Current Developments and Trends in the Field of Intellectual Property: Implications for Arab Countries[*]

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Introduction

The conclusion of the Trade Related Aspects Intellectual Property Agreement (TRIPS), in the context of the Uruguay Round of trade negotiations (1994,) ushered in an unprecedented interest in the protection of intellectual property (IP) particularly concerning the impact of new global IP rules on developing countries. However, developments relating to protection of IP in Arab countries have, in general, received less attention, from stakeholders, particularly civil society, than in other developing countries of Africa, Asia and Latin America. In this connection, the aim of this paper is to stress the need for Arab countries to adopt a more development-oriented perspective on IP protection. It will first underline some general trends and developments in the field of IP and analyze their impact on Arab countries. It will then highlight some recommendations in order for Arab countries to advance towards this objective.

I- Current Developments and Trends in the Field of IP

Current developments and trends in the field of IP can be observed at the institutional level and at the substantive level.

a) Developments at the institutional level

At the institutional level, two distinctive trends have appeared in recent years. The first one relates to the proliferation of fora and processes involved in IP standard-setting at the multilateral, regional and bilateral level. The second one concerns the increasing complexity of IP standard-setting.

1. The proliferation of fora and processes involved in IP standard-setting

The TRIPS agreement of the WTO has been, in recent years, the focus of attention of most developing countries, including Arab countries. Much of the expertise of these countries in the field of IP, and their limited resources, have been devoted to the implementation of TRIPS and to following deliberations of the WTO/TRIPS Council, particularly in relation to such issues as public health. Nevertheless, this situation is gradually changing. Although TRIPS remains the central foundation of the international IP architecture, establishing its minimum substantive standards, there is an increasing realization that TRIPS is only a part of this architecture. Beyond TRIPS and the WTO, a wide array of international fora are involved, directly or indirectly, in IP standard-setting. Primary among those is the World Intellectual Property Organization (WIPO). While most developing countries, including Arab countries, have approached WIPO, primarily as a technical assistance provider, there is a growing awareness about the importance of WIPO's

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standard-setting activities. Ongoing negotiations in WIPO on issues such as the protection of broadcasting organizations and the substantive harmonization of patent law have been particularly controversial. In addition to WTO and WIPO, IP is the subject of deliberations and decisions in international organizations and fora dealing with human rights, health, telecommunications, bio-diversity and culture.[1] At the regional and bilateral level, IP clauses are becoming an important feature of the Free Trade Agreements (FTAs), particularly those concluded by the United States and the European Union, with developing countries, since the 1990s. They also figure prominently in bilateral investment treaties. In certain regions, IPRs come under the jurisdiction of a number of regional organizations and arrangements.[2]

2. The increasing complexity of international IP standard-setting

As a result, in part, of the proliferation of fora and processes, international IP norm-setting is becoming more diversified and complex. At the multilateral level, particularly at WIPO, reliance on "soft-law"- in the form of recommendations, guidelines, and resolutions - has grown in comparison to treaty-making, whose lengthy procedures appear to be less adapted to a rapidly changing and technologically driven area of law.[3] Soft law is also an important form of norm-setting in many fora dealing directly or indirectly with IP related issues. Nevertheless, developing countries, whose traditional focus has been on treaty making, have not fully grasped the implications of a greater reliance on soft-law despite the fact that it can considerably influence the behavior of states. Beyond this issue, the tendency towards incorporating IP provisions in regional and bilateral FTAs is adding a new level of complexity to the international IP architecture. The relationship between those provisions and multilateral standards is often not clear and introduces a degree of uncertainty in the exercise by countries of their rights and in the fulfillment of their international obligations. This particularly the case in relation to public health where the legal uncertainty concerning the relationship between the rights of a number of developing countries under TRIPS and the Doha Declaration on TRIPS and Public Health (2001) on one hand and their obligations on patents and medicines included in bilateral and regional free trade agreements on the other hand, has been underlined.[4] Reflecting on this, one analyst commented:

> The provisions of the CAFTA and U.S. – Morocco FTA relating to patents and pharmaceutical regulation are not accessible to laypersons. They are confusing to specialists in the field of IP law and medicines regulation. Public international lawyers are needed to work out the complex hierarchical relationships among the conflicting provisions…. Individuals operating in the real world of medicines regulation, procurement and distribution cannot be expected to sort out these incredibly complicated rules. This point cannot be stressed too strongly.[5]

[1] For instance, the Declaration of Principles adopted by the First part of the World Summit on the Information Society (WSIS), in Geneva, in December 2003, included a specific reference to IP.
[2] This is the case of OAPI and ARIPO in Africa and of the Andean Community in Latin America.
[3] Edward Kwakwa, "Some Comments on Rule Making at the World Intellectual Property Organization", *Duke Journal of Comparative and International Law*, Vol 12, No1, 2002, pp.179-195
[4] Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health and the Contradictory Trend in Bilateral and Regional Free Trade Agreements*, Occasional Paper 14, Quaker United Nations Office, April 2004.
[5] *Ibid*, p.12

The proliferation of fora and processes dealing with IP at the international level and the increasing complexity of international IP standard-setting raise extraordinary challenges for developing countries seeking to deal, in a comprehensive manner, with developments related to IP particularly taking into consideration their limited resource and expertise in this field.

b) Developments at the substantive level

At the substantive level, two distinctive trends appear to be simultaneously at work the internationally: a trend asserting the need for integrating the development dimension in IP and a trend inducing inciting developing countries to take on so called "TRIPS-plus" obligations.

1. The need of integrating the development dimension in IP

TRIPS was concluded on the premise that it would foster transfer of technology to developing countries as well as increase the levels of investment and innovation in these countries. Ten years later, most opinions converge in underlining its limited effects in this regard. At the same, its impact on the protection of public health and bio-diversity, has been a particular source of public concern. The cost of its implementation by developing countries has also often been stressed. TRIPS is now widely perceived a "one size fits all" approach to IP norm-setting which should be avoided in the future, particularly at the multilateral level.

Nevertheless, TRIPS has generated a vigorous public debate about the cost and benefits of global IP rules, in particular for developing countries. IP is no longer perceived as a purely technical and complex regulatory issue which involves a limited number of specialists and business groups. It is increasingly approached as a public policy issue which has a significant cross-sectoral impact on many other policy areas and involves many sectors of society.

In addition, the experience of implementing TRIPS has emphasized the need, for developing countries, to carefully assess the potential benefits of new IP rules against their costs. It has also highlighted the importance for these rules to be supportive of other public policy objectives such as those relating to the transfer of technology, the protection of public health and of the environment. Finally, it has underscored the need for developing countries to avail themselves of the flexibilities they enjoy under existing international IP standards to promote these objectives.

Such considerations figure prominently in the Doha Declaration on TRIPS and Public Health (2001) and in the initiative to establish a Development Agenda for WIPO which was launched at the 40th session of the WIPO Assemblies (2004). They also appear in many statements adopted by developing countries, in recent years, at the highest level. For instance, the Brasilia Declaration adopted by the First Arab-South American Summit, held in May 2005, included a paragraph where the Heads of State and Government :

"Stress their commitment to protect IP, recognizing that IP protection should not prevent developing countries from access to basic science and technology, and from taking measures to promote national development, particularly concerning public health policies."

The trend towards asserting the need to integrate the development dimension in IP is reflected, in part, in the notion of "policy space" consecrated in the Sao Paolo consensus adopted by the UNCTAD XI Conference. [6]

2. The TRIPS-plus trend

At the opposite of the trend recognizing the need for "policy space" by developing countries in formulating and implementing their IP policies, is a trend working towards inducing developing countries to take on so called "TRIPS-plus" obligations.

What exactly are TRIPS-plus obligations? In a general sense, TRIPS-plus refers to "commitments which go beyond what is already included or consolidated in the TRIPS Agreement."[7] More precisely, it can be defined as a "concept which refers to the adoption of multilateral, plurilateral, regional and/or national IP rules and practices which have the effect of reducing the ability of developing countries to protect the public interest."[8] It covers "both those activities aimed at increasing the level of protection for right holders beyond that which is given in the TRIPS Agreement and those measures aimed at reducing the scope or effectiveness of limitations on rights and exceptions under the TRIPS Agreement."[9] TRIPS-plus agreements or commitments can imply: inclusion of new area of IPRs, implementation of a more extensive standard of protection and elimination of an option for countries under TRIPS.[10]

FTAs, at the regional and bilateral level, are the most well known vehicles for TRIPS-plus obligations for developing countries. IP is often one of the most contentious issues in FTAs negotiations and has been, in certain cases, among the main obstacles to their conclusion. This is particularly the case in negotiations over the Free Trade Area of the Americas (FTAA) or the FTAs currently negotiated by the United States with Thailand and with SACU countries.

However, TRIPS-plus commitments do not occur only in bilateral and regional negotiations, but also in international fora outside the WTO such as WIPO.[11] The draft Substantive Patent Law Treaty (SPLT) is an illustration of how WIPO's norm-setting activities could result in TRIPS-plus standards for developing countries, particularly as there have been attempts to focus the negotiations on a limited number of provisions, favored by developed countries, and thus excluding the proposals by developing countries aiming at safeguarding their public policy flexibilities.

At the national level, TRIPS-plus obligations have, in many cases, found their way into the national legislation of developing countries, in implementation of the TRIPS Agreement. This has been the case in areas such as protection of undisclosed information or copyright.

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[6] "Sao Paolo Consensus", UNCTAD .XI, document TD/410, June 25, 2004, para.8 (available at www.unctad.org/en/docs/td410_en.pdf)
[7] David Vivas, *Regional and bilateral agreements and a TRIPS-plus world: the Free Trade Area of the Americas (FTAA),* TRIPS Issues Papers 1, QUNO/QIAP/ICTSD, 2003, p.4
[8] Sisule Musungu and Graham Dutfield, *Multilateral Agreements and a TRIPS-plus world: The World Intellectual Property Organization,* TRIPS Issues Papers 3*,* QUNO/Geneva and QUIAP/Ottawa, 2003, p.3
[9] *Ibid,*
[10] Vivas, *supra*, note 7
[11] *Ibid*,

While there can be a rationale for the acceptance by developing countries of TRIPS-plus obligations in the context of FTAs at the regional and bilateral level, in exchange for other trade related concessions, it is not clear what would be the incentive to do so at the multilateral level or at the national one.

The two trends at work in the field of IP, at the substantive level, have been described as "contradictory." In any case, they put policy-makers of developing countries in a difficult situation as they are simultaneously confronted to TRIPS-plus demands while also they seek to retain the flexibilities they enjoy under TRIPS.

II- Developments relating to IP protection in Arab countries

In general, little attention has been awarded to IP regulation in the Arab world.[12] Nevertheless, the experience of Arab countries in dealing with IP issues is not homogenous as it often varies considerably from one country to another. Arab countries could be divided into two groups: a small group of countries with an active involvement in IP issues at the international level as well as some experience in IP rule-making at the national level and another one with a more limited participation in international IP related discussions and a relatively recent experience in legislating on IP at the domestic level. Furthermore, it is important to note that several Arab countries are not members of the WTO[13] and some are going through their accession process.

However, despite the importance of differentiating between the experiences of Arab countries, it remains that the majority of them has been confronted, in the past decade, to two main challenges: First, compliance with TRIPS and more recently FTAs entailing TRIPS-plus obligations. How have Arab countries dealt with these challenges?

a) TRIPS implementation

The imperative of implementing TRIPS has largely determined the priorities of Arab countries in the field of IP in past years. These priorities have consisted, mainly, in introducing the necessary changes to their legislative framework in implementation of the substantive and procedural requirements of TRIPS as well as in the modernization of their national IP administrations dealing with patents, trademarks and copyright. Efforts have also been made to raise awareness about the importance of IP protection and of its effective enforcement. Issues relating to the protection of traditional knowledge, national heritage and folklore have also received a renewed attention, taking into consideration that many Arab countries had manifested an interest them since several decades.

The process of adjustment to TRIPS has been contrasted, in Arab countries, as it has generated intense public debate in some countries, particularly in relation to issues as TRIPS and public health, while in other countries it has been less controversial. In general, deliberations on IP issues in the Arab world remain confined to a limited number of experts, with little involvement of civil society and consumer organizations.

[12] Mohammed El-Said, The Road from TRIPS-Minus, to TRIPS, to TRIPS-plus, Implications of IPRs for the Arab World, *The Journal of World Intellectual Property*, 2005, p.53
[13] Algeria, Iraq, Libya, Saudi Arabia, Sudan, Syria and Yemen

When examining the national legislations of Arab countries, in implementation of TRIPS, it is worthwhile noting that in some cases they already contain TRIPS-plus obligations. This is, for example, the case in relation to copyright, as many of these legislations include technological protection measures for copyrighted digital works, although this is not a TRIPS-requirement. It is not always clear if these TRIPS- plus obligations are the result of a conscious and deliberate choice by legislators and decision-makers or if they are more the result of inadequate legislative advice given to Arab countries in the process of modernization of their IP laws.

b) FTAs

Since the 1990s, Arab countries have been confronted to FTAs entailing TRIPS-plus obligations first in the partnership agreements concluded with the European Union and then in the FTAs concluded with the United States.

European Partnership agreements contain a general a provision on IP requiring countries which have concluded such agreements to enforce the "highest international standards of IP protection," although it is not entirely clear to which standards this formulation refers to.[14] They also require from countries, which have concluded such agreements, adherence to a certain number of international instruments in the field of IP such as the Patent Cooperation Treaty, the UPOV (1991) convention and the Budapest Convention on the Deposit of Micro-organisms. No reference is made to any of these treaties in the TRIPS agreement. Adherence to UPOV (1991) deprives countries of one of the flexibilities in TRIPS which required the establishment an "effective sui generic system for plant variety protection" without specifying UPOV in particular.
The TRIPS-plus provisions in the FTAs concluded by the United States with Arab countries are of a much more comprehensive nature. They concern all areas of IPRs such as patents, trademarks and copyright. So far only three Arab countries have concluded FTAs with the United States: First Jordan in 2000, then Morocco in 2003 and finally Bahrain in 2004. Negotiations with Oman have been recently concluded, and negotiations are taking place with the United Arab Emirates, Qatar and Kuwait. Exploratory talks are being held with Egypt in perspective of future FTA negotiations.

Many opinions point out to the fact that TRIPS-plus provisions in these FTAs erode the flexibilities available to countries under TRIPS as they narrow the grounds of exclusion from patentability; limit the grounds of issuance of compulsory licenses, oblige parties to provide for an extension of patent term to compensate patent owners for regulatory delays in being able to exploit, envisage longer protection terms for copyright etc.

What is striking when looking at the experience of Arab countries in negotiating FTAs with the US is the short time period in which they have been negotiated. In general, and may be with the exception of the Morocco, there has been little mobilization of civil society and Non-Governmental Organizations (NGOs), during the negotiations. It is not always clear, whether the acceptance of TRIPS-plus obligations in these agreements without extensive negotiations, is more the result of an over-arching desire to conclude those agreements, at any price, or of a lack of understanding of what such obligations would entail.

[14] In the partnership agreement between Egypt and the European Union, reference is made to "prevailing international standards."

III- Towards Development-oriented IP policies in the Arab world

The current predominant view about IP, in Arab countries, still considers IP only as a tool for economic development and growth. This view, often promoted in seminars and conferences held in the region, stresses the absolute benefits of IP in rewarding creativity, promoting innovation, encouraging investment and transfer of technology. However, the international debate has moved beyond this narrow perspective to apprehend IP in the context of wider development policies and in particular in its relation to other important public policy objectives. In this connection, this paper wishes to highlight a number of issues, which Arab countries should take into account in order to pursue more development-oriented IP-policies:

a) Realizing that IP is a contentious issue

Acknowledging the potential benefits of IP protection does not dispense from debating its costs and particularly its impact on the wider socio-economic process in areas such as public health, access to knowledge, agriculture and education. Neither does it dispense from acknowledging that the scope, nature and modalities of IP protection are a matter of contention both within developed countries and between developed and developing countries. Issues such as software patentability, technological protection measures for copyrighted digital works, protection of non-original databases are some examples of contentious IP issues within developed countries and between them. Similarly, the relationship between IP and development, the patenting of life forms, the ways to address the misappropriation of genetic resources and traditional knowledge are deeply divisive issues between developed and developing countries at the international level. Some issues - such as the expansion of scope of protection for geographical indications are a matter of disagreement between developing countries themselves. What can be inferred from the above is that the nature and scope of IP protection must be a subject of extensive deliberations and discussions before new IP rules are formulated or adherence to new international instruments is decided. Ideally, the benefits of new IP rules or adherence to a new IP instruments, should outweigh the costs.

IP can be valuable in promoting innovation and competitiveness, but only when applied in a careful, gradual and selective manner. This is what we learn from a growing amount of historical evidence derived from the experience of developed countries in this regard. Consequently, it is imperative for each Arab country to assess by its own, and to the extent possible, the nature and scope of IP protection that is most suited to its own socio-economic circumstances. There is no "one-size fits all" model to be followed. In doing this, careful attention should be paid to the cross-sectoral effect of IP rules on other public policy objectives. In this regard, little "critical" thinking has been done in the Arab world, in recent years about IP, particularly in its relation to public policy objectives such as transfer of technology, public health and access to knowledge. One of the few exceptions, in this regard, is the Arab Human Development Report of 2003, which examined the situation of knowledge in the Arab world.

b) Promoting Integrated IP policy making

IP policy making in Arab countries, as in most other developing countries, is often fragmented and compartmentalized. For many years, the policy making process was confined to a limited number of government departments and agencies dealing with patents, copyright, trademarks and trade. However, the implementation of new global IP rules, created a new level of awareness

about the impact of IP of such rules on important public policy objectives such as public health, education and agriculture. As a result, there is a growing convergence of opinions on the fact that IP policy-making should be the result be of a coordination across government involving all concerned departments and agencies, in particular those most affected by global IP rules (such as ministries of health, education and environment).

c) Assessing technical assistance and diversifying its sources

Arab countries, as most developing countries, have relied, in the past decade, a great deal on technical assistance in their implementation of the TRIPS agreement, as well in the modernization of their IP infrastructure. However, reliance on a limited number of technical assistance providers makes them more vulnerable to the perspective on IP promoted by these technical assistance providers. This is a matter of importance given that the priorities and modalities of technical assistance in field of IP have come under increasing criticism, in past years, as they are perceived to have focused largely on the enforcement of IP from the perspective of right holders. This can be particularly problematic, especially when there is a conflict between the interests of IP right holders and the larger public interest, such as in public health. The target of these criticisms is not so much technical assistance, embodied in material and physical deliverables, but technical assistance of a more sensitive nature such as legislative advice or seminars on certain contentious IP issues. Consequently, when benefiting from technical assistance in the form of legislative advice or seminars, Arab countries should exert a certain amount of caution, be fully aware of the particular perspective on IP being promoted by the technical assistance provider and be able to assess critically the information provided. When dealing with technical assistance of such form provided by a multilateral organization, Arab countries should legitimately expect that this assistance be neutral, impartial, and that it is not used to influence their domestic legislative process to the benefit of some stakeholders, at the expense of others, or to influence their positions in international negotiations on IP. Arab countries should work towards diversifying their sources of technical assistance, in particular as to include non-traditional providers, and this in order to increase their exposure to a diverse set of perspectives in relation to IP protection.

d) Working towards more effective participation in international standard-setting

Most Arab countries, as most developing countries, are "spectators" in international IP standard-setting[15]. Representatives of Arab countries to international fora dealing with IP issues, such as WTO and WIPO, are often passive or take positions from a narrow "technical" perspective that do not take into consider the wider development dimension of the IP issues under discussion, particularly, in relation to other important public policy objectives. In this connection, it is important to underline that an increasing number of opinions emphasize that the formulation of positions of developing countries in international IP standard-setting should not be the exclusive competence of any particular individual or administration but the result of coordination across government, given the cross-sectoral impact of IP standards. One particular reason why Arab countries should more effectively try to shape the formulation of global IP rules is that these rules are often then incorporated in regional and bilateral FTAs.

[15] Commission on Intellectual Property Rights Report, *Integrating Intellectual Property Rights and Development Policy*, London, 2002, p.138

e) Promoting greater involvement of civil society and consumer groups

In developed countries, and increasingly at the international level, NGOs and particularly consumer groups, participate actively in discussions concerning IP and public health, bio-diversity and traditional knowledge as well as access to knowledge and educational material. In developed countries, in particular, IP rule-making is often the result of an interactive relationship between government, the private sector and civil society. This contributes towards ensuring that new IP rules are balanced and take into account the concerns of all sectors of society. However, discussions about IP and its implications, in Arab countries, are often restricted to a narrow group of "experts" and business groups. The participation of civil society, NGOs and consumer groups in IP related deliberations has been considerably more limited than in other developing countries, particularly in Asia and Latin America. Consequently, there is an urgent need to widen the involvement of civil society and consumer groups in these discussions, particularly, as many Arab countries are engaged in FTA negotiations or are about to initiate such negotiations.

f) Dealing with FTAs

Although the FTAs that some Arab countries, are currently negotiating or will negotiate in the near future, will most likely include a number of TRIPS-plus obligations, it is important for Arab countries to realize that there are often differences in the legal and technical aspects of the provisions included in FTAs. Each FTA has its own dynamics. In this regard, Arab countries should seek to benefit from negotiating expertise acquired by other developing countries, particularly those that have concluded FTAs with long and detailed provisions on IP. Arab countries should, to the extent possible, strive towards the preservation of the flexibilities and exceptions they enjoy under the TRIPS agreement in the FTA negotiations they engage in.

Conclusion

Current developments and trends in the field of IP are confronting Arab countries, as many other developing countries, with a number of difficult challenges and choices. Most Arab countries are not well prepared to deal with them as a narrow perspective on IP protection has prevailed in the Arab world in past years. It is time for Arab countries to move beyond such a narrow perspective towards a more development-oriented one that integrates IP in the wider development policies. Before adopting new IP rules or adhering to new international instruments on IP, Arab countries should carefully assess their costs and benefits, and ensure that the benefits outweigh the costs, in particular the social cost in relation to other important public policy objectives such as the protection of public health, promoting access to knowledge or protecting the bio-diversity. Although the current and prospective FTAs with which Arab countries are faced will most likely entail TRIPS-plus obligations, they might represent a valuable opportunity for many Arab countries to "awake" to the global debate about the cost and benefits of IPRs, particularly for developing countries, that has "shaken" the international community in past years.