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The Morning After: TRIPS-Plus, FTAs and Wikileaks - Fresh Insights on the Implementation and Enforcement of IP Protection in Developing Countries

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THE MORNING AFTER: TRIPS-PLUS, FTAs AND WIKILEAKS

FRESH INSIGHTS ON THE IMPLEMENTATION AND ENFORCEMENT OF IP PROTECTION IN DEVELOPING COUNTRIES

Mohammed El Said¹

ABSTRACT

Leaked diplomatic cables related to the United States' foreign policy implementing and enforcing intellectual property in developing countries draw a bleak picture. U.S. interest groups and local agents collaborate to achieve higher levels of intellectual property protection without taking into consideration the public interest and consumer rights of local communities. This "act of state-sponsored violence," as some have proclaimed it, jeopardizes the lives of millions of citizens across the globe. It also undermines the foundations of the global multilateral trading regime and its institutions, particularly the World Trade Organization (WTO), which was created by the global community in 1995 in order to put an end to multilateralism and multilaterally regulate global trade in goods and services.

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ABSTRACT	1
I. INTRODUCTION.....	2
II. THE BEGINNINGS.....	4
III. DOMESTIC PROCESS, GLOBAL AGENDA.....	6
IV. LAYING DOWN THE FOUNDATIONS.....	10
V. COSTS WITHOUT BENEFITS: THE MYTHS.....	13
VI. AN UNFINISHED AGENDA? THE MORE THE MERRIER.....	22
VII. OURS VS. THEIRS.....	26
VIII. THE FTAs CLUB.....	27
IX. CONCLUSION.....	28

I. INTRODUCTION

On August 30, 2011, Wikileaks released the latest batch of classified U.S. Department of State cables, revealing significant insights related to various aspects of the United States' foreign and trade policy. In highlighting the severity of the leaks, the Economist remarked that "if Cyberspace had air, it would be thick with recrimination."² Of particular interest to this paper are those cables related to the United States' foreign policy implementing and enforcing intellectual property in developing countries. The leaks draw a bleak picture, in which U.S. interest groups and local agents collaborate to achieve higher levels of intellectual property protection in developing countries, without taking into consideration the public interest and consumer rights of local communities. This "act of state-sponsored violence," as some have proclaimed it,³ jeopardizes the lives of millions of citizens across the globe. It also undermines the foundations of the global multilateral trading regime and its institutions, particularly the World Trade Organization (WTO), which was created by the global community in 1995 in order to put an end to multilateralism and multilaterally regulate global trade in goods and services.

Although the leaks contain references to many other U.S. initiatives and

² *Swept Up and Away*, THE ECONOMIST, Sept. 10, 2011, at 62.

³ James Love, *In Defense Of WikiLeaks: Looking At Cables On Pharmaceutical Drugs And Trade Pressures*, HUFFINGTON POST, Sept. 4, 2011, http://www.huffingtonpost.com/james-love/wikileaks-cables-pharmaceutical-drugs_b_947806.html?view=print&comm_ref=false.

efforts aimed towards strengthening and enforcing intellectual property protection in many developing countries,⁴ this study will focus on those related to the implementation of the U.S.-Jordan bilateral Free Trade Agreement⁵ (FTA), signed in 2001 in the area of intellectual property protection. Bilateral FTAs between powerful, industrialized countries, particularly the United States and European Union, and poorer developing countries proliferated over the past decade. As now acknowledged by many, the signing of an FTA represents the beginning of a long and winding road, but there is little analysis of what actually happens following the conclusion of a bilateral free trade agreement. This is particularly true in the area of intellectual property protection, which affects the lives of millions in developing countries. One reason for the lack of analysis of the implantation of FTAs is that, in most cases, these agreements are negotiated, signed, and implemented secretly, behind closed doors with little public debate and participation.⁶ This study analyzes the implementation of U.S.-Jordan FTA based on a thorough review of recent releases of the Wikileaks cables, supplemented by the observations and experience of the author in the region.

This study is a first attempt at analyzing and explaining the process that ensues during the signing of an FTA between a developed and a developing country. The case of Jordan is invaluable for many reasons. First, the U.S.-Jordan FTA was the first FTA signed by the United States with any Arab or Muslim country.⁷ Second, the U.S.-Jordan FTA was the first agreement of its type that contained several intellectual property obligations of a TRIPS-Plus nature.⁸ Third, the U.S.-Jordan FTA is one of the few agreements where the impacts of FTAs on developing country have been studied. Research findings have alarmingly affirmed the negative impact arising from the implementation of comparable FTAs in developing countries, particularly in the area of public health and access to medicines.⁹ Within

⁴ See, e.g., those related to Thailand, Philippines and Guatemala.

⁵ Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63 [hereinafter U.S.-Jordan FTA]

⁶ For more, see Brian J. Schoenborn, *Public participation in trade negotiations: open agreements, openly arrived at?*, 4 MINN. J. GLOBAL TRADE 103 (1995).

⁷ For more on US-Jordan FTA see Mohammed El-Said, *The Evolution of the Jordanian TRIPS-Plus Model: Multilateralism Vs Bilateralism and the Implications for the Jordanian IPRs Regime*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 501 (2006).

⁸ On TRIPS-Plus, see Peter Drahos, *BITS and BIPS: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791 (2001); Mohammed El-Said, *The Road from TRIPS-Minus to TRIPS to TRIPS-Plus: Implications of IPRs for the Arab World*, 8 J. WORLD INTELL. PROP. 53 (2005).

⁹ See OXFAM INT'L, ALL COSTS, NO BENEFITS: HOW TRIPS-PLUS INTELLECTUAL PROPERTY RULES IN THE US-JORDAN FTA AFFECT ACCESS TO MEDICINES (2007). See also

this context, this paper will use information obtained through the Wikileaks to make a more detailed assessment of the process of surveillance and implementation undertaken by the U.S. authorities following the signing of a bilateral free trade agreement.

Although the main concern of this study is the domestic process associated with setting and creating intellectual property protection norms and regulations in developing countries (particularly Jordan), the study also highlights how this process relates to the global debate over intellectual property norms. It reveals the rivalry between the main players—the U.S. and the E.U.—in this area and their efforts to push the boundaries of intellectual property protection further in developing countries. Based on this finding, the study explains the complexities associated with national norm setting initiatives and concludes that the process of setting and implementing intellectual property norms at the national level should not be viewed in isolation from other major global developments. What this study won't do is to delve into the substantive details of the intellectual property TRIPS-Plus provisions included under the U.S.-Jordan FTA, as this has been dealt with extensively elsewhere.¹⁰

II. THE BEGINNINGS

Jordan has maintained strong relations with the United States since its creation as an Emirate in early 1920s.¹¹ The country's geography, demography, pragmatic leadership, and, more recently, its involvement in the U.S.'s "War on Terror," ensured continuous special relationships with various U.S. administrations, with few exceptions.¹²

The close relationship between Jordan and the U.S. is evidenced by the exceptional military and financial support Jordan has received from the U.S. over the years.¹³ Jordan is one of the largest recipients of U.S. aid in the world. Since 1951, the country received approximately \$11.38 billion in

Hamed El-Said & Mohammed El-Said, *TRIPS-Plus Implications for Access to Medicines in Developing Countries: Lessons from Jordan-US FTA*, 10 J. WORLD INTELL. PROP. 438 (2007).

¹⁰ See El-Said, *supra* note 7.

¹¹ The U.S. State Department website explains, "Relations between the United States and Jordan have been close for 6 decades, with 2009 marking the 60th anniversary of U.S.-Jordanian ties." Bureau of Near Eastern Affairs, *Background Note: Jordan*, U.S. DEPARTMENT OF STATE (Dec. 30, 2011), <http://www.state.gov/r/pa/ei/bgn/3464.htm>.

¹² One exception refers to disagreements over the country's support for Iraq during the first Gulf War (1990-91).

¹³ See generally on relations AVI SHLAIM, *LION OF JORDAN: THE LIFE OF KING HUSSEIN IN WAR AND PEACE* (2007).

U.S. aid, third only to Israel and Egypt in the region.¹⁴ On September 22, 2008, the U.S. and Jordanian governments reached an agreement, whereby the United States would provide a total of \$660 million in annual foreign assistance to Jordan over a five year period.¹⁵

Jordan has signed a number of bilateral agreements with the U.S. during the past two decades. For instance, a bilateral “open skies” Aviation Agreement and a Bilateral Investment Treaty (BIT) were signed between the two countries in 1996 and 2003, respectively. Additionally, in 1996, the U.S. Congress created Qualifying Industrial Zones (QIZ) to support the peace process signed between Jordan and Israel in 1994. Under the agreement, QIZ goods that contain at least 12 per cent of their value added from Israel enter the United States economy tariff and quota-free. This has had important economic growth implications for the Jordanian economy and turned the U.S. into Jordan’s main trading partner (replacing Iraq), by encouraging and increasing Jordan’s exportation of light manufactured products such as garments.

The two countries signed a Science and Technology Cooperation Agreement in 2007 to facilitate and strengthen mutual scientific cooperation, as well as a memorandum of understanding on nuclear energy cooperation. U.S. backing ensured Jordan’s speedy accession to the WTO in 2000 and subsequently paved the way for the signing of the first bilateral free trade agreement (FTA) between the U.S. and an Arab country in 2001 (the U.S.-Jordan FTA).¹⁶

High levels of collaboration between the two countries in the area of intellectual property have existed for some time. However, it was often U.S. pressure, triggered by industry groups, that dictated the terms of the relationship between the two countries. For instance, until 1998 Jordan was still placed on the United States’s “Section 301 Watch List”. In the same year, the Pharmaceutical Research and Manufacturers of America (PhRMA) went even further, by formally asking the USTR to name Jordan in the next year as a “Priority Watch” country, for “failing to provide adequate intellectual property protection.”¹⁷ The relationship became less turbulent following the country’s accession to the WTO and its signing of an FTA with the U.S. in 2000 and 2001, respectively.

¹⁴ JEREMY M. SHARP, CONGRESSIONAL RESEARCH SERVICE, U.S. FOREIGN ASSISTANCE TO THE MIDDLE EAST: HISTORICAL BACKGROUND, RECENT TRENDS, AND THE FY2011 REQUEST (2010), available at <http://www.fas.org/sgp/crs/mideast/RL32260.pdf>.

¹⁵ *Id.* at 7

¹⁶ , *supra* note 11.

¹⁷ See Ghaliya Alul, *PhRMA Requests Jordan be Placed on “Priority Watch” List*,

III. DOMESTIC PROCESS, GLOBAL AGENDA

The information revealed in the Wikileaks reinforces the widely acknowledged view that the regulation of intellectual property was deliberately designed with loopholes that could be exploited by its drafters. As Sell explains:¹⁸

Since TRIPs, the institutional environment around intellectual property has gotten much denser, much thicker, and much more heavily populated with new forums and new actors. The result is an increasingly incoherent and internally inconsistent intellectual property regime. Much of this incoherence is a product of strategic forum shifting, in which actors take their intellectual property concerns to the forums in which they expect to better achieve their goals. Various interest groups and government agencies have become heavily invested in increasingly ineffective approaches to property protection and enforcement.

The case of Jordan not only conforms to these observations, but also sheds new light on the inconsistencies and loopholes present in intellectual property regulation, given the explicit influence of the U.S. Government and its lobbyists over the entire process of negotiations. Persuasion, motivation, and threats are some of the tools used to influence negotiations. These mechanisms are often used interchangeably to implement and enforce high-level intellectual property protection (what is often referred to in the literature as TRIPS-Plus provisions) in many developing countries, including Jordan.

The United States' position is formulated primarily by the collaborative effort of several official, governmental, and private interest groups and agencies that share a unified vision for seeking the implementation and enforcement of higher intellectual property protection levels—often of a TRIPS-Plus nature—with their FTA partner state. These groups and agencies rely upon various strategies in achieving their objectives. The strategies are often complimented by a “revolving door” policy, through initiating discussions with and passing messages to various local contacts and other concerned official departments and authorities.

A snapshot of the main players involved in this process shows an intricate web of exchanges and discussions between Jordanian and

JORDAN TIMES, April 15, 1998.

¹⁸ Susan Sell, *Everything Old Is New Again: The Development Agenda Then and Now*, 3 WIPO J. 17, 21 (2011).

American key players. However, it is important to first identify and explain the role of each of these players and how this process shapes their positions and objectives.

The key players representing the United States' private sector interests include a number of historically well-established and organized business groups and associations. For instance, both the Business Software Alliance (BSA)¹⁹ and the International Intellectual Property Alliance (IIPA)²⁰ have been vocal in their push for strengthened copyright protection in Jordan. Meanwhile, the Pharmaceutical Research and Manufacturers of America (PhRMA)²¹ continues their pursuance of higher levels of intellectual property protection in the area of pharmaceutical patents in the country. These business groups and associations are also supported by their local representatives, agents, and networks of contacts.

Unsurprisingly, these business associations were also the most vocal advocates and enthusiasts for inclusion of strong provisions for intellectual property protection—through the implementation of the TRIPS Agreement—during the Uruguay Round of Trade Negotiations. The Uruguay Round lasted from 1986-1994 and culminated in the birth of the WTO. Their efforts were highly influential in lobbying the United States government to include intellectual property protection in the negotiations agenda and in pressuring other developing countries to implement higher levels of intellectual property protection. Commenting on the role of such groups, Sell explains:

¹⁹ On its website, the BSA presents itself as the “voice of the world’s commercial software industry and its hardware partners before governments and in the international marketplace. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade, and e-commerce.” See BUSINESS SOFTWARE ALLIANCE, <http://www.bsa.org/GlobalHome.aspx> (last visited Feb. 9, 2012).

²⁰ “The International Intellectual Property Alliance is a private sector coalition, formed in 1984, consisting of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers.” For more see *About IIPA*, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, (Feb. 9, 2012), <http://www.iipa.com/aboutiipa.html>.

²¹ “The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the US’s leading pharmaceutical research and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA companies are leading the way in the search for new cures. PhRMA members alone invested an estimated \$49.4 billion in 2010 in discovering and developing new medicines. Industry-wide research and investment reached an estimated \$67.4 billion in 2010.” For more see *About PhRMA*, PhRMA (Feb. 9, 2012), <http://www.phrma.org/about/about-phrma>.

These private actors were in a good position in so far as they represented vigorous export industries that enjoyed positive balances... They were able to present their industries as part of the solution to America's trade woes, as opposed to being part of the problem. They successfully argued that foreign pirates, particularly in East Asia and Latin America, were robbing them of hard-earned royalties. They pushed hard for a trade-based approach to IP protection.²²

Today, these same players continue to pursue a “maximalist” approach to intellectual property and pressure the U.S. government to pursue higher levels of intellectual property protection and enforcement in developing countries. Just as in the economic crises of the 1970s, U.S. industry representatives today present intellectual property a cure for present day economic woes and financial crises.²³

Several American governmental agencies and bodies also constitute key players, given their ability to provide official coverage and exercise political clout and economic leverage. The U.S. Embassy in Amman, which often acts as a medium in interactions involving U.S. players and stakeholders; the Office of the United States Trade Representative (USTR); the United States Agency for International Development (USAID) and its AMIR Program in Jordan; and the United States Patent and Trademark Office (USPTO) appear to be the most active and persevering agencies in the push for higher intellectual property protection and enforcement.²⁴ Other agencies and private bodies are periodically called upon to step in and provide legal review or technical training and advice. These include the United States Food and Drug Authority (USFDA), the Customs and Border Protection (CBP), the Immigration and Customs Enforcement (ICE), and the Library of the United States Congress (LOC). In addition, a number of local representatives of large U.S. Multinational Enterprises (MNEs) such as Microsoft, Caterpillar, and Chrysler, and other industry representatives also attended and actively participated in a number of workshops and

²² SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 86 (2003). For more, see JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000).

²³ Debora Halbert, *The Politics of IP Maximalism*, 3 WIPO JOURNAL 81 (2011).

²⁴ For examples, see *GIPA - Patent, Trademark, and Copyright Law and Policy Program - November 5-8, 2007, Amman, Jordan*, UNITED STATES PATENT AND TRADEMARK OFFICE, (Feb. 6, 2012), http://www.uspto.gov/ip/events/agenda_jordan.jsp (describes for one of the USPTO's training programs run by its Global Intellectual Property Academy (GIPA) in Jordan back in 2007.)

seminars focusing on intellectual property protection and enforcement in Jordan.

On the other hand, the cables clearly reveal inadequate levels of representation from Jordanian enterprises, agencies, and corporations in developing intellectual property provisions. In a situation often prevalent in developing and Arab countries, the Jordanian position is generally “responsive” with regard to intellectual property protection.²⁵ Consequently, the limited and sometimes targeted participation may be confined to a small number of agencies and/or ministries when discussions on intellectual property ensue. The main players from the Jordanian side feature the Ministry of Industry and Trade, the official authority entrusted with managing industrial property protection in the country; the National Library, the authority concerned with copyright and neighboring rights protection, which is part of the Ministry of Culture; and the Jordan Food and Drug Administration (JFDA), an agency mainly concerned with granting marketing authorizations for drugs and pharmaceutical products in the country that is affiliated with the Jordanian Ministry of Health.

In addition, other agencies, officials, and individuals are called upon in cases where procedural or administrative issues persist, where additional enforcement levels are sought, or where technical and legal training and advice are offered.²⁶ Of these, one can identify the Jordan Institute for Standards and Metrology (JISM), the Jordan Customs Department (JCD), and the judiciary as recurring players. Unlike the United States’ private sector business groups, local business groups are fragmented and seem to have limited presence and influence over the intellectual property policies of the government in Jordan. On occasion, some local businesses even align their business interests with those of their American counterparts.²⁷

Overall, the dynamics of the relationship between these stakeholders and representatives (both from the United States and Jordan) reflect a

²⁵ “These countries often ‘traded away’ the issue of intellectual property in exchange for concessions in other areas without carefully assessing the impact of these trade-offs.” MOHAMMED EL SAID, *THE DEVELOPMENT OF INTELLECTUAL PROPERTY PROTECTION IN THE ARAB WORLD* (2008).

²⁶ In some cases, the U.S. went as far as placing permanent advisers in FTA countries. A 2011 study, published by IIPA and USPTO, stated that “Reportedly the technical assistance includes not only seminars and short training courses but also a group on the ground in Peru to assist with intellectual property efforts.” See ALEXANDER W. KOFF, LAURA M. BAUGHMAN, JOSEPH F. FRANCOIS & CHRISTINE A. MCDANIEL, *INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE, STUDY ON THE ECONOMIC IMPACT OF “TRIPS-PLUS” FREE TRADE AGREEMENTS* (2011), available at http://www.tradepartnership.com/pdf_files/IIPi%20TRIPS-Plus%20Study.pdf.

²⁷ For instance, the Jordan Intellectual Property Association (JIPA) often advocates a pro-protection intellectual property approach.

general pattern of encouragement and collaboration where positions are unified.²⁸ When positions are not, criticism is often associated with suspension—or threat of suspension—of funds from the U.S. side as a stick mechanism.

What is of concern here is the evident lack of public input and the absence of public participation and civil society representation in these discussions, particularly from the Jordanian side. As will be discussed in more detail in the ensuing parts of this article, the main theme emerging from the discussions and negotiations between the United States teams and their Jordanian counterparts is the drive to raise levels of intellectual property protection and enforcement in Jordan, without undertaking a proper impact assessment or inviting national debate about the effects of these provisions on society and consumers. Instead, “intellectual property rhetoric” is inserted into discussions and deliberations, which describes higher levels of protection and enforcement as an anchor for attracting businesses, high technology and know-how, and foreign direct investment (FDI), without providing substantial evidence supporting such claims.

The next part of this paper will present specific examples, which demonstrate the United States’ tactics in mobilizing its stakeholders and governmental agencies in pursuance of strengthened TRIPS-Plus intellectual property protection levels and enforcement procedures in Jordan.

IV. LAYING DOWN THE FOUNDATIONS

Since the U.S.-Jordan FTA was the first FTA signed between the United States and any Arab or Muslim state, the agreement became a template for other subsequent FTAs signed in the Middle East. Moreover, the U.S.-Jordan FTA was one of the first bilateral agreements to include extensive TRIPS-Plus provisions. These provisions had noticeable impacts on many development-related areas.²⁹ In particular, the agreement contains several TRIPS-Plus provisions, which directly impact public health and access to

²⁸ For instance, in order to intensify the raids against copyright infringers, an agreement between the National Library and the Business Software Alliance (BSA) was signed with the aim of identifying those involved in illegal activities. For more, see U.S. Embassy, Cable 05AMMAN8330, Jordan IPR Problems and Solutions: Part I - Awareness Campaign Tackles Street-Smart Pirates (Oct. 23, 2005).

²⁹ For more on FTAs’ impact on the Arab World, see MOHAMMED EL SAID, WORLD HEALTH ORGANIZATION & INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, PUBLIC HEALTH RELATED TRIPS-PLUS PROVISIONS IN BILATERAL TRADE AGREEMENTS: A POLICY GUIDE FOR NEGOTIATORS AND IMPLEMENTERS IN THE WHO EASTERN MEDITERRANEAN REGION (2010), *available at* http://www.emro.who.int/publications/Book_Details.asp?ID=1081.

medicines in the country. These may be summarized as follows:

1. *Data exclusivity protection.* The U.S.-Jordan FTA obliges Jordan to provide legal protection for data exclusivity for a period which may be extended up to eight years. Accordingly, Article 4.22 of the FTA states that:³⁰

Pursuant to Article 39.3 of TRIPS, each Party, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products that utilize new chemical entities, the submission of undisclosed test or other data, or evidence of approval in another country, the origination of which involves a considerable effort, shall protect such information against unfair commercial use. In addition, each Party shall protect such information against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the information is protected against unfair commercial use.

2. *“New use” legal protection for chemical entities.* Although the TRIPS Agreement does not oblige member states to provide legal protection for “new use,” the U.S.-Jordan FTA includes reference to this type of protection. In this regard, Footnote 10 of Article 4.22 the U.S.-Jordan FTA states that:

It is understood that protection for “new chemical entities” shall also include protection for new uses for old chemical entities for a period of three years.

3. *Patent term extension:* Article 33 of the TRIPS Agreement provides that legal protection shall be granted to patents for a period of twenty years from the date of filing. The U.S.-Jordan FTA further extends this period in order to compensate the applicant for the time

³⁰ Footnotes 10 and 11 of the U.S.-Jordan FTA, which are related to Article 4.22, subsequently state:

It is understood that protection for “new chemical entities” shall also include protection for new uses for old chemical entities for a period of three years.

It is understood that, in situations where there is reliance on evidence of approval in another country, Jordan shall at a minimum protect such information against unfair commercial use for the same period of time the other country is protecting such information against unfair commercial use.

spent during the examination of the application and/or marketing authorization. Article 4.23 of the U.S.-Jordan FTA states that:

With respect to pharmaceutical products that are subject to a patent:

- a. Each Party shall make available an extension of the patent term to compensate the patent owner for unreasonable curtailment of the patent term as a result of the marketing approval process.

4. *Restrictions on compulsory licensing.* The TRIPS Agreement grants member states the right to grant compulsory licenses. However, the agreement does not list nor specify the grounds whereby such licenses may be granted, but instead awards member states the discretion to define such grounds.³¹ On the other hand, the U.S.-Jordan FTA lists the grounds where such licenses may be granted, hence eroding the policy space available to Jordan, by broadly defining these grounds. Accordingly, Article 4.20 of the FTA states:

Neither Party shall permit the use of the subject matter of a patent without the authorization of the right holder except in the following circumstances

- a. to remedy a practice determined after judicial or administrative process to be anti-competitive;
- b. in cases of public non-commercial use or in the case of a national emergency or other circumstances of extreme urgency, provided that such use is limited to use by government entities or legal entities acting under the authority of a government; or
- c. on the ground of failure to meet working requirements, provided that importation shall constitute working

The impact of these TRIPS-Plus conditions in the area of public health and access to medicines is grave. In brief, such measures would result in prolonging the monopoly terms granted to pharmaceutical patents and would delay the entrance of generics into the market at an earlier stage.³²

³¹ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, Art. 30, available online at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (the TRIPS Agreement).

³² To this effect, a recent study stated that “Reportedly overlaying U.S.-style rules over Jordan’s pharmaceutical sector negatively affects the ability of generic industries to

Such delays would result in a substantial increase in the price of medicines and drugs, due to royalty payments, and would increase governmental expenditure on public health and medicines as a result.³³ Some of these effects, as will be explained in more detail, have already taken place in the country.

V. COSTS WITHOUT BENEFITS: THE MYTHS

After laying the foundations for TRIPS-Plus obligations, under the national legal framework through the FTA, the United States moved next to interpreting the obligations during their implementation. The leaked cables provide some interesting illustrations about how the United States monitors the implementation of intellectual property obligations of its FTA partner states, particularly with regard to those commitments related to pharmaceutical patents. More specifically, the cables explain the interplay between concerned authorities and groups in both the U.S. and Jordan and the approach adopted by each in dealing with intellectual property issues impacting public health and access to medicines. In general, the U.S. position, backed by its powerful industry interest groups, is centered on interpreting intellectual property commitments widely, with a TRIPS-Plus approach, and conflating public health issues with these related to intellectual property protection. The Jordanian position, on the other hand, could be best described as “reactive” in most cases, and “reluctant” in some cases, to heed to the United States’ demands.

The following examples illustrate in greater detail the interplay between these various players in relation to a number of issues impacting public health and access to medicines, as revealed by the leaks.

Data exclusivity appears to be one of the major issues of concern to the United States included under the U.S.-Jordan FTA.³⁴ Data exclusivity refers to the procedure wherein originative pharmaceutical companies are granted a period of time during which would-be generic producers of existing drugs are prohibited from obtaining regulatory approval for a competing drug if they rely on the results of the originator’s clinical trials. Although legal

operate, which is why many from Jordan’s generic pharmaceutical industry view the FTA as TRIPS-“Minus.” See Koff, *supra* note 27, at 49.

³³ For more, see El Said, *supra* note 30.

³⁴ Pressure was not confined to Jordan in this area; for another example, see GUATEMALA’S CONGRESS REINSTATES DATA PROTECTION: THE END OF THE PROBLEM THAT REFUSED TO GO AWAY (Mar. 11, 201) available at <http://www.keionline.org/node/1206> (the detailed account of U.S. government pressure on the Guatemalan legislature to shape legislation on pharmaceutical test data protection in the country).

protection regimes granting data exclusivity predate the signing of the TRIPS Agreement,³⁵ the U.S. and EU's attempts to include data protection under the auspices of the TRIPS Agreement were met by fierce resistance. Due to objections from developing countries, data exclusivity provisions were ultimately excluded from the TRIPS Agreement.³⁶ However, data exclusivity was reintroduced by the U.S.—and more recently the E.U.—through their bilateral FTAs with a number of countries. These agreements created a de facto legal international protection regime for data exclusivity, by virtue of Article 4 of the TRIPS Agreement, relating to the Most Favored Nation “MFN” principle.³⁷

In the case of Jordan, one observes that the issue of data exclusivity protection features extensively in the U.S. cables, despite the global criticism that data exclusivity has attracted in recent years.³⁸ Fears of the monopolistic impact of patent-term extension on prices of medicines and the curtailment of compulsory licensing appear to have been realized in Jordan. Nonetheless, Jordan became one of the first Arab countries where the issue of data exclusivity surfaced during discussions with U.S. officials following the signing of the Jordan-U.S. FTA, as revealed by the cables.

As stated above, the U.S.-Jordan FTA introduces five years of data exclusivity that commence on the date of registration of a medicine in the country.³⁹ An additional three years of data exclusivity (beyond the initial five years period) are also granted for new uses of known chemical entities.⁴⁰ The U.S. cables show how the U.S. attempted to interpret these provisions in ways that favor its industry's interests and views.

One cable dating back to 2005 stated that international pharmaceutical companies seem to be generally satisfied with the drug registration system

³⁵ For instance, the North American Free Trade Agreement [hereinafter NAFTA] included some reference to data exclusivity protection, while the European Community member states have provided protection for data filed in support of marketing authorizations for pharmaceuticals since 1987. *See* Jerome H. Reichman, Rethinking the Role of Clinical Trial Data in International Intellectual Property Law: The Case for a Public Goods Approach, 31 *MARQUETTE INTELL. PROP. L. REV.* 1 (2009).

³⁶ For more on history of negotiations, see *id.*

³⁷ The TRIPS Agreement, Article 4 states:

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

³⁸ For more on this debate, see UNITED NATIONS DEVELOPMENT PROGRAMME, GOOD PRACTICE GUIDE: IMPROVING ACCESS TO TREATMENT BY UTILIZING PUBLIC HEALTH FLEXIBILITIES IN THE WTO TRIPS AGREEMENT(2010), *available at* <http://apps.who.int/medicinedocs/documents/s17762en/s17762en.pdf> [hereinafter UNDP].

³⁹ *See* US-Jordan FTA Article 4.22.

⁴⁰ *See id.*

in Jordan, which is managed mainly by the JFDA.⁴¹ Despite this, it was evident that the U.S. was not satisfied with the pro-public health approach often adopted by JFDA's committees. The 2005 cable further describes the committees operating under the JFDA as “multi-agency committees [that] do not have the same reputation [as the JFDA], being holdovers from a former paternalistic era of healthcare.”⁴² As demonstrated by the same cable, the U.S. attempted, on several occasions, to influence the decisions of the JFDA and its committees. In one data exclusivity dispute, the 2005 cable reports that “a company filed for protection for a once-a-week-dose drug in 2004 less than a year before the daily dosing would lose its data exclusivity protection (for the clinical data that, once in the public domain, would allow a generic firm to make the same drug and market it at reduced costs).”⁴³ After reaching the court, the case was “dismissed on a technicality unrelated to the substantive dispute.”

Unsatisfied with this result, which, in the eyes of the U.S. embassy, meant that the generic company had “won” the dispute, the cable explains that “[s]ome in the PhRMA community believe it was a breach of the law for the [government of Jordan] to fail to uphold the FTA obligation to protect data submitted for the once-weekly dose, regardless of any lawyer court decision. However, to maintain harmonious relations with its regulator, the aggrieved company—which continues to believe itself to have been wronged—decided not to pursue the case.”⁴⁴ Disregarding the independence of the Jordanian judiciary and the fact that the FTA itself did not include such an obligation, the cable boldly states:

The weekly-dose case raises the general problem with data exclusivity and NCE's [new chemical entities] in Jordan. For example, an adult dosage, a children's dose, and a pre-school or infant dose – each with its own set of data in support of JFDA approval – should receive, each in its own turn, five years of protection, according to the manufacturer. But the JFDA can't square that proposition with its view of a single NCE deserving only one period of five-year protection. As PhRMA and individual companies read it, the FTA appears to come down more strongly in favor of protections from "unfair competition" and to be more favorable toward data exclusivity in the narrowest sense, for each dose. The main FTA provisions on drugs –

⁴¹ U.S. Embassy, Cable 05AMMAN9748, Jordan's IPRS Challenges and Solutions: Part III - Pharmaceuticals Pose Frontier IPR Issues (December 19, 2005).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

FTA Article 4, paragraph 22 and its related footnotes – have yet to be interpreted in a manner acceptable to all, however.⁴⁵

If the U.S. had gotten its way, an additional protection period would have prevented the generic medicine from entering the market, a provision which would have hurt domestic consumers. The U.S. interpretation takes a clear pro-protection approach that favors U.S. pharmaceutical manufacturers, but disregards the public interests of developing countries.

In another case, a dispute over a cancer treatment raised the issue of when the exclusivity period actually begins: when the drug is first used under a tender or when it is first approved by the regulator. An embassy cable reports that back in 2001, an originative firm's cancer treatment was approved for tender in a Jordanian government hospital.⁴⁶ Afterwards, the manufacturer filed a formal request for the drug's approval by the national JFDA. However, in 2005, a generic of the same drug, produced by an Australian company, appeared on the market, less than five years after the original drug had received JFDA approval. In responding to the complaint, the JFDA Director General explained that JFDA officials reasoned that the drug had enjoyed five years of data exclusivity, dating from the special tender bid in 2001. On the other hand, the innovator manufacturer disagreed, arguing that the data exclusivity period began with the more recent JFDA approval. The JFDA maintained its position that the same rule applies to all situations: the data exclusivity period begins the moment a drug gets approval under the tender and not upon subsequent registration. Unhappy with the JFDA's interpretation, the U.S. Embassy called for a review of the FTA, while USAID's AMIR program called upon legal consultants to conduct a gap analysis to provide legislative recommendations. The U.S. Embassy even went further, by boldly demanding that Jordan's JFDA should include a PhRMA representative on the "High Committee for Drugs."⁴⁷ This request clearly reflects a high level of U.S. interference in the work of the JFDA. Conversely, the U.S. would likely object if the same request was made by a Jordanian—or even a European—delegation demanding the inclusion of their representative in the board of the United States Food and Drug Authority (USFDA).

The two previous examples demonstrate how the United States

⁴⁵ *Id.*

⁴⁶ *Id.* (In these special tender cases, a waiver is often obtained through the traditional JFDA approval process.)

⁴⁷ The PhRMA would serve as one of three private sector members on the committee, which is tasked with ruling on directives regarding drug approvals and intellectual property issues.

attempted to broadly interpret FTA provisions and to influence the decisions of public health authorities in Jordan, so as to grant longer protection periods of data exclusivity to pharmaceutical innovators. It also shows how U.S. authorities tried to influence the process of granting approvals to generic medicines, in accordance with PhRMA's interpretation. However, the FTA itself does not contain any provisions which obligate Jordan to interpret the agreement in line with the US' position.⁴⁸

Empirical research also supports the argument that data exclusivity protection measures had negative effects on public health in Jordan. In 2007, Oxfam International published a study on the U.S.-Jordan FTA. This study was one of the earliest that analyzed the impact of FTAs upon public health and access to medicines in developing countries.⁴⁹ The findings of the study were alarming; they explicitly stated that the U.S.-Jordan FTA had a negative impact on access to medicines, finding that:⁵⁰

- TRIPS-plus rules, particularly data exclusivity, independently prevented generic competition for 79 per cent of medicines launched by 21 multinational pharmaceutical companies since 2001.
- Additional expenditures for medicines with no generic competitor, as a result of enforcement of data exclusivity, were between \$6.3m and \$22.04m.

In addition to the issue of data exclusivity, the U.S.-Jordan FTA also included references to the protection of “new use.”⁵¹ New use protection aims at enabling new uses of known substances, by issuing a patent on the new use(s). Therefore, if a certain drug was found to work in another field, in which it was not protected, an additional period of patent protection could be awarded for an already known and registered drug, thereby extending the patent protection term substantially. This process is referred to as “evergreening.”

Once again, the cables evidence how the U.S. attempted to widely interpret TRIPS-Plus provisions related to “new use,” as stipulated under the U.S.-Jordan FTA. In one dispute, a drug used as an anti-asthma therapy came onto the market in 2005, but new chemical data trials showed that the drug was also effective for those patients exhibiting both asthma and co-existing allergic rhinitis. The JFDA approved the drug for the “new use,”

⁴⁸ For more on impact, see El Said, *supra* note 30 and UNDP, *supra* note 39.

⁴⁹ *All costs, no benefits: how TRIPS-plus intellectual property rules in the US-Jordan FTA affect access to medicines*, OXFAM BRIEFING NOTE (Oxfam Int'l, Oxford), Mar. 2007.

⁵⁰ *Id.*

⁵¹ See U.S.-Jordan FTA, *supra* note 5, at Art. 4.22 N.10.

but not for a “new indication,” as U.S. representatives called for. The JFDA justified its position by claiming that the “gray area of overlapping uses does not permit a distinction,” and argued that it was therefore unwilling to grant an additional three years of exclusivity protection.⁵² The JFDA’s reasoning supported domestic public interest considerations.

The cables revealed PhRMA’s outrage on this issue; in PhRMA’s view, when a product was approved for a “new use,” the period of data exclusivity should be expanded from five to eight years, at minimum, for that “new use.”⁵³ The cable states that “after the innovator appealed, and when [embassy officials] highlighted the appeal for the JFDA [Director General], it appears the JFDA will be taking a second, harder look at what ‘protection’ means.”⁵⁴ It was not clear how the JFDA handled the issue of “new use” following the appeal.

Scrutinizing the cables, a sense of frustration on the part the U.S. officials is evident, as a result of JFDA’s reluctant approach to award additional TRIPS-Plus protection to drug manufacturers. This frustration is apparent despite the fact that the JFDA’s position was influenced by domestic public health considerations. The cables further demonstrate U.S. dissatisfaction with the JFDA’s drug approval process. One cable states that “[a]dding to manufacturer’s concerns, the JFDA includes an extra layer of safety to its drug approval process by requiring that a drug be on the open market in one of seven countries with high safety standards for a full year before it can receive a formal approval in Jordan.”⁵⁵ The cable unearths complaints about this strict requirement and the fact that the JFDA’s drug approval process may last up for a period of six months, stating that “PhRMA companies deem this a technical barrier to market access.”⁵⁶ The U.S. position is tenuous, as the TRIPS Agreement and the U.S.-Jordan FTA do not contain any obligations for Jordan in this area, but rather leave space for Jordan to set policy in line with its national legal framework and administrative procedures.

Dissatisfied that its discussions with the JFDA were largely fruitless, it was time for the U.S. to widen the scope of the debate and engage other national players in the discussion. The U.S. decided that the next step would be to engage the Ministry of Industry and Trade in these discussions, bypassing the Ministry of Health altogether. It was time to bring the FTA’s

⁵² U.S. Embassy, Cable 05AMMAN9748, Jordan’s IPS Challenges and Solutions: Part III- Pharmaceuticals Pose Frontier IPR Issues (Dec. 19, 2005).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

most powerful card to the table.

Through several exchanges between the U.S. embassy, the JFDA, and the Ministry of Industry and Trade, the U.S. demanded that the government of Jordan abide “scrupulously” by its FTA commitments regarding pharmaceuticals protection.⁵⁷ Accordingly, it would be imperative that more bilateral consultation be established, in order to implement the obligations of the FTA. The cable further explains that the USAID’s AMIR program had already called upon legal consultants to conduct a gap analysis, to study whether relevant legislation might be lacking in the country. As mentioned, the Embassy went even further, by boldly asking the JFDA to include a PhRMA representative on the High Committee for Drugs. Additionally, the cable reports that the U.S. requested that the Ministry of Industry and Trade—which seems to have been more receptive to U.S. demands—should also have a member on the High Committee of Drugs.⁵⁸ Moreover, following one of the joint meetings attended by the Minister of Industry and Trade, the JFDA Director General, and U.S. embassy representatives, the Minister of Industry and Trade told U.S. representatives that Jordan wished to be consistent with “international best practices and adhere to the FTA.”⁵⁹ The cable further reports that the Minister assured the representatives Jordan would rectify the situation if such was not in line with its FTA obligations.⁶⁰ This reference reflects a questionable position, taking into consideration that the notion of a uniform “international best practices” does not exist in this particular area, where countries typically exercise considerable discretion. In any case, the cable went further, reporting that the government of Jordan had invited the U.S. government to provide its own “position papers outlining any concerns” about the “international best practices.”⁶¹ The cables did not reveal what the U.S. advice in relation to this request was.

The U.S. has often proclaimed that these FTAs (containing strengthened intellectual property rules of a TRIPS-Plus nature) would facilitate and encourage technology transfer and increase foreign direct investment (FDI) flows to its partner FTA states,⁶² a claim which is, unfortunately, echoed by

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² For example, the USTR on its website states that “The United States-Jordan FTA has expanded the trade relationship by reducing barriers for services, providing cutting-edge protection for intellectual property, ensuring regulatory transparency, and requiring effective labor and environmental enforcement”. <http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta>.

many uninformed national politicians.⁶³ For instance, a report published in 2004 by the International Intellectual Property Institute (IIPI) in partnership with the AMIR program claimed that stronger intellectual property protections area is helping to transform Jordan into the leading knowledge economy in the region and that Jordan's pharmaceutical sector has actually benefited from the strengthening of its intellectual property regime. The report also claims that there is a growing multinational presence, medical tourism has taken on new importance, and the number of clinical trials in the country has multiplied. The study continues by stating that intellectual property reforms in Jordan have motivated local industry to cultivate a great deal of "business activity that is intellectual property-intensive and high value-added."⁶⁴

Once again, emerging evidence contradicts these claims. In its 2007 Study on the U.S.-Jordan FTA, Oxfam International published the following findings:⁶⁵

- There has been nearly no FDI by foreign drug companies in Jordan since 2001 to synthesize or manufacture medicines in partnership with local generics companies, and this has harmed public health. The only FDI into Jordan by foreign drug companies has been to expand scientific offices, which use aggressive sales tactics to ensure that expensive patented medicines are used in lieu of inexpensive generics.
- Stricter intellectual property rules have not encouraged companies in Jordan to engage in R&D for medicines since the passage of the FTA, thus these companies have not developed any new medicines.

⁶³ Nesheiwat states that 'Jordanian officials, most notably the under-secretary for Industry and Trade, consistently cite the adoption of modern intellectual property laws in Jordan as a prerequisite for foreign direct investment inflows into the Jordanian economy'. Ferris K. Nesheiwat, *The Adoption of Intellectual Property Standards beyond TRIPS - Is It a Misguided Legal and Economic Obsession by Developing Countries*, 32 Loy. L.A. Int'l & Comp. L. Rev. 361 (2010), (316-391), at 366. Furthermore, a recent Study found that in relation to trademark protection, 'Judges in Jordan explained that TRIPS-Plus is helpful because it raises awareness of and respect for IPR among the domestic population and provides foreign investors with greater comfort in doing business in the country. The enforcement provisions of the FTA also provided additional flexibility that judges could use when meting out penalties and sentences, and there were many technical assistance training sessions and workshops that reportedly would not have happened without the FTA'. See Alexander W. Koff, Laura M. Baughman, Joseph F. Francois, Christine A. McDaniel, Study on the Economic Impact of "TRIPS-Plus" Free Trade Agreements, study by International Intellectual Property Institute (IIPI) and the United States Patent and Trademark Office (USPTO). 2011, available at http://www.tradepartnership.com/pdf_files/IIPI%20TRIPS-Plus%20Study.pdf, at p 29.

⁶⁴ See MICHAEL RYAN AND JILLIAN SHANEBROOK, ESTABLISHING GLOBALLY-COMPETITIVE PHARMACEUTICAL AND BIO-MEDICAL TECHNOLOGY INDUSTRIES IN JORDAN: ASSESSMENT OF BUSINESS STRATEGIES AND THE ENABLING ENVIRONMENT 24 (2004).

⁶⁵ Oxfam Int'l, *supra* note 50, at 2-3.

- The number of new products launched in Jordan is only a fraction of the new products launched in the U.S. and the E.U. Many new medicines launched in Jordan are exorbitantly priced and unaffordable for ordinary people. Few or no units of these recently launched medicines have actually been purchased on the local market.

Others have reached similar conclusions in studying the impact of expanding intellectual property protection in Jordan. Nesheiwat, for instance, states that “there is little, if any, relationship between FDI and intellectual property standards, and ... numbers constantly used to prop up such a connection for Jordan are misused and cartoon-like in their simplicity.”⁶⁶

Similar findings were reiterated by U.S. Embassy cables themselves. A 2008 cable explains that the withdrawal of the multinational pharmaceutical giant Bristol Mayers Squibb (BMS) from the Jordanian market had, in fact, caused anxiety in the country.⁶⁷ This came following a statement made by BMS Vice President that the company was about to close down its Jordanian sales operations, and that its products would no longer be available for sale in the country. This step was “part of a larger corporate strategy;” it was reported by the BMS Vice President that this had nothing to do with the “local political situation, the security situation, the ease/difficulty of doing business, nor Jordan's intellectual property rights (IPR) record.”⁶⁸ The cable added that the decision was met with “serious concerns and confusion” by Jordanian businessmen, doctors, and government officials.⁶⁹ Furthermore, officials were concerned that this move, which placed Jordan alongside countries such as Syria, Sudan and Yemen (the other countries included in BMS's withdrawal decision), would send a negative signal about Jordan's business environment and would also limit the availability of cancer drugs to its nationals. Innumerable calls were made by Jordanian government officials to the regional representative of PhRMA, arguing that Jordan's “efforts to improve IPR and the attractiveness of the market are wasted if companies pull-out.”⁷⁰ Despite Jordan's commitment to provide higher levels of intellectual property protection, the government was unable to persuade BMS to change its decision to close down its operations. Evidently, higher intellectual property

⁶⁶ Nesheiwat, *supra* note 64, at 364.

⁶⁷ U.S. Embassy, Cable 08AMMAN3017, US Pharmaceutical Company Pulling out of Jordan creates Anxiety and New Opportunities (Nov. 5, 2008).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

levels had no positive impact on the company's decision. PhRMA was in no mood to ride against the tide of an American firm and defend Jordan's interests.

The example cited above clearly demonstrates that even with an FTA containing TRIPS-Plus protection regime, there are no guarantees that powerful countries will seek to encourage their MNEs to invest in developing-country partners, or even to preserve and sustain the level of investments that had already been established prior to the signing of the FTA.

As this section reveals, the U.S. utilized various techniques in pushing its TRIPS-Plus agenda, engaging a broad range of Jordanian partners in the process. But an important question arises: what lessons did the U.S. learn from its FTA experience with Jordan?

In order to avoid any misinterpretation following the implementation of an FTA, the United States revised its standard intellectual property provisions for FTAs. Subsequent FTAs included more detailed and comprehensive chapters dealing with intellectual property protection than the chapter included under the U.S.-Jordan FTA. For example, while the U.S.-Jordan FTA included only five pages dedicated to intellectual property protection, the U.S.-Oman and U.S.-Bahrain FTAs signed subsequently each included twenty five pages of intellectual property commitments.⁷¹ Despite the negative effects stemming from intellectual property measures within its own FTA, one might argue that Jordan was blessed to be the first country to sign an FTA with the U.S.

VI. AN UNFINISHED AGENDA? THE MORE THE MERRIER

The agencies and groups representing U.S. interests operate through an organized agenda that requires collaboration and coordination of their efforts. The process often follows a clear and defined pattern, summarized as follows. First, the U.S. embassy staff, in collaboration with multinational companies, identifies an issue of interest (either a problem of current concern to U.S. industry groups or the need for a legislative reform in the host country). Then discussions are initiated with several local agencies and authorities. This process often includes engagement through the provision of advice, propositions for reform, and—depending on the nature of the issue concerned—the use of stick and carrot techniques if needed.

The following example demonstrates this process, by describing how

⁷¹ Mohammed El Said, *Surpassing Checks, Overriding Balances and Diminishing Flexibilities: FTA-IPRs Plus Bilateral Trade Agreements – From Jordan To Oman*, 8 J. WORLD INV. & TRADE 243 (2007).

U.S. industry groups attempted to achieve their objectives in advocating TRIPS-Plus standards in the area of copyright protection and enforcement in Jordan.

In one of the cables dating back to 2003, a U.S. Embassy official reported that meetings with a number of Jordanian officials took place to discuss a complaint related to the importation of pirated software from Syria into the country.⁷² The complaint was initiated in 2002 by Electronic Arts (a U.S. entertainment software developer) and was subsequently brought to the attention of the USPTO and the U.S. Embassy in Jordan by the IIPA. The main claim, according to the cable, was that Jordanian customs authorities had been releasing unauthorized copies of Electronic Arts' software, which was imported from Syria, into the local market, without first seeking the opinion of the National Library (the entity responsible for copyright enforcement in Jordan). Electronic Arts asserted that Jordanian customs had instead relied on approvals from the Ministry of Information's "Censorship Office," which has no copyright enforcement authority, as the basis for releasing the pirated goods.⁷³

Although the initial assessment put forth in the U.S. Embassy cable explains that the cause of this infraction was a "communications breakdown within Jordan's piracy interdiction system,"⁷⁴ the cable reassuringly explains that such was not "a willful attempt to circumvent the existing IPR protection regime" in the country.⁷⁵ The cable further states that "[n]evertheless, our interviews have highlighted gaps in the current system that we hope to begin addressing through increased training and retooling of the procedural and legislative framework for IPR protection in Jordan."⁷⁶ Taking advantage of the presence of a high-level Jordanian delegation in Washington for a concurrent economic meeting, the USPTO took it upon itself to raise the complaint to the Jordanian Industry and Trade Minister, who in turn promised to review the complaint upon his return to the country. Subsequent meetings took place, which followed up on the complaint and relayed U.S. concerns about Jordan's intellectual property regime. These meetings included representatives from the Ministry of Industry and Trade, the Customs Directorate, the Amman Customs House, the Jaber Border Crossing with Syria, the National Library, and the

⁷² U.S. Embassy, Cable 03AMMAN1233, Engaging the GOJ on IPR Complaint from Electronic Arts (Mar. 3, 2003).

⁷³ *Id.* Notably, this represents clear interference in the country's national administrative framework, which is not related to intellectual property enforcement and not part of Jordan's obligations under the TRIPS Agreement or the US-Jordan FTA.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

Censorship Office. Ultimately, the Amman Customs House admitted that such activity did take place in the past, due to a lack of coordination amongst concerned agencies, but assured the U.S. Embassy official that this would not be a problem in the future.⁷⁷ Finally, the cable states that the U.S. Embassy was considering a request for provision of additional training for line officers at border points on intellectual property issues. The cable called for a review of current intellectual property legislation and suggested that new mechanisms were needed to ensure better coordination between the concerned public authorities to enhance the National Library's ability to initiate enforcement and confiscation actions. The majority of prescribed measures are classified as TRIPS-Plus in their nature.

This, however, was not the end of the story. Subsequent cables show a high level of persistence and determination in U.S. efforts to enforce its intellectual property related demands. As Jordan was expected to comply with its TRIPS-Plus FTA obligations, shortly after the signing of the FTA, an opportunity arose. To ensure full compliance, the United States tied intellectual property legislative (including copyright) reform to its promise of much needed financial and economic assistance. Accordingly, amendments to the national copyright legislation were reviewed, as part of the USAID-sponsored "conditions precedent." This exercise was tied to aid-related cash transfers, making it clear that it is only when legislative changes were undertaken would economic assistance be provided.⁷⁸ As a result, on March 31, 2005, a new FTA-compliant copyright law containing several TRIPS-Plus conditions was published in the official gazette.

One would think that the amendment to the copyright law would suffice, thereby bringing the issue to an end. Unfortunately, this was not the case. The cables, once again, reveal ongoing monitoring and surveillance, aimed towards ensuring a high level of enforcement and compliance with the new copyright law. In addition, the cables identified other weak enforcement procedures and measures which, from the U.S. point of view, required reform. In 2005, the U.S. embassy in Amman reported that "[w]ithin days of the [copyright] law's publication, the enforcement unit based in the National Library conducted raids on 40 to 50 shops along Amman's Garden Street."⁷⁹ The cable also stated that the raids were directed towards software piracy activities, in which pirated software was confiscated and infringers were referred for prosecution, in accordance with

⁷⁷ *Id.*

⁷⁸ U.S. Embassy, Cable 04AMMAN6508, Jordan IPR – Two Steps Forward, A Half Step Back (Mar. 8, 2004).

⁷⁹ U.S. Embassy, Cable 05AMMAN3171, IPR Enforcement Team Goes After Copyright Law Violators (Apr. 20, 2005).

the new copyright law. The cable affirmed a desire to ensure compliance and expressed fears about the weakness of penalties imposed upon infringers, stating that the U.S. “*will attempt to follow these cases through the courts to identify and report strengths or weaknesses of the enforcement system.*”⁸⁰ Interestingly, the same cable shows some frustration with the judiciary's lack of enthusiasm for laying down severe penalties against the infringers; it argued for the need to send a clearer message that “crime does not pay.”⁸¹ As more awareness and training were needed to ensure proper enforcement, the National Library, with the assistance of USAID, was to launch a public campaign on intellectual property awareness and enforcement in the country. A key aim of the campaign would be to “convince the judiciary to enforce the new penalties available under the Copyright Law.”⁸² The cable clearly identified the judiciary as the next institution to be targeted in its quest for stricter intellectual property enforcement.

By observing global developments, it becomes evident that these national discussions were not isolated from those taking place internationally. In 2009, the IIPA submitted to the USTR a Special Mention report on Jordan, highlighting some of the main areas of concern (some of which were already included under the U.S.-Jordan FTA). These areas included:⁸³

- Anti-Circumvention and Technological Protection Measures (“TPMs”),
- Appropriately Narrow Exceptions and Limitations.
- Compensatory Damages.
- Deterrent Statutory Maximum Fines.
- Seizure of Documentary Evidence.
- *Ex Officio* Enforcement Authority.
- Presumptions of Ownership and Subsistence of Copyright.
- Fixing Provision Allowing Alteration of Features in Seized Materials, Which Impinges on Exclusive Adaptation Right.
- Customs/Border Provisions.

Unsurprisingly, most of these issues, which were raised at the domestic level in Jordan, were discussed and later included in the highly

⁸⁰ *Id.*, emphasis added.

⁸¹ *Id.*

⁸² *Id.*

⁸³ INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT (JORDAN) 385 (Feb. 17, 2009), *available at* <http://www.iipa.com/rbc/2009/2009SPEC301JORDAN.pdf> .

controversial Anti-Counterfeiting Trade Agreement (ACTA) in 2011.⁸⁴

VII. OURS VS. THEIRS

One of the interesting insights the cables reveal is the relationship between the major players (mainly the E.U. and U.S.) and the processes by which each perceives and monitors the other's initiatives in developing countries. Although competing interests may dictate different strategies and approaches, both the E.U. and the U.S. are united in their vision for raising the levels of intellectual property protection globally, through various means including bilateral free trade and association agreements.⁸⁵

Although Jordan signed an Association Agreement with the E.U. back in 1997, before inking an FTA with the U.S. in 2001, it took five years to get the E.U. agreement ratified. Quipping about such a slow process, a 2002 U.S. Embassy Cable highlights the slowness and weakness of the E.U. Association Agreement (AA), which contains mild intellectual property obligations in comparison to those in the U.S. FTAs. In the cable, U.S. officials brushed away fears about its impact, by stating that the E.U. Agreement “does little for Jordan's Economy” and that the long ratification process had, in fact, “frustrated Jordan and embarrassed the E.U. diplomats [t]here.”⁸⁶

At the same time, the cables highlight the U.S.'s real concern regarding the E.U.-Jordan AA: its fear of the E.U.'s attempt to bring Jordan and other partner countries in the region in line with the E.U.'s position on a number of global issues currently subject to international debate. These issues included labeling, Genetically Modified Organisms (GMO's), Sanitary Phytosanitary SPS measures, and other similar issues in the WTO. The cable concludes that the U.S. Embassy in Amman will “continue to monitor these efforts, and to work closely with the [Government of Jordan] to ensure it maintains its close partnership with the U.S. on central WTO issues.”⁸⁷

Once again, this example shows the close and detailed monitoring carried out by the U.S., with respect developing countries' interactions with

⁸⁴ For more on ACTA, see Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement (ACTA)*, (Program on Info. Justice & Intell. Prop., Research Paper Series, no. 17, 2011), available at <http://digitalcommons.wcl.american.edu/research/17/>; Peter Yu, ACTA and Its Complex Politics, 3 WIPO Journal 1 (2011).

⁸⁵ For more on the role of the E.U. in TRIPS-Plus agreements see Mohammed El Said, *The European TRIPS-Plus Model and the Arab World: From Cooperation to Association – A New Era in The Global IPRs Regulation*, 28 LIVERPOOL L. REV. 143 (2007).

⁸⁶ U.S. Embassy, Cable 02AMMAN2371, EU Association Agreement Does Little For Jordan's Economy (May 14, 2012).

⁸⁷ *Id.*

other global players. It uncovers deliberate U.S. aspirations and efforts to restore the balance in its favor, thus preventing other major players from molding and influencing developing countries' position under the international framework.

VIII. THE FTAs CLUB

The cables further uncover a global aspiration that the U.S. aims to achieve by linking its FTA partnerships. Accordingly, the U.S. is using its FTAs to form alliances and groups that would support its positions globally. This vision is not confined to the U.S.; the E.U. attempts to achieve a similar outcome in the Arab World through its Barcelona Process and the subsequent association agreements it has signed with a number of Arab States. However, the U.S. position is unique, as a result of the politics and techniques it adopts in order to achieve that goal.

Back in 2003, a U.S. Embassy cable reported that Singapore's Trade Minister had passed a letter to the King of Jordan during the World Economic Forum, hosted in Jordan, proposing an FTA between Jordan and Singapore.⁸⁸ Although an agreement of this nature would seem a natural progression of the relationship between both countries as a result of Singapore's historical good relations with the region and its Muslim community, one must take note of the U.S. role in steering the two countries towards a closer relationship. Notably, both countries had just signed an FTA with the U.S. Thus, the question arises as to where the idea of the Singapore-Jordan FTA originated.

The cable states that a senior Singaporean trade official had told Singapore's acting political and economic counsel that the Middle East is "an important region, but one where Singapore's economic engagement has been minimal."⁸⁹ The cable goes further, indicating that the idea of the Singapore-Jordan FTA had "initially been raised by then USTR Barshefsky, when the U.S. and Singapore were planning to use the U.S.-Jordan FTA as a model for the U.S.-Singapore FTA."⁹⁰ Shortly thereafter, in 2004, the Jordan-Singapore FTA was signed.

⁸⁸ U.S. Embassy, Cable 03AMMAN4185, Jordan/Singapore: US FTA Partners Link Up? (July 10, 2007).

⁸⁹ *Id.*

⁹⁰ *Id.*

IX. CONCLUSION

The recent release of U.S. Department of State Cables provided us with a rare opportunity to view the back-door initiatives and discussions involved in shaping and regulating intellectual property between developed and developing countries through the use of FTAs. From the U.S. position, this represents a historical continuation of previous initiatives aimed towards raising the levels of intellectual property rights globally. These efforts have been carried out with little consideration for other countries' interests. Remarks made by President in Obama in 2010 suggest that this policy will continue with the same vigor in the near future.⁹¹

What's more, we're going to aggressively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity of the American people. It is essential to our prosperity and it will only become more so in this century. But it's only a competitive advantage if our companies know that someone else can't just steal that idea and duplicate it with cheaper inputs and labor. There's nothing wrong with other people using our technologies, we welcome it—we just want to make sure that it's licensed, and that American businesses are getting paid appropriately. That's why USTR [the United States Trade Representative] is using the full arsenal of tools available to crack down on practices that blatantly harm our businesses, and that includes negotiating proper protections and enforcing our existing agreements, and moving forward on new agreements, including the proposed Anti-Counterfeiting Trade Agreement.

It is unlikely that this aggressive trend related to intellectual property enforcement in developing countries will undergo significant change. On January 24, 2012, in his State of the Union Speech, President Obama promised additional measures and assured American industries of the U.S. position in protecting its interest, by stating:⁹²

⁹¹ See President Barack Obama, Remarks by the President at the Export-Import Bank's Annual Conference (Mar. 11, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>).

⁹² President Barack Obama, State of the Union Address As Prepared for Delivery, "An America Built to Last" (Jan. 24th, 2012) (transcript available at <http://www.theatlantic.com/politics/archive/2012/01/state-of-the-union-speech-full-text/251941/>).

It's not right when another country lets our movies, music, and software be pirated... Tonight, I'm announcing the creation of a Trade Enforcement Unit that will be charged with investigating unfair trade practices.... There will be more inspections to prevent counterfeit or unsafe goods from crossing our borders.

Indeed, one would question the prudence of this policy in the long-run.⁹³ However, this aggressive posture ignores the historical policies adopted by the U.S. during its transition to industrialization and innovation, which were heavily reliant on others' innovations. On the other hand, the U.S. position raises some questions about the prudence of this, for both the United States and the global community. As Sell explains:⁹⁴

The United States' aggressive decades-long push to ratchet up intellectual property protections may come back to haunt it sooner than later. It is easy to imagine that in the not-too-distant future, US consumers will be paying more royalties to foreign rights holders. Pharmaceutical innovation virtually has come to a halt in the US, with many blockbuster drugs about to come off patent and very little new drugs in the pipeline. Many critics contend that the US patent system is choking off innovation with strategic patenting, patent thickets, and overly broad claims. Numerous in-depth critiques of the US patent system have raised profound questions about the wisdom of exporting our broken and dysfunctional system.

On the other hand, the recent developments—or revolutions—taking place in the Arab World, witnessed in the emergence of the “Arab Spring,” are changing how governments are responding to their citizens' aspirations. At the heart of these revolutions lies the call for a more balanced, participatory, and transparent national decision-making process. Careful consideration of the public interest is fundamental for successful decision-making and policy-setting. One is hopeful that the regulation of intellectual property at the national levels is no exception.

Though often referred to as an “oasis of calm” in a turbulent region,⁹⁵

⁹³There have been some recent calls within the U.S. for revisiting the current innovation system and its reliance on science and technology. As Subra Suresh, the Director of America's National Science Foundation, stated recently, “We must reexamine long-held assumptions about the global dominance of...American science and technology.” *Brain Gain: Why America is wrong to fear Asian Innovation*, THE ECONOMIST, Jan. 21, 2012, <http://www.economist.com/node/21543170>.

⁹⁴ Sell, *supra* note 18, at PAGE

⁹⁵ Ferry Biedermann, *Jordan: An Oasis of Financial Calm*, THE FINANCIAL TIMES,

Jordan is not isolated from the recent developments in the Middle East. The country is experiencing an unprecedented wave of reform championed by King Abdullah II.⁹⁶ References to political and economic reform, transparency, and the fight against corruption are commonplace in present-day headlines in Jordan. One can hope that these developments and calls will reach those involved in intellectual property policy-making, and prompt them to adopt a more balanced and participatory approach, by engaging concerned stakeholders and placing the public interest at the center of policy-making. For now, however, the morning after the signing of an FTA remains a stormy one.

June 23, 2010.

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