical Assistance*

Agenda eventually bore some fruit for its advocates in 2007, when WIPO adopted a series of recommendations related to it and suspended the new SPLT.⁶⁶⁶ But it seems that much of the implementation of the Development Agenda will require reforming WIPO's governance.⁶⁶⁷

7.3 Effect of IP Enforcement on Access to Pharmaceuticals

Advocates of equitable access to medicine want to bring the World Health Organization (WHO) into the battle for control of IP policy within international organizations. In recent years, the WHO has become one of the main arenas for debate between NGOs and the pharmaceutical industry.⁶⁶⁸ At the forefront of this debate have been issues such as access to medicine, extended patent rights, and the industry's lack of focus on research and development on some drugs that disproportionately afflict the developing world, because the markets cannot meet the costs of drug development. The WHO itself concedes that the implications of trade agreements on public health have been among the most debated topics in recent years, particularly the impact of the WTO-TRIPS Agreement on access to essential medicines.⁶⁶⁹ In 2004, WHO member states were further encouraged to ensure that RBTs take into account the flexibilities contained in the WTO-TRIPS Agreement on Public Health.⁶⁷⁰

For Jordan, the most immediate effect of the adoption of TRIPS on access to medicine has been the tightening of access to counterfeit brand-name drugs; however, the more lasting effect has been the on-going struggle to fix the prices of brand-name drugs, which undergoes a constant tug between affordability and availability.⁶⁷¹ Jordan, not being a major regional drug importer or having a significant regional market population, has never had the necessary leverage or bargaining power to counter the effects of escalating drug prices as a result of the implementation of TRIPS.⁶⁷² As a result, to lessen the impact of price increases by pharmaceutical brand-name producers, Jordan must rely on a complicated mechanism that ties the prices of brand-name pharmaceuticals to various benchmarks.⁶⁷³

The JFDA regulates the pricing of drugs in Jordan using the Provisional Drugs and Pharmaceuticals Law⁶⁷⁴ and the relevant pricing standards.⁶⁷⁵ If the product is only registered and priced in its country of origin, then it will be priced based on the price of other drugs with similar chemical compositions or treatment effects.⁶⁷⁶ The prices of imported products with

Programmes (ICTSD-UNCTAD Dialogue, 2nd Bellagio Series on Development and Intellectual Property, 2003), <http://ictsd.org/i/ip/24504/>.

⁶⁶⁶ William New, "WIPO Launches New Agenda On IP And Development," *Intellectual Property Watch*, 2007.

⁶⁶⁷ Carolyn Deere-Birkbeck, "Reforming Governance to Advance the WIPO Development Agenda," *J. de Beer, ed., Waterloo, ON: Wilfred Laurier University Press/Centre for International Governance Innovation/International Development Research Centre* (2009).

⁶⁶⁸ William New and Mara, Kaitlin, "WHO Session On IP And Health Clashes On Vision, Practicalities," *Intellectual Property Watch*, 2007.

⁶⁶⁹ WHO, "Trade, IPRs and Access to Medicines", January 12, 2010, <http://www.who.int/medicines/areas/policy/globtrade/en/index.html>.

⁶⁷⁰ *Ibid.*

⁶⁷¹ Jarrar, "Interview"; Sboul, "Interview."

⁶⁷² Jarrar, "Interview"; Sboul, "Interview."

⁶⁷³ Jarrar, "Interview"; Sboul, "Interview"; *Drugs and Pharmaceuticals Law No. 80*, 2001.

⁶⁷⁴ *Drugs and Pharmaceuticals Law No. 80*.

⁶⁷⁵ *Drug Pricing, Price Revision and Price Objection Standards*, 2007.

⁶⁷⁶ *Ibid.*, sec. 4(e)

generic equivalents registered and priced in Jordan are determined by the following pricing mechanisms:⁶⁷⁷

1. If purchased on a Cost, Insurance and Freight (CIF) basis, the factory price plus customs duties, insurance, clearing, inland transport, local client's margin (for products purchased on a Free on Board (FOB) basis, shipping costs must be added); or
2. The public selling price in the country of origin (after deducting the said country's wholesaler's and retailer's margin), plus freight costs, insurance, custom duties, inland transport and local client's margin; or
3. The export price from Saudi Arabia. In the event the product was not registered in Saudi Arabia, the price shall be reviewed upon its registration in Saudi Arabia (where the Agent importing the product must inform the FDA of the requested price within four months of its registration in Saudi Arabia). Saudi Arabia is chosen because it is the largest in market population and in spending per capita in the region.

7.4 Effect of Economic Pressures on the Adoption of IP Standards

The tension that exists between developing and developed countries in how each views the role of IPRs is at the centre of the pressures exerted by the developed countries to spread their vision of those rights. The developed countries are interested in promoting IPRs as a way of spurring innovation, which in their minds justifies concepts like exclusive ownership, the right to limit use, and the ownership right of control over proprietary goods. Little attention is paid to claims that their current IPRs policies will not help the developing countries grow out of complete dependence on the technology of developed countries.

Developed countries, however, recognizing the strong resistance to TRIPS, have adopted a divide-and-conquer approach to TRIPS implementation, whereby they target a subset of developing countries with economic pressures to adopt TRIPS-plus standards. Such pressures are the primary explanation for the developing countries' eventual agreement to adopt TRIPS and TRIPS-plus standards.⁶⁷⁸ Jordan is not an exception to that rule; when compared to the lack of any significant economic or technological transfers, the progression of IP standards in Jordan can only be explained by economic pressures and/or initial promises which later failed to materialize.

If we consider the developed countries' selling of the "idea" of economic progress and national innovation as going hand in hand with ever-stricter IP standards, then Jordan can be seen to have been one of the first and most avid adopters of those economic promises. This explains to a large extent the adoption of TRIPS-plus standards under the JUSFTA and the JEUAA, even though severe economic pressures were not apparently applied; it was simply the combination of economic and ideational pressures that provided the developed countries with a formidable carrot-and-stick approach. In an open society, however, the influence of, and support for, ideational hopes will diminish if that society realizes the lack of progress made on the economic and development promises. The following section discusses the use of soft economic incentives and the coercion-based approach to IP enforcement.

⁶⁷⁷ Ibid., sec. 5

⁶⁷⁸ For the examination of power in its different dimensions in global governance including intellectual property protection see, Michael Barnett and Raymond Duvall, *Power in Global Governance* (Cambridge University Press, 2004).

7.5 The Incorporation of TRIPS-plus Standards

RBTs like the JUSFTA and the JEUA are among the most common and potent tools for encouraging developing countries to adopt TRIPS-plus standards.⁶⁷⁹ Both the JUSFTA and the JEUA are model agreements in that regard, as their terms include obligations to accede to specific international agreements, decrease copyright requirements, expand patent coverage to new subject matter, and (under the ultimate catch-all requirement used in the JEUA) adopt the ‘highest international standards’.⁶⁸⁰ One example of these TRIPS-plus standards for IP is the JEUA’s requirement, in addition to the ‘highest international standards’ requirement, that Jordan provide patent protection for chemicals and pharmaceuticals two years earlier than required under TRIPS.⁶⁸¹

The trend of including TRIPS-plus standards in trade agreements is also used by smaller trade groups like the European Free Trade Area (EFTA) countries (Iceland, Lichtenstein, Norway, and Switzerland), who include TRIPS-plus standards, such as joining intellectual-property-related treaties and providing stronger patents and data protections, in their negotiations with developing countries. The EFTA–Jordan Free Trade Agreement reflects such measures and TRIPS-plus standards and calls for the provision of enforcement mechanisms under national laws at the same level as that provided for in the TRIPS agreement.⁶⁸²

These agreements have had a significant impact on a regional basis, and on trade agreements between developing countries, by acting as a force multiplier for TRIPS-plus standards between developing countries. In general, RBTs between developing countries have not included provisions addressing IP. Where one developing country has already implemented TRIPS-plus standards, they will most likely be reflected in trade agreements with other developing countries to maintain consistency and equal treatment requirements.

A recently noted development in the scope of IP treaties is the drive for the development of a plurilateral Anti-Counterfeiting Trade Agreement (ACTA) for establishing international standards on IPRs enforcement within the participating countries.⁶⁸³ ACTA’s proponents describe it as a tool to provide an international framework that improves the enforcement of existing IPRs without creating new one. They argue that ACTA will create improved international enforcement standards regarding how to act against large-scale infringement of IPRs.⁶⁸⁴ The intended scope of ACTA is broad, including counterfeit goods as well as “piracy over the Internet”, with a focus on counterfeiting and piracy activities that significantly affect commercial interests, rather than

⁶⁷⁹ In certain cases such as China the U.S. signed a series of bilateral agreements prior to China’s accession to the WTO, an undoubtedly influenced by the size of the Chinese market. The first such agreement was the 1992 Sino-American memorandum of Understanding in the Protection of Intellectual Property. See also Andrew Mertha and Robert Pahre, “Patently Misleading: Partial Implementation and Bargaining Leverage in Sino-American Negotiations on IPRs,” *International Organization* 59, No. 03 (2005): 695-729..

⁶⁸⁰ See the Jordan-United States Free Trade Agreement (entered into force in 2001), and the Jordan-European Union Association Agreement (entered into force in 2002).

⁶⁸¹ Article 3, of Annex VII of the JEUA called for such protection either within three years of the JEUA coming into force or Jordan’s accession to the WTO, whichever came earliest.

⁶⁸² Jordan-EFTA Free Trade Agreement – signed 21 June 2001, entered into force 1 September 2002. Protections for IPRs are addressed under Annex VI of the Agreement. EFTA states have similar agreements with Turkey, Israel, and Singapore.

⁶⁸³ “The Anti-Counterfeiting Trade Agreement - Fact Sheet”, May 1, 2010, <http://trade.ec.europa.eu/doclib/html/140836.htm>.

⁶⁸⁴ Ibid.

activities of ordinary citizens.⁶⁸⁵ The claim that ordinary citizens are not targeted by ACTA is challenged by various groups who maintain that leaked versions indicate that ACTA will target individuals, by demanding that they prove that copyrighted material on their electronic devices does not infringe copyright law, and that internet service providers will be required to divulge information about their customers without a warrant.⁶⁸⁶ Ascertaining the nature of ACTA is not made easier by the shroud of secrecy placed around its negotiations.⁶⁸⁷

Additionally, negotiations for ACTA are not part of any international organization (e.g., the WTO).⁶⁸⁸ In October 2007, the US government, the European Commission, Switzerland and Japan first announced that they would negotiate ACTA; since then, countries that have confirmed their involvement in the ACTA negotiations include New Zealand, the US, Australia, Canada, the EU, Japan, Korea, Mexico and Switzerland.⁶⁸⁹ The last round of ACTA negotiations (held in Washington, D.C., on 30-31 July 2008) included, in addition to the above, the US' RBT partners like Jordan, Morocco, Singapore and the United Arab Emirates. On 15 November 2010, a final text of the treaty was released, further confirming that it is intended as an international legal framework that countries can join on a voluntary basis, while creating its own governing body operating independently from international institutions such as the WTO, WIPO and the United Nations.

From a political economic perspective, ACTA is another step towards 'new constitutionalism', under which 'public policy is increasingly premised on the goal of increasing the security of property owners and minimising the uncertainty of investors.'⁶⁹⁰ In effect, the goal is to 'strengthen surveillance mechanisms and institutional capabilities to reinforce...market discipline at the multilateral level, and to help sustain the legal and political conditions for trans-national capital.'⁶⁹¹

7.6 Effect on WTO's Dispute Settlement Process

The dispute settlement process within the WTO, commonly known as the DSU, has been both a victim of trade agreements and a tool for developed countries to promote the pro-intellectual-property climate.

Typically, trade agreements carry with them their own dispute settlement mechanisms, which cover potential dispute areas under those agreements, including the area of IP.⁶⁹² This has had a corrosive impact on the ability and potential for the trade agreement's contracting parties to use the DSU as they commit themselves to a new forum outside the DSU venue. The developing country is left alone in the arena against their better-prepared counterparty.

None of the dispute settlement mechanisms under the RBTs with Jordan reference DSU cases or contemplate using them as precedent in future disputes. This dispute-settlement forum shifting

⁶⁸⁵ "The Anti-Counterfeiting Trade Agreement - Summary of Key Elements Under Discussion," *ISN*, May 1, 2010, <http://www.isn.ethz.ch/isn/Digital-Library/Primary-Resources/Detail/?lng=en&id=114570>.

⁶⁸⁶ Mathew Ingram, "Do we need copyright cops?," *The Globe and Mail-Blogs*, May 27, 2008.---

⁶⁸⁷ See for example, *Electronic Frontier Foundation, Et Al. Vs. Office of the United States Trade Representative* (n.d.). Filed under the Freedom of Information Act to force the USTR to divulge information about on-going ACTA negotiations.

⁶⁸⁸ New Zealand Ministry of Economic Development, "Anti-Counterfeiting Trade Agreement", January 23, 2010, http://www.med.govt.nz/templates/ContentTopicSummary___34357.aspx.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ Stephen Gill, *Power and Resistance in the New World Order* (Palgrave Macmillan, 2003).

⁶⁹¹ *Ibid.*

⁶⁹² This applies to all U.S FTA's except that with Israel.

occurs mostly at the expense of developing countries, which are less technically sophisticated in navigating this new venue of dispute settlement, as well as at the expense of the DSU's potential to become a universal forum for trade resolution with established precedents and uniform procedural rules that apply equally to all WTO member countries.

One obvious benefit for developed countries that seek such forum shifting is the added flexibility in managing future disputes with trading partners. Jordan, therefore, should it choose to contest any enforcement requests or interpretations similar to those issued under the Special 301 Report, is bound to address them through the JUSFTA dispute settlement mechanism and suffer from the above shortcomings of such a forum. The JUSFTA specifically calls for the creation of a Joint Committee "to supervise the proper implementation" of the Agreement.⁶⁹³ That Committee's authority is open-ended and not well defined, but its functions are broad enough to include considering and adopting amendments to the Agreement and developing guidelines and rules for its proper implementation.⁶⁹⁴

That approach by developed countries, particularly the US, is not recent or new, as the US pursued it long before the DSU system was perpetuated. US trade policy was described as moving towards the pragmatic, ad hoc approach of dealing with trading partners on a bilateral basis and 'rewarding friends'.⁶⁹⁵

In a real-life example of the realist theory of international relations, the US government simultaneously supported the continued evolution of RBTs and the DSU. On the one hand it became the heaviest user of the DSU system, while on the other hand it pushed for RBTs with dispute resolution clauses that undermined the DSU system. For developed countries, trade agreements presented the opportunity to regulate the unilateralist retaliation among themselves.⁶⁹⁶ To developing countries, they also presented the opportunity for preferential access to markets. However, the increased criticisms targeting TRIPS, especially its patent provisions and their impact on access to medicines, caused the US companies and their lobbyists to turn their attention to the possibilities offered by RBT's, both for forum shifting and for ushering in TRIPS-plus standards.⁶⁹⁷ For instance, Article 6 of TRIPS states that, for the purposes of dispute settlement, nothing in TRIPS can be used to address exhaustion issues, but the US can use RBTs to address the issue of exhaustion.⁶⁹⁸

But do the dispute resolution mechanisms in RBTs supersede Jordan's dispute resolution rights under the DSU? Article 23 of the DSU provides that⁶⁹⁹ "when Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements, or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." The interplay between the DSU and the dispute resolution mechanisms in RBTs, to the extent that there is any, will also determine if the DSU is still considered a valid dispute resolution

⁶⁹³ "Jordan-United States Free Trade Agreement", 2000, sec. 15.1.

⁶⁹⁴ "JUSFTA."

⁶⁹⁵ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1997).

⁶⁹⁶ John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press, 2000). For example, both Canada and Mexico saw merits in a preferential trade arrangement that offered a way of dealing with US trade unilateralism.

⁶⁹⁷ Peter Drahos, "Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach," *Temple Law Review* 77 (2004): 401.

⁶⁹⁸ Ibid.

⁶⁹⁹ WTO, "Dispute Settlement Understanding" (WTO, May 1, 2010), sec. 23.1.

mechanism between countries that have RBTs, or if the RBTs dispute settlement process effectively deprive parties of access to the WTO's dispute settlement process. The flip side of this issue is whether the WTO can accept complaints initiated through the WTO dispute settlement proceedings in possible violation of their RBT obligations.⁷⁰⁰ To date, the WTO appellate panel has not declined any cases based on exclusive jurisdiction under an RBT. Examples include the request by the US to review Mexico's actions against non-cane sugar sweeteners, which Mexico argued the WTO panel should refuse to address in light of Mexico's efforts to initiate North America Free Trade Agreement (NAFTA) Chapter 20 proceedings. The Appellate Body held that the panel could not decline to exercise jurisdiction and that the WTO had no basis to determine whether or not the US had acted consistently with its NAFTA obligations.⁷⁰¹ That ruling offers hope that Jordan can always take any potential case to the WTO's DSU, as the DSU, it seems, would not decline to exercise jurisdiction.⁷⁰²

The position that Jordan can always take any potential case to the WTO's DSU is also supported by, article 23 of the DSU, which provides that WTO violations can only be resolved through the WTO's dispute settlement mechanism even if an RBT has already adjudicated the matter.⁷⁰³ This has been the case in cases involving members of the Mercado Común del Sur (MERCOSUR),⁷⁰⁴ which has been commonly appealed to the WTO even though a MERCOSUR panel had already adjudicated the matter.⁷⁰⁵ This shows that the issues raised by conflicts and forum choices between the WTO and RBTs include several factors, such as disputes over jurisdiction, duplicative proceedings that can lead to conflicting rulings, various procedural issues related to the lack of *res judicata*,⁷⁰⁶ and the preclusion of defences afforded by using the WTO as back channel to re-litigate an unfavourable RBT verdict.

Another important concern is the impact RBT decisions can have on third parties. Hypothetically, the US and Jordan could settle a trade dispute through the RBT mechanism, only to have one or both sued through the DSU by third parties claiming that the resolution causes its goods or services to be treated unfairly or discriminated against. This was the case, for example, when the European Commission (EC) sued Brazil through the DSU to object to restrictions on the importation of re-treaded tires, which were implemented after Brazil lost a claim to Uruguay at the MERCOSUR arbitral tribunal.⁷⁰⁷

⁷⁰⁰ David Gantz, "Dispute Settlement Under The NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties," *American University International Law Review* 14 (1999): 1025.

⁷⁰¹ *Ibid.*

⁷⁰² Gantz, "Dispute Settlement Under The NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties"; Frederick M. Abbott, "WTO Dispute Settlement Practice Relating to the Agreement on Trade-Related Intellectual Property Rights," *SSRN eLibrary* (n.d.), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920816.

⁷⁰³ WTO, "DSU," sec. 23.

⁷⁰⁴ A Regional Trade Agreement (RTA) among Argentina, Brazil, Paraguay and Uruguay founded in 1991 by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto. Its purpose is to promote free trade and the fluid movement of goods, people, and currency.

⁷⁰⁵ For example, the panel in Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil stated that panels are not bound to follow the rulings of RTA panel proceedings, even if the proceedings involve the same measures. DSU Panel, "Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil" (WTO, April 22, 2003). There, a MERCOSUR panel had ruled in Argentina's favor. See also, DSU Panel, "Brazil—Measures Affecting Imports of Retreaded Tyres" (WTO, June 12, 2007).

⁷⁰⁶ Means that a final judgment is no longer subject to appeal. Also used to refer to the legal doctrine meant to bar (or preclude) continued litigation between the same parties.

⁷⁰⁷ DSU Panel, "Brazil—Measures Affecting Imports of Retreaded Tyres."

The outcome of a dispute is never certain for developed countries, as shown by the outcomes of the US TRIPS disputes against India in 1996 (alleging absence of patent protections for pharmaceuticals), Argentina in 1999 and 2000 (alleging, *inter alia*, failure to protect against unfair use of undisclosed test data, and denial of certain exclusive rights for patents), and Brazil in 2000 (alleging, *inter alia*, inconsistency of measures for enjoyment of exclusive patent rights). The Indian government adopted administrative delays to lessen the impact of the dispute settlement body.⁷⁰⁸ Argentina still retains several provisions in its laws, and Brazil does the same, albeit agreeing to consult with the US in the case of compulsory licensing.⁷⁰⁹ In the face of these obstacles, the US deployed the Special 301 Report powers as another pressuring tool operating outside the realm of the WTO.

7.7 Special 301 Report and Enforcement by Coercion

We have already examined the historic roots of the Special 301 Report powers and the way the USTR has been deploying them to threaten trade retaliation and to induce policy changes in targeted states. But have such powers been a more effective coercion tool than the WTO and the RBT dispute settlement mechanisms in improving the actual level of IP protection or enforcement?

There have been instances when private investors were successful in obtaining concessions from their joint venture partners that the US government, Section 301 notwithstanding, has been unable to secure.⁷¹⁰ At the same time, research has shown that the substance and timing of the US' policies that induced changes to improve IP protection in targeted countries can be explained as the product of a strategy of coercion, including the use of Special 301 Report powers.⁷¹¹

That strategy, which exemplifies the asymmetry in economic power between developed and developing countries, uses Special 301 Report powers to draw targeted countries to the negotiations table, while at the same time requiring that stronger IP standards be agreed to in exchange for greater market access. This strategy goes hand in hand with the use of RBTs, as discussed above. A targeted country for a bilateral trade agreement is often pre-listed on the Priority Watch List, as was the case with Jordan, thus placing it at risk of trade sanctions or the withdrawal of unilateral trade preferences. The carrot side of the strategy consists of being removed from the Priority Watch List or, at a minimum, being downgraded from the Priority Watch List to the Watch List. Jordan is a classic example of that strategy; it was listed on the Watch List of the Special 301 Report but was removed in 2000, when it agreed to TRIPS-plus standards incorporated within the JUSFTA.

But the signing of the RBT and the acceptance of TRIPS-plus standards are only the beginning of the enforcement road, as the added commitments under the RBT are used to provide more ammunition for future threats of placement on the Special 301 Report Watch List. The theory that countries like Jordan signed agreements like the JUSFTA without seriously considering implementing or enforcing them is not valid, because the Special 301 Report powers are continuously threatened to nudge the targeted country towards complete compliance. Any

⁷⁰⁸ Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*.

⁷⁰⁹ Ibid.

⁷¹⁰ Susan K. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* (SUNY Press, 1998), citing the example of Texas, IBM, and Microsoft use of licensing agreements with local Taiwan industries for the production of computer hardware, software, and chip production.

⁷¹¹ Alan O. Sykes, "Constructive Unilateral threats in International Commercial Relations: The Limit Case for \line Section 301," *Law & Policy in International Business* 23, no. 2 (1992): 263-330.

illusions of lackadaisical monitoring by developed countries are quickly displaced as the various corporate lobbyists in Washington, D.C. start requesting that the targeted country meet its full obligations under the RBT. Even a disagreement on the interpretation of certain clauses is a basis for threatening the targeted country with the Special 301 Report powers. Again, Jordan represents the classic example of that scenario. Within four years of signing the JUSFTA, in its 2005 Special 301 Report Submission, the Pharmaceutical Manufacturers Association (PhRMA) called for Jordan to be placed on the 2006 Priority Watch List, claiming that the health authorities were not effectively implementing the JUSFTA and that ‘unsupportable adverse interpretations’ were being applied to the protection of data.⁷¹² In addition, the report claimed that PhRMA members were facing some market access barriers, particularly through pricing directives and regulatory requirements.⁷¹³

PhRMA also requested that Jordan be listed on the Watch List in 2007 due to recent weaknesses in IP protection and alleged barriers to market access for US firms in Jordan; however, Jordan was not actually placed on the watch list that year. Similar calls were made in 2009, when again Jordan was ultimately not included on the Watch List, but only after a letter to the USTR by local industry representatives’ detailing commitments to push for stronger implementation of IP standards.⁷¹⁴ This method of avoiding being listed on the Special 301 Report Watch List is worth considering, because it essentially consisted of accepting all the positions advocated by the US government and acknowledging that they had not yet been met.

Even though the 2009 letter to the USTR was issued by private organizations rather than by the Jordanian government, it is highly unlikely that it had not been authorized by governmental agencies, especially since it involved the dreaded Special 301 Report Watch List. References within the letter to helping Jordan avoid the negative impact of being listed on the Watch List hint at behind-the-scenes governmental drafting. The quasi-official sanctioning of the 2009 letter to the USTR, therefore, is one that will likely come back to haunt Jordan if future questions arise regarding whether or not the letter’s self-imposed enforcement benchmarks were met. The letter further limits Jordan’s ability to interpret the JUSFTA clauses by accepting the US’ position on the contested issues.

7.8 Socialization by External Inducements and Effectiveness of Coercion

In examining the reaction of Jordan’s private and public sectors to the enforcement demands and coercion of the US, both sectors can be characterized as being influenced by “socialization by external inducements”, in which socialization plays an important role both in establishing an international order and in facilitating the functioning of that order.⁷¹⁵ Such socialization, which in Jordan’s case originates from the institutionalized cooperation formalized in bilateral agreements,

⁷¹² PhRMA, “PhRMA ‘Special 301 Report’ Submission”, 2005, www.cptech.org/ip/health/trade/2005phrma301.pdf.

⁷¹³ Ibid.

⁷¹⁴ “USAID Supports AmCham Paper on Jordan’s IP Laws,” *Alghad Daily Newspaper*, February 21, 2009. The letter was drafted by the American Chamber of Commerce in Jordan (AmCham) and the Jordan Intellectual Property Association (JIPA) and called on the USTR not to list Jordan in the Special 301 Report because that would hamper the Kingdom’s image and ability to attract investments. They said that they were prompted into action in light of pressure by representatives from the US private sector to include Jordan in the list due to what they said cases of violations of IPRs violations manifested in selling pirated software, DVDs and CDs in the Kingdom. The letter called for stringent actions against piracy, particularly audiovisual and optical piracy, against known locations and traders in Jordan. They also called for specialized courts to deal with issues of IPRs violations.

⁷¹⁵ G. John Ikenberry and Charles A. Kupchan, “Socialization and Hegemonic Power,” *International Organization* 44, no. 03, International Organization (1990): 283-315.

leads the political and economic elite to believe that US norms are in their best interest.⁷¹⁶ This change in belief can result from technical assistance, capacity-building programs or the frequent contacts with foreign authorities that usually follow the signing of an RBT.⁷¹⁷ The importance of socializing policy makers through training and education can produce advocates in domestic policy elites for the new protections of IPRs, thus helping to overcome and silence the local objections.⁷¹⁸

Further, in conjunction with the coercion approach discussed above, the US applies considerable diplomatic pressure to ensure that any negative view of the effect of TRIPS-plus standards on development is not granted the imprimatur of any international body or organization. Examples include the pressure exerted on the World Bank in 2005 to retract and revise an analytical note examining the impact on development caused by TRIPS-plus provisions in US RBTs.⁷¹⁹ Similarly, the US called on the WHO to withdraw its sponsorship of two WHO papers, one published jointly with the South Centre addressing TRIPS flexibilities and the other published jointly with ICTSD addressing guidelines for the grant of pharmaceutical patents.⁷²⁰

While we have seen that Special 301 Report powers can be effective in enforcing the IP policy on the national level, do these powers impact the adoption of TRIPS-plus standards on a multilateral level? Morin, after examining six potential roads from bilateralism to plurilateralism, argues that claims of the huge impact of bilateral trade deals on international patent law making is unsubstantiated.⁷²¹ Bilateral agreements, however, can have a positive effect on promoting accession to existing multilateral agreements.⁷²² That is certainly true in the case of Jordan, whose accession (or promise to accede) to several international multilateral IP agreements occurred after concluding its bilateral agreements with the US and the EU, suggesting that the multilateral agreements were joined to honour bilateral commitments. For Jordan the treaties referenced by the JUSFTA included the UPOV, which Jordan joined in 2004, as well as the Patent Cooperation Treaty and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, both of which Jordan has yet to join.⁷²³ Similarly, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure was referenced by the JUSFTA, albeit without a direct requirement to join.⁷²⁴

⁷¹⁶ Ibid.

⁷¹⁷ Jean-Frederic Morin, “Multilateralizing TRIPs-Plus Agreements: Is the US Strategy a Failure?,” *The Journal of World Intellectual Property* 12, no. 3 (2009): 175–197.

⁷¹⁸ May, “The World Intellectual Property Organization.”

⁷¹⁹ Deere, *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*.

⁷²⁰ Ibid.

⁷²¹ Morin, “Multilateralizing TRIPs-Plus Agreements: Is the US Strategy a Failure?”. The six roads examined included the impact of a bilateral trade agreement to produce a chain reaction under which developing countries accept US norms, attract new parties and progressively evolve toward plurilateral agreements, build coalitions for multilateral negotiations, create success stories that can be used to promote and justify US patent norms, offer tools for interpretation of existing multilateral agreements, or serve as the basis for new international customary norms

⁷²² Ibid.

⁷²³ Article 4.2 of the JUSFTA states that each party “shall make best efforts to ratify or accede to the *Patent Cooperation Treaty* (1984) and the *Protocol Relating to the Madrid Agreement Concerning the Registration of Marks* (1989)”. In subsequent FTA’s with the United States, this “best efforts” language was replaced with progressively stronger language.

⁷²⁴ Article 4.21 of the JUSFTA states that “when it is not possible to provide a sufficient written description of the invention . . . each Party shall require a deposit with an “international depository authority,” as defined in the

In addition to extending the duty to abide by whole agreements, an RBT can reference certain parts of multilateral agreements that it sees fit for both parties to abide by, even if the whole agreement is not acceded to. Examples in the JUSFTA include the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999), WIPO Copyright Treaty (1996), and WIPO Performances and Phonograms Treaty (WPPT, 1996).⁷²⁵ The same applies to the requirements under the JEUA to fulfil the commitments under several multilateral IP agreements, including the Berne Convention for the Protection of Literary and Artistic Works, the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and the Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks.⁷²⁶ RBTs, therefore, reinforce multilateral IP agreements by harmonizing the applicability of those treaties to trade and imposing additional enforcement requirements far beyond those required under TRIPS.

The extent of TRIPS-plus and the reduction in TRIPS flexibilities under RBTs have not escaped the attention of regulators within developed countries, even when their counterparties in the developing countries, such as Jordan, have ironically been conspicuously silent on the same issues. For example, the legitimacy of imposing TRIPS-plus standards on bilateral partners and restricting the Doha Declaration flexibilities was challenged within the US government; twelve members of the US Congress argued in a letter that the insertion in RBTs of IP provisions that restrict access to generic drugs “violate[s] the requirement in section 2101 (b)(4)(C) of the Trade Promotion Authority Act 2002 to uphold the 2001 WTO Declaration on Public Health.”⁷²⁷ That letter also attacked the USTR’s inclusion of the allowance for such flexibilities in appending letters instead of in the body of the RBT itself. That led in 2007 to a compromise known as the New Trade Policy Template, which calls for enhanced provisions in all future US bilateral and regional free trade agreements on IP protection. This compromise aims at striking a balance between the rights of drug companies to protect their patents and the need of developing countries for life-saving drugs. As a direct result the US’ RBTs with Colombia, Peru and Panama do not reach beyond TRIPS as did RBTs signed previously (including the JUSFTA). This is evident in the relaxing of several patent-related rules in those later agreements, including rules on data exclusivity, patent linkage and patent extension. An unprecedented explicit reference to the Doha Declaration and the need for each country to be able to protect the public health of its citizens was also added in the body of these agreements rather than as an appended letter. Similarly, the importance of “respecting and preserving traditional knowledge and practices of indigenous and other communities” was recognized. Overall, these results seem to indicate that the criticisms related to some aspects of the agreements, particularly those concerning the reduction of TRIPS flexibilities, have produced concrete results.⁷²⁸

7.9 Factors Impacting the Enforcement of IP Standards

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980).” Note, that the US bilateral treaties signed with Morocco, Australia, Bahrain, countries of Central America and Dominican Republic, Colombia, Oman, Panama, Republic of Korea and Peru, each contain the wording: “[e]ach party shall ratify or accede to . . .”

⁷²⁵ See article 4.1 of the JUSFTA.

⁷²⁶ “Jordan-European Union Association Agreement”, 1999. Annex VII.

⁷²⁷ Hilda Solis et al., “Letter from 12 Members of Congress to President Bush on Intellectual Property Provisions in CAFTA”, 2004, <http://www.cptech.org/ip/health/trade/cafta/congress09302004.html>.

The Trade Act of 2002, also known as the U.S. Trade Promotion Authority Act, grants the President of the United States the authority to negotiate trade deals with other countries and gives Congress the approval to only vote up or down on the agreement, not to amend it. This authority is sometimes called fast track authority. Agreements negotiated under this authority include FTAs.

⁷²⁸ *A Shift in Intellectual Property Policy in US FTAs?* (International Centre for Trade and Sustainable Development, August 2007), <http://ictsd.org/i/news/bridges/4128/>.

The influence exerted through technical assistance and building capacity for developing countries is not less significant than the influence of economic pressures. Ideational factors such as technical assistance are important in explaining compliance and enforcement patterns. They impact and alter the terms of the debate by framing it according to the views of one side. Specifically, those ideational factors play a significant role in how developing countries understand and interpret their obligations under TRIPS or RBTs, mainly because those factors play a role by supporting a certain type of expertise or capacity building to the exclusion of other types, resulting in enforcement, executive and even legislative officials accepting the notion of stronger IP as a given.⁷²⁹ Below, we will discuss some specific factors influencing the enforcement of IP standards within the Jordanian context.

(a) Framing

Framing primarily designates meanings. By doing so, it builds understandings and subsequently produces specific actions and solutions to be adopted later as policy.⁷³⁰ This is done through the creation of advocacy focal points whose assignment is to constantly promote and perpetuate the designation of meanings, the building of understandings, and the subsequent adoption into policy of the solutions produced as a result. Such focal points gain their legitimacy by claiming that they are knowledge or expertise communities, or communities of activists such as experts, journalists, academics, and public officials, and would therefore present their views disinterestedly and objectively. Socialization by external inducements, mentioned above, is an important step in such a process. Of course, those calling for a more balanced IP system can use this approach as well.

The usual constituents of such knowledge centres are patent attorneys and lawyers, patent administrators, and other specialists who collectively play a key part in the exploitation, administration and enforcement of the patent system. These knowledge centres are also populated with regular users of the patent system, like pharmaceutical companies.⁷³¹ Within this system, the alignment of economic power around “objective” expertise would definitely work to frame the positions held by such expertise to become the conventional wisdom within regulatory agencies and throughout society.⁷³² This is especially true in developing countries like Jordan, where the Patent Bar is almost non-existent and the governmental trade and industry facilities are starved for know-how and training.

The pro-IP team’s efforts in Jordan in that regard extend to the private sector through Chambers of Commerce and the funding of papers, research, and similar products that advocate their point of view,⁷³³ sometimes even relying on donor

⁷²⁹ Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Publishing Co. Ltd., 1996), R. Mayne, “The Global Campaign on Patents and Access to Medicines,” in *Global IPRs: Knowledge, Access and Development* (Palgrave Macmillan, 2003), 244-259.

⁷³⁰ Drahos, *A Philosophy of Intellectual Property*.

⁷³¹ Peter Drahos, “Biotechnology Patents, Markets and Morality,” *European Intellectual Property Review* 21, no. 9 (1999): 441–449.

⁷³² Graham Dutfield, *IPRs, Trade and Biodiversity* (Earthscan Publications Ltd., 2002).

⁷³³ See for example, A Attaran and L Gillespie-White, “Do Patents for Antiretroviral Drugs Constrain Access to AIDS Treatment in Africa?,” *JAMA: The Journal of the American Medical Association* 286, no. 15 (October 17, 2001): 1886–1892.

dollars to accomplish such goals. Overall, such positions intend to link higher IP standards with innovation, economic development, integration into the world economy, and economic stability, essentially selling the idea that competitive advantage can be engineered through regulation. Even if governmental IP administrators privately hold doubts about this, the industry is always there to remind them of the argument.⁷³⁴

WIPO, as an international organization vested in the more aggressive adoption of IP standards, played a similar role by exerting soft power through technical assistance that emphasized stronger IP protections and linked IPRs with development. Consequently, all of WIPO's technical assistance, support, and publications are geared toward that goal. A perfect example is the 2003 WIPO publication titled "IP – A Power Tool for Economic Growth", which advocated the position that IP is a force for good that is not yet being used to optimal effect, particularly in the developing world.⁷³⁵

The role WIPO plays by emphasizing stronger IP protections is not surprising, as WIPO and similar organizations have no economic incentive to hold a different position; similar to a patent office, they are unlikely to move in ways that diminish the size of their organizational domain (as measured by number of members and fees paid).⁷³⁶ In the same vein, those organizations constantly reinforce to governments of developing countries the message that the governments are good global citizens and promoters of sound economic policies.

Given that reinforcement, one can have a better understanding of why developing countries in general, and Jordan in particular, leapt from pre-TRIPS to TRIPS and then to TRIPS-plus IP standards. Jordan strove, and continues to strive, almost with abandon, to promote itself as an avant-garde country on the economic front, actively embracing the new economic world order with its good governance, economic modernization, and legal reform. This is an important reality that must be taken into account when viewing its IP efforts. The positions held by its government officials clearly point to the diffusion of pro-IP ideas and the success of the framing of the issues. Statements from Jordanian officials frequently demonstrate the diffusion of pro-IP ideas in official Jordanian policy through framing. A recent example is an op-ed piece by a former MoIT minister calling for stronger enforcement of existing IP laws and, linking piracy, without much explanation or proof, to the violation of Arabic cultural values.⁷³⁷ The piece also pointedly mentioned the risk of being listed on "watch lists" if IPRs are not adequately protected.⁷³⁸

Similarly, general non-specific and unsubstantiated statements about the effect of IP on investments abound, such as the declaration by the Director of the National Library that "IPRs are one of the main pillars for attracting investments."⁷³⁹ This

⁷³⁴ Drahos, "Biotechnology Patents, Markets and Morality."

⁷³⁵ Kamil Idris, *Intellectual Property - A Power Tool for Economic Growth* (World Intellectual Property Organization, 2003).

⁷³⁶ Boyle, "Manifesto on WIPO and the Future of Intellectual Property"; May, "The World Intellectual Property Organization."

⁷³⁷ Jawad Anani, "IPRs," *Alghad Daily Newspaper*, November 1, 2009.

⁷³⁸ Ibid.

⁷³⁹ "Head of NL: IP Key for Investments," *Alghad Daily Newspaper*, April 10, 2006.

position was similarly echoed by the MoIT Undersecretary, who declared that “IP is a key requirement for attracting foreign investments.”⁷⁴⁰ Local officials and foreign donors like the US also linked IPRs to not only economic but also social development and described it as key factor for helping society progress.⁷⁴¹ Observing that stronger IP became one of the most vital issues in the modern world, the head of the largest economic free zone in Jordan, the Aqaba Special Economic Zone Authority (ASEZA), proclaimed that IP is the cornerstone of the new economic world order.⁷⁴² He stressed that IP laws were “attracting investments into Aqaba”, despite the fact that at the time of his remarks, there wasn’t a single IP related investment project at ASEZA, as the vast majority of such investments were related to the real estate and tourism infrastructure.

Anti-piracy campaigns were also a major component of the pro-IP framing efforts, with the launching of periodic high-profile campaigns to promote awareness of IPRs,⁷⁴³ protect the public from the dangers of pirated products,⁷⁴⁴ safeguard the national economy and assure its integration into the global market,⁷⁴⁵ and pressure the government to do more to enforce IPRs.⁷⁴⁶ Additionally, the very obvious involvement of foreign donor organizations and state-sponsored aid agencies (such as the USAID)⁷⁴⁷ in the efforts to promote and publicize the importance of meeting IPRs under the JUSFTA signals the use of such agreements as tools of foreign policy.⁷⁴⁸ As Weintraub describes it, an RBT is not “necessarily an agreement in which all parties benefit from trade expansion, but rather a favour to be bestowed based on support of US foreign policy.”⁷⁴⁹ In that context, TRIPS-plus is part of the price to be paid, in foreign policy terms, especially for a small country like Jordan.

Opponents who advocate a more flexible approach to IPRs by Jordan have also engaged in their own framing efforts. They have attempted to re-frame the debate to emphasize the need for less restrictive IP standards or, at a minimum, to establish a more accommodating timeline for enforcement and compliance with registration and licensing requirements.⁷⁵⁰ Similarly, they have pushed, with minimal success, for offering original products at reduced prices to reflect the disparity in income between the intended customer in the developed countries and the intended customer in the developing countries, specifically Jordan.⁷⁵¹ Such activities were sometimes undertaken in spite of a governmental decision to

⁷⁴⁰ Tareq De3ajah, “Abiding by Intellectual Property Conditions Is Key for Attracting Foreign Investments,” *Alghad Daily Newspaper*, July 15, 2009.

⁷⁴¹ “Joint Jordanian USAID Media Campaign Promoting IP,” *Alghad Daily Newspaper*, October 2, 2005.

⁷⁴² Ahmad Rawashdeh, “IP Cornerstone of New Economic World Order,” *Alghad Daily Newspaper*, June 17, 2009.

⁷⁴³ “Launching of the IP Arab Day,” *Alghad Daily Newspaper*, December 6, 2009.

⁷⁴⁴ “NL Warns Public From Buying Pirated Products,” *Alghad Daily Newspaper*, November 9, 2005.

⁷⁴⁵ Rawashdeh, “IP Cornerstone of New Economic World Order.”

⁷⁴⁶ Omar Obeidat, “Jordan Should Do More to Combat Piracy,” *The Jordan Times*, February 14, 2010.

⁷⁴⁷ “USAID Supports AmCham Paper on Jordan’s IP Laws.”

⁷⁴⁸ On the relationship between RBTs and political security, see Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions*. (Princeton University Press, 2000)_

⁷⁴⁹ Sidney Weintraub, “The politics of US trade policy,” <http://news.bbc.co.uk/2/hi/business/3169649.stm>, accessed 16 February 2010

⁷⁵⁰ “Engineering Offices Demand IP Law Postponement,” *Alghad Daily Newspaper*, January 23, 2007.

⁷⁵¹ “Agreement to Supply Software Programs at Discount,” *Alghad Daily Newspaper*, April 25, 2007.

the contrary, as when the members of the Engineering Offices syndicate refused to abide by a decision of the Engineers Union to open their offices for inspection to ensure that software programs used by those offices were original.⁷⁵²

Overall, however, the popular efforts in Jordan to reframe the debate towards a more flexible approach to IPRs are not as successful as those in other parts of the world, like Africa, South America, and Southeast Asia. Similarly, not much effort is being made to reframe the debate from an intellectual point of view. The philosophical and logical basis held by the pro-IP camp is not deconstructed or seriously challenged by the Jordanian intelligentsia. Many reasons can account for such a weak effect, including the difficulty to present an opposing point of view in light of the government agencies' control of the mainstream media, especially if such a viewpoint runs against the national trade policies advocated by the government and the Monarch himself. This also explains the minimal coverage of IPRs issues except from the pro-intellectual-property point of view.

One of the main areas of global convergence for popular opposition to strict IP standards has been agricultural liberalization and traditional knowledge. This is not a prominent issue in Jordan, as it imports the majority of its grains and does not have any significant traditional knowledge. A general lack of understanding of IP issues on the behalf of the legislators also helped push several changes to IP laws through the legislature, without much analysis or discussion, and has contributed to the lack of a point of view counter to the pro-IP camp views. Further, the laws for the WTO accession and the JUSFTA were passed under the executive authority of the King while the Parliament was dissolved, without much public debate or involvement. Finally, the technical and financial support that the donor countries and the multi-national companies provide for pro-intellectual-property Jordanian NGOs (e.g., JIPA) and Jordanian professional organizations (e.g., the JPMA) helps such entities to promote the pro-IP point of view to a credulous public.

(b) Monitoring and Capacity Building

Both monitoring and capacity building present a mutually supporting approach for influencing enforcement of IP standards. They allow for the pressuring of individual countries on TRIPS implementation through monitoring, while at the same time influencing that implementation through the ideational and economic power of capacity building.

In the case of Jordan, the broad spectrum of capacity development tools included legislative and policy advice, as when the patent and trademark laws were amended after the JUSFTA accession to incorporate references to the PCT and the Madrid protocol,⁷⁵³ training and technical development,⁷⁵⁴ and support for enforcement at the institutional level.⁷⁵⁵ Such programs, however, support a one-size-fits-all solution and do not take into account Jordan's stage of development as an indicator of the appropriate forms of IPRs protection.⁷⁵⁶ Overall, those

⁷⁵² "Engineering Offices Protest Union's Decision," *Alghad Daily Newspaper*, September 12, 2007.

⁷⁵³ See this thesis, Chapter 4, International vs. National Trademark and Patent Applications.

⁷⁵⁴ See this thesis, Chapter 4, Figure titled IP Jordanian Trainees in Foreign Countries (2008)

⁷⁵⁵ See this thesis, Chapter 4, The Customs Department.

⁷⁵⁶ Alawamleh, "Interview"; Jarrar, "Interview."

programs focus on ‘best practices’ and aim to reorient Jordan’s legal and enforcement regime in line with TRIPS, when Jordan has no expertise or tradition in the IP field commensurate with the level of TRIPS sophistication.⁷⁵⁷ The best practices approach aiming to reorient Jordan’s legal and enforcement regime reflects a global model in the use of capacity development as a tool for political and ideological re-orientation, as the capacity development programmes emphasize standard solutions for enforcement and compliance, and with countries’ specific circumstances accorded weight only where this does not conflict with the “best practices”.⁷⁵⁸

The US’ Special 301 Report process, which represents one of the most important examples of the use of monitoring to influence enforcement, is the EU’s “IP Enforcement” surveys. Those surveys build on the EU Commissions’ “Strategy for the Enforcement of IPRs in Third Countries,”⁷⁵⁹ with the goal of setting out a list of priority countries in which the counterfeiting and piracy of IPRs remains a serious problem that should be the focus for future EU work. This strategy, the EU Commission states, is not meant to “impose unilateral solutions” or to propose a “one-size-fits-all approach to promoting IPRs enforcement”;⁷⁶⁰ rather, it is intended to identify “a limited number of countries on which the efforts of the Commission in the framework of the present strategy should be concentrated”. Another stated goal is to assure the meeting of the “very high standard of protection of IP (including the enforcement thereof)”,⁷⁶¹ included in the numerous bilateral agreements established by the European Commission. The EU Commission then states, in a clear coupling of monitoring and capacity building, that, since most such agreements also include a clause allowing for technical cooperation in the area of IP, “those clauses must be carefully monitored and effectively implemented.”⁷⁶²

In addition to the formal governmental monitoring discussed above, industry lobbyists and groups conduct and publish their own lists of rankings and reports, according to their sector-specific goals, which cover, for example, the pharmaceutical industry through PhRMA, the software industry through the BSA, and general IP protection through the IIPi.⁷⁶³ Their findings are greatly publicized and often find their way into the Special 301 Report.

The WTO has its own monitoring approach through the Trade Policy Review Mechanism (TPRM), which is intended to monitor the “adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements.”⁷⁶⁴ Such monitoring is intended to occur through a Trade Policy Review Body

⁷⁵⁷ Alawamleh, “Interview”; Jarrar, “Interview”; Haddad, “Interview.”

⁷⁵⁸ May, “The World Intellectual Property Organization.”

⁷⁵⁹ Directorate General of Trade, *Strategy for the Enforcement of IPRs in Third Countries*, Commission Communication (Brussels: European Commission (EC), 2004).

⁷⁶⁰ Ibid.

⁷⁶¹ Ibid.

⁷⁶² Ibid.

⁷⁶³ Annual reports by those organizations are available on their websites.

⁷⁶⁴ “Agreement Establishing the World Trade Organization, Annex 3: Trade Policy Review Mechanism”, 1994.

(TPRB), which “will subject the trade policies and practices of all Members to periodic review.”⁷⁶⁵

For a TPRM meeting, the WTO member under review should provide written answers, by the beginning of the review meeting, to questions submitted at least two weeks before the meeting. Questions posed subsequently should be answered, to the extent possible, before the start of the second session of the meeting. For Jordan’s first TPRM, held 10-12 November 2008, the following delegations submitted questions in writing: Brazil; Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei); Colombia; Argentina; Japan; the Republic of Korea; the US; and China. Written questions by Canada, the European Communities, and India were submitted after the two-week deadline.⁷⁶⁶

Effectively, this review process increases the transparency for TRIPS implementation, placing further pressures on Jordan for stronger measures of enforcement. Collectively, this process places an emphasis on compliance by giving other WTO members the opportunity to voice concerns on issues that they perceive as still lacking proper implementation or clarification, including the status of IP laws. A significant portion of the questions in Jordan’s TPRM came from developing countries, such as Brazil, Colombia, Argentina, Korea, and India, but the most detailed questions came from the US, Canada, and the European Community. For example, the US posed questions about the creation of an “IPRs entity” for enforcement about Jordan’s progress in increasing its courts’ specialization (especially their ability to try IP cases), and about the status of amendments to the Copyright, JISM, and Trademark Laws.⁷⁶⁷ Questions posed by Canada included a request for more information on exclusions from patentability under Jordanian law, the compulsory licensing amendments of Jordanian Patent Law, and the Jordanian courts’ handling of cases covering “famous trademarks.”⁷⁶⁸

Overall, therefore, the TPRM serves as an additional tool for scrutiny, which the developed countries seem to be adroitly using, thus making it harder for Jordan to conceal weaknesses in enforcement and compliance and forcing it to confront those issues in a global forum on a regular basis. This process plays a role in shaping Jordan’s enforcement and compliance by keeping such issues at the forefront of Jordan’s review process.

(c) Donor Funding

Jordan’s excessive dependence on donor support is controversial because it may allow those donors to become exceedingly involved in policy decisions. Jordan uses donor funds to maintain not only discretionary spending on projects supported by those donors, but also to support the national budget and thus the

⁷⁶⁵ Ibid.

⁷⁶⁶ *Trade Policy Review, 10 and 12 November 2008 - Jordan*, Minutes of Meeting (World Trade Organization, December 19, 2008).

⁷⁶⁷ WTO Press Release, “Trade Policy Review: Jordan - Continued reform would help an already strong economic performance.” November 10, 2008.

⁷⁶⁸ Ibid.

overall national debt levels.⁷⁶⁹ Thus, donor funding has steadily grown to become a fixture in the annual budget preparation process in Jordan.⁷⁷⁰ Of course, this dependence makes Jordan susceptible to the agendas presented by donors in return for their largess. It also seems to contravene research suggesting that donors need to recognize the political rationality behind cross-payments and spending to maintain important constituencies that political sustainability may require reform sequences that are out of step with current donor orthodoxy, and that outside actors need to refrain from intervening too directly in the political process by supporting particular interests.⁷⁷¹

While resource-poor MENA countries' dependence on donor support is common, Jordan has been skilful in masking its dependence for many years behind figures of economic growth, such as the rise in GDP and national economic growth figures, which it claimed to show that it was not dependent on donor aid. This concealment finally came to an abrupt end with the onset of the global economic crisis in 2008-2010. The collapse of donor funding over the 2009-2010 period⁷⁷² was expected to cause the budget deficit in 2010 to go up to JD 1.105 billion (\$1.6 billion), or 8% of the GDP (up from 5.5% the previous year),⁷⁷³ and the national debt level to rise by 12.9% by the end of 2010, to JD 9.66 billion (compared to JD 8.55 billion in 2008), or 62% of the GDP.⁷⁷⁴ The collapse of the donor funding clarified the relationship between the levels of donor funding and the national fiscal policy in Jordan, as 50% of foreign grants in 2010 were used to support budgetary items.⁷⁷⁵ The high level of donor funding also provided support to the claims that such funding has been playing an important role in shaping national policies and strategies, including the enforcement and implementation of IP laws.

Using donor aid to influence IPRs, however, is not a recent or accidental development, as the WTO itself called on developed countries to assist developing countries in their implementation of TRIPS.⁷⁷⁶ In Jordan's case, the US, through its Patent and Trademark Office (USPTO) and the USAID, was heavily involved in the provision of technical assistance in the area of IPRs. The majority of the training courses in the field of IP for 2008 occurred in the US.⁷⁷⁷ Overall, 150 trainees from Jordan attended courses in the US, compared to 30 trainees who attended courses in the rest of the world.⁷⁷⁸ This is in line with the

⁷⁶⁹ Overall foreign aid to Jordan from the period 1999-2008 was \$9.1 billion, with the United States providing 47% of that number, followed by the EU, Japan, and Germany at 9%, 5%, and 4.3% respectively. Of the total foreign aid number 64% comes in the form of grants and the remainder in the form of long-term loans. See Mohammed Khresat, "More Foreign Aid Expected," *Alghad Daily Newspaper*, May 16, 2009..

⁷⁷⁰ The United States provides Jordan with regular annual economic foreign aid in the amount of \$370 million and military aid in the amount of \$150 million. See "Jordan to Receive \$150 million more in Military Aid," *Alghad Daily Newspaper*, February 15, 2010.

⁷⁷¹ Deborah Bräutigam, "Foreign Aid and the Politics of Participation in Economic Policy Reform," *Public Administration and Development* 20, no. 3 (August 1, 2000): 253-264.

⁷⁷² Randa Habib, "Unconditional Aid," *Jordan Times*, March 4, 2010.

⁷⁷³ "Gov't Issues JD160m Budget Supplement," *Jordan Times*, March 3, 2010.

⁷⁷⁴ Omar Obeidat, "Income Tax Revenues to Drop in 2010," *Jordan Times*, March 1, 2010.

⁷⁷⁵ Khalid Neimat, "Half of Foreign Grants to Support Budget," *Jordan Times*, February 23, 2010.

⁷⁷⁶ TRIPS Agreement, Chapter 3.

⁷⁷⁷ Jordanian Judicial Council, *Annual Courts Report - 2008* (Jordanian Judicial Council, 2008).

⁷⁷⁸ *Ibid.*

US Government's efforts to design its financed technical assistance to help put TRIPS-plus standards in place across a range of developing countries, including Jordan. It is also in line with the interview feedback, which clearly pointed to a training agenda focused by the US and the EU on the provision of technical assistance in the areas of 'best practices' and enforcement with little or no focus on flexibilities.⁷⁷⁹ A new US foreign aid agency was created in February 2004 to administer the Millennium Challenge Account (MCA) initiative. The MCA is intended to concentrate significantly higher amounts of US resources in a few low and low-middle income countries, including Jordan, that have demonstrated a strong commitment to political, economic, and social reforms.

The agendas behind the technical assistance provided by developed countries, international organizations, and multi-national corporations have not gone unnoticed. Such agendas were branded as biased towards compliance-oriented policies, which encourage the broadening of IPRs protections regardless of specific needs and circumstances.⁷⁸⁰ Critics have questioned the neutrality of international organizations like WIPO. In some cases, the questioning went beyond the organization itself and even included the people in charge of the organization, as was the case with UPOV's Secretary-General, who was targeted for the aggressive UPOV approach to promoting plant variety protection and for recruiting new members to the Convention, which Jordan joined on 24 September 2004.⁷⁸¹

For Jordan, whatever takes the King's shilling must do the King's bidding. Its dependency on foreign aid is forcing it to move in the same direction as its donors, toward tighter IP standards and an ever-expanding enforcement role for the governmental agencies. Because of the national economic model that is not heavily dependent on foreign aid, one cannot seriously expect an objective governmental review of the realities of IP legislations and obligations in Jordan under those circumstances.

(d) Levels of Adjustment, Technology Transfer & Societal Norms

For Jordan, adjusting to the IP standards and their enforcement has been an accepted official target, as expressed by successive governments from its accession to the WTO in 2000 to the present time. To that effect, the legal framework was modified and IP laws were amended or added to be in full compliance with the successive TRIPS and TRIPS-plus requirements. In terms of adjusting the legal framework and codes, Jordan has been a leader in the region and indeed the world when compared to other developing countries.

Along with the amendment of laws, Jordan also adjusted the enforcement mechanisms and tools for such laws, which has been an on-going process since its accession to the WTO. There are currently multiple agencies with enforcement responsibilities of IPRs, including the MoIT, the National Library, the JISM, the Food and Drug Administration, the customs department, and the

⁷⁷⁹ Jarrar, "Interview"; Haddad, "Interview"; Alawamleh, "Interview"; Khayyat, "Interview."

⁷⁸⁰ UNCTAD, *UNCTAD Least Developed Countries Report 2007. Chapter 3 - Intellectual Property Rights and Other Incentive Mechanisms for Learning and Innovation*, n.d.

⁷⁸¹ The person in question was Barry Greengrass. See Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*.

Public Security Department. Optimally, not all of those agencies should necessarily have a hand in the enforcement process, but their proliferation does reflect the influence of donor funding on the formulation of public policy, in the sense that technical assistance for them is provided through donor funding. Overall, Jordan has adapted sufficiently, albeit not optimally, to the need for adjustments at the legislative and the executive branches.

The judicial branch presents a more ambivalent situation; it has not been a truly active participant in the evolution of IP, mainly because IP litigation, which is the main conduit for the judicial branch's involvement in this area, is very weak and concentrated on trademark registration and infringement. However, this has not exempted the courts from being subjected to donors' efforts to create specialized IP courts.

Levels of technology transfer, which are most common within industries that are technical in nature and undergo technological upgrades in order to become more competitive, are not very strong within Jordan. This can be seen from reviewing Jordan's exports, the majority of which are related to heavy industry and agriculture sectors, namely garments, vegetables, phosphate, pharmaceuticals, potash (fertilizers), and transportation equipment.⁷⁸² None of these items falls within a technological or intellectual-property-sensitive area except for pharmaceuticals. A similarly weak technologically component exists for Jordan's imports, the majority of which are transportation equipment, crude oil, iron and steel, electrical machinery, raw material for the garment industry, and heavy equipment for industry and agriculture.⁷⁸³ Closer examination reveals not only that those sectors are technologically insensitive, but also that some of them, like the garment industry, offer minimal added value to the local economy. The garment industry, which constitutes the majority of Jordan's exports to the US, valued at \$1 billion in 2008, relies on raw material that is 100% imported. Also, 60% of its labour force is foreign,⁷⁸⁴ despite the fact that Jordan's "official" unemployment rate for the past decade has been around 12-14%.⁷⁸⁵ Similarly the transportation equipment in the export column is mainly a re-exportation business to surrounding countries, especially Iraq, as Jordan does not manufacture or produce any transportation equipment.

The one technologically sensitive sector of the Jordanian economy, the pharmaceutical sector, is focused on generic drugs. Jordanian producers of generic drugs complain that there are issues with IPRs related to data exclusivity that deal with a lack of transparency in rights and obligations.⁷⁸⁶ A 2007 Oxfam

⁷⁸² Source, Jordan Central Bank, 2009

⁷⁸³ Figures provided by the Jordanian Central Bank and the Department of Statistics, as reported in "CBJ Issues Import Export Numbers," *Al Arab Alyawm Daily Newspaper*, October 25, 2009.

⁷⁸⁴ Only 10,000 Jordanians are among the 45,000 employed by the garment exporting industry. The garment industry also suffers from discrimination against married female local employees, because the industry prefers unmarried female workers who will work the various shifts and not be constrained by the demands of their families.

⁷⁸⁵ Unemployment rates within certain age groups are much higher, as for example the age group 20-24 with unemployment rate of 28%; and for women in general it is around 27%.

⁷⁸⁶ See U.S. Government Accountability Office, *International Trade: Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain*, 2009, <http://www.gao.gov/products/GAO-09-439>.

report further states that because of the TRIPS-plus provisions of the JUSFTA, many Jordanian pharmaceutical firms' generic medicines are precluded from the market through an acceptance procedure called "data exclusivity", through which drug regulatory agencies are prevented, for a period of 5 years, from using the clinical trial data developed by the originator company to establish the safety and efficacy of the medicine for market approval of a generic drug that had already been shown to be equivalent to the original one.⁷⁸⁷ Jordan's FDI numbers are also not targeted towards technologically sensitive areas, as 90% of the increase in FDI growth between 2002 and 2009 came from Arab sources towards non-technology related areas.⁷⁸⁸

From an enforcement point of view, with its very low research and development levels and low patent application numbers, Jordan could not objectively argue for much economic benefit from higher patent protections. Any further strengthening of patent protection or facilitation of obtaining patents in Jordan, as with the PCT process, will provide substantial benefits for international patent holders but negligible benefits for the Jordanian industries or economy. The same can be said of other technology-related IP areas like the Integrated Circuits Law,⁷⁸⁹ an industry that is virtually non-existent in Jordan. The societal norms within Jordan also present a significant challenge for the enforcement of any IPRs, especially in the areas of copyright. The Jordanian society has historically relied on education as a social lever to propel individuals out of poverty and into the middle class, and it has higher enrolment in elementary, secondary and tertiary levels of education than the global average.⁷⁹⁰

A relatively new (1992) law governs copyright in Jordan.⁷⁹¹ Prior to that law, Jordan used the Ottoman-era copyright law, and the Supreme Administrative Court confirmed such usage in opinions.⁷⁹² The older copyright law's denial of any protection for copyrighted material that was not registered with the National Library was an acceptable compromise for Jordanian citizens, as intellectual works by local individuals had not played an important role in the cultural or educational development of the economy. Material that would otherwise be considered copyrighted material, such as books and audio-visual works, were produced by non-Jordanians; thus, because they were not usually registered with the National Library, they were not offered protection under the older copyright law. Conversely, the 1992 copyright law granted automatic copyright protection to any published work whether or not it was registered by the Jordanian National Library.⁷⁹³ In addition to expanding the level of protection granted to the author,

⁷⁸⁷ Oxfam, *All Costs, No Benefits: How TRIPS-plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines*, Briefing Paper (Oxfam, March 2007).

⁷⁸⁸ See U.S. Government Accountability Office, *International Trade: Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain*. It states: "While Jordan does not maintain official detailed statistics of FDI, aggregate inflows of registered capital tracked by the Central Bank indicate that the main source countries for foreign investment are Middle Eastern (Iraq, Kuwait, United Arab Emirates, Saudi Arabia, Egypt, and Bahrain) or European (Denmark, Belgium, and the United Kingdom)."

⁷⁸⁹ *Integrated Circuits Law No. 10*, 2000.

⁷⁹⁰ The UNESCO Institute for Statistics, *Measuring Educational Participation: Analysis of Data Quality and Methodology Based on Ten Studies* (The UNESCO Institute for Statistics, 2010).

⁷⁹¹ *Copyright Law No.22*, 1992.

⁷⁹² *Opinion No. 76/81* (n.d.).

⁷⁹³ *Copyright Law No.22*, sec. 45. The National Library (NL) is the governmental agency in charge of registering copyrightable material.

it clarified as exclusive to the author rights that were previously thought to also belong to publishers, editors and the public at large.⁷⁹⁴ (The duration of copyright protection granted under the law varies with the type of work protected, as discussed in Chapter 4).

The 1992 law improving copyright protection, along with the concerns of the major donors, brought mostly Western standards for protection and significantly improved protection in areas mostly dominated by Western products, such as sound recordings, audio-visual products, and computer software. Considering the lack of any local products or substitutes in those areas, as well as the lack of any alternative pricing scheme for original products in the local markets, those products were placed out of the reach of the vast majority of the local population. That helps to explain the proliferation of pirated audio-visual products and other copyrightable material.⁷⁹⁵

Because copyright law is incompatible with Jordanian economic realities and Jordanian culture, which considers education rather than author's rights to be paramount, it will continue to prove extremely difficult to enforce. Significantly, the law's value in improving creativity in Jordan is in doubt. The Jordanian audio-visual industry, for example, which was a reasonably respectable industry in the late twentieth century, is on the verge of collapse, with the number of its productions greatly reduced. This situation might not be directly related to IPRs, but it proves that the promises of increased copyright innovation with the enforcement of tighter copyright protections were unfounded.⁷⁹⁶ Similarly, Jordan's levels of research and development are less than half a per cent of the GDP, and much of that amount is allocated to the military.⁷⁹⁷ Any enforcement activity in the copyright area will impact low-income citizens, operators of kiosks, and street vendors depending on such products for economic survival.

Therefore, by virtue of its economic set-up as an importer and buyer of most of its key products and technologies, Jordan will continue to be restricted in its ability to benefit from IPRs. If anything, higher IP standards under such a situation will increase the cost of imports, resulting in higher fees and processing costs in some sectors and further diminishing the establishment of domestic benefits of IPRs. This is in direct conflict with the position espoused by donors and international corporations, who claim that stronger IPRs are an important factor of economic growth.

(e) Policy Issues and Governmental Capacity

For Jordan, national policy issues play a role in shaping IP enforcement and give domestic effect to international legal obligations. Such policy issues are also influenced by factors like governmental capacity and coordination.

⁷⁹⁴ Ibid., sec. 8.

⁷⁹⁵ Naseem Tarawnah, "Steal This Article!," *Jordan Business*, May 2008.

⁷⁹⁶ Nedal Burqan, "Ministry of Culture Conferance: Jordanian Drama in Danger," *Addustour Daily Newspaper*, March 5, 2010.

⁷⁹⁷ Jomana Amara, "Military Industrialization and Economic Development: Jordan's Defense Industry," *Review of Financial Economics* 17, no. 2 (2008): 130–145.

The local expertise in Jordan was, and to a certain extent continues to be, weak both in the governmental and the private sectors. This problem is fostered by a deep lack of technical knowledge and policy experience of IP issues. The lack of economic advancement, not in absolute numbers of FDI or GDP growth but rather in the creation and flourishing of technologically industries, continue to preclude substantial development of such expertise. The implementation process for Jordan's IP obligations was further hampered by the absence of a cohesive, long-term approach, especially since the accession and the implementation phase has seen the changing of several governmental cabinets.⁷⁹⁸

The process of passing IP legislation as part of the adjustment process discussed earlier should have helped build the legislative capacity in that area, but in actuality it did not, as most of the amendments occurred while the Parliament was suspended and were later approved by the Parliament without much debate.⁷⁹⁹ This process did not foster conditions for accountability, transparency or rule of law, all of which are key factors for the development of good governance and political sustainability.⁸⁰⁰ The overriding rationale for the adoption and implementation of IP standards was embedded in the social, economic, political and cultural relationship envisioned with the US in particular and the West in general. In that sense, Jordan has not been notably different from other countries in the region, which exhibit similar dependence on those entities.

The fragmentation of the entities responsible for various IP areas impeded the emergence of a strategic approach to the implementation of TRIPS based on a broad policy framework for development goals and policies. For example, copyright is handled by the National Library and the Department of Press & Publications; industrial property is handled by the MoIT, with patent examination largely handled through WIPO; plant varieties are handled by the Ministry of Agriculture; and border measures are handled both by the customs department, which is within the Ministry of Finance, and the JISM, which is an independent governmental organization. The process of organizing IP decision-making is still evolving, and the number of involved agencies is subject to increase, as the government is pondering the creation of a combined entity charged with all matters related to IP.⁸⁰¹

With IP technical expertise within the Jordanian governmental entities strongly influenced by the technical assistance, training, support, and other services provided by international donors, its positions on implementation of IP standards are vulnerable to the donors' points of view. The bulk of donor resources to Jordan in the IP area are channelled towards public campaigns or training to further enforcement activities rather than towards commercializing technology or inventions. This shows that the donors are more interested in protecting their own IP interests than in introducing IPRs to promote innovation. Further, the actual drafting of IP laws, which was influenced by the above dynamic, is not consistent with the economic and technological levels within Jordan, and the IP laws do not meet local economic interests. All of the above perpetuates

⁷⁹⁸ Between 2000 and 2009 Jordan has had seven cabinets.

⁷⁹⁹ Jordanian Parliament was suspended between 2000-2002 and 2009-2010.

⁸⁰⁰ Deborah Brautigam, "Governance, Economy, and Foreign Aid," *Studies In Comparative International Development* 27, no. 3 (September 1992): 3-25.

⁸⁰¹ *Trade Policy Review, 10 and 12 November 2008 - Jordan.*

ignorance towards them and makes the process of enforcement exceedingly difficult.

A prime example of the disconnect between the IP laws and the realities in Jordan is the patent law, from which Jordan stands to benefit little, as it has not reached the required stage of development for developing significant, globally competitive innovations. As Jordan is still in its early stages of industrial growth, its ability to mature in that regard is hampered by its inability to copy or imitate imported technologies. This in turn counters the drive for innovation, because imitation can serve as a stepping-stone that enables firms in developing countries to innovate.⁸⁰² Jordan should, therefore, not sign the PCT as a matter of policy, because it clearly does not have an economic incentive to do so and stands to gain very little from joining it. To do so would make international patents much more easily recognized under Jordanian law, further restricting the ability for local imitation. Until Jordan develops a technological base, stronger patent protections will constitute a barrier for innovation and access to important technologies, which runs counter to the Jordanian communal value of putting the good of the community as a whole ahead of the interests of the individual.

Jordan should also further refine its process for making trade policy. Currently, there is no systematic process for gathering expert and stakeholder input, and consultations are generally restricted to export lobbies, such as the Jordan Chamber of Industry, the Jordan Chamber of Commerce, and the Amman Chamber of Commerce. Such entities are mostly the only constituency equipped and organized to present views and recommendations. Higher IP standards under TRIPS-plus were not a significant concern for the majority of the members of the market-access lobbies in Jordan, because they are not technologically sensitive exporters.

7.10 Conclusion

As a result of Jordan's failure to show tangible economic benefits that have materialized from applying stricter IP standards, the efforts to convince the Jordanian public of the value of enforcement efforts will suffer a setback over the short to the medium term. The Special 301 Report's political arm-twisting, which leads to coercion-based enforcement, will add to the sense of resentment and subjugation felt by developing countries, and the aggressive attempts to pressure compliance by such means are likely to backfire and produce little in the way of long-term results. Developed countries must understand that there will be little to gain from the continuous drive to ratchet up the levels of IP standards, when the economic promises made to justify the enforcement of those standards ring hollow.

At the same time, it is important to understand the economic and international pressures exerted on Jordan, as such factors help to explain the drive for IP enforcement and TRIPS and TRIPS-plus implementation. In the case of Jordan, the weak national political dynamics in the area of IP have diminished Jordan's ability to counter the influence of international pressures and have consequently undermined the coalescing of a national position on the adoption and enforcement of IP standards.

⁸⁰² Amy Jocelyn Glass, "Imitation as a Stepping Stone to Innovation," *OSU Working Paper No. 99-11* (July 14, 1999)

The difficulties associated with the enforcement of IP laws in Jordan stem from a disregard of the cultural, social, legal and economic norms in Jordan and how they differ from those in developed countries. Until those norms are linked to IP laws, enforcement will continue to be exclusively associated with the threat of punitive measures by developed countries. Such a link is also important to help IPRs deliver on the so far unfulfilled and exceedingly distant promise to boost innovation and creativity.

The US has an unprecedented opportunity to use its stock of knowledge to further the development of other countries in the world. With the vast knowledge within its borders, it should move to disseminate that knowledge and not succumb to the calls of multinationals to restrict its diffusion. The US should adopt towards Jordan a position that considers knowledge to be part of a global intellectual commons, which, as the free software movement has shown, is not inconsistent with the development of business models. The excessive use of TRIPS-plus standards in RBTs has contributed to the anti-development reputation of the US government, even as it seeks global support for its IP enforcement goals.

In the pursuit of IP enforcement in Jordan, there are no easy solutions to the structural enforcement problems that have been discussed in this chapter. The leading developed countries have essentially adopted the position that increasing the strength of IP systems is a means of engineering competitive advantage through regulation. Jordan must recognize the disconnect that exists at various levels between its IP laws and its economic and developmental goals, and it must move in ways that will reconcile that disconnect. Only then will enforcement be a meaningful and self-perpetuating activity, rather than one driven by foreign coercion and local half-measures.

8. CHAPTER VIII: CONCLUSION

8.1 Introduction

This thesis analysed the IP laws in Jordan, examined the problems and difficulties underlying their enforcement, and made policy recommendations in that regard. It argues that IP laws fail to be fully enforced in Jordan because they do not fit with Jordan's culture and level of economic development and therefore are unable to advance the economic interests of the Jordanian people. The claims of the developed countries that IPRs protections will aid and support the economic development of the developing countries do not withstand closer scrutiny in the case of Jordan. The same arguments fail to acknowledge the need for national recognition of interests as an evolutionary, historically contingent context for IPRs development and enforcement, as opposed to the TRIPS universal approach that is presented ahistorically. The Jordanian national policies regarding IP were not developed in parallel with wider social development dynamics. Jordan's current stage of development indicates that the commercial interests of Jordanians are in free access to IPRs to enable them to develop their industrial and service sectors without the restrictions of license requirements and payments. This approach is not much different from that taken by developing countries themselves in the era before they achieved high levels of industrial development and started proclaiming the reification of IPRs.

This thesis attempted to reframe the debate on the enforcement of IPRs within the commercial and capitalist interests of the parties involved (developing countries, in this case Jordan, and developed countries), rather than as the infringement of a reified natural right. That reframing helps locate the IPRs issue within the political domain, makes it accessible to the calculus of cost and benefit analysis, and makes it a national issue. The thesis examined the historical and theoretical framework for IPRs development and analysed the legal and socioeconomic issues to underline the failure of the current IPRs system in Jordan to deliver the promised economic development. It argues against any further involvement in any RBTs involving IPRs and against the narrow interpretation of the current bilateral agreements entered into by Jordan in ways that will create further enforcement responsibilities on the Jordanian public and private sectors. It concluded that any such bilateral agreements presented little if any value for the added harmonization and enforcement burdens they impose; therefore, they should be rejected, as the proposed trade-offs with the ability to formulate national policies are not commensurately meaningful.

Since the start of the IMF's Jordan Support Program in 1989, many laws have been amended and introduced to promote the economic policies that supported the attraction of foreign investment and to promote open trade. The fact that such policies were the result of a foreign formulation meant that they ran the risk of ignoring the long-term real interests and needs of the Jordanian people in order to meet the more immediate interests of lenders and foreign investors. IP laws were one of the main areas affected by that process.

Historically, TRIPS was dominated by developed countries that included their proposal for TRIPS in the Uruguay Round (1986-1994) as a means to regulate IP protection within the GATT rules. As such, TRIPS represent one view of IPRs that came to be marketed by developed countries as the *only* acceptable form, which counters the process by which IPRs were developed and formulated at various national levels throughout the history of IP. Jordan was not a party to TRIPS negotiations, as it was not yet a member of the WTO, and its acceptance of TRIPS as a *fait accompli* within the WTO accession process, as opposed to a debated and properly negotiated agreement, partially explains the failure of the WTO membership to positively impact IP

enforcement and implementation in Jordan. It also marked Jordan's sliding from its centrist approach to IP regulation and enforcement, which balanced the public and private interests, to the more monopolistic end of the IP enforcement spectrum, where right holders are given precedent over public interest. Other factors contributing to TRIPS ineffectiveness include its non-compatibility within Jordanian cultural norms and the low level of industrial development in Jordan.

Historically and culturally, the Jordanian society is anchored to traditional communal values that favour collective effort and knowledge over individual ownership and monopoly. These values were sustained by the agrarian nature of the Jordanian society for the majority of the twentieth century. Jordan's religious background also supports such a position as reflected in the absence of any developed sense of IPRs during the history of the Islamic state, which lasted until the fall of the Ottoman Empire at the end of World War I. Developed and sophisticated IP concepts, therefore, did not originate within the Jordanian society; rather, these concepts were introduced by interaction with developed countries through colonialism. This is still true today, mainly because the economic pressures from developed countries (Jordan's major lenders) and from international financial institutions like the IMF require law reform and subsequent enforcement of IP laws.

The first Jordanian patent law No. 22 (1953) provided for process patents but did not allow for product patents.⁸⁰³ It further allowed for a 16-year protection period, which would not be extended in the event of any modifications or amendments made to the original patent.⁸⁰⁴ While the law allowed the patent registrar at the MoIT to approve a patent, it placed the responsibility for the veracity of the patent's information on the applicant rather than the registrar,⁸⁰⁵ effectively ensuring that Jordan never developed patent examination expertise. A new Patent Law granting 20 years of protection was enacted in 1999, incorporating TRIPS-consistent standards into its language.⁸⁰⁶ The language of the 1999 law presented a significant departure from the language in the previous law; it clarified the criteria for awarding a patent, listed areas outside patentability domain, detailed the rights and obligations of a patent holder, and outlined some specific sanctions that can be requested by a patent holder in the event of a patent infringement. The law was amended twice, in 2001 and 2007, to reflect other concepts and to put it in line with Jordan's obligations and international best practices.

Under the new patent law, product patents were allowed, an examination process was required, and several ways to extend the life of a patent were provided, including marketing exclusivity periods for data protection. The law puts forth the following patentability conditions that must be met for a patent to be issued: novelty, non-disclosure, non-obviousness, and industrial utility.⁸⁰⁷ These requirements restrict the universe of what can be patented under Jordanian law. The new patent law was modelled after similar laws in developed countries; thus, it was not suitable for a country with a virtually non-existent patent law practice and whose patent examination duties were delegated to the WIPO.

By expanding the terms of the patentability and enlarging the sphere of patent protection, the patent law of 1999 drastically limited imitation and therefore failed to address the needs of the Jordanian people for technological and innovation incentives. This is shown by the patent ownership numbers in Jordan, which are predominantly foreign-based, and by the negligible rate

⁸⁰³ *Patent Law No. 22.*, art. 4

⁸⁰⁴ *Ibid.*, art. 16

⁸⁰⁵ *Ibid.*, art. 4(2)

⁸⁰⁶ *Patent Law No.32.*

⁸⁰⁷ *Ibid.*, art. 3

of technology transfer. Up till mid-2010, around 80% of patents granted were for foreign holders, and 87% of the patent applications were by foreigners.⁸⁰⁸ The patent law of 1999 also failed to encourage foreign companies to transfer their technologies to their Jordanian counterparts, although those foreign companies had benefited from the protections granted to them under the Patent Law. The net result so far is that Jordanian industry is not benefiting from any significant levels of technology transfer, is still dependent on importing technology products, and must pay high prices for those products.

The area of trademark law, on the other hand, occupies a more significant place in the Jordanian IP jurisprudence, mainly because the law regulating it has been successful in establishing trademarks as a legitimate field of commercial enterprise.⁸⁰⁹ Additionally, there is a general acceptance of the notion that trademarks protect the communal public interest by distinguishing reputable brands, ultimately resulting in the protection of the Jordanian public from misleading counterfeit goods, as well as the protection of trademark owners who act in good faith. Trademarks are traditionally acceptable forms of denoting quality, which the public expects the government to regulate and protect as part of its official duty to protect private property. By comparison, copyrights and patents, themselves, were traditionally and culturally regarded as public property; and the notion of giving private rights precedence over public rights in those two areas does not fit with the traditional view of the Jordanian public. As a result, trademark law became relatively well developed in Jordan, as courts played a role both in its interpretation and in establishing certain tests in areas that were mentioned, but not clearly expounded upon, by the law. Trademark law, therefore, served the goals of the Jordanian culture and fulfilled the interests of the Jordanian people, both as consumers and as trademark owners acting in good faith.

The amendments made to the trademark law in preparation for accession to the WTO, however, provided protections for registered marks and prohibited the registration in Jordan of foreign-registered trademarks by someone other than the holder of the foreign mark, either for the same type of goods or services, or for goods and services other than those with which the famous mark is associated if such registration can cause public confusion or defamation to the famous foreign mark.⁸¹⁰ Famous marks have another advantage in Jordan; they do not need to prove that their foreign registration predates the registration requirement in Jordan by someone other than the famous mark owner. By implication, famous foreign-registered marks can obtain registration in Jordan even if their application is contested by a similar non-registered mark in Jordan. However, this considerable protection to famous marks did not translate into those further investment by the mark holders in their Jordanian production facilitates, particularly the QIZs, as workers within those areas continue to be among the lowest paid in Jordan, in addition to having foreign, rather than local, labour constitute the majority of their workforce.

Copyright had been a neglected area of Jordanian law until the enactment of the 1992 copyright law.⁸¹¹ Previously, Jordan had used the Ottoman-era copyright law, which was not only antiquated in its coverage of published works but also did not cover whole areas of copyrightable material like audio-visual products. The 1992 copyright law addressed those issues but fell short of international standards; thus, in cooperation with the WIPO, Jordan amended the law in 1998 and 1999 to bring it in line with the requirements of accession to the World Trade

⁸⁰⁸ Data until March 2010. See “MoIT Department of Industrial Property,” <http://www.mit.gov.jo>. The researcher relied on the data within the tables and not the totals provided, as the numbers within the tables do not add-up to the totals provided by the tables.

⁸⁰⁹ *Trademarks Law No.33*.

⁸¹⁰ *Ibid.*, art. 8

⁸¹¹ *Copyright Law No.22*.

Organization.⁸¹² One of the most significant changes brought about by the 1998 and 1999 amendments was the automatic grant of copyright protection to any published work, whether or not it was registered by the Jordanian National Library.⁸¹³ This did not impact the enforcement environment, where the general public, as well as enforcement authorities, were unfamiliar with the concept of copyright, as they were and continue to be influenced by cultural values that have placed the written word within the public domain for millennia. Under those values, piracy was not considered a crime unless it injured the public interest; otherwise, it was considered a tool to help further education and cultural advancement, both considered noble goals by the Jordanian society. This view was historically supported by the fact that the vast majority of intellectual works available to the Jordanian public were not of Jordanian origin, but rather were produced in neighbouring countries and, as transportation advanced, in the rest of the world. Under those circumstances, considering the limited financial resources of the majority of the Jordanian public, strict adherence to copyright laws would cut the supply of intellectual works to Jordanians and effectively place them in a time capsule, unable to benefit from recent developments.

8.2 Findings

Copyright, is very difficult to enforce in Jordan, because it is not compatible with Jordan's values, culture, or level of development. The levels of creativity, innovation, and production of intellectual works have not been significantly enhanced by the current copyright law; in fact, Jordanian audio-visual production has nearly collapsed since the law's enactment.

Overall, the ratification of TRIPS and the subsequent JUSFTA and JEUA agreements have resulted in a significant shift in favour of private over public interests; these agreements have gone a long way towards establishing a debate about the enforcement of IPRs within the realm of the enforcement of universal and natural rights, while producing few economic benefits and fewer legitimate mechanisms for balancing competing interests. Thus, these agreements have produced losers before producing winners and have failed to formulate a mechanism for the compensation of those losers.

TRIPS and the changes it effectuated to the Jordanian IP laws have yet to produce tangible results in the areas of enhanced innovation, creativity, foreign investment, and economic growth. As a result, the Jordanian public are realizing that they stand to gain little from attempts to assure stronger compliance with TRIPS. Those findings apply to the TRIPS-plus standards incorporated in the JUSFTA and the JEUA, as well as to Jordan's adoption of IP standards in areas where it clearly has no existing industrial base (e.g., integrated circuits and protection of plant varieties). The very nature of the current IPRs enforcement model, which is based on coercion, is stocking the fires of rejection against increased IPRs enforcement. Increasingly, current IPRs enforcement model is seen as a tool of foreign intervention and bullying by foreign corporations and governments.

As Jordan struggles through the consequences of the global economic downturn, stricter enforcement of IP laws brings with it potential economic costs to both the government and the Jordanian people. These costs can have destabilizing consequences on the social fabric and the governmental budget. The public's daily encounters with the impact of unemployment,⁸¹⁴ long

⁸¹² Amending Copyright Laws No. 14 (1998) and No. 29 (1999).

⁸¹³ *Copyright Law No.22.*, article 45. The National Library (NL) is the governmental agency in charge of registering copyrightable material.

⁸¹⁴ Unemployment rate: 13.5% (2009 est.), 12.6% (2008 est.), unofficial rate is approximately 30%. Source "Jordan Unemployment Rate - Economy", April 20, 2010, http://www.indexmundi.com/jordan/unemployment_rate.html.

waiting lines for public medical services, reduced access to medicine,⁸¹⁵ increased costs of goods,⁸¹⁶ and rising inflation,⁸¹⁷ along with the added cost of doing business, leave the average citizen with little alternative to pirated and counterfeit products sold by people who have no other source of income than that derived from selling them.

8.3 Recommended Policies for Implementing IP Laws

A number of policy recommendations for the implementation of IP laws in Jordan result from the findings of this thesis.

Current IP laws are not in sync with Jordan's economic development levels or its existing societal and cultural norms. The laws, therefore, cannot be justified, as they don't help to meet the needs of the Jordanian people. Until that obstacle is surmounted, the public will continue to ignore those laws and consequently eschew their enforcement, as it continues to view them as irrelevant to its daily life and even detrimental to its welfare.⁸¹⁸

The current set-up of patent law provides little benefit for the Jordanian people, as Jordan's industry, universities, and institutions have a low level of research and development and innovation. Consequently, they produce few if any patents or discoveries with global competitive value. At its current early stage of industrial growth, Jordan has no use for a sophisticated patent system that will hamper imitation levels necessary to spur innovation and development by the local industries and research facilities. This is especially true considering the patent law's failure to boost the transfer of technology into Jordanian industries. Had such a boost occurred it would have otherwise allowed Jordanians to gain access to advanced technology. The current patent law, with its strengthening of the patent system, prohibits imitation and consequently reduces the chances for innovation, leaving little room for the Jordanian public to perceive patent law as meaningfully connected to its everyday needs and thus negatively impacting the public's involvement in any enforcement effort.

The current patent law, with its restrictions on the marketing of generic pharmaceuticals if similar brand-name drug is presented for marketing in Jordan, negatively impacts the welfare of the Jordanian public by increasing the prices of medications. The exclusivity period for brand-name drugs grants up to five years of protection, even if they don't have a Jordanian patent. This goes against the societal norms of the Jordanian public, which views medical treatment above the narrow calculus of profit and loss. The current patent law must be reviewed with an eye towards those issues whereby it would benefit the Jordanian public. Until this matter is adequately addressed, Jordan should not consider joining the PCT.

The 1952 trademark law managed to establish a solid base of practical and judicial treatment and awareness. It established and emphasized concepts that were tangible and useful to the general public – associating value and quality with certain names and products established and existing in Jordan, employing Jordanians, providing added value to the local economy, and providing

⁸¹⁵ Mohammad Kayyali, "Cancer and Kidney Failure Medications Not available - Pharmacy Union says," *Alghad Daily Newspaper*, April 17, 2010.

⁸¹⁶ Jumana Ghnemaat, "Prices of Propane Gas might go up by 40%," *Alghad Daily Newspaper*, April 19, 2010.

⁸¹⁷ Inflation for 2008 was 13.9%, for 2009 -0.7%, for 2010 5%. Source "CBJ - Inflation in Jordan", April 20, 2010, http://www.cbj.gov.jo/pages.php?menu_id=173&local_type=0&local_id=0&local_details=0&local_details1=0&localsite_branchname=CBJ.

⁸¹⁸ Coulson, *A History of Islamic Law*.

impetus to the cycle of the capital movement. The amendments to the trademark law provided protection to known trademarks even if they were not registered in Jordan. This gave them the same protection as those marks that are active participants in the local economy, which could be perceived by the Jordanian public as unfair treatment, as it grants known trademarks rights similar to those granted under the Madrid Protocol, even though Jordan is not a party to it.

Given the relative sophistication of the trademark review and registration process in Jordan, as well as the Jordanian courts' familiarity with issues on trademark law as a result of its handling such claims for decades, Jordan should consider joining the Madrid Protocol on trademarks. This step would give the local trademark owners a mechanism to obtain 'international registration' for their trademark from the WIPO. Local trademarks will have a level playing field in terms of rights granted to known trademarks under the Jordanian trademark law.

Copyright issues have real practical significance in Jordan because there is a fairly developed shadow economy based on counterfeit copyright materials. Traditionally, copyright was never acknowledged by the Jordanian society at the same level as in developed countries; as a result, copyright law drastically conflicts with the Jordanian societal and social realities. The traditional view of copyright emphasizes attribution of used sources, whereas the view advocated by the current copyright law emphasizes the need for monetary compensation in return for use. Traditionally, given the humble economic realities of most of the population, copying was not seen as an issue in Jordan, as it contributed to the acquisition of knowledge. By contrast, the current law demands payment for the copyrighted material. To be enforceable, the copyright law must reflect the social and economic realities of the Jordanian society, and it must provide economic alternatives to the interests of people who are financially dependent on what the current copyright law considers illegal commercial behaviour. Such alternatives might be in the form of reduced pricing schemes to accommodate Jordanian realities.

The chequered record for the implementation and enforcement of IP laws in Jordan should sound alarm bells for their review. The various attempts by the developed countries and other international organizations to promote strict enforcement of high standards of IP laws through a coercion model that is based on framing, monitoring, capacity building, and donor funding is destined to prove ineffectual. Focus, instead, should be on the social realities and cultural values in Jordan and other developing countries, which in turn will determine what types of IP laws those societies should implement. Input from the general public, which was excluded from the process that produced the existing IPRs, must be solicited. This integrated approach will prove more effective than the punitive ad hoc approach in securing enforcement of IPRs in Jordan. In time, such an approach and the resulting laws may actually have a positive impact on the development and welfare of the local economy and consequently result in an enforcement model that is not coercion-based.

8.4 Recommended Approaches to Future Research

This thesis identifies several points that can be used to guide further research in the IP area for the Middle East. It does so by identifying several central research areas that can serve as a road map for scholars. The areas outlined below draw the attention of legal scholars to outstanding questions and gaps in the existing IP literature that can be used as a template to create future research objectives for other Arab countries as well. Future research should:

1. Examine the notions that true and proper enforcement should not be confused with amendments in local laws and policies and that direct pressure to adopt IP laws from developing countries may lead to little change in enforcement behaviour.

2. Address the question of whether there is good reason to assume that country-specific knowledge and information is likely to lead to a different set of policies, thereby rendering a one-size fits all IP approach similar to TRIPS ineffective.
3. Focus on the contextualisation of RBTs, such as the JUSFTA and the JEUAA, in order to examine expectations and obligations and to determine which, if any, of the RBTs' objectives were reached.
4. Extend IP analysis to areas beyond access to medicines, which has been its main focus thus far.
5. Focus on examining whether technical assistance provided to patent offices has been geared towards the US and EU's best enforcement practices at the expense of exploring flexibilities available under TRIPS and RBTs.
6. Address the question of whether US and EU patent systems are functionally unfit for developing countries because both systems are built around allowing litigation to correct for errors in patent examination and granting, whereas developing countries generally do not have robust patent prosecution or litigation practices.
7. Focus on developing a sound economic basis for IP analysis, because all the benefits promised by TRIPS and RBTs are based on economic factors. To be relevant and meaningful, economic analysis should focus on country-specific research to establish direct correlations, and focus less so on works of a more general nature.

9. ANNEXES

9.1 Annex 1: Letter from the Jordanian Customs listing the number of cases referred by it to the courts for the years 2003-2009.

9.2 Annex 2: Report by Department of the National Library on Copyright Activities and Status during the Year 2008.

9.3 Annex 3: Presentation by the Public Security Department on IPRs.

9.4 Annex 4: List of the number of IP cases decided by Jordanian courts between 2000-2009.

9.5 Annex 5: Letter from MoIT to the Ministry of Foreign Affairs on the Special 301 Report.

9.6 Annex 6: Instructions Governing Border Measures for IP Protection, No. 7 (2000).

9.7 Annex 7: Interview Notes

1. Yousef Gurefat – Captain, Jordanian Customs, Department of Intellectual Property Protection (20 July 2009) (0799067790)
 - Notes not available.
 - A follow up letter requesting official data answered on 29 July 2009, by letter No. 104/4/8/45549. See [Annex 1](#).
2. National Library request
 - Request letter not available.
 - NL provided bulleted answers. See [Annex 2](#).
3. Public Security Department request
 - Request letter not available.
 - PSD provided printed presentation. See [Annex 3](#).
4. Laila Jarrar – Drug Directorate Director(2006-2011) at the Jordan Food and Drug Administration (26 July 2011)
 - The JFDA follows the Drug and Pharmacy Law, which requires the registration of any drug with the JFDA before it can enter into Jordan.
 - The JFDA does not allow any generic drug covered by an already issued data protection order to enter Jordan.
 - A data protection order is valid for five years and allows for the exclusion from the market of generic drugs with similar formulation.
 - The JFDA has no linkage to patent prosecution at the Ministry of Industry & Trade, or any ensuing patent litigation initiated by a private party.
 - Even though there are generic equivalents to brand name drugs on the Jordanian markets, the prices for the generic drugs can still be high because the generic manufacturer is allowed to price the generic drug up to 80% of the price of the brand name drug.
 - The US embassy sponsors activities focused on counterfeit products and how to deal with them within the context of the existing Jordanian laws.
 - The U.S. FDA has provided training courses for Jordanian employees of the JFDA on registration of drugs and related regulatory activities.
 - The pharmaceutical sector as a whole has seen minimal technology transfer, and still has no research and development base.
 - The Jordanian pharmaceutical companies (i.e. those registered in Jordan) have limited market entry into developed countries markets. Hikma is still considered a Jordanian based company, registered at the Ministry of Industry & Trade employing 6100 employee most of whom are Jordanians.
 - The traditional markets for Jordanian pharmaceuticals were the regional and other developing countries. Some of those countries, most notably Saudi Arabia, are developing their own pharmaceutical industry and are working towards a model that is less dependent on imports.

5. Hanan Sboul –Secretary General of the Jordanian Association of Pharmaceutical Manufacturers (26 July 2011) (0795504878)
- The JAPM is an umbrella organization for pharmaceutical manufacturers in Jordan with 17 members.
 - The pharmaceutical sector does not benefit from free trade agreements that aim to reduce the customs on drugs, because drugs are usually not heavily taxed by customs.
 - Jordan did not prepare any study or assessment before joining the WTO or the Jordan U.S. FTA exploring the full benefits and drawbacks of such agreements.
 - The WTO and the JUSFTA agreements did not have an impact on the technology transfer to pharmaceutical manufacturers in Jordan. The limited level of technology transfer before and after the WTO and the JUSFTA is independent of those agreements.
 - JPMA did provide input to the Jordanian government ahead of the WTO accession on the negative impact such a decision will have on the pharmaceutical industry, but the final decision did not take such input into account. Suspect that other political and economic factors were considered.
 - The potential involvement of Jordan in ACTA is harmful to the pharmaceutical industry because ACTA mixes IP infringement with counterfeit medicine, and customs officials cannot determine counterfeit pharmaceuticals on their own.
 - The Customs law amendment advocated by the USTR are not in line Jordan's commitments under the WTO or the JUSFTA, and are not reasonable because they attempt to place the responsibility of private enforcement on the Jordanian government.
 - Agrees that the positions advocated by USAID through various publications, especially those by Michael Ryan, are general and lack any specificity to counter the detailed criticism levelled against WTO and JUSFTA agreements by other organizations like Oxfam.
6. Imad Uqlah – First Lieutenant, Jordanian Customs, Department of Intellectual Property Protection (28 July 2011 & 4 August 2011) (0797711064)
- The Customs Department has forwarded to the Prime Minister's office the suggested amendments to the Customs law, and in particular to article 41. The suggested amendments will allow the Customs officials to determine on their own whether a product is counterfeit or not, proceed to not clear the cargo, and then to destroy it.
 - Mr. Uqlah believes that the proposed amendments are suitable, despite the opposition presented against them, and should be the de-facto position. When asked how he developed that position he mentioned attending several workshops and training sessions discussing that position. Asked about who organized those sessions, he mentioned the Government of Jordan, USAID, and other international organizations he does not remember. Instructors in all the sessions were foreigners, he said.
 - Under the current customs law, customs officials will, if they suspect of the goods bearing a counterfeit trademark, notify the official agent of the original trademark in Jordan, as listed with the Ministry of Industry and Trade. The official agent has, as per samples sent by the customs department from the

confiscated goods, to decide if the goods are indeed counterfeit, and if so to decide file a court claim demanding the destruction or the exportation of the goods. The window for filing the legal claim is eight days. The Customs department does not have the legal mandate to do either. The JISM takes over from that point forward.

- If the agent does not respond within the eight days window, the customs proceed to lift the restrictions on the goods, and are allowed entry if they meet the relevant Jordanian standard. Otherwise, the goods are re-exported.
- Discussed the Instructions Governing IP Protection at the Borders No.7 (2000).
- The Customs barley has enough resources to carry out its mandate under the current law. He does not see how the Customs will be able to also take over the responsibility of (i) determining on its own whether a good is counterfeit and (ii) initiating legal action against the importer if the legal agent chooses not to.

7. Mohammed Jabali – Captain, Jordanian Customs, Department of Intellectual Property Protection (4 August 2011)

- Refused to share a copy of the proposed amendment to article 41 of the Customs’ Law, and referred me to the department of legal affairs.
- Provided the following data:
 - Number of letters sent to commercial agents indicating that Customs temporarily holds suspected counterfeit goods and giving the agent 8 days to file a legal action. He sees an increasing trend for 2011.

<i>Year</i>	<i>Number of Letters</i>
2009	320
2010	360

- Number of cases filed as a result of the letters to legal agents

<i>Year</i>	<i>Number of cases</i>
2007	145
2008	109
2009	87
2010	96

- His opinion as to why 320 and 360 letters to official agents in 2009 and 2010, respectively, resulted in only 87 and 96 cases filed, is that the official agent will not take action if the quantities in question are deemed commercially insignificant, which differs from one agent to the other. In other cases the commercial agent, happened to be a regional agent as well, and simply expressed lack of interest in the Jordanian market.

8. Wasfi Tawahiah – First Lieutenant, Jordanian Customs, Legal Affairs (4 August 2011)

- Refused to share a copy of the proposed amendment to article 41 of the Customs’ Law, but indicated that the amendment recommends giving Customs to initiate legal action against the importer even if the commercial agent declines to do so within 8 days from receiving a letter from the Customs that suspected counterfeit goods are temporarily held.

- Indicated that Customs and the Ministry of Industry & Trade are holding meeting on the ACTA meetings but provided no other information.
 - The impression was that the Custom's legal department considers its role, as an implementer of what the donor countries think is the appropriate amendments to existing laws. The Customs does not have any role in formulating enforcement policy.
 - He acknowledges that the proposed amendments will place additional requirements on Customs, which it is not ready or even capable to carry.
9. Dr. Lina Haddad – Head of Patent Office, Ministry of Industry & Trade (31 July 2011)
- The patent office is in charge of examining all patent applications for a Jordanian patent. It comprises of four examiners, with technical training in pharmacy and engineering.
 - Patent applications are examined on the merits based on the patent being novel, non-obvious, and have industrial application.
 - The filings with the patent office are categorized under two broad groups: first time filings and non-first time filings. Under the later, the patent application can have priority, if filed within 12 months of the earliest patent application, or can be without priority if filed in Jordan past the 12 months mark. First time filings are processed internally, and the WIPO service for patent examination is used when the existing four examiners cannot review the patent.
 - In order for a patent application to qualify for the WIPO review it must meet minimum proper drafting standards, which results in patent applications not meeting such a standard to be asked to modify the drafting to become suitable, or be rejected. There are no available statistics on the percentage of patents examined by the four examiners, and those by the WIPO.
 - The number of foreign filings decreased since 2008, which the patent office thinks is a result of the economic crisis.
 - Local filings are not as much affected by the world economic situation, rather by the general mood and economic trends in Jordan. The adverse economic situation in Jordan seems to have resulted in reduced patent filings.
 - Local filings are characterized by low quality in drafting, and limited industrial application, which makes them of limited or no use. The patent office has not seen much of an effect of a technology transfer factor in the quality of filed patents.
 - There is no patent attorney practice in Jordan, and potential inventors draft their own claims and applications, which perpetuates the problem of low quality drafting.
 - Jordanian culture of applying for patents for the sake of self-aggrandizement, without much concern for the quality of the patent itself, reinforces trend in poor local patents filed.
 - There is a perception that the current IPRs system is non-negotiable and Jordan has no option but to comply with its demands.
10. Zain Alawamleh – Assistant Director for International Agreements, Department of Industrial Property, Ministry of Industry & Trade (2 August 2011)

- The senior levels of decision makers have a weak understanding of the enforcement and compliance aspects of TRIPS and the JUSFTA. The same applies to legal branch – prosecutors and judges.
- The level of compliance and enforcement is not based on a specific strategy, rather is manager-dependent and fluctuates accordingly.
- There is still a minimal understanding of the scope of IP commitments under WTO and JUSFTA agreements.
- I asked for data on
 - how many training seminars, workshops, and conferences did the members of the department attend?
 - in which countries were they held?
 - which organizations sponsored them?
 - what were the areas and topics covered?

but was given a verbal answer only to the effect that 2-3 workshops and expert visits are conducted each year, which are conducted by WIPO, WTO, USAID, and TAIEX (an EU funded donor program)

- The content of the seminars and training held is dependent on the level of attendees, which so far has been more of the beginner to intermediary type, and is mainly on the best practices in developed countries.
- Most of the flexibilities under TRIPS are pre-empted by the legal requirements under JUSFTA and the JEUA.
- The amendments to Jordanian IP laws were translated into Arabic and not the result of a collective and deliberative local process that took into account Jordanian needs and particularities. Some laws like the Geographical Indicators and the Integrated Circuits laws were entirely translated.
- Foreign aid and cash transfers were linked by donors to passing of new IP laws such as the Geographical Indicators and the Integrated Circuits laws, and the amendment of existing ones, like trademark and copyright laws.
- Many factors contribute to the modest level of capacity development at the departmental level, which include the language barrier, budgetary constraints and high employee turnover. The same factors are limiting the role of the Department in the education of the Jordanian decision makers.
- Jordan is working towards meeting its obligations under the various agreements, and is planning to complete the Instructions for the accession to the PCT and the Madrid protocol by 2012-2013.
- There are no Jordanian specific indicators (e.g. reaching a certain GDP per capita, achieving a certain added value for all existing industries, or attaining a certain level of technology transfer) for the timeline on joining the PCT or the Madrid protocol, or on tailoring the level of enforcement of existing laws.
- The attempt to create an independent IP agency that focuses on registration and policy issues did not materialize.
- Amending the laws of Jordan is the price Jordan has to pay in order for it to continue to receive aid and financial assistance from western countries.

11. Halim Abu Rahmeh – CEO, Jordan Exporters Association (7/8/2011)

- Jordanian industry has not benefitted from opening up of the US market, because of its inability, with few exceptions, to develop competitive products and invest in marketing and development.
 - JEA does not produce any data or statistics.
 - The Jordan Chamber of Industry is not playing any role in expanding the potential markets for Jordanian manufacturers, and the JEA is trying to work against that but it lacks the financial resources.
 - From the JEA point of view the WTO membership and the JUSFTA have not been important in opening new markets for Jordanian products. Part of that problem is caused by the Jordanian manufacturer's inability to develop its products (low quality, no R&D, focus on local market only), and the negligible technology transfer to the Jordanian manufacturing sector is another culprit.
 - Industries that were established to benefit from the JUSFTA (e.g. Garment industry) do not provide any added value to the economy as they use predominantly foreign labour, and all their raw materials are imported. Also, they have an exemption from the already low minimum wage.
12. Yaseen Khayyat – Director General, Jordan Institute for Standards & Metrology (7/8/2011)
- Jordan does not have a technical specification for everything. When a product is imported, which does not have a technical specification the JISM relies on a certificate from an accredited lab in the country of origin.
 - Customs is a fee-collecting agency with no technical expertise in the area of identifying counterfeit products. The proposed amendments to article 41 should not be passed.
 - The proposed amendments to the JISM law will allow it to (i) conduct market surveys for counterfeit products and charge the merchant for the testing costs if the tested goods turned out to be a counterfeit and (ii) confiscate counterfeit trademarks.
 - JISM benefitted from training by the US by sending 10 employees to attend training courses paid for by the USG. The 10 employees trained other employees upon their return.
 - Amending the laws of Jordan is the price Jordan has to pay in order for it to continue to receive aid and financial assistance from western countries. As far as the JISM is concerned that is a price worth paying as it does not cost the JISM anything to conform with the requirements and demands for amending the laws, but in return it is getting valuable resources and support, which the GoJ is not financially capable of providing.
 - JISM is working from a global economy perspective but the Jordanian industries are still focus on a national and regional outlook. The CEO of the Jordan Chamber of Industry told him he is not interested in Europe and the US markets.
13. Rula Madanat – Assistant Director General for Technical Affairs, Jordan Institute for Standards & Metrology, (9/8/2011) (Advisor to the Jordanian delegation on accession to the WTO. Member of the Jordanian delegation to the JUSFTA negotiations)
- The WTO accession was started on a take-it or leave it basis, but the Jordanian negotiator make concessions when possible (e.g. stop using 'expiration date' on food products and instead use 'best before', which date to be determined by

manufacturer) and rejected compromises when needed (e.g. reduction of taxes on cigarettes and alcohol, and liberating the prices of the dairy market).

- Does not think that the bargain of joining the WTO and JUSFTA (open markets, increased FDI, and technology transfer) materialized.
- During the JUSFTA negotiations phase, Jordan followed an approach to not raise an issue unless raised by the US side. The purpose being to avoid unnecessary battles, but it also meant that IP section was not fully addressed.
- The drive for the JUSFTA was driven by predominantly political (desire to strike an FTA with the US before other countries and to show Jordan's ability to partner with the world's largest market) and not economic reasons.
- A Mutual Recognition Agreement (MRA) for Conformity Assessment Procedures did not precede the JUSFTA, nor was such an agreement negotiated along with the JUSFTA. When Jordan requested entering into such an agreement after the conclusion of the JUSFTA, its request was declined.
- The absence of the MRA is a key impediment to the entry to US market for Jordanian goods, because conformity assessment certificates issued in Jordan are not recognized by federal and state US agencies. Therefore, each Jordanian product desiring to enter the US market must apply individually in the US for approval of its specific product prior to exporting. This is an expensive and time-consuming process.
- Jordan does not have an MRA with the EU, but is negotiating one at the moment. It will only cover one or two products and tested for a few years to see if the process goes without major problems before expanding it to more products. The goal is for Jordan and the EU to sign an Acceptance of Conformity Assessment & Acceptance of Industrial Products Agreement (ACA).
- Further, the EU market currently requires that any Jordanian product imported must have a Manufacturer's Representative who will be held in the Jordanian manufacturer if any problems arise. It is very difficult for Jordanian manufacturers to secure a European company that agrees to act in such a capacity.
- Another key impediment to entry into US and EU market is the cost of Jordanian goods, which can be high because:
 - Jordan produces few raw materials (potash and phosphate), which means any raw materials must be imported.
 - Jordan is not a producer of any technologies, especially manufacturing ones, which must in turn be imported as well.
 - Jordanian labour is generally not trained and requires considerable time for training. It is also more expensive than imported labour.
 - The cost of water, electricity, and fuel are higher in Jordan than any regional country. Jordan is one of the poorest countries in water resources and imports 95% of its energy.
- Jordanian laws are amended and changed with such frequency that the investors are not always sure of what the law is saying.
- Governmental agencies have benefited from technical assistance and support from the West, but these benefits admittedly have yet to be felt by the general public and the industrial sector.

14. Mohammad Halaiqah – Member of lower chamber of parliament (Former minister of industry and Trade. Former Deputy Prime Minister. Head of the Jordanian delegation to WTO accession negotiations. Head of the Jordanian delegation to the JUSFTA negotiations) (9/8/2011)

- Joining the WTO was a condition precedent to the JUSFTA.
- Jordan made a decision to join the WTO and sign the JUSFTA because it wanted to change its economic dynamic that was dependent on the Iraqi market and cross-regional trade, and to execute economic and legal reforms.
- The WTO negotiating team had representatives from the private sector including the commerce and industry chambers, and the Jordan Association of Pharmaceutical Manufacturers.
- Jordan is a small country with limited negotiating room. Had to go through bilateral negotiations with 17 countries prior to reaching the WTO secretariat.
- Jordan had a good deal with its WTO accession. There was a trade off on patents and IP laws as Jordan accepted them in return for concessions elsewhere in the WTO and the JUSFTA.
- The industrial sector itself through its limited marketing and lack of innovation and spending on development, bears part of the responsibility for failing to penetrate EU and US markets.
- The FDI flow and technology transfer promises made by western countries were exaggerated and did not materialize, but the private sector and not the government's spearhead such things anyway.
- Jordan benefitted from the legal and economic reforms and the overall benefits of the WTO and the JUSFTA outweigh the drawbacks.
- Even if parliament were in place at the time of WTO and JUSFTA negotiations, it would not have strengthened the Jordanian position.
- TRIPS is a universal standard and it should be followed not negotiated.
- A good deal of the laws that were enacted as part of the legal reform process for the WTO and the JUSFTA were not properly thought-out and analysed. Some like the plant patents, geographical indicators, and the electronic circuits were translated out right. That is acceptable because these laws represent the acceptable universal standard.
- A good deal of the weaknesses in the negotiating position of Jordan at the time being is a result of the draining of qualified people out of the government, with only mediocre talents remaining.

15. Ahmed Hammad – Head of Trade Policy Division – Ministry of Industry & Trade (18/8/2011)

- Jordan is not a member to the ACTA negotiations and has no intention to sign it once completed.
- Jordan was invited to, and attended, the first ACTA plenary meeting in 2007 in Geneva, and indicated afterwards that it is not interested in joining the ACTA once completed. Nevertheless, Jordan received an invitation from the EU to re-join the ACTA negotiations in late 2010. The official Jordanian position against ACTA has not changed though.
- The reasons for the official Jordanian position are:
 - ACTA require substantive legislative amendments.

- ACTA will result in increased administrative and enforcement costs.
- ACTA will require significant changes to the nature and level of authorities among the various involved governmental agencies.
- Why is Jordan invited to ACTA?
 - Jordan has strong relations with the EU and the US
 - There is a need to market ACTA and by having Jordan on board, the case of selling it to other countries in the region can be easier.
 - Jordan is already on board with TRIPS-plus IPRs standards, and ACTA represents a move in the same direction.
- The Jordanian decision maker does not have any studies on the impact of IPRs on Jordanian economic sectors, and therefore, decisions in that regard are made with a political agenda and not an economic or development-based one.

9.8 Annex 8: Questionnaire Students' attitudes towards Copyright and Trademarks

Pirated products, are those products that have a trademark holder's brand on them, but are produced by companies with no affiliations to the registered trademark. Pirated products can also come in the form of CD's containing illegally copied software or even books that have been copied without the permission of the publishing company that holds the rights to those books.

Part-One: Current views regarding the use of pirated products amongst students of the University of Jordan

1.0.1	Please read the following and place a check beside the result that best applies to you.		
	Yes	No	
1. Have you purchased pirated products at least once?	1	2	—
2. Is it likely that you will continue to purchase pirated products?	1	2	—
3. I would not buy pirated products if I could afford the price of the original products ?	1	2	—

1.0.2	What is the main source that supplies/sells you pirated products?		
	Pirated Products dealer	1	—
	Shops that amongst other things, also sells pirated products	2	
	Friends and Family	3	

1.0.3	Are there any original computer software programs on your computer ?		
	1. None at all		—
	2. 1 to 3 original programs		
	3. 4 or more original programs		

Part two: Students opinion on pirated products from a religious perspective

2.0.1	Please read the following and place a check beside the result that best applies to you.		
	Yes	No	
1. Are pirated products prohibited by religion?	1	2	—
2. If religion was to forbid buying pirated products, would you purchase them?	1	2	—
3. Even if buying pirated products is prohibited by law, I shall still purchase them	1	2	—

2.0.2	Considering that pirated products are not mentioned in any of the religious books, therefore my main reference on them comes from:		
	“Al-Mofti”	1	—
	Local Religious Leaders	2	
	My Father/Mother	3	
	Others	4	

2.0.3	If your main religious reference declared that pirated products are prohibited under your religion, would you follow this opinion ?		
	1. Always	—	
	2. On Occasion		
	3. I would not		

3.0.1	Student Opinion on pirated products from a moral perspective		
	Yes	No	— — — — —
1. Production of pirated products is morally sound as it benefits those of a lower income.	1	2	
2. Pirated products infringe on the rights of companies	1	2	
3. I feel uncomfortable when purchasing pirated products	1	2	
4. I will continue to purchase pirated products, even if I possess the financial ability to purchase originals.	1	2	
5. Pirated products do not harm Arab and Muslim populations	1	2	
6. Personally, I do not care if a company loses some profit over pirated products	1	2	

Personal Information:

Age (Years):	Sex:	Male/Female
Marital Status:	Single	Married Other
Average monthly Family income (Dinar):	Who pays your university fees?	
Which college do you attend ?		
Place of Birth: (Country)	The province: (Residence of Family)	

9.9 Annex 9: Frequency Tables

Frequency Table

q1011 Q101.1 I have you engaged at least one time in buying Counterfeit products?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Yes	342	89.8	89.8	89.8
	2 No	39	10.2	10.2	100.0
	Total	381	100.0	100.0	

q1012 Q101.2 Are you likely to continue buying Counterfeit products?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Yes	202	53.0	53.0	53.0
	2 No	179	47.0	47.0	100.0
	Total	381	100.0	100.0	

q1013 Q101.3 I will not buy Counterfeit products if I can afford to buy the original.

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Yes	245	64.3	64.3	64.3
	2 No	135	35.4	35.4	99.7
	6 I dont know	1	.3	.3	100.0
	Total	381	100.0	100.0	

q102 Q102. Do you have any original software installed on your computer?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 None	101	26.5	26.5	26.5
	2 One to two	227	59.6	59.6	86.1
	3 Three or more	50	13.1	13.1	99.2
	6 I dont know	1	.3	.3	99.5
	9 Missing	2	.5	.5	100.0
	Total	381	100.0	100.0	

q103 Q103. What is your main source for buying Counterfeit products?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Dedicated shops only	94	24.7	24.7	24.7
	2 Dedicated shops and other places	213	55.9	55.9	80.6
	3 Relatives and friends	73	19.2	19.2	99.7
	9 Missing	1	.3	.3	100.0
	Total	381	100.0	100.0	

q2011 Q201.1 Do you think that Counterfeit products are prohibited by religion?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Yes	109	28.6	28.6	28.6
	2 No	251	65.9	65.9	94.5
	6 I dont know	18	4.7	4.7	99.2
	7 Refused to answer	1	.3	.3	99.5
	9 Missing	2	.5	.5	100.0
	Total	381	100.0	100.0	

q2012 Q201.2 If you know that Counterfeit products are prohibited by religion will you continue to buy and use such products?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Yes	66	17.3	17.3	17.3
	2 No	309	81.1	81.1	98.4
	6 I dont know	4	1.0	1.0	99.5
	9 Missing	2	.5	.5	100.0
	Total	381	100.0	100.0	

q2013 Q201.3 If you know that state law prohibits Counterfeit products will you continue to buy and use such products?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Yes	132	34.6	34.6	34.6
	2 No	247	64.8	64.8	99.5
	6 I dont know	1	.3	.3	99.7
	9 Missing	1	.3	.3	100.0
	Total	381	100.0	100.0	

q202 Q202. Counterfeiting is not addressed directly by religion, what is the main source of your Islamic actions and decisions?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 The Mufti	157	41.2	41.2	41.2
	2 The Cleric in my neighborhood	60	15.7	15.7	57.0
	3 Parents	65	17.1	17.1	74.0
	4 Other	96	25.2	25.2	99.2
	6 I dont know	2	.5	.5	99.7
	9 Missing	1	.3	.3	100.0
	Total	381	100.0	100.0	

q203 Q203. If the source of your religious guidance deemed Counterfeiting prohibited by religion, how much will you abide by such an edict?

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Always	201	52.8	52.8	52.8
	2 Sometimes	148	38.8	38.8	91.6

3 Never	30	7.9	7.9	99.5
6 I dont know	1	.3	.3	99.7
9 Missing	1	.3	.3	100.0
Total	381	100.0	100.0	

q3011 Q301.1 Counterfeit products are ethical because they allow people with limited income access to goods, software and books.

	Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid 1 Yes	274	71.9	71.9	71.9
2 No	104	27.3	27.3	99.2
6 I dont know	1	.3	.3	99.5
9 Missing	2	.5	.5	100.0
Total	381	100.0	100.0	

q3012 Q301.2 Counterfeit products intrude on the rights of companies.

	Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid 1 Yes	286	75.1	75.1	75.1
2 No	91	23.9	23.9	99.0
6 I dont know	2	.5	.5	99.5
9 Missing	2	.5	.5	100.0
Total	381	100.0	100.0	

q3013 Q301.3 I feel uncomfortable when buying Counterfeit products.

	Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid 1 Yes	188	49.3	49.3	49.3
2 No	190	49.9	49.9	99.2
6 I dont know	1	.3	.3	99.5
9 Missing	2	.5	.5	100.0
Total	381	100.0	100.0	

q3014 Q301.4 I will continue to buy Counterfeit products even if I afford to buy the original.

	Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid 1 Yes	103	27.0	27.0	27.0
2 No	273	71.7	71.7	98.7
6 I dont know	3	.8	.8	99.5
9 Missing	2	.5	.5	100.0
Total	381	100.0	100.0	

q3015 Q301.5 Counterfeit products do not harm Muslim or Arab people.

	Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
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Valid	1 Yes	173	45.4	45.4	45.4
	2 No	204	53.5	53.5	99.0
	6 I dont know	2	.5	.5	99.5
	9 Missing	2	.5	.5	100.0
	Total	381	100.0	100.0	

q3016 Q301.6 I do not personally care about the companies' losses because of Counterfeiting.

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 Yes	242	63.5	63.5	63.5
	2 No	135	35.4	35.4	99.0
	6 I dont know	2	.5	.5	99.5
	9 Missing	2	.5	.5	100.0
	Total	381	100.0	100.0	

q700 Q700.age

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	18	11	2.9	2.9	2.9
	19	56	14.7	14.7	17.6
	20	91	23.9	23.9	41.5
	21	105	27.6	27.6	69.0
	22	43	11.3	11.3	80.3
	23	13	3.4	3.4	83.7
	24	15	3.9	3.9	87.7
	25	3	.8	.8	88.5
	26	5	1.3	1.3	89.8
	27	3	.8	.8	90.6
	28	1	.3	.3	90.8
	29	2	.5	.5	91.3
	30	1	.3	.3	91.6
	36	1	.3	.3	91.9
	38	1	.3	.3	92.1
	40	2	.5	.5	92.7
	44	1	.3	.3	92.9
	99 Missing	27	7.1	7.1	100.0
	Total	381	100.0	100.0	

q701 Q701.Sex

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 male	177	46.5	46.5	46.5
	2 famle	199	52.2	52.2	98.7
	9 Missing	5	1.3	1.3	100.0
	Total	381	100.0	100.0	

q703 Q703.Marital Status

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	1 single	351	92.1	92.1	92.1
	2 Married	16	4.2	4.2	96.3
	3 Other	10	2.6	2.6	99.0
	9 Missing	4	1.0	1.0	100.0
	Total	381	100.0	100.0	

q704 Q704.Family monthly income

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	150	1	.3	.3	.3
	200	1	.3	.3	.5
	250	7	1.8	1.8	2.4
	300	14	3.7	3.7	6.0
	320	1	.3	.3	6.3
	350	9	2.4	2.4	8.7
	365	1	.3	.3	8.9
	370	1	.3	.3	9.2
	400	14	3.7	3.7	12.9
	450	5	1.3	1.3	14.2
	470	1	.3	.3	14.4
	500	42	11.0	11.0	25.5
	600	21	5.5	5.5	31.0
	700	18	4.7	4.7	35.7
	750	1	.3	.3	36.0
	800	14	3.7	3.7	39.6
	850	1	.3	.3	39.9
	900	2	.5	.5	40.4
	995	1	.3	.3	40.7
	1000	54	14.2	14.2	54.9
	1200	7	1.8	1.8	56.7
	1250	1	.3	.3	57.0
	1300	1	.3	.3	57.2
	1400	3	.8	.8	58.0
	1450	1	.3	.3	58.3
	1500	11	2.9	2.9	61.2
	1640	1	.3	.3	61.4
	1700	2	.5	.5	61.9
	1900	1	.3	.3	62.2
	2000	19	5.0	5.0	67.2
	2500	4	1.0	1.0	68.2
	3000	2	.5	.5	68.8
	4000	1	.3	.3	69.0
	5000	3	.8	.8	69.8
	6000	1	.3	.3	70.1
	7000	1	.3	.3	70.3
	7500	1	.3	.3	70.6
	30000	1	.3	.3	70.9
	9999996 I dont know	4	1.0	1.0	71.9
	9999997 Refused to answer	17	4.5	4.5	76.4

9999998 Unknown	14	3.7	3.7	80.1
9999999 Missing	76	19.9	19.9	100.0
Total	381	100.0	100.0	

q705 Q705.Who is paying your tuition fees

	Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid ١ فاعل خير	2	.5	.5	.5
٢ على نفقتي الخاصه	39	10.2	10.2	10.8
٣ عمي	1	.3	.3	11.0
٤ الاهل	234	61.4	61.4	72.4
٥ زوجي	2	.5	.5	73.0
٦ حكومه	1	.3	.3	73.2
٧ جيش	7	1.8	1.8	75.1
٨ ديوان ملكي	20	5.2	5.2	80.3
٩ اخي	1	.3	.3	80.6
١٠ وزاره التربيه والتعليم	6	1.6	1.6	82.2
١١ ابناء عاملين	8	2.1	2.1	84.3
١٢ ابناء مخيمات	1	.3	.3	84.5
١٤ التعليم العالي	1	.3	.3	84.8
١٥ الام	1	.3	.3	85.0
١٦ مكرومه	31	8.1	8.1	93.2
١٧ منظمه فتح	1	.3	.3	93.4
999 Missing	25	6.6	6.6	100.0
Total	381	100.0	100.0	

q706 Q706.Respondent's faculty

	Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid ١ هندسه	84	22.0	22.0	22.0
٢ علوم سياسيه	1	.3	.3	22.3
٣ علوم تربويه	33	8.7	8.7	31.0
٤ علوم وراثيه	1	.3	.3	31.2
٥ علوم	41	10.8	10.8	42.0
٦ شريعه	17	4.5	4.5	46.5
٧ زراعه	4	1.0	1.0	47.5
٨ طب	1	.3	.3	47.8
٩ رياضيات	1	.3	.3	48.0
١٠ دراسات دوليه	1	.3	.3	48.3
١١ تكنولوجيا المعلومات	33	8.7	8.7	57.0
١٢ الاعمال	71	18.6	18.6	75.6
١٣ الاجتماعيه	1	.3	.3	75.9
١٤ الاداب	49	12.9	12.9	88.7
١٥ اللغات	1	.3	.3	89.0
١٦ هندسه صناعيه	2	.5	.5	89.5
١٧ هندسه ميكانيكيه	1	.3	.3	89.8
١٨ هندسه مدنيه	1	.3	.3	90.0
١٩ هندسه وتكنولوجيا	21	5.5	5.5	95.5
999 Missing	17	4.5	4.5	100.0
Total	381	100.0	100.0	

q707 Q707.Respondent's country of birth

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	١ فلسطين	9	2.4	2.4	2.4
	٢ الاردن	319	83.7	83.7	86.1
	٣ كيف-اكورانيا	1	.3	.3	86.4
	٤ كويت	11	2.9	2.9	89.2
	٥ سوريه	3	.8	.8	90.0
	٦ الامارات	7	1.8	1.8	91.9
	٧ بريطانيا	1	.3	.3	92.1
	٨ السعودية	9	2.4	2.4	94.5
	٩ الصين	1	.3	.3	94.8
	١٠ امريكا	2	.5	.5	95.3
	١١ مصر	1	.3	.3	95.5
	١٢ ليبيا	1	.3	.3	95.8
	١٣ لبنان	1	.3	.3	96.1
	999 Missing	15	3.9	3.9	100.0
	Total	381	100.0	100.0	

q708 Q708.Respondent's place of living (province)

		Frequency	Per Cent	Valid Per Cent	Cumulative Per Cent
Valid	١ فلسطين	1	.3	.3	.3
	٢ عمان	280	73.5	73.5	73.8
	٣ البلقاء	25	6.6	6.6	80.3
	٤ رام الله	1	.3	.3	80.6
	٥ جرش	8	2.1	2.1	82.7
	٦ اربد	2	.5	.5	83.2
	٧ العقبة	2	.5	.5	83.7
	٨ الكرك	2	.5	.5	84.3
	٩ الطفيله	1	.3	.3	84.5
	١٠ السعوديه	3	.8	.8	85.3
	١١ الزرقاء	15	3.9	3.9	89.2
	١٢ الشونه	1	.3	.3	89.5
	١٣ الامارات	1	.3	.3	89.8
	١٤ المفرق	1	.3	.3	90.0
	١٥ الموقر	1	.3	.3	90.3
	١٦ معان	2	.5	.5	90.8
	١٧ مادبا	18	4.7	4.7	95.5
	١٨ نابلس	1	.3	.3	95.8
	999 Missing	16	4.2	4.2	100.0
	Total	381	100.0	100.0	

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