
**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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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*

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remarked, “if Cyberspace had air, it would be thick with recrimination.”¹ 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,² 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 to put an end to bilateralism and multilaterally regulate global trade in goods and services.

Although the leaks contain references to many other U.S. initiatives and efforts aimed toward strengthening and enforcing intellectual property protection in many developing countries, this study will focus on those leaks related to the implementation of the U.S.-Jordan bilateral free trade agreement³ (“FTA”) signed in 2001 in the area of intellectual property protection. Bilateral FTAs between powerful, industrialized countries and regions, particularly the United States and European Union, and poorer, developing countries have 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 implementation of FTAs is that, in most cases, these agreements are negotiated,

1. *Wikileaks: Swept Up and Away*, ECONOMIST, Sept. 10, 2011, <http://www.economist.com/node/21528600/print>.

2. James Love, *In Defense of WikiLeaks: Looking at Cables on Pharmaceutical Drugs and Trade Pressures*, HUFFINGTON POST (Sept. 4, 2011, 3:43 PM), http://www.huffingtonpost.com/james-love/wikileaks-cables-pharmaceutical-drugs_b_947806.html.

3. 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].

signed, and implemented secretly, behind closed doors, with little public debate and participation.⁴ This study analyzes the implementation of the 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 transpires 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 the United States signed with any Arab or Muslim country.⁵ Second, the U.S.-Jordan FTA was the first agreement of its type that contained several intellectual property obligations of a TRIPS-Plus nature.⁶ Third, the U.S.-Jordan FTA is one of the few agreements where the impacts of FTAs on developing countries 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 medicine.⁷ Within this context, this article will

4. See generally Brian J. Schoenborn, *Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?*, 4 MINN. J. GLOBAL TRADE 103, 135–37 (1995) (discussing the importance of balancing the democratic interest in public disclosure with the degree of confidentiality inherent in the contractual treaty negotiation process).

5. See Mohammed El Said, *The Evolution of the Jordanian TRIPS-Plus Model: Multilateralism Versus Bilateralism and the Implications for the Jordanian IPRs Regime*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 501, 513 (2006) [hereinafter El Said, *Multilateralism Versus Bilateralism*] (emphasizing the historical significance of the U.S.-Jordan FTA in that it has become a “cornerstone for the subsequent agreements signed between the US and other nations in the new era of trade bilateralism”); *Background Note: Jordan*, U.S. DEP'T OF STATE (Dec. 30, 2011), <http://www.state.gov/r/pa/ei/bgn/3464.htm>.

6. Accord 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, 61 (2005) (citing, for example, the obligation to “treat geographical indications as trademarks for the purposes of protection registration and implementation”); see Peter Drahos, *BITS and BIPS: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 792, 797–98 (2001) (explaining that “TRIPS Plus” may allow for more extensive protection than TRIPS standards, and it allows members to qualify, or choose amongst, TRIPS standards).

7. See MOHAMMED EL SAID, WORLD HEALTH ORG. & INT'L CTR. FOR TRADE & SUSTAINABLE DEV., *PUBLIC HEALTH RELATED TRIPS-PLUS PROVISIONS IN BILATERAL TRADE AGREEMENTS: A POLICY GUIDE FOR NEGOTIATORS AND*

use information obtained through Wikileaks to make a more detailed assessment of the process of surveillance and implementation that U.S. authorities undertook following the signing of a bilateral FTA.

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 United States and the European Union—in this area and their efforts to push the boundaries of intellectual property protection 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 will not do is 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.⁸

II. THE BEGINNINGS

Jordan has maintained strong relations with the United States since its creation as an emirate in the early 1920s.⁹ Jordan's geography,

IMPLEMENTERS IN THE WHO EASTERN MEDITERRANEAN REGION 16 (2010) [hereinafter EL SAID, PUBLIC HEALTH RELATED TRIPS-PLUS PROVISIONS IN BILATERAL TRADE AGREEMENTS]; Mohammed El Said, *All Costs, No Benefits: How TRIPS-Plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines*, OXFAM INT'L (Oxfam Briefing Paper No. 102, 2007), at 2 (“[D]ata exclusivity [in Jordan] has delayed generic competition for 79 percent of medicines newly launched by 21 multinational pharmaceutical companies between 2002 and mid-2008.”); Hamed El Said & Mohammed El Said, *TRIPS-Plus Implications for Access to Medicines in Developing Countries: Lessons from Jordan-United States Free Trade Agreement*, 10 J. WORLD INTELL. PROP. 438, 445 (2007) (highlighting the vast shift IPR protection has undergone in Jordan since 1973, at which time patent protection was only afforded to processes, which permitted the legal manufacture of generic drugs, which were developed, tested, and patented in other countries).

8. El Said, *Multilateralism Versus Bilateralism*, *supra* note 5.

9. *E.g.*, *Background Note: Jordan*, *supra* note 5 (“Relations between the

demography, pragmatic leadership, and, more recently, its involvement in the United States' "War on Terror" ensured continuous special relationships with various U.S. administrations, with few exceptions.¹⁰

The close relationship between Jordan and the United States is evidenced by the exceptional military and financial support Jordan has received from the United States over the years.¹¹ Jordan is one of the largest recipients of U.S. aid in the world. Since 1951, the country received approximately \$11.38 billion in U.S. aid, third only to Israel and Egypt in the region.¹² 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.¹³

Jordan has signed a number of bilateral agreements with the United States 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.¹⁴ Additionally, in 1996, the U.S. Congress created Qualifying Industrial Zones ("QIZ") to support the peace process through the peace treaty signed between Jordan and Israel in 1994.¹⁵

United States and Jordan have been close for 6 decades, with 2009 marking the 60th anniversary of U.S.-Jordanian ties.").

10. *But see id.* (providing a notable exception to the generally favorable relations between Jordan and the United States relating to disagreements over the country's support for Iraq during the first Gulf War (1990-91)).

11. *See generally* AVI SHLAIM, LION OF JORDAN: THE LIFE OF KING HUSSEIN IN WAR AND PEACE (2007) (tracing the history of Jordan with respect to the Arab-Israeli conflict and identifying the level of military and financial assistance received from the United States).

12. JEREMY M. SHARP, CONG. RESEARCH SERV., RL32260, U.S. FOREIGN ASSISTANCE TO THE MIDDLE EAST: HISTORICAL BACKGROUND, RECENT TRENDS, AND THE FY2011 REQUEST 7 (2010), *available at* <http://www.fas.org/sgp/crs/mideast/RL32260.pdf>.

13. *Id.* at 7.

14. Air Transport Agreement Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan, U.S.-Jordan, Nov. 10, 1996, <http://www.state.gov/documents/organization/66317.pdf>; Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Jordan, July 2, 1997, U.S. Sen. Treaty Doc. 106-30.

15. West Bank and Gaza Strip Free Trade Benefits, Pub. L. No. 104-234, 110

Under the agreement, QIZ goods that contain at least twelve percent of their value added from Israel enter the United States tariff- and quota-free. This has had important economic growth implications for the Jordanian economy and turned the United States 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.¹⁶ 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 FTA between the United States and an Arab country in 2001 (the U.S.-Jordan FTA).¹⁷

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 1999 Jordan was still placed on the United States' "Section 301 Watch List."¹⁸ The following year, the Pharmaceutical Research and Manufacturers of America ("PhRMA") went even further by formally asking the Office of the U.S. Trade Representative ("USTR") to name Jordan in the next year as a "Priority Watch" country, for "failing to provide adequate intellectual property protection."¹⁹ The relationship became less turbulent following the country's accession to the WTO and its signing of the FTA with the

Stat. 3058.

16. Agreement Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan on Science and Technology Cooperation, U.S.-Jordan, Apr. 5, 2007, <http://www.state.gov/documents/organization/142911.pdf>.

17. *Background Note: Jordan*, *supra* note 5.

18. See, Matthew K. Miller, *Hong Kong Removed from U.S. Trade Representative's Special 301 Watch List*, 5 B.U. J. SCI. & TECH. L. 12, 12, n.23 (1999) (providing a general overview of the Special 301 Watch List as a warning signal to the business community and foreign nations that deny adequate intellectual property protection).

19. Ghaliya Alul, *PhRMA Requests Jordan Be Placed on "Priority Watch" List*, JORDAN TIMES, Apr. 15, 1998, available at <http://www.jordanembassyus.org/041598002.htm>.

United States in 2000 and 2001, respectively.

III. DOMESTIC PROCESS, GLOBAL AGENDA

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

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.²⁰

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 throughout the negotiation process. 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 private interest groups and governmental 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 on various strategies in achieving their objectives. The strategies are often complemented by a “revolving door” policy, through initiating discussions with and passing messages to various local contacts and other concerned

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

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

The key players representing the private sector interests of the United States include a number of historically well-established and organized business groups and associations. For instance, both the Business Software Alliance (“BSA”)²¹ and the International Intellectual Property Alliance (“IIPA”)²² have been vocal in their push for strengthened copyright protection in Jordan. Meanwhile, the Pharmaceutical Research and Manufacturers of America (“PhRMA”)²³ continues to pursue 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

21. Cf. BUS. SOFTWARE ALLIANCE, <http://www.bsa.org/GlobalHome.aspx> (last visited Aug. 16, 2012) (presenting the BSA 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.”).

22. Cf. *About IIPA*, INT’L INTELLECTUAL PROP. ALLIANCE (Feb. 9, 2012), <http://www.iipa.com/aboutiipa.html> (describing the IIPA as “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”).

23. Cf. *About PhRMA*, PHRMA.ORG, <http://www.phrma.org/about/about-phrma> (last visited Aug. 12, 2012) (“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 intellectual property protection—through the implementation of the TRIPS Agreement—during the Uruguay Round of Trade Negotiations. The Uruguay Round lasted from 1986 to 1994 and culminated in the birth of the WTO. Their efforts were highly influential in lobbying the U.S. 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, one author explains:

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.²⁴

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 as a cure for present-day economic woes and financial crises.²⁵

Several U.S. government agencies and bodies also constitute key players, given their ability to provide official coverage and to 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 U.S. Trade Representative (“USTR”); the U.S. Agency for International Development (“USAID”) and its Achievement of Market-Friendly Initiatives and Results (“AMIR”) Program in Jordan; and the U.S. Patent and Trademark Office (“USPTO”) appear to be the most active and persevering agencies in the push for higher intellectual property

24. SUSAN SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 86 (2003).

25. Deborah Halbert, *The Politics of IP Maximalism*, 3 *WIPO J.* 81, 90 (2011).

protection and enforcement.²⁶ Other agencies and private bodies are periodically called upon to step in and provide legal review or technical training and advice. These include the U.S. Food and Drug Authority (“USFDA”), the Customs and Border Protection (“CBP”), the Immigration and Customs Enforcement (“ICE”), and the Library of the U.S. 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 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 norms at the national level. In a situation often prevalent in developing and Arab countries, the Jordanian position is generally “responsive” with regard to intellectual property protection.²⁷ 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 concerned mainly with granting marketing authorizations for drugs and pharmaceutical products in the country and that is affiliated with the Jordanian Ministry of Health.

26. See, e.g., *GIPA - Patent, Trademark, and Copyright Law and Policy Program - November 5-8, 2007, Amman, Jordan*, USPTO, http://www.uspto.gov/ip/events/agenda_jordan.jsp (last visited Aug. 12, 2012) (describing one of the USPTO’s training programs run by its Global Intellectual Property Academy (GIPA) in Jordan in 2007).

27. MOHAMMED EL SAID, *THE DEVELOPMENT OF INTELLECTUAL PROPERTY PROTECTION IN THE ARAB WORLD* 46 (2008) [hereinafter EL SAID, *THE DEVELOPMENT OF INTELLECTUAL PROPERTY PROTECTION IN THE ARAB WORLD*] (“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.”).

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.²⁸ 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 U.S. counterparts.²⁹

Overall, the dynamics of the relationship between these stakeholders and representatives (both from the United States and Jordan) reflect a general pattern of encouragement and collaboration where positions are unified.³⁰ When positions are not, criticism is often associated with suspension—or threat of suspension—of funds from the U.S. side as a stick-and-carrot policy.

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 U.S. 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.

28. See ALEXANDER W. KOFF ET AL., INT’L INTELLECTUAL PROP. INST., STUDY ON THE ECONOMIC IMPACT OF “TRIPS-PLUS” FREE TRADE AGREEMENTS 35 (2011), available at http://www.tradepartnership.com/pdf_files/IIPI%20TRIPS-Plus%20Study.pdf (reporting that the United States’ technical assistance has provided “not only seminars and short training courses but also a group on the ground in Peru to assist with intellectual property efforts”).

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

30. For instance, 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. U.S. Embassy, Cable 05AMMAN8330, *Jordan IPR Problems and Solutions: Part I - Awareness Campaign Tackles Street-Smart Pirates* (Oct. 23, 2005), available at <http://wikileaks.org/cable/2005/10/05AMMAN8330.html>.

Instead, the key players insert intellectual property rhetoric into discussions and deliberations, describing 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 article will present specific examples that 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

Because the U.S.-Jordan FTA was the first FTA signed between the United States and an Arab or a Muslim state, the agreement became a template for 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.³¹ In particular, the agreement contains several TRIPS-Plus provisions, which directly affect public health and access to medicine 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 that may be extended up to eight years. Accordingly, article 4.22 of the FTA states:

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

31. See EL SAID, PUBLIC HEALTH RELATED TRIPS-PLUS PROVISIONS IN BILATERAL TRADE AGREEMENTS, *supra* note 7 (suggesting that as a result of signing FTAs, countries in the Eastern Mediterranean Region face difficulties in creating the proper and adequate public health regimes and in ensuring the availability and access to medicine for their populations).

necessary to protect the public or unless steps are taken to ensure that the information is protected against unfair commercial use.³²

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 references to this type of protection. In this regard, a footnote to article 4.22 states:

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.³³

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 to compensate the applicant for the time spent during the examination of the application and/or marketing authorization. Article 4.23 of the U.S.-Jordan FTA states:

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.³⁴

4. *Restrictions on compulsory licensing.* The TRIPS Agreement grants member states the right to grant compulsory licenses. However, the agreement does not list or specify the grounds whereby such licenses may be granted but instead awards member states the discretion to define such grounds.³⁵ On the

32. U.S.-Jordan FTA, *supra* note 3, art. 4.22. A footnote to article 4.22 further states: “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.” *Id.* art. 4.22 n.11.

33. *Id.* art. 4.22 n.10.

34. *Id.* art. 4.23.

35. Agreement on Trade-Related Aspects of Intellectual Property Rights,

other hand, the U.S.-Jordan FTA lists the grounds on which 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:

to remedy a practice determined after judicial or administrative process to be anti-competitive;

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

on the ground of failure to meet working requirements, provided that importation shall constitute working.³⁶

The impact of these TRIPS-Plus conditions in the area of public health and access to medicine is grave. In brief, such measures would result in prolonging the monopoly terms granted to pharmaceutical patents and delaying the entrance of generics into the market.³⁷ Such delays would result in a substantial increase in drug prices, due to royalty payments, and would increase governmental expenditure on public health and medicine as a result.³⁸ Some of these effects, as will be explained in more detail, have already taken place in the country.

Including Trade in Counterfeit Goods art. 30, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

36. U.S.-Jordan FTA, *supra* note 3, art. 4.20.

37. See KOFF ET AL., *supra* note 28, at 49 (“Reportedly overlaying U.S.-style rules over Jordan’s pharmaceutical sector negatively affects the ability of generic industries to operate, which is why many from Jordan’s generic pharmaceutical industry view the FTA as TRIPS-‘Minus.’”).

38. For more, see EL SAID, THE DEVELOPMENT OF INTELLECTUAL PROPERTY PROTECTION IN THE ARAB WORLD, *supra* note 27.

V. COSTS WITHOUT BENEFITS: THE MYTHS

After laying the foundation 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 United States and Jordan and the approach adopted by each in dealing with intellectual property issues affecting public health and access to medicine. 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 those related to intellectual property protection. The Jordanian position, on the other hand, could be best described as “reactive,” in most cases, and “reluctant,” in other 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 affecting public health and access to medicine, 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.³⁹ 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 protection regimes granting data exclusivity predate the signing of the TRIPS Agreement,⁴⁰ the United States’ and European Union’s attempts to

39. See *Guatemala’s Congress Reinstates Data Protection: The End of the Problem That Refused to Go Away*, KNOWLEDGE ECOLOGY INT’L (Mar. 3, 2010), <http://www.keionline.org/node/1206> (providing a detailed account of U.S. government pressure on the Guatemalan legislature to shape legislation on pharmaceutical test data protection in the country).

40. See Jerome H. Reichman, *Rethinking the Role of Clinical Trial Data in International Intellectual Property Law: The Case for a Public Goods Approach*,

include data exclusivity 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.⁴¹ However, the United States—and more recently the European Union—reintroduced data exclusivity through 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.⁴²

In the case of Jordan, 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.⁴³ Fears of the monopolistic impact of patent-term extension on drug prices and the curtailment of compulsory licensing appear to have been realized in Jordan. Nonetheless, Jordan became one of the first Arab countries in which the issue of data exclusivity surfaced during discussions with U.S. officials following the signing of the U.S.-Jordan FTA, as revealed by the cables.

As stated above, the U.S.-Jordan FTA introduces five years of data exclusivity that commences on the date of registration of a medicine in the country.⁴⁴ An additional three years of data exclusivity (beyond the initial five-year period) are also granted for new uses of known chemical entities.⁴⁵ The U.S. cables show how the United

13 MARQ. INTELL. PROP. L. REV. 1, 12–16 (2009) (explaining that 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).

41. *Id.* at 17–19.

42. TRIPS Agreement, *supra* note 35, art. 4 (“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.”)

43. See U.N. DEV. PROGRAMME, GOOD PRACTICE GUIDE: IMPROVING ACCESS TO TREATMENT BY UTILIZING PUBLIC HEALTH FLEXIBILITIES IN THE WTO TRIPS AGREEMENT 24–26 (2010) [hereinafter UNDP], available at <http://apps.who.int/medicinedocs/documents/s17762en/s17762en.pdf> (identifying “data exclusivity” as “an additional market protection form for originator pharmaceuticals” and advising developing nations to refrain from adopting data exclusivity regimes).

44. U.S.-Jordan FTA, *supra* note 3, art. 4.22 n.11.

45. *Id.*, art. 4.22 n.10.

States 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 in Jordan, which is managed mainly by the Jordan Food and Drug Administration (“JFDA”).⁴⁶ Despite this, it was evident that the United States 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.”⁴⁷ As demonstrated by the same cable, the United States attempted on several occasions to influence the decisions of the JFDA and its committees. In one data exclusivity dispute, the 2005 cable reports:

[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)⁴⁸

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:

Some 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

46. See U.S. Embassy, Cable 05AMMAN9748, Jordan's IPRS Challenges and Solutions: Part III - Pharmaceuticals Pose Frontier IPR Issues ¶ 3 (Dec. 19, 2005), <http://wikileaks.org/cable/2005/12/05AMMAN9748.html#> (“International R&D-based drug firms are comfortable with the registration system in Jordan; to date, Embassy received no complaints of excessive bureaucracy or delayed decisions by the JFDA.”).

47. *Id.*

48. *Id.* ¶ 4.

wronged—decided not to pursue the case.⁴⁹

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—FTA Article 4, paragraph 22 and its related footnotes—have yet to be interpreted in a manner acceptable to all, however.⁵⁰

If the United States had gotten its way, an additional protection period would have prevented the generic medicine from entering the market, a provision that 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, in 2001, an originative firm's cancer treatment was approved for tender in a Jordanian government hospital.⁵¹ Afterward, the manufacturer filed a formal request for JFDA approval. 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.⁵² In response to the complaint, the JFDA Director General explained

49. *Id.* ¶ 5.

50. *Id.* ¶ 6.

51. *Id.* ¶ 9. In these special tender cases, a waiver is often obtained through the traditional JFDA approval process.

52. *Id.*

that JFDA officials reasoned that the drug had enjoyed five years of data exclusivity, dating from the special tender bid in 2001.⁵³

The innovator manufacturer disagreed, arguing that the data exclusivity period began with the more recent JFDA approval.⁵⁴ 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.⁵⁵ 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.⁵⁶ The U.S. Embassy went even further, boldly urging that Jordan's JFDA should include a PhRMA representative on the High Committee for Drugs.⁵⁷ This request clearly reflects a high level of U.S. interference in the work of the JFDA. Conversely, the United States would likely object if the same request was made by a Jordanian—or even a European—delegation demanding the inclusion of their representative on the board of the U.S. Food and Drug Administration (“USFDA”).

The two previous examples demonstrate how the United States 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 that obligate Jordan to interpret the agreement in line with the United States' position.⁵⁸

Empirical research also supports the argument that data exclusivity protection measures had negative effects on public health in Jordan.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* ¶ 10.

57. *Id.* (urging the JFDA to consider including a “PhRMA representative among three private sector members on the committee”).

58. For more on impact, see EL SAID, PUBLIC HEALTH RELATED TRIPS-PLUS PROVISIONS IN BILATERAL TRADE AGREEMENTS, *supra* note 7, and UNDP, *supra* note 43.

In 2007, Oxfam International published a study on the U.S.-Jordan FTA.⁵⁹ This study was one of the earliest that analyzed the impact of FTAs upon public health and access to medicine in developing countries. The findings of the study were alarming; they explicitly stated that the U.S.-Jordan FTA had a negative impact on access to medicine, finding that:

- 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.⁶⁰

In addition to the issue of data exclusivity, the U.S.-Jordan FTA also included references to the protection of “new use.”⁶¹ 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.”⁶²

Once again, the cables provide evidence of how the United States attempted to interpret broadly 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

59. OXFAM INT'L, ALL COSTS, NO BENEFITS: HOW TRIPS-PLUS INTELLECTUAL PROPERTY RULES IN THE US-JORDAN FTA AFFECT ACCESS TO MEDICINES (2007), available at <http://www.oxfam.org/sites/www.oxfam.org/files/all%20costs,%20no%20benefits.pdf>.

60. *Id.* at 20. For a more recent study, see Ryan B. Abbott et al., *The Price of Medicines in Jordan: The Cost of Trade-Based Intellectual Property*, 9 J. GENERIC MEDS. 75 (2012).

61. See U.S.-Jordan FTA, *supra* note 3, art. 4.22 n.10 (“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.”).

62. See generally C. Scott Hemphill & Bhaven N. Sampat, *Evergreening, Patent Challenges, and Effective Market Life in Pharmaceuticals*, COLUMBIA UNIVERSITY LAW AND ECONOMICS WORKING PAPER, No. 399 (May 3, 2011).

those patients exhibiting both asthma and co-existing allergic rhinitis. The JFDA approved the drug for the “new use,” but not for a “new indication,” as U.S. representatives were asking for. The JFDA justified its position by claiming that the “gray area of overlapping uses does not permit a distinction,” and it argued that it was therefore unwilling to grant an additional three years of exclusivity protection.⁶³ 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.⁶⁴ 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.”⁶⁵ 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 of 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.”⁶⁶ The cable unearths complaints about this strict requirement and the fact that the JFDA’s drug-approval process may last up to a period of six months, stating that “PhRMA companies deem this a technical barrier to market access.”⁶⁷ 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

63. U.S. Embassy, Cable 05AMMAN9748, *supra* note 46.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

in line with its national legal framework and administrative procedures.

Dissatisfied that its discussions with the JFDA were largely fruitless, the United States decided it was time to widen the scope of the debate and engage other national players in the discussion. The United States decided the next step would be to engage the Ministry of Industry and Trade, bypassing the Ministry of Health altogether. It was time to bring the FTA's most powerful card to the table.

Through several exchanges with the U.S. Embassy, the JFDA, and the Ministry of Industry and Trade, the United States demanded that the government of Jordan abide "scrupulously" by its FTA commitments regarding pharmaceuticals protection.⁶⁸ Accordingly, it would be imperative that more bilateral consultation be established 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 above, the Embassy went even further, by boldly asking the JFDA to include a PhRMA representative on the High Committee for Drugs.⁶⁹ Additionally, the cable reports that the United States 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 for Drugs.⁷⁰ 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."⁷¹

The cable further reports that the Minister assured the representatives Jordan would rectify the situation if its practices were not in line with its FTA obligations.⁷² This reference reflects a questionable position, considering that the notion of a uniform "international best practices" does not exist in this particular area,

68. *Id.*

69. *Id.* ¶ 10.

70. *Id.*

71. *Id.*

72. *Id.*

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.”⁷³ The cables did not reveal what advice the United States gave in relation to this request.

The United States 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,⁷⁴ a claim that is unfortunately echoed by many uninformed national politicians.⁷⁵ For instance, a report published in 2004 by the International Intellectual Property Institute (“IPI”) in partnership with the AMIR program claimed that stronger intellectual property protections are 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.⁷⁶ The report also claims that there is a growing

73. *Id.*

74. See *Jordan Free Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/> (last visited Aug. 14, 2012) (“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.”).

75. See, e.g., 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, 366 (2010) (“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.”). 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 KOFF ET AL., *supra* note 28, at 29.

76. MICHAEL P. RYAN & JILLIAN SHANEBROOK, INT’L INTELLECTUAL PROP. INST., ESTABLISHING GLOBALLY-COMPETITIVE PHARMACEUTICAL AND BIO-MEDICAL TECHNOLOGY INDUSTRIES IN JORDAN: ASSESSMENT OF BUSINESS

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.”⁷⁷

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

- 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.
- New product launches in Jordan are only a fraction of total product launches in the USA and the EU. 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.⁷⁸

Others have reached similar conclusions in studying the impact of expanding intellectual property protection in Jordan. One author, 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.”⁷⁹

STRATEGIES AND THE ENABLING ENVIRONMENT 20 (2004).

77. *Id.*

78. OXFAM INT'L, *supra* note 59, at 20.

79. Nesheiwat, *supra* note 75, at 364.

Similar findings were reiterated by U.S. Embassy cables. A 2008 cable explains that the withdrawal of the multinational pharmaceutical giant Bristol Myers Squibb (“BMS”) from the Jordanian market had, in fact, caused anxiety in the country.⁸⁰ This came following a statement made by the BMS vice president that the company was about to close 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”; the BMS vice president reported 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.”⁸¹ The cable added that the decision was met with “serious concerns and confusion” by Jordanian businessmen, doctors, and government officials.⁸²

Furthermore, officials were concerned that this move, which placed Jordan alongside countries such as Syria, Sudan, and Yemen (from which BMS was also withdrawing), would send a negative signal about Jordan’s business environment and would also limit the availability of cancer drugs to its nationals. Jordanian government officials made innumerable calls 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.”⁸³ 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 its operations. Evidently, higher intellectual property levels had no positive impact on the company’s decision. PhRMA was in no mood to ride against the tide of a U.S. firm and defend Jordan’s interests.

The example cited above clearly demonstrates that even with an FTA containing a 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

80. U.S. Embassy, Cable 08AMMAN3017, US Pharmaceutical Company Pulling Out of Jordan Creates Anxiety and New Opportunities (Nov. 5, 2008), <http://cables.mrkva.eu/cable.php?id=176772>.

81. *Id.*

82. *Id.*

83. *Id.*

and sustain the level of investments that had already been established prior to the signing of the FTA.

As this section reveals, the United States used 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 United States learn from its FTA experience with Jordan?

To avoid any misinterpretation following the implementation of an FTA, the United States revised its standard intellectual property provisions for subsequent 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 subsequent U.S.-Oman and U.S.-Bahrain FTAs each included twenty-five pages of intellectual property commitments.⁸⁴ Therefore, despite the negative effects stemming from intellectual property measures within Jordan's FTA, one might argue that Jordan was blessed to be the first country to sign an FTA with the United States.

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

84. Agreement Between the Government of the United States of America and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Area, U.S.-Bahr., Sept. 14, 2004, <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text>; Agreement Between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, U.S.-Oman, Jan. 19, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>; 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, 261 (2007).

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 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.⁸⁵ 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.⁸⁶

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,"⁸⁷ the cable reassuringly explains that it was not "a willful attempt to circumvent the existing IPR protection regime" in the country.⁸⁸ The cable further

85. U.S. Embassy, Cable 03AMMAN1233, Engaging the GOJ on IPR Complaint from Electronic Arts (Mar. 3, 2003), <http://cables.mrkva.eu/cable.php?id=6057>.

86. *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 U.S.-Jordan FTA.

87. *Id.*

88. *Id.*

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.”⁸⁹ 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.⁹⁰ 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 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.⁹¹ 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-

89. *Id.*

90. *Id.*

91. *Id.*

related cash transfers, making it clear that only when legislative changes were undertaken would economic assistance be provided.⁹² 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 toward ensuring a high level of enforcement and compliance with the new copyright law. In addition, the cables identified other weak enforcement procedures and measures that, 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.”⁹³ The cable also stated that the raids were directed toward software piracy activities, in which pirated software was confiscated and infringers were referred for prosecution, in accordance with 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 United States “*will attempt to follow these cases through the courts to identify and report strengths or weaknesses of the enforcement system.*”⁹⁴

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.”⁹⁵ As more awareness and training were needed to ensure proper enforcement, the National Library, with the assistance of USAID, planned 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

92. U.S. Embassy, Cable 04AMMAN6508, Jordan IPR – Two Steps Forward, A Half Step Back (Mar. 8, 2004), <http://cables.mrkva.eu/cable.php?id=19391>.

93. U.S. Embassy, Cable 05AMMAN3171, IPR Enforcement Team Goes After Copyright Law Violators (Apr. 20, 2005), <http://wikileaks.org/cable/2005/04/05AMMAN3171.html>.

94. *Id.* (emphasis added).

95. *Id.*

judiciary to enforce the new penalties available under the Copyright Law.”⁹⁶ 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:

- 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 Provisions⁹⁷

Unsurprisingly, most of these issues, which were raised at the domestic level in Jordan, were discussed and later included in the highly controversial Anti-Counterfeiting Trade Agreement (“ACTA”) in 2011.⁹⁸

96. *Id.*

97. INT’L INTELLECTUAL PROP. ALLIANCE (IIPA), JORDAN: 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 387 (2009), *available at* <http://www.iipa.com/rbc/2009/2009SPEC301JORDAN.pdf>.

98. For more on the ACTA, see Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Free Trade Agreement (ACTA)*, AM. UNIV. WASH. COLL. OF LAW PROGRAM ON INFO. JUSTICE & INTELL. PROP. (PIJP Research Paper Ser. No. 17, 2011), *available at* <http://digitalcommons.wcl.american.edu/research/17/>; Peter Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1 (2011).

VII. OURS VS. THEIRS

One of the interesting insights the cables reveal is the relationship between the major players (mainly the European Union and United States) 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 European Union and the United States are united in their vision for raising the levels of intellectual property protection globally, through various means including bilateral free trade and association agreements.⁹⁹

Although Jordan signed an association agreement (“AA”) with the European Union in 1997, before inking an FTA with the United States in 2001, it took five years to ratify the E.U. agreement. Quipping about such a slow process, a 2002 U.S. Embassy cable highlights the slowness and weakness of the E.U. 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, 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.”¹⁰⁰

At the same time, the cables highlight the United States’ real concern regarding the E.U.-Jordan AA: its fear of the European Union’s attempt to bring Jordan and other partner countries in the region in line with the European Union’s position on a number of global issues currently subject to international debate. These issues included labeling, genetically modified organisms (“GMOs”), Sanitary Phytosanitary SPS measures, and other similar issues in the WTO. One 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

99. See generally Mohammed El Said, *The European TRIPS-Plus Model and the Arab World: From Cooperation to Association—A New Era in the Global IPRs Regime?*, 28 LIVERPOOL L. REV. 143 (2007) (discussing the role of the European Union in TRIPS-Plus agreements).

100. U.S. Embassy, Cable 02AMMAN2371, EU Association Agreement Does Little For Jordan’s Economy (May 14, 2012), <http://wikileaks.org/cable/2002/05/02AMMAN2371.html>.

with the U.S. on central WTO issues.”¹⁰¹

Once again, this example shows the close and detailed monitoring carried out by the United States with respect to developing countries' interactions with 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 United States aims to achieve by linking its FTA partnerships. Accordingly, the United States is using its FTAs to form alliances and groups that would support its positions globally. This vision is not confined to the United States; the European Union 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 to achieve that goal.

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.¹⁰² 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 toward a closer relationship. Notably, both countries had just signed an FTA with the United States. 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.”¹⁰³ The cable goes further, indicating

101. *Id.*

102. U.S. Embassy, Cable 03AMMAN4185, Jordan/Singapore: US FTA Partners Link Up? (July 10, 2007), <http://wikileaks.org/cable/2003/07/03AMMAN4185.html>.

103. *Id.*

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.”¹⁰⁴ Shortly thereafter, in 2004, the Jordan-Singapore FTA was signed.

IX. CONCLUSION

The recent release of U.S. Department of State cables provided the public 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 toward 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 Obama in 2010 suggest that this policy will continue with the same vigor in the near future:

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.¹⁰⁵

It is unlikely that this aggressive trend related to intellectual property enforcement in developing countries will undergo significant

104. *Id.*

105. Press Release, The White House, Remarks by the President at the Export-Import Bank’s Annual Conference (Mar. 11, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>.

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 interests, by stating:

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.¹⁰⁶

Indeed, one would question the prudence of this policy in the long run.¹⁰⁷ However, this aggressive posture ignores the historical policies adopted by the United States 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 one author explains:

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.¹⁰⁸

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

106. President Barack Obama, State of the Union Address: An America Built to Last (Jan. 24, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

107. There have been some recent calls within the United States 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*, *ECONOMIST* (Jan. 21, 2012), <http://www.economist.com/node/21543170>.

108. Sell, *supra* note 20, at 22.

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,¹⁰⁹ 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.¹¹⁰ 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.

109. Ferry Biedermann, *Jordan: An Oasis of Financial Calm*, FIN. TIMES (June 23, 2010), <http://www.ft.com/cms/s/0/bd88daca-7d1f-11df-8845-00144feabdc0.html#axzz21QSO6PjW>.

110. See, e.g., MARWAN MUASHER, CARNEGIE ENDOWMENT FOR INT'L PEACE, *A DECADE OF STRUGGLING REFORM EFFORTS IN JORDAN: THE RESILIENCE OF THE RENTIER SYSTEM* (2011), available at <http://carnegieendowment.org/2011/05/11/decade-of-struggling-reform-efforts-in-jordan-resilience-of-rentier-system/1gf> (discussing King Abdullah II's political reforms, including efforts at creating a new government "to take speedy practical and tangible steps to unleash a real political reform process that reflects [Jordan's] vision of comprehensive reform, modernization and development.") (alterations in original).