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The American University in Cairo

School of Humanities and Social Sciences

**EVALUATION OF EGYPT'S CONFORMITY WITH
INTELLECTUAL PROPERTY STANDARDS IN THE U.S. FREE
TRADE AGREEMENTS**

A thesis submitted to the

Department of Law

**in partial fulfillment for the requirements of
the LL.M Degree in International and Comparative Law**

By

Sherif Hazem Mohamed Ibrahim

May 2008

The American University in Cairo
School of Humanities and Social Sciences

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ABSTRACT

Intellectual property rights have become an integral issue to international trade due to the pressure from developed countries. Developing countries are usually reluctant to adopt advanced measures of IPR protection because of their limited capacities. However, they have been pressured to accept the TRIPS Agreement as part of the WTO single undertaking. Nevertheless, developed countries are still dissatisfied with the multilateral level of IPR protection. Developed countries are thus pursuing free trade agreements that include IPR measures beyond the TRIPS, known as the TRIPS Plus. The U.S. FTAs are famous with their ambitious TRIPS Plus provisions. Those provisions raise fears in many developing countries about the effects of the TRIPS Plus trends. However, the U.S. has managed to enter into FTAs with many developing countries which are motivated by political and commercial benefits. Egypt has very special relations with the U.S. and thus the possibility of an FTA was examined informally by both countries. These FTA preparations were terminated for undisclosed political reasons. The probability of a sudden revival of the FTA preparations is omnipresent, thus it is precautionary for Egypt to examine its ability to conform to IPR standards in the U.S. FTAs apart from the pressure of negotiations. The Egyptian IPR Law is frequently criticized by many developed countries including the U.S. for non compliance with the TRIPS measures. This paper will study first Egypt's compliance with its international IPR obligations. Second, the paper will provide a legal comparison between the Egyptian Law and the U.S. FTAs, with a special focus on that of Morocco. Third, the paper will examine policy concerns that might hinder Egypt's prospects to join an FTA with the U.S.

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I. Introduction

Every country must rely on international trade when it seeks economic growth. The concept of international trade has been lately extended to include fields that formerly belonged to domestic domains such as intellectual property right (IPR), investment and competition.¹ IPR has, therefore, become a common factor in any international trade arrangement, whether bilateral, regional or multilateral. The WTO has as part of its package of agreements, a specialized agreement on the relationship between IPR and international trade. This Agreement is known as the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS)². However, some might fairly argue that the world has already moved beyond the TRIPS era, and now it has become mature enough to accept TRIPS Plus measures.

Multilaterally, IPR was dealt with under the umbrella of a U.N. specialized organization known as the World Intellectual Property Organization (WIPO).³ This organization dealt with IPR from predominantly legal and technical perspectives, while international trade was only a side issue. The consecutive rounds of negotiations under the General Agreement on Tariffs and Trade (GATT)⁴ did not give attention to IPR till the Uruguay Round establishing the World Trade Organization (WTO).⁵ Developed countries had been unsatisfied with the WIPO outcomes, and they thus sought to give a stronger international push for IPR.

The prospects of growth of international trade in terms of volume and scope were attractive enough to motivate developed countries to insert their IPR interests under the GATT umbrella. During the Uruguay Round of GATT negotiations, developed countries managed to insert the issue of IPR in the negotiations agenda,

¹Hereinafter IPR.

²Hereinafter the TRIPS.

³Hereinafter the WIPO.

⁴ Hereinafter the GATT.

⁵Hereinafter the WTO.

despite strong reluctance from developing countries. Developed countries were motivated by the lack of a viable enforcement mechanism under the WIPO or any other international agency. They also asserted that liberalization of international trade should be accompanied by better protection of IPR.

Conversely, developing countries opposed this inclusion of IPR under the GATT for several reasons. First, developing countries were concerned about the negative effects of the monopolistic rights conferred by IPR on their access to strategic products, especially of essential medicines. Second, restraints to dissemination of knowledge necessary to build technological bases also concerned developing countries. Third, these countries had no interest in the unnecessary insertion of IPR into international trade regime, which would only further complicate the Uruguay negotiations. Finally, lack of capacity was a big threat to developing countries' ability to comply with their new IPR obligations under the GATT.

Developed countries responded by granting developing countries great flexibilities with respect to their IPR obligations. These flexibilities included transitional periods to be granted to developing and least developed countries in implementing their obligations. Technical assistance was also promised in IPR areas that would be burdensome to developing countries with limited capacities. Moreover, a major tradeoff for the IPR obligations was made with developing countries by including agricultural products in the multilateral trading system. This inclusion was of great significance to developing countries as their agricultural exports had competitiveness in developed countries' markets. This competitiveness is based on the comparatively cheap labor and raw materials in developing countries. However, these exports faced the challenges of trade tariff barriers imposed by developed countries to protect the interests of their strong agricultural lobbies.

The Uruguay Round negotiations were successful in the establishment of the WTO, with its list of agreements known as the "Uruguay Package". These agreements are binding on all WTO members, as part of the multilateral single undertaking. The WTO has also a relatively efficient enforcement mechanism under its subsidiary Dispute Settlement Body (DSB).⁶

Moreover, the "Uruguay Package" included a specialized agreement on the relationship between IPR and international trade. This agreement is called the WTO Agreement on the Trade Related aspects of Intellectual Property Rights. This agreement sets an international precedence of linking IPR to international trade. Its obligations take a strictly legal and procedural form. Countries are obliged to change their laws in accordance with the TRIPS standards. WTO members are fully free to adopt more ambitious IPR provisions than those in the TRIPS Agreement. The TRIPS, however, acts as a benchmark to determine any additional levels of IPR protection.

At the preferential level, WTO members can adopt more ambitious standards than those in the TRIPS. Such additional standards could be derived from either a regional or bilateral agreement that is usually referred to as "free trade agreement" (FTA).⁷ Sluggish progress in WTO negotiations has encouraged its members to conclude more FTAs. Parties of such FTAs are both developing and developed countries. Each country has selected IPR interests that may not be satisfied under the WTO TRIPS terms and thus tries to attain more favorable FTAs through bilateral negotiations with key trading partners. Favoring the FTA alternative is also because negotiation burdens at the bilateral level are less than those at the WTO level.

⁶Hereinafter the DSB.

⁷Hereinafter FTA.

Bilateral negotiations only address interests of two countries instead of the large number of WTO members.

Developed countries like the U.S. enter into FTA negotiations with developing countries to pursue their areas of priority. For the U.S., IPR is one of the key issues, especially with respect to FTAs with lesser trading partners like those of the Middle East. Lack of proximity of some trading partners limits the scope of trade in agricultural goods. The U.S. normally focuses its FTA negotiations on trade interests like IPR that aren't hindered by distance. The FTA provisions on IPR are known as the TRIPS Plus. These FTAs provisions vastly exceed the level of protection provided by the TRIPS and the U.S. FTAs have the highest international level of IPR protection. In contrast, the E.C.'s Association Agreements have relatively limited emphasis on IPR compared to other issues like trade in agricultural products.

On the other hand, countries with legal systems that fall short of their TRIPS obligations are described as TRIPS Minus. This description applies to countries that are currently in the stage of accession to WTO or WTO members that have enacted TRIPS deficient IPR laws. The deficiency of the laws is frequently the result of public hostility to the TRIPS objectives and effects. TRIPS Minus countries have little chance to join FTAs with the U.S. unless there is substantive legal reform to their IPR laws. Occasionally, the U.S. enters into negotiations with TRIPS Minus countries eliciting strict promises of law reform at later stage.

Informal joint FTA preparations between Egypt and the U.S. took place in 2005, but were terminated for unannounced political reasons. It behooves Egyptian policy makers to examine the conformity of the Egyptian IPR Law with the IPR standards endorsed by the U.S. FTAs in anticipation of future negotiations with the U.S. This precautionary examination will be very useful if these FTA preparations are

revived one day. The number of Arab countries that are parties to the U.S. FTAs is increasing. It is thus reasonable to project a revival of the preparations in the near future as a natural outcome of the special political relations between the U.S and Egypt. It is also useful to carry out this examination apart from the pressures of immediate negotiations with a developed country like the U.S. The intense pressures of the negotiations on the Government of Egypt to adopt TRIPS Plus provision, might preclude thoughtful examination of the Law. The Egyptian Government needs to be well protected against US pressures confronting a pincher with domestic ones. The detection of the legal gaps between the Egyptian IPR Law and the U.S. FTAs, will facilitate the policy formulation process in Egypt.

The purpose of this paper is to identify Egypt's vulnerabilities with respect to IP standards in the U.S. FTAs. Two steps are necessary: first, the examination of Egypt's compliance with its current international IPR obligations, then a comparative study between the Egyptian IP Law and the U.S. FTAs.

Chapter 1 of this paper provides an introduction to the issue of IPR in the context of international trade. It also highlights the purpose and background of this paper.

Chapter 2 provides an extensive overview of Egypt's current international obligations in the field of IPR. This chapter identifies the benchmarks from which policy makers can consider the application of further standards. It covers Egypt's obligations under the Paris, Berne and Rome Conventions as well as the TRIPS Agreement. Egypt isn't yet a member of the Rome Convention, but must accede to this Convention before June 2008, as required by the preferential Association Agreement with the E.C. and the FTA with the EFTA Group. This chapter includes an

examination of the brief IPR provisions encompassed by these preferential agreements.

Chapter 3 explains major U.S. concerns about IPR protection in Egypt, specifically in reference to comments from the U.S. annual reports addressing IPR. This Chapter reviews the USTR Section 301 and National Trade Estimate reports. It also considers the annual report issued by the International Intellectual Property Alliance (IIPA) which is influential on the USTR decision making.⁸ It then considers the U.S. concerns expressed at the multilateral level under the WTO trade policy review for Egypt.

Chapter 4 looks directly at the issue of Egypt's conformity with the IP standards in the U.S. FTAs. A legal comparison between the Egyptian IP Law and the U.S. FTA with Morocco will be presented. The choice of Morocco was made on grounds of its great similarity with Egypt in terms of economic conditions. In addition, both Egypt and Morocco are Arab countries with some similar political concerns *vis –a vis* the U.S.

Chapter 5 concludes with summary of the areas of the Egyptian policy concerning the IPR standards in the U.S. FTAs. A consideration of reports from various U.N. organizations will be included. Recommendations for the IPR legal reform in Egypt will be provided as well. In conclusion, this paper focuses on the vision of the Egypt's prospects of signing an FTA with the US.

II. Exploring International IPR standards That Are Obligatory to Egypt

⁸Hereinafter the IIPA.

A. Multilateral Treaties

1. The Paris Convention⁹

The Paris Convention for the Protection of Industrial Property is the oldest working IPR legal text, dating from 1883. This Convention was revised several times. The latest version was revised at Stockholm in 1967 and amended in 1979. It provides protection to all fields of industrial property. The comprehensive approach of this Convention was then replaced by that of the WIPO which deals separately with each form of industrial property. WIPO treaties cover very specific aspects pertaining to one particular field of industrial property, like registration of trademarks or classification of patents. The Convention is, almost in whole, incorporated in the TRIPS.¹⁰

a. Patents

Patent provisions under the Convention do not cover all areas pertaining to the global patent protection system. The Convention only covers some areas without giving precise details concerning, for instance, term of patent protection. The Convention covers the priority rights for patents. Such rights make the patent applicant entitled to priority in his invention in all countries of the Paris Union. This priority has effect in other countries of the Paris Union even if other applications are filed by third parties for the same invention.¹¹ This priority right is only for a limited period of one year from the filing date in the original country.¹² The second application filed by the original applicant in another country of the Union is to be treated as the original application. This second application is completely independent

⁹ Paris Convention for the Protection of Industrial Property, (20 March 1883), Stockholm Act (1967), modified in 1979, Publication of the World Intellectual Property Organization No. 201(E).

¹⁰TRIPS, *supra* note 2, at Article 2.1.

¹¹Paris Convention, *supra* note 9, at Article 4.A(1).

¹²Paris Convention, *supra* note 9, at Article 4C(1) – (2).

of the first one upon which priority is established.¹³ The only link between both applications is the priority right enjoyed by the applicant for the second application by virtue of the first one. This means that refusal of the first application has no effect on the authorities' decision concerning the second application.¹⁴

Inventors shall always enjoy the moral right of attribution of their inventions to their names apart from the transfer of economic rights.¹⁵ The patent is to be treated in the abstract. A patent only provides the inventor with a negative right to prevent others from making use of the patent without his consent. However, the patent holder has to go through other procedures for getting the marketing approval for the patented product. The competent authority's decision on marketing approval is without retroactive effect on the patent itself. Accordingly, refusal of marketing approval shall not prevent the applicant from being granted patent protection.¹⁶

Patent rights are subject to limitations such as compulsory licenses or forfeiture. A compulsory license is the first option available to the authorities in the face of insufficient supply of the patented product. Under compulsory licensing, competent authorities assign third parties to use the patent to fill in the shortage in the supply of the patented product. The patent holder does not fully lose his rights to the patent. The holder's right to prevent third parties from using the patent only becomes conditionally and partially suspended. Compulsory licensing is justified by the Convention to avoid abuses of exclusive rights conferred by the patent.¹⁷ Abuses are considered broadly by the Convention. Failure to work is one example of the possible grounds for issuing compulsory licenses.¹⁸ This failure can be a total failure to make

¹³Paris Convention, *supra* note 9, at Article 4bis (1).

¹⁴Paris Convention, *supra* note 9, at Article 4bis (1)-(2).

¹⁵Paris Convention, *supra* note 9, at Article 4ter.

¹⁶Paris Convention, *supra* note 9, at Article 4quater.

¹⁷Paris Convention, *supra* note 9, at Article 5A(2).

¹⁸Paris Convention, *supra* note 9, at Article 5A(2).

use of the patent or just insufficient use.¹⁹ The compulsory license can only be issued on the ground of failure to work after "three years from granting the patent or four years from the date of application".²⁰ This compulsory license is issued unless the patent holder demonstrates that external factors forced such failure.²¹ In contrast, forfeiture prevents the patent holder from making use of the patent. Forfeiture may only be resorted to by the authorities in cases where compulsory licenses fail to reach their objectives.²² Forfeiture can only be made after two years from the date of issuance of the first compulsory license.²³

b. Marks

Marks and patents share some aspects like priority rights. Otherwise, marks are covered by the Convention in specific provisions. Unlike patents, the priority right for trademarks under the Convention is only six months from the date of the first application.²⁴ Marks applications are like patents with respect to their full independence even from the country of origin.²⁵ Specific provisions assigned to marks include the protection of well - known marks. This protection can either be *ex officio* or, at least, upon request of an interested party.²⁶ Marks are protected against all acts that are likely to cause confusion with the original marks.²⁷ The period for which owners of well - known marks can request the cancellation of their registration is "five years from the date of this registration".²⁸ However, such a period of limitation isn't binding on owners in cases of bad faith.²⁹ "Trade names shall also be protected

¹⁹Paris Convention, *supra* note 9, at Article 5A(4).

²⁰Paris Convention, *supra* note 9, at Article 5A(4).

²¹Paris Convention, *supra* note 9, at Article 5A(4).

²²Paris Convention, *supra* note 9, at Article 5A(3).

²³Paris Convention, *supra* note 9, at Article 5A(3).

²⁴Paris Convention, *supra* note 9, at Article 4C(1) – (2).

²⁵Paris Convention, *supra* note 9, at Article 6.

²⁶Paris Convention, *supra* note 9, at Article 6bis(1).

²⁷Paris Convention, *supra* note 9, at Article 6bis(1).

²⁸Paris Convention, *supra* note 9, at Article 6bis(2).

²⁹Paris Convention, *supra* note 9, at Article 6bis(3).

whether or not they form parts of marks".³⁰ Goods infringing marks or trade names shall be seized or at least prohibited from importation.³¹ Seizure could either be upon request of an interested party or *ex officio* by the competent authority.³² This prohibition of importation does not apply to goods in transit trade.³³ The seizure must also take place inside the country where the infringement of the mark happened.³⁴

c. False Indications

The Convention provides some measures to combat false indications. False indications can either be for "the source of the goods or the identity of the persons interested in the good whether the producer, manufacturer, or merchant".³⁵ Persons, whether natural or legal, are considered to be interested parties.³⁶ The false indication of source can be for either the locality or country of the good.³⁷ The geographical indication (GI) is a subsidiary area to false indication that was later introduced to international trade.

The major difference between false indications of source and GIs lies in the factor of the geographical place of production of the good as emphasized by the latter. Geographical indication is thus a specification of the wider concept of false indication of source. To elaborate, if the indication of source involves a false indication of the geographical region of its production, then an infringement of a GI occurs.

d. Industrial Designs

³⁰Paris Convention, *supra* note 9, at Article 8.

³¹Paris Convention, *supra* note 9, at Article 9(1)&(5).

³²Paris Convention, *supra* note 9, at Article 9(3).

³³Paris Convention, *supra* note 9, at Article 9(4).

³⁴Paris Convention, *supra* note 9, at Article 9(2).

³⁵Paris Convention, *supra* note 9, at Article 10(1).

³⁶Paris Convention, *supra* note 9, at Article 10(2).

³⁷Paris Convention, *supra* note 9, at Article 10(2).

Industrial designs are not covered in the Convention in much detail with respect to duration and rights conferred by protection. Generally, the Convention states that "industrial designs shall be protected in all countries of the Union".³⁸ The right of priority for industrial designs is determined by the Convention as six months, like that of marks.³⁹ Forfeiture of industrial designs protection is prohibited by the Convention on any grounds.⁴⁰ Meanwhile, the Convention is silent about compulsory licensing for industrial designs.

e. Unfair Competition

The Convention covers the issue of unfair competition in an extremely broad manner that would later be the TRIPS foundation of the legal justifiability of the protection granted to all forms of IPR. However, the reliance on the concept of fair competition varies from one IPR form to another. Fair competition is more assertively referred to in provisions covering some particular IPR forms like undisclosed information and indications of source. The Convention, in turn, only provides the obligation to prevent acts of unfair competition, especially those related to misrepresentation of business information.⁴¹

The prohibition of misrepresentation of business information in both the Convention and the TRIPS aims to protect the public from being misled.⁴² The Convention identifies misrepresentation of one's business to include the nature, quality, quantity or the characteristics of his goods.⁴³ On the other hand, the act of misrepresenting information about others can be to either confuse the public or discredit others' businesses.⁴⁴

³⁸Paris Convention, *supra* note 9, at Article 5quinquies.

³⁹Paris Convention, *supra* note 9, at Article 4.C(1).

⁴⁰Paris Convention, *supra* note 9, at Article 5.B.

⁴¹Paris Convention, *supra* note 9, at Article 10bis(1).

⁴²Paris Convention, *supra* note 9, at Article 10bis(3)3 & TRIPS, *supra* note 2, at Article 22.3.

⁴³Paris Convention, *supra* note 9, at Article 10bis(3)3.

⁴⁴Paris Convention, *supra* note 9, at Article 10bis(3) 2-3.

2. The Berne Convention⁴⁵

In addition to the Paris Convention, the Berne Convention for the Protection of Literary and Artistic Works is another of the oldest IPR legal texts in the world. It goes back to the year 1886 and has been revised several times reflecting the evolution of copyrights. The current version was reissued under the name of the Paris Act of 1971, later amended in 1979. However, this Convention is still referred to by its historical name "the Berne Convention". The Convention only obliges countries of the Berne Union to meet the minimum standards of copyright protection endorsed by its provisions. Those countries are fully free to adopt further protective measures in their laws.⁴⁶ The same applies to higher standards provided by agreements between countries.⁴⁷

a. Scope of Protection

The scope of protection provided by the Berne Convention covers all forms of literary, scientific and artistic works.⁴⁸ The Convention drafters, apparently aware of the evolutionary nature of copyrights, used concise wording for the scope of copyright protection. The Convention, thus, provides a long non – exhaustive list of the possible fields of copyrights. However, this list allows for the future adoption of other copyright areas like computer programs and compilations of databases. It also sets the precedent for segregating the collection from its content. This aspect is mentioned in the Convention with reference to encyclopedias and anthologies, where efforts used in

⁴⁵ Berne Convention for the Protection of Literary and Artistic Works (9 September 1886), Act of Stockholm (1967), Publication of the World Intellectual Property Organization No. 282(E), Paris Act (1971) as modified in 1979 Publication of the World Intellectual Property Organization No. 287(E), (hereinafter the Berne Convention).

⁴⁶ Berne, *supra* note 45, at Article 19.

⁴⁷ Berne, *supra* note 45, at Article 20.

⁴⁸ Berne, *supra* note 45, at Article 2(1).

compiling the information deserve their own protection.⁴⁹ This protection of compilations is separate from the copyright of their contents.⁵⁰

b. Rights Conferred

i. Moral Rights

Rights granted under the Convention can be categorized as either moral or economic rights. Unlike economic rights, moral rights are non-transferable during the author's life and aren't subject to any limitations of any kind.⁵¹ The author always enjoys the right of attribution of the work to his name.⁵² The author also has the right to object to any alteration of his work in a manner that could adversely affect his public image.⁵³ Such alterations are redressable by the author.⁵⁴ Moral rights are also enjoyed by his successor in title after his death for at least the duration of protection of economic rights for the same work.⁵⁵

ii. Economic Rights

Economic rights have more extensive coverage in the Convention with some specificities pertaining to particular forms of copyright. The first among those economic rights is the right of translation.⁵⁶ The author has the "exclusive right to make or authorize" the translation of his protected work.⁵⁷ This right is subject to a limitation that it is only enjoyable by countries declaring themselves as developing countries.⁵⁸ Those countries have the right to authorize translation of the protected work to the languages prevailing in their territories.⁵⁹ This is only allowed by the Convention if the author has not made or authorized the translation within three years,

⁴⁹Berne, *supra* note 45, at Article 2(5).

⁵⁰Berne, *supra* note 45, at Article 2(5).

⁵¹Berne, *supra* note 45, at Article 6bis(1).

⁵²Berne, *supra* note 45, at Article 6bis(1).

⁵³Berne, *supra* note 45, at Article 6bis(1).

⁵⁴Berne, *supra* note 45, at Article 2(3).

⁵⁵Berne, *supra* note 45, at Article 2(2).

⁵⁶Berne, *supra* note 45, at Article 8.

⁵⁷Berne, *supra* note 45, at Article 8.

⁵⁸Berne, *supra* note 45, at Appendix, Article II(1).

⁵⁹Berne, *supra* note 45, at Appendix, Article II(2)(a).

or if the authorized copies are out of print.⁶⁰ This period can be reduced to only one year if the translation is carried out in a language that is not the same as that of any of the developing countries members to the Convention.⁶¹ This exceptional right granted by the authorities to third parties is not exclusive or transferable.⁶²

The second economic right is the exclusive right of reproduction of the original copy created by the author.⁶³ The core principle in this regard is to secure the author's right to authorize making his work available to the public. Reproduction can take several forms including broadcasting or cinematographic adaptation.⁶⁴ Other acts of reproduction are only applicable to specific forms of copyright and are thus treated separately under the provisions of the Convention. For example, "authors of dramatic and musical works shall enjoy the exclusive right to authorize the public performance or any communication to the public of this performance of their protected works".⁶⁵ Moreover, authors of artistic works and manuscripts enjoy the consistent right to a share in all the resales made after the original transfer of his economic rights.⁶⁶

The third economic right is the right to authorize adaptations, arrangements and other alterations of the protected works.⁶⁷ The fourth is the author's right to enforce protection for his works through legal proceedings available under the legislation of each country.⁶⁸ Infringing copies of the protected works are to be seized by the countries whether in their domestic markets or on importation.⁶⁹ The Convention is not specific about the nature of such proceedings and other alternatives

⁶⁰Berne, *supra* note 45, at Appendix, Article II(2)(a)-(b).

⁶¹Berne, *supra* note 45, at Appendix, Article II(3)(a).

⁶²Berne, *supra* note 45, at Appendix, Article II(1).

⁶³Berne, *supra* note 45, at Article 9(1).

⁶⁴Berne, *supra* note 45, at Articles 11bis & 14.

⁶⁵Berne, *supra* note 45, at Article 11(1).

⁶⁶Berne, *supra* note 45, at Article 14 ter.

⁶⁷Berne, *supra* note 45, at Article 12.

⁶⁸Berne, *supra* note 45, at Article 15.

⁶⁹Berne, *supra* note 45, at Article 16.

or complementary administrative procedures. This might explain the presence of the detailed enforcement provisions in the TRIPS Agreement.

c. Terms of Protection

The term of protection of copyright is the author's life plus fifty years after his death.⁷⁰ For joint works, the computation of the term of protection starts from the death of "the last surviving author".⁷¹ If the author's life is unavailable, the benchmark for computing the term of protection is replaced by an alternative method. Specifically, the term of protection then becomes fifty years from the date of making the work available to the public.⁷² This alternative method would cease to apply if, under any circumstances, the author's name becomes available during the term of protection.⁷³ The term of protection for photographic works and works of applied arts is twenty five years from the date of making.⁷⁴

3. The Rome Convention⁷⁵

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was completed in Rome in 1961. This Convention covers forms that are considered integral to the international IPR protection regime. The peculiar nature of this Convention is that it includes forms that are not always compatible with the conventional conceptualization of IPR, which covers products that are the creation of the human mind. The intangibility of these creations makes them different from ordinary trade in goods. Nevertheless, they cannot be neglected in commercial law as they hold a considerable value added in all economic activities. Questions arise with respect to the applicability of IPR

⁷⁰Berne, *supra* note 45, at Article 7(1).

⁷¹Berne, *supra* note 45, at Article 7bis.

⁷²Berne, *supra* note 45, at Article 7(3).

⁷³Berne, *supra* note 45, at Article 7(3).

⁷⁴Berne, *supra* note 45, at Article 7(4).

⁷⁵Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, (26 October 1961),, Publication of the World Intellectual Property Organization No. 203(E), (hereinafter the Rome Convention).

intangibility to forms of related rights like producers of phonograms. The entrepreneurial character of phonogram production cannot be compared to the creativity effort of copyright authors. These phonogram producers, rather, profit from the creations of others (the authors). They provide only the financial and managerial leverage necessary to make the creations economically rewarding for the creators.

a. Scope of Protection (National Treatment)

The wide scope of protection provided by the Convention is already stated in the title of the Convention which provides protection to performers, producers of phonograms and broadcast organizations. There are sub - scopes in each of the three fields. All types of protection fall under the principle of national treatment. For performers, protection is offered by the Contracting States according to the criteria of place of performance or incorporation of the performance in any of the other two fields of related rights.⁷⁶ Performance in one of the Contracting States entails protection regardless of the nationality of the performers.⁷⁷ Incorporation of the performance into either phonograms or broadcasts doesn't derogate from the protection granted to performers under the Convention.⁷⁸

For producers of phonograms, the eligibility for protection depends on either the nationality of the producer, fixation or publication of the phonogram.⁷⁹ Nationality lies in the simple concept of national treatment, in which protection is granted to nationals of other Contracting States.⁸⁰ The other two grounds of national treatment for producers of phonograms are based on the place of production, regardless of the nationality of the producers.⁸¹ Those two grounds of national treatment acts can either

⁷⁶*Id.*, at Article 4.

⁷⁷Rome, *supra* note 75, at Article 4(a).

⁷⁸Rome, *supra* note 75, at Article 4(b)-(c).

⁷⁹Rome, *supra* note 75, at Article 5.

⁸⁰Rome, *supra* note 75, at Article 5.1(a).

⁸¹Rome, *supra* note 75, at Article 5.1(b) – (c).

be the first fixation or publication in another Contracting State.⁸² Any State can, however, choose not to apply either the fixation or the publication criterion.⁸³

For broadcasting organizations, national treatment can be granted according to the place of either the business headquarters or transmission.⁸⁴ The place of business is where the headquarters of the organization are established in another Contracting State.⁸⁵ The place of transmission acts as a ground for national treatment under the Convention if the transmitter is placed in another State of the Rome Union.⁸⁶ A State can, as in the case for producers of phonograms, choose to apply both criteria.⁸⁷ In such a case, for an organization to be eligible for protection it must have its headquarters and transmit in the same State.⁸⁸ As the case for performers and producers of phonograms, the nationality of the organization is not a prerequisite to protection.

b. Rights Conferred

Rights conferred differ depending upon the field of related rights. They are all described in the Convention as the minimum rights. This implicitly encourages or at least enables Contracting States to adopt further measures. Performers have the right to authorize the acts of fixation, reproduction and public availability.⁸⁹ The latter can be done by either broadcasting or other means of communication to the public.⁹⁰ Producers of phonograms "have the right to authorize or prohibit the direct or indirect reproduction of their phonograms"⁹¹. The performers and producers are also entitled to a "single equitable remuneration" for secondary uses other than those initially destined

⁸²Rome, *supra* note 75, at Article 5.1(b) – (c).

⁸³Rome, *supra* note 75, at Article 5.3.

⁸⁴Rome, *supra* note 75, at Article 6.1.

⁸⁵Rome, *supra* note 75, at Article 6.1(a).

⁸⁶Rome, *supra* note 75, at Article 6.1(b).

⁸⁷Rome, *supra* note 75, at Article 6.2.

⁸⁸Rome, *supra* note 75, at Article 6.2.

⁸⁹Rome, *supra* note 75, at Article 7.1.

⁹⁰Rome, *supra* note 75, at Article 7.1.

⁹¹Rome, *supra* note 75, at Article 10.

by the performance or production.⁹² This remuneration is specifically required with respect to broadcasts or other means of making their performances or phonograms available to the public.⁹³ Broadcasting organizations have the right to authorize or prohibit the rebroadcasting, fixation or reproduction of their broadcasts.⁹⁴

c. Terms of Protection

The term of protection prescribed under the Convention for any of the three fields of related rights is twenty years.⁹⁵ For performers, this term is computed from the date of either the performance or the incorporation of the performance in a protected phonogram.⁹⁶ For producers of phonograms, the computation starts from the date of fixation.⁹⁷ For broadcasts, it starts from the broadcasting date.⁹⁸ Notably, this term is stated in the Convention as the "minimum duration of protection", which paves the way for increasing this term under the TRIPS.⁹⁹

4. The WTO TRIPS Agreement

The TRIPS Agreement presents the benchmark for any given IPR law of any of the WTO members including Egypt. Any WTO member is free to go beyond the TRIPS standards or levels of protection as long as there is no contravention to its provisions.¹⁰⁰ Members are practically and legally expected to draft their laws in view of the TRIPS. The country can then insert additional levels of protection that build on those specified by the TRIPS. This Agreement, unlike the WIPO approach which treats each form of IPR separately, treats IPR as a whole.

⁹²Rome, *supra* note 75, at Article 12.

⁹³Rome, *supra* note 75, at Article 12.

⁹⁴Rome, *supra* note 75, at Article 13(a)-(c).

⁹⁵Rome, *supra* note 75, at Article 14.

⁹⁶Rome, *supra* note 75, at Article 14(a).

⁹⁷Rome, *supra* note 75, at Article 14(b).

⁹⁸Rome, *supra* note 75, at Article 14(c).

⁹⁹Rome, *supra* note 75, at Article 14 .

¹⁰⁰TRIPS, *supra* note 2, at Article 1.1.

The TRIPS has 73 Articles covering various aspects of IPR including administration and procedures pertaining to the mandate of the TRIPS Council. Some of the TRIPS provisions, like those on national treatment, most favored nation, objectives and general principles, treat all forms of IPR equally. Other TRIPS provisions cover only specific IPR forms, in which redundancy with other provisions of the WIPO treaties is carefully avoided. This redundancy avoidance occurs only in the TRIPS text with respect to WIPO treaties that are accepted widely like the Berne, Paris and Rome Conventions. The approach of the TRIPS is thus to build on the already existing obligations under the WIPO treaties. This is done by simply incorporating the core provisions of each of those treaties in their proper context in the TRIPS.

a. Copyrights and Related Rights

i. Copyrights

The part of the TRIPS covering copyright and related rights, begins by requiring all WTO members to comply with Articles 1 to 21 of the Berne Convention.¹⁰¹ The TRIPS then adds measures to those provided by the Berne Convention. Forms of copyrights that are not provided by the Berne Convention, like "computer programs and compilations of data", are clearly stated by the TRIPS to be integral to the copyright scope.¹⁰² Specific rights are also added, namely "rental rights for the public for computer programs and cinematographic works".¹⁰³ Such rental rights are not referred to in the Berne Convention.

¹⁰¹TRIPS, *supra* note 2, at Article 9.1.

¹⁰²TRIPS, *supra* note 2, at Article 10.

¹⁰³TRIPS, *supra* note 2, at Article 11.

Terms of copyright protection are covered in full detail by the Berne Convention.¹⁰⁴ A further elaboration of such terms is provided by the TRIPS, which makes the computation of the term of protection on the basis of the creation of the protected work.¹⁰⁵ This is only the case where, neither the author nor the date of public availability is known.¹⁰⁶ In contrast, the Berne Convention makes the computation on the basis of the creation of the work with respect only to cinematographic and photographic works.¹⁰⁷

ii. Related Rights

The TRIPS made more substantive contributions in the field of related rights than copyrights. The reason for this greater contribution by the TRIPS is that a smaller number of countries are members of the Rome Convention compared to the Berne Convention. Accordingly, it was not feasible to make a direct incorporation of the Rome Convention's provisions in the TRIPS. The TRIPS had, thus, to reiterate some of the basic provisions encompassed by the Rome Convention. For example, rights conferred to performers¹⁰⁸, producers of phonograms¹⁰⁹ and broadcast organizations¹¹⁰ were just reiterated by the TRIPS without any substantial changes.

The TRIPS also elevates the status of protection in other provisions of the Rome Convention. This elevated protection deals with terms of protection for both performers and producers of phonograms. These terms are raised by the TRIPS to fifty years instead of twenty years as provided by the Rome Convention.¹¹¹ The basis of computation for the terms of protection of related rights, unlike those in the case of

¹⁰⁴Berne, *supra* note 45, at Articles 7 – 7bis.

¹⁰⁵TRIPS, *supra* note 2, at Article 12.

¹⁰⁶TRIPS, *supra* note 2, at Article 12.

¹⁰⁷Berne, *supra* note 45, at Articles 7(2) & 7(4).

¹⁰⁸ TRIPS, *supra* note 2, at Article 14.1, Rome, *supra* note 75, at Article 7.

¹⁰⁹TRIPS, *supra* note 2, at Article 14.2, Rome, *supra* note 75, at Article 10.

¹¹⁰TRIPS, *supra* note 2, at Article 14.3, Rome, *supra* note 75, at Article 13.

¹¹¹TRIPS, *supra* note 2, at Article 14.5, Rome, *supra* note 75, at Article 14.

copyrights, are the same in both the TRIPS and the Rome Convention.¹¹² Meanwhile, the twenty year term of protection that is provided by the Rome Convention "from the end of the year in which the broadcast took place" is kept unchanged.¹¹³

b. Trademarks

Although the Paris Convention extensively covers various aspects pertaining to marks, the TRIPS added a limited number of provisions that are effective in strengthening the protection. Above all, the TRIPS has made a terminological change from the frequent reference to "marks" by the Paris Convention to "trademarks". This shift actually suits the contextual nature of the TRIPS' being part of the international trade regime. The TRIPS sets a term of protection for trademarks of seven years, to be renewable indefinitely.¹¹⁴ It also extends the protection of well known marks to services, while the Paris Convention limits the protection to goods.¹¹⁵ This protection offered by the TRIPS is ambitious as it requires no registration and has to be carried out *ex officio* by members.¹¹⁶

The TRIPS makes a more decisive requirement than that of the Paris Convention regarding the distinctiveness of the marks.¹¹⁷ The TRIPS gives WTO members the option of requesting that marks are visually perceptible in order to be eligible for protection.¹¹⁸ The TRIPS makes the application of border measures to trademarks obligatory.¹¹⁹ In contrast, the Paris Convention lists a number of options with respect to seizure on importation.¹²⁰ The first option is the seizure on importation upon request of an interested party or *ex officio*.¹²¹ The second option is the

¹¹²TRIPS, *supra* note 2, at Article 14.5, Rome, *supra* note 75, at Article 13.

¹¹³TRIPS, *supra* note 2, at Article 14.5, Rome, *supra* note 75, at Article 13.

¹¹⁴TRIPS, *supra* note 2, at Article 15.

¹¹⁵TRIPS, *supra* note 2, at Article 14.5 & Paris, *supra* note 9, at Article 6 bis.

¹¹⁶Paris, *supra* note 9, at Article 6 bis.

¹¹⁷TRIPS, *supra* note 2, at Article 15.1 & Paris, *supra* note 9, at Article 6 quinquies (B).

¹¹⁸TRIPS, *supra* note 2, at Article 15.1 & Paris, *supra* note 9, at Article 6 quinquies (B).

¹¹⁹TRIPS, *supra* note 2, at Article 50.1.

¹²⁰Paris, *supra* note 9, at Article 9.

¹²¹Paris, *supra* note 9, at Article 9 (3).

prohibition of importation where the law of the member does not permit the seizure.¹²² The third option is a temporary one that does not apply to Egypt anymore. It grants nationals of a country of the Paris Union the same protection granted to nationals of any other country, if the laws of the latter do not permit seizure or prohibition of importation.¹²³

The TRIPS is clear that the owner has the right to assign his trademark with or without the transfer of the business to which the trademark belongs.¹²⁴ This provision replaces the optional character of this obligation under the Paris Convention.¹²⁵ Compulsory licenses for trademarks are prohibited by the TRIPS, where the Paris Convention leaves this point unclear.¹²⁶

c. Geographical Indications (GIs)

The inclusion of this form of IPR in international trade is attributed to the TRIPS. The Paris Convention only provides protection against false indication of source, without a reference to the term of GI. Rather, it presents the terms indications of source and appellations of origin as objects of industrial property.¹²⁷ In contrast, the TRIPS provides for full coverage of GIs. However, a controversy over the level of GIs protection took place in the Uruguay Round while drafting the TRIPS. This controversy led to a compromise in the text of the TRIPS, which is currently full of contradictions and ambiguities. This compromise explains the TRIPS' flexibility with respect to the system of GIs protection offered by each member. WTO members may choose any legal system under which GIs would be protected, as long as the TRIPS standards are met. This TRIPS flexibility is different from its precise requirements for the protection of other IPR forms like patents.

¹²²Paris, *supra* note 9, at Article 9 (5).

¹²³Paris, *supra* note 9, at Article 9 (6).

¹²⁴TRIPS, *supra* note 2, at Article 21.

¹²⁵Paris, *supra* note 9, *supra* note 9, at Article 6 quater.

¹²⁶TRIPS, *supra* note 2, at Article 21.

¹²⁷Paris, *supra* note 9, at Article 1.

The TRIPS provisions include the definition of GIs, which specifies "goods attributed to some geographical area".¹²⁸ Examples of such GIs include goods like Cheddar cheese and Bordeaux wine. Exceptions to GIs protection are clearly specified in the TRIPS. These include an "exception to the protection of GIs for wines and spirits, that were continuously used in good faith for at least ten years before the entry into force of the TRIPS".¹²⁹ Another exception covers some acts pertaining to trademarks that are identical or similar to GIs. Despite the overlapping with GIs, trademarks may be entitled protection if they are registered, applied for or used in good faith, before either the implementation of the TRIPS or the date of GI protection in the country of origin.¹³⁰ Moreover, WTO members are not obliged under the TRIPS to offer protection to GIs that are not protected in the country of origin.¹³¹

However, other TRIPS provisions on GIs may produce confusion regarding the two levels of protection. A review of the historical context of drafting the TRIPS can help eliminate some of this confusion. The negotiators were divided over GIs into proponents and opponents. The proponents of GIs in general include countries in what is known as the Old World, *vis -a- vis*, those of the New World. The latter term refers to countries that were discovered in the mid - centuries including the Americas, Australia and New Zealand. Before discovery, such countries had not developed the human communities that exist today, and thus, they are unlikely to have their GIs now. This is due to the fact that a GI is an accumulative gift to a particular community that develops over generations. The Old World has a lot of interests in GIs, whereas the New World acts as a free user of GIs. Legitimate grounds for such use are, however, claimed by the New World. The current inhabitants of many of the New

¹²⁸TRIPS, *supra* note 2, at Article 22.1

¹²⁹TRIPS, *supra* note 2, at Article 24.4.

¹³⁰TRIPS, *supra* note 2, at Article 24.5.

¹³¹TRIPS, *supra* note 2, at Article 24.9.

World countries are descendants of the Old World, particularly from Europe. Accordingly, the New World seeks to prevent Europe from claiming exclusivity to GIs that are currently shared by descendants of the same European origins.

These negotiations led to a compromise between two levels of GI protection. The initial level now includes all GIs except those for wines and spirits. At this level, WTO members are obliged to prevent the use of GIs where the public is being misled about the true origin of the product.¹³² This means that except for wines and spirits, members may allow the use of foreign GIs in their territories. The users have to clearly state the true place of production which may be different from the one implied by the GI. For example, a Danish company can produce the Egyptian Damietta cheese, as long as the consumers in Denmark are not misled to believe that it was produced in Egypt. The additional level of GIs protection is only granted by the TRIPS at the current stage to wines and spirits.¹³³ Under this additional level, even the mention or reference in the course of trade of any kind of the protected GIs for wines or spirits is prohibited.¹³⁴ Members are obliged to offer GIs protection upon request of an interested party, while they have to *ex officio* protect GIs incorporated in trademarks.¹³⁵ The TRIPS doesn't specify any term of protection for GIs, as the termination of protection after the lapse of this term does not suit the accumulative nature and the generic proprietorship of GIs.

The TRIPS has a different mandate to the TRIPS Council regarding future negotiations on each of the two levels of GIs protection. For the first level of GIs protection, the language of the provisions on the future negotiations is less mandatory than those of the additional level. Members are instructed by the TRIPS to enter into

¹³²TRIPS, *supra* note 2, at Article 22.2(a).

¹³³TRIPS, *supra* note 2, at Article 23.

¹³⁴TRIPS, *supra* note 2, at Article 23.1.

¹³⁵TRIPS, *supra* note 2, at Article 22.3.

negotiations to increase the scope of the additional level of protection that is currently granted to wines and spirits.¹³⁶ The real target of this negotiations mandate is the elevation of the first level of GIs protection to the additional one. The language of the provisions on the negotiations mandate for the additional level is much stronger and straightforward. The provisions on this additional level instruct the "TRIPS Council to hold official negotiations on the establishment of the multilateral system of notification and registration of GIs for wines and spirits".¹³⁷ The objective of this multilateral system is only to facilitate and not elevate the protection.¹³⁸ This multilateral system is also voluntary with respect to participation. Members are not obliged to furnish notification of their GIs for wines or spirits in the event that they do not have any or are disinterested.¹³⁹

d. Industrial Designs

The TRIPS makes substantial additions to measures for industrial design protection offered by the Paris Convention. The TRIPS specifies novelty or originality as the test for protection.¹⁴⁰ A clear distinction is made between industrial designs and patents. Protection offered to industrial designs must not be extended to technical or functional aspects.¹⁴¹ Rights conferred to owners of industrial designs are listed. Such rights are similar to patents and unlike copyrights. Both patents and industrial designs give their owners the "negative rights". These rights grant the owners the privilege of preventing "third parties from making, selling or importing goods bearing their industrial designs without their consent".¹⁴² An infringement can consist of either copycatting the entire design in full or by partially copying a substantial part.¹⁴³ The

¹³⁶TRIPS, *supra* note 2, at Article 24.1.

¹³⁷TRIPS, *supra* note 2, at Article 23.4.

¹³⁸TRIPS, *supra* note 2, at Article 23.4.

¹³⁹TRIPS, *supra* note 2, at Article 23.4.

¹⁴⁰TRIPS, *supra* note 2, at Article 25.1.

¹⁴¹TRIPS, *supra* note 2, at Article 25.1.

¹⁴²TRIPS, *supra* note 2, at Article 26.1.

¹⁴³TRIPS, *supra* note 2, at Article 26.1.

rights conferred by the ownership of industrial designs are, however, subject to limited exceptions usually described as the three step test. The steps are: exceptions are limited, don't prejudice either the exploitation rights or legitimate interests of the owners.¹⁴⁴ The duration of protection is specified to be at least ten years.¹⁴⁵

e. Patents

i. Scope and Definition of Patents

This form of IPR is one of the most important to developed countries' interests. This importance explains the extensiveness and substantiality of the TRIPS provisions on patents compared to other IP forms like industrial designs. The TRIPS Patents Section starts by defining patents¹⁴⁶. This definition sets three conditions for an invention to be considered as a patent and thus be protected by its rights conferred by the TRIPS¹⁴⁷. Those conditions are novelty, inventive step and industrial applicability.¹⁴⁸

Some of the conditions may be changed to suit legal systems in some developed countries. Novelty could be replaced under the TRIPS by non – obviousness, while industrial applicability could be replaced by utility.¹⁴⁹ Such changes primarily reflect different scopes for patents applied for in different countries, which in some cases, include agricultural inventions. The TRIPS definition also grants protection for patents for both processes and final products.¹⁵⁰ The Paris Convention doesn't specify inclusion of patents for final products. The TRIPS also mentions that patent protection applies to all fields of technology without prejudice to the place of invention.¹⁵¹

¹⁴⁴TRIPS, *supra* note 2, at Article 26.2.

¹⁴⁵TRIPS, *supra* note 2, at Article 26.3.

¹⁴⁶TRIPS, *supra* note 2, at Article 27.1.

¹⁴⁷TRIPS, *supra* note 2, at Article 27.1.

¹⁴⁸TRIPS, *supra* note 2, at Article 27.1.

¹⁴⁹TRIPS, *supra* note 2, at Article 27.1

¹⁵⁰TRIPS, *supra* note 2, at Article 27.1

¹⁵¹TRIPS, *supra* note 2, at Article 27.1

Exclusions from patentability suit the particular nature of patents, those which might have serious adverse effects on the environment or public order.¹⁵² Inventions of such effects are not granted protection under the TRIPS.¹⁵³ Other exceptions have more serious implications as they cover fields of technology granted optional protection by WTO members. All other fields except those specified are to be granted obligatory protection. The excepted fields are diagnostic, therapeutic and surgical methods for the treatment of humans or animals.¹⁵⁴ The same also applies to plants and animals other than microorganisms.¹⁵⁵

For new plant varieties, members are obligated to grant protection either through patents, a *sui - generis* system or combination thereof.¹⁵⁶ The reason for this extremely flexible approach is that developing countries have little experience in this regard, since plant varieties haven't been covered by the Paris Convention. Another technical reason for this flexibility lies in the fact that agricultural products do not meet the patentability conditions for industrial application. In contrast, countries that request the utility of the product for eligibility to patent protection will not face inadequacy of applying patent conditions to plant varieties. The opposite is true for countries that require the condition of industrial application of the product for patent approval. Accordingly, it is more appropriate for these countries to protect plant varieties by a *sui – generis* system rather than patents, as the creation of new plant varieties is not an act of industrial application.

ii. Rights Conferred to Patent Owners

Rights conferred by patents are specified in the TRIPS in a manner that is very similar to the way rights are conferred for industrial designs except for the issue of

¹⁵²TRIPS, *supra* note 2, at Article 27.2.

¹⁵³TRIPS, *supra* note 2, at Article 27.2.

¹⁵⁴TRIPS, *supra* note 2, at Article 27.3(a).

¹⁵⁵TRIPS, *supra* note 2, at Article 27.3(b).

¹⁵⁶TRIPS, *supra* note 2, at Article 27.3(b).

exhaustion. For product patents, owners have the negative right to prevent third parties, not having their consent, from "making, using, offering for sale, selling or importing their protected products".¹⁵⁷ Exhaustion applies to all such rights except for the making of the patented product to avoid duplication of rights conferred to owners.¹⁵⁸ Exhaustion opens the door to parallel importation which provides poor countries with alternative sources of patented product especially for pharmaceuticals.

For process patents, owners have rights similar to those of product patents, excluding the making of the process, since it is practically inapplicable in this case.¹⁵⁹ Another difference is the absence of exhaustion.¹⁶⁰ A patent is assignable, transferable or contractible subject to its owner's consent.¹⁶¹ The term of protection is specified as twenty years from the filing date.¹⁶² This term is not specified in the Paris Convention.

iii. Limitations to Rights Conferred by Patents

Despite all rights mentioned above, patent protection has various procedural and legal limitations. Procedurally, a patent applicant must submit a clear description of the invention.¹⁶³ This requirement serves a couple of objectives. The most important objective is the avoidance of "misappropriation of patents" based on information that is already available in the public domain. Another objective is the dissemination of knowledge, which is claimed by the TRIPS to be one of its priorities.¹⁶⁴ The requirement also aims at quieting fears shared by developing countries regarding adverse effects of the TRIPS on their developmental potential. The TRIPS also endorses general exceptions that are similar to those provided for copyrights. For such

¹⁵⁷TRIPS, *supra* note 2, at Article 28.1(a).

¹⁵⁸TRIPS, *supra* note 2, at Article 28.1(a).

¹⁵⁹TRIPS, *supra* note 2, at Article 28.1(b).

¹⁶⁰TRIPS, *supra* note 2, at Article 28.1(b).

¹⁶¹TRIPS, *supra* note 2, at Article 28.2.

¹⁶²TRIPS, *supra* note 2, at Article 33 .

¹⁶³TRIPS, *supra* note 2, at Article 29.1.

¹⁶⁴TRIPS, *supra* note 2, at Article 7.

exceptions to be acceptable under the TRIPS Agreement, they have to be limited. They also should not conflict with the owner's rights or normal exploitation of the patent. The generic wording of such "limited exceptions" compared to the explicit wording in compulsory licenses has made them impractical to apply.

The most serious and effective exception to patents is compulsory licensing. The TRIPS has a long list of conditions for any WTO member trying to use compulsory licensing.¹⁶⁵ However, grounds for issuing such licenses are not exhaustively listed in the TRIPS. The TRIPS adjusts some of the grounds for only some of the conditions. These adjustments take the form of attaching the grounds to particular conditions, or waiving some conditions for some of the grounds. Adoption of a compulsory licensing system is not an obligation for members. The obligation comes only when the member decides, before using the system, to abide by the conditions.¹⁶⁶ Ironically, the terminology "compulsory licensing" is not referred to in the TRIPS. "Other use" (than the limited exceptions) is the description used in the TRIPS for compulsory licensing.¹⁶⁷ WTO documents indicate that the TRIPS provisions on "other use" actually deal with compulsory licensing. The Doha Declaration on the TRIPS and Public Health, as well as, its mandated negotiations explicitly link the conditions of "other use" and the compulsory licensing system.¹⁶⁸ The state has authority for issuing compulsory licensing. "Authorization" is the method acknowledged by the TRIPS for third parties to be granted compulsory licenses.¹⁶⁹ The compulsory licensee could be either a private third party or the government.¹⁷⁰ The authority competent to issue the license, thus, replaces the patent owner in giving the authorization where a ground for compulsory licensing applies.

¹⁶⁵TRIPS, *supra* note 2, at Article 31.

¹⁶⁶TRIPS, *supra* note 2, at Article 31.

¹⁶⁷TRIPS, *supra* note 2, at Article 31.

¹⁶⁸TRIPS, *supra* note 2, at Article 31 (f).

¹⁶⁹TRIPS, *supra* note 2, at Article 31.

¹⁷⁰TRIPS, *supra* note 2, at Article 31..

The conditions for issuing a compulsory license are enumerated in paragraphs (a) to (l) of article 31 of the TRIPS. Each of the licenses is considered apart from other patented products.¹⁷¹ Negotiations with the patent holder should precede the use of the system.¹⁷² Good faith is to be exerted in these negotiations, and reasonable terms should be offered to the holder.¹⁷³ The obligation to negotiate can be waived in one of three cases: "national emergency, extreme urgency or public non commercial use".¹⁷⁴ The waiver of negotiations is adjusted to the nature of the grounds for issuing the license. Time availability or commercial purposes will not probably be applicable to those three cases to require entering into negotiations with the patent owner before issuing a compulsory license. Negotiations in any of the three cases are replaced by another obligation to notify the holder.¹⁷⁵ In the first two cases, where the time factor is critical to meet the purpose of the license, the holder must be notified as soon as possible.¹⁷⁶ In the third case, the holder must be notified promptly as there is no reason to justify the delay.¹⁷⁷

Other conditions for using the compulsory license are not confined to particular grounds. Those conditions tend to limit the scope of the system so as not to undermine the patent regime. Above all, the right holder must receive adequate remuneration computed on the basis of the economic value of the licensed subject matter. The purpose of the license must not be exceeded by the licensee.¹⁷⁸ The licensee does not really enjoy any rights except those justified by the objective of meeting the exceptional circumstances. This license would terminate once its grounds

¹⁷¹TRIPS, *supra* note 2, at Article 31 (a).

¹⁷²TRIPS, *supra* note 2, at Article 31 (b).

¹⁷³TRIPS, *supra* note 2, at Article 31 (b).

¹⁷⁴TRIPS, *supra* note 2, at Article 31 (b).

¹⁷⁵TRIPS, *supra* note 2, at Article 31 (b).

¹⁷⁶TRIPS, *supra* note 2, at Article 31 (b).

¹⁷⁷TRIPS, *supra* note 2, at Article 31 (b).

¹⁷⁸TRIPS, *supra* note 2, at Article 31 (c).

cease to exist.¹⁷⁹ This termination could also take place after the license ground is reviewed by the issuing authority under request of the legitimate holder.¹⁸⁰ In all cases of termination, the legitimate interests of the licensee must also be considered.¹⁸¹ The license could be issued to several third parties as the license is non – exclusive.¹⁸² This condition serves the purposes of expanding competition necessary to meet the exceptional circumstances. The licensee has the sole right to exploit the license but not to assign it to others.¹⁸³ All decisions to issue the license are subject to "judicial review by a higher authority".¹⁸⁴

The most significant condition is that use of the licenses be "predominantly directed towards the supply of the domestic market needs".¹⁸⁵ Practically this means that every country must rely on its resources to produce compulsory licensed products. This condition initiated the infamous negotiations over the relationship between the TRIPS and public health.¹⁸⁶

All these conditions are waived in case of anticompetitive practices committed by the patent holder.¹⁸⁷ Logically, limitations to patent rights by compulsory licenses emanate from the fact that external factors caused the need for the extra patented products. If external factors are involved in the sudden rise in need for the patented product, there is no negative reflection upon the patent holder. The opposite is true if the holder is inflexible in negotiations on increasing the supply to meet this need, or if anticompetitive practices take place. Anticompetitive practices are severe violations of

¹⁷⁹TRIPS, *supra* note 2, at Article 31 (g).

¹⁸⁰TRIPS, *supra* note 2, at Article 31 (g).

¹⁸¹TRIPS, *supra* note 2, at Article 31 (g).

¹⁸²TRIPS, *supra* note 2, at Article 31 (d).

¹⁸³TRIPS, *supra* note 2, at Article 31 (e).

¹⁸⁴TRIPS, *supra* note 2, at Article 31 (i).

¹⁸⁵TRIPS, *supra* note 2, at Article 31 (f).

¹⁸⁶TRIPS, *supra* note 2, at Article 31 (f).

¹⁸⁷TRIPS, *supra* note 2, at Article 31 (k).

the law that would deprive the holder of its patent rights. The extent of the violation would determine the degree of deprivation of the privileges granted to the holder. Thus the TRIPS leaves this issuance of compulsory licensing on the ground of anticompetitive practices for the determination of the judicial authorities in each WTO member.¹⁸⁸

The compulsory license system is deemed by the TRIPS to be sufficient to meet public needs or to combat anticompetitive practices. This explains the extensiveness of the TRIPS provisions covering compulsory licensing compared to those for revocation or forfeiture. The only requirement for the member to revoke or forfeit the patent is the approval of the act by judicial review.¹⁸⁹ The clear difference between compulsory licensing and revocation/forfeiture is the strict legal nature of the latter part. Revocation/forfeiture seriously prejudice the holder's rights, whereas compulsory licensing only provides confined and temporary limitations to the rights conferred by the patent.

Iv. Burden of Proof for Process Patents

The uniqueness of IPR in the realm of international trade has resulted in some singular procedural aspects in the TRIPS such as the reverse of the burden of proof for patented processes. The question remains: why does the TRIPS not provide for this reverse of the burden of proof for patented products? The answer is: violation of patent rights for final products is easily detected compared to patent process. It is sufficient for the patent holder to claim that a product with a certain configuration and serving a particular function is infringing his patent. The documents of registration of the patent for his product can prove his claim. Documents submitted by a holder while applying for a patent for his process are not sufficient for proving his rights, as the

¹⁸⁸TRIPS, *supra* note 2, at Article 31 (k).

¹⁸⁹TRIPS, *supra* note 2, at Article 32.

same result could be reached from different processes. The question is then, how do the judicial or administrative authorities decide on infringement allegations for patented processes? The logical answer is that the producer must share the processes used in obtaining the products with the authorities. If the producer shows a process that is different from the patented process, then the infringement allegation is dismissed. The TRIPS obligation, in this regard, puts forward two scenarios either of which is sufficient for the defendant to prove that his process is different from the patented one. The first scenario is when the defendant presents a new product to the judicial authorities.¹⁹⁰ The second is when the process is being used by the defendant to produce known products but the patent owner fails to uncover the process actually used.¹⁹¹ Members are free to follow either scenario to substantiate the violation of the patented process.¹⁹² However, it must first be proved that the product resulting from the disputed process is identical to that of the patented process.¹⁹³ In all cases, the confidentiality of trade secrets of the defendant must be respected.¹⁹⁴ From the TRIPS perspective, this requirement could be legally fulfilled only by applying the provisions of undisclosed information.

f. Layout-Designs (Topographies) of Integrated Circuits

The TRIPS adopted the same approach of copyrights and related rights with respect to this field. The main provisions of the Treaty on Intellectual Property in respect of Integrated Circuits are incorporated in the TRIPS.¹⁹⁵ Rights conferred by protection of integrated circuits are close to those granted to other forms of IPR. Right holders of integrated circuits enjoy negative rights to prevent others from "importing,

¹⁹⁰TRIPS, *supra* note 2, at Article 34.1(a).

¹⁹¹TRIPS, *supra* note 2, at Article 34.1(b).

¹⁹²TRIPS, *supra* note 2, at Article 34.2.

¹⁹³TRIPS, *supra* note 2, at Article 34.1.

¹⁹⁴TRIPS, *supra* note 2, at Article 34.3.

¹⁹⁵TRIPS, *supra* note 2, at Article 35.

selling or distributing their protected works without their consent".¹⁹⁶ The difficulty of protecting this highly technical IPR form has made the TRIPS provisions flexible with respect to its violations. Persons not knowing that a protected layout design was incorporated in a product are not liable under the TRIPS.¹⁹⁷ However, once they learn of the presence of the protection they are required to pay the royalty to the holders.¹⁹⁸ Compulsory licensing conditions for patents are also applicable for layout designs.¹⁹⁹ One major difference between patents and integrated circuits is the more limited grounds for compulsory licensing for the latter. The only two grounds allowed to members for integrated circuits are public non - commercial use and combating anticompetitive practices.²⁰⁰ The TRIPS specified the term of protection for layout designs as being at least ten years from the filing date.²⁰¹ If the member does not require registration, the term has to be computed from the first commercial exploitation of the integrated circuit in any place in the world.²⁰² Members may also terminate the term of protection after fifteen years from the creation of the layout design.²⁰³

g. Undisclosed Information

Undisclosed information is one of the most controversial forms of IPR, thus its provisions in the TRIPS are very brief. It is also one of the key factors in all almost all U.S. FTAs. The gap between the levels of protection provided to undisclosed information by the TRIPS and the U.S. FTAs, reveals the developed countries' interests in this particular form. Undisclosed information is the broad phrase that encompasses all types of trade secrets. The Paris Convention does not literally or

¹⁹⁶TRIPS, *supra* note 2, at Article 36.

¹⁹⁷TRIPS, *supra* note 2, at Article 37.1.

¹⁹⁸TRIPS, *supra* note 2, at Article 37.1.

¹⁹⁹TRIPS, *supra* note 2, at Article 37.2.

²⁰⁰TRIPS, *supra* note 2, at Article 31(C).

²⁰¹TRIPS, *supra* note 2, at Article 38.1.

²⁰²TRIPS, *supra* note 2, at Article 38.1-2.

²⁰³TRIPS, *supra* note 2, at Article 38.3.

substantially address the protection of undisclosed information. Rather, the concept of undisclosed information is derived from the Convention Article 10 *bis* covering unfair commercial use. The TRIPS distinguishes between undisclosed information in the broadest sense, and test data submitted to authorities competent for granting marketing approval for pharmaceuticals and agricultural chemical products.²⁰⁴ The TRIPS gives significant consideration to defining the subject matter of protection covered by this section.

Undisclosed information must satisfy three conditions in order to be eligible for protection under the TRIPS. The conditions all focus on the factor of secrecy: the information is secret, has commercial value because of its secrecy and it is kept from disclosure by its legitimate possessor.²⁰⁵ Additional specific conditions are required for test data to be protected by the recipient authorities as undisclosed information. The data must include new chemical entities resulting from considerable efforts.²⁰⁶ Submission of such data to the authority upon its request is a prerequisite for granting marketing approval.²⁰⁷ This means that information voluntarily submitted by the possessor to the authorities could lose its protected status. Moreover, information that is well known to the public is not eligible for protection. If conditions are met, authorities are obliged to protect submitted data from unfair commercial use and disclosure.²⁰⁸

The condition of secrecy is the sharpest difference between undisclosed information and data exclusivity. Undisclosed information is the level of protection provided by the TRIPS, while data exclusivity is adopted by most developed countries. Data exclusivity does not require secrecy as the key factor for eligibility for

²⁰⁴TRIPS, *supra* note 2, at Article39 .

²⁰⁵TRIPS, *supra* note 2, at Article39.2.

²⁰⁶TRIPS, *supra* note 2, at Article39.3.

²⁰⁷TRIPS, *supra* note 2, at Article39.3.

²⁰⁸TRIPS, *supra* note 2, at Article39.3.

protection. The TRIPS language provides the opportunity for members to issue marketing approvals for generic versions of pharmaceuticals in cases where the information about them is already disclosed. The central point for avoiding violations of the TRIPS obligations is that the disclosure of submitted data is not made by the recipient authority. Disclosure may take place away from the recipient authority as in the case of reverse engineering performed outside of the country's territory. The formulae of the generic versions could even be available on the internet or in medical references. Where the legitimate possessor of the information claims that the recipient authority has committed the disclosure, many legal systems would put the burden of proof upon the claimant. Meanwhile, the TRIPS has not prohibited the authorities from granting marketing approval based upon disclosed information. Notably, the TRIPS does not specify any terms of protection for undisclosed information.

h. Enforcement of IPR

Enforcement is one of the most crucial contributions of the TRIPS to the international IPR regime. It is one of the reasons why developed countries were so keen to bring IPR under the umbrella of the WTO. In prior conventions and agreements, enforcement provisions were either insufficient or even absent. Even when they existed, the availability of an international enforcement mechanism was still questionable. The WTO solved this problem by creating the Dispute Settlement Body.

Enforcement provisions include criminal and civil remedies, and provisional measures. They cover the various aspects needed to give respect to the levels of protection prescribed in the previous part of the TRIPS. They also cover both domestic markets and borders leaving no gaps for IPR infringement in the course of trade. The presence of many optional enforcement measures in the TRIPS stems from

its Article 1.1. This Article acknowledges the right of WTO members to apply the IPR protection as mandated by the TRIPS in harmony with their own legal systems. The variety of these legal systems is most diverse with respect to applying the law rather than setting out its standards. Another component of the variety of members' legal systems is that enforcement, unlike legislation, requires resource facilities that might not always be affordable to developing and least developed countries. Accordingly, each member has the right to enforce the agreed IPR protection standards of the TRIPS within its own capacity and with full regard to its legal system.

The TRIPS drafters refrained from elaborating details of enforcement so as not to complicate the applicability of its provisions. However, the TRIPS flexibility regarding enforcement has generated heavy complaints among WTO members for non-complying with the TRIPS provisions on enforcement. These complaints are due to the fact that it is very hard for members to agree upon criteria for implementing the TRIPS enforcement provisions. In the broadest sense, critics always complain about insufficient efforts exerted by the criticized party to ensure enforcement. The latter in turn responds with extensive reports about its continuous and rigorous efforts. If the criticized party is a developing country member, it usually attributes the whole enforcement problem to lack of resources. Discrediting the sufficiency of the technical assistance programs provided by developed countries is also a defense by developing countries.

i. Civil and Administrative Procedures and Remedies

The TRIPS gives heavier weight to the pursuit of civil remedies through judicial rather than administrative authorities. Members are not supposed to follow a predetermined set of detailed rules. Remedies are much more dependant on the member's legal system. Members are only required to pay respect to some broad

guidelines. Basically, all rights holders are entitled access to civil judicial procedures to protect their rights.

Specifically, judicial authorities should have the right to order all parties of a dispute to establish the required evidence on the merits of any case.²⁰⁹ This obligation does not discriminate between the status of any party.²¹⁰ Authorities here have the privilege of placing the burden of proof on any party.²¹¹ Normally, the party that fails to provide the authorities with the required evidence bears the consequences as the losing party.²¹² The TRIPS even gives members the option of deciding a case solely on the grounds of the content of the complaint, when the responding party does not provide the refuting evidence.²¹³

In addition, judicial authorities have the right to order injunctions aimed at preventing the infringing party from its violations.²¹⁴ Injunctions cover all IPR infringements, but with a special focus on released imported goods (trademarks)²¹⁵. The rationale for this focus on domestic markets is further illustrated by the detailed provisions on members' obligations to apply border enforcement measures. Intent of infringement is a prerequisite for the injunction obligation to be mandatory to members. The TRIPS gives members the option to exclude persons not knowing of the existence of the infringement from such injunctions.²¹⁶ This is true even in case where those persons possess or even have ordered the infringing products.²¹⁷ Members are free not to apply injunctions in cases of compulsory licenses.²¹⁸ Injunctions may be

²⁰⁹TRIPS, *supra* note 2, at Article 43.1.

²¹⁰TRIPS, *supra* note 2, at Article 43.1

²¹¹TRIPS, *supra* note 2, at Article 43.1.

²¹²TRIPS, *supra* note 2, at Article 43.2.

²¹³TRIPS, *supra* note 2, at Article 43.2.

²¹⁴TRIPS, *supra* note 2, at Article 44.1.

²¹⁵TRIPS, *supra* note 2, at Article 44.1.

²¹⁶TRIPS, *supra* note 2, at Article 44.1.

²¹⁷TRIPS, *supra* note 2, at Article 44.1.

²¹⁸TRIPS, *supra* note 2, at Article 44.2.

replaced by the adequate remuneration that would be paid to rights holders in such cases.²¹⁹

Members are obliged to authorize their judicial authorities to order the infringing party to pay the right holder damages caused by the infringement. This is only obligatory for members with respect to infringers who know about the existence of the infringements.²²⁰ Otherwise, this obligation is optional to members.²²¹ Another optional measure for members is to order the infringer to pay for judicial expenses.²²² Confiscation or destruction of the infringing products or tools used predominantly in the course of infringement is optional for judicial authorities²²³. Removal of the infringing trademarks is not enough to permit the release of the product to domestic markets.²²⁴ It is also optional for members to order the infringer to disclose any third parties involved in producing or distributing the infringing products.²²⁵ In all cases, proportionality should always be maintained between the judicial orders or procedures and the seriousness of the harms caused to the right holder.²²⁶

The defendant is entitled to indemnification if the allegation that he has committed an IPR violation appears to be false. This indemnification shall be aimed at compensating the defendant from both the damage and expenses accrued by the false complaint.²²⁷ The TRIPS allows members only to exempt their judicial or administrative authorities from paying such indemnification to the defendant for damage caused by their decisions, if they did not intend to cause that damage.²²⁸ Members have the right to implement any of the foregoing obligations by

²¹⁹TRIPS, *supra* note 2, at Article 44.2.

²²⁰TRIPS, *supra* note 2, at Article 45.1.

²²¹TRIPS, *supra* note 2, at Article 45.2.

²²²TRIPS, *supra* note 2, at Article 45.2.

²²³TRIPS, *supra* note 2, at Article 46.

²²⁴TRIPS, *supra* note 2, at Article 46.

²²⁵TRIPS, *supra* note 2, at Article 47.

²²⁶TRIPS, *supra* note 2, at Article 46-47.

²²⁷TRIPS, *supra* note 2, at Article 48.1.

²²⁸TRIPS, *supra* note 2, at Article 48.2.

administrative rather than judicial procedures.²²⁹ This is only permissible in the TRIPS as long as the same level of remedies is attained.²³⁰

ii. Provisional Measures

As in the case of civil remedies, the TRIPS obliges members to authorize their judicial authorities to order provisional measures.²³¹ Such measures aim at either preventing an infringement or preserving evidence. Provisional measures can prevent the circulation of released products from customs in the domestic market.²³² The applicant must submit available evidence to support its request for the provisional measures.²³³ At a further stage, the applicant must also submit all the required evidence for the application to proceed.²³⁴ To prevent abuses, the applicant also has to submit a security payment to the judicial authorities.²³⁵ This deposit can also be used to compensate the defendant if the application is revoked or proven to be invalid.²³⁶

In urgent cases, judicial authorities have the authority to order provisional measures without notifying the third party accused of infringement.²³⁷ The defendant shall, however, be notified of the provisional orders as soon as possible.²³⁸ Once notified, the defendant has the right to be heard and to submit counter evidence that the application for provisional measures submitted by the claimant is groundless.²³⁹ The defendant also has the right to request the initiation of a case within a reasonable period of time.²⁴⁰ This time can either be determined by the judicial authorities, or else, will be 20 working or 31 calendar days.²⁴¹ Where the time limit is not met, the

²²⁹TRIPS, *supra* note 2, at Article 49.

²³⁰TRIPS, *supra* note 2, at Article 49.

²³¹TRIPS, *supra* note 2, at Article 50.1.

²³²TRIPS, *supra* note 2, at Article 50.1.

²³³TRIPS, *supra* note 2, at Article 50.3.

²³⁴TRIPS, *supra* note 2, at Article 50.5.

²³⁵TRIPS, *supra* note 2, at Article 50.3.

²³⁶TRIPS, *supra* note 2, at Article 50.3.

²³⁷TRIPS, *supra* note 2, at Article 50.2.

²³⁸TRIPS, *supra* note 2, at Article 50.4.

²³⁹TRIPS, *supra* note 2, at Article 50.4.

²⁴⁰TRIPS, *supra* note 2, at Article 50.6.

²⁴¹TRIPS, *supra* note 2, at Article 50.6.

ordered measures are revoked.²⁴² The defendant has the right of compensation in case of revocation of the measures.²⁴³ As with other civil remedies, members may apply administrative procedures when all the preceding obligations are fully met.²⁴⁴

iii. Border Measures

Members are obliged to apply border measures to prevent infringing products from entering their domestic markets. Ironically, this issue of border measures is the only one that can fairly be described as an international trade issue. Most other TRIPS provisions deal with matters relevant to domestic jurisdictions. Border measures entail the suspension of the release of the goods at the customs gates upon request of an interested party.²⁴⁵ The measures are only mandatory with respect to importation.²⁴⁶ Their application to exportation is left for each member to decide.²⁴⁷ Members are not obliged to apply border measures to goods in transit.²⁴⁸ The nature of transit trade requires expeditious procedures and the customs authorities have limited control.

Members are obliged to at least apply the measures to trademarks and copyrights.²⁴⁹ Applying the measures to other forms of IPR remains optional for members.²⁵⁰ Inspection of consignments containing products that are subject to IPR protection is practical for these two forms. For example, it is hard to carry out border inspections for patent infringement as it might require sophisticated technical facilities (laboratories) and lengthy processes. The facilities might not be available for customs authorities, while the long process could be detrimental to the flow of trade.

²⁴²TRIPS, *supra* note 2, at Article 50.6.

²⁴³TRIPS, *supra* note 2, at Article 50.7.

²⁴⁴TRIPS, *supra* note 2, at Article 50.8.

²⁴⁵TRIPS, *supra* note 2, at Article 51.

²⁴⁶TRIPS, *supra* note 2, at Article 51.

²⁴⁷TRIPS, *supra* note 2, at Article 51.

²⁴⁸TRIPS, *supra* note 2, at Article 51.

²⁴⁹TRIPS, *supra* note 2, at Article 51.

²⁵⁰TRIPS, *supra* note 2, at Article 51.

The TRIPS encompasses some border measures that are similar to those of provisional measures for domestic markets. In fact, TRIPS provisions on border measures also provide for provisional measures but with a different scope of application. Among these provisional measures are the ones concerning submission of evidence including a detailed description of the infringed products.²⁵¹ The same is also true with respect to payment of a security to prevent abuse of enforcement measures.²⁵² "Where the suspension application is approved, both the importer and the applicant shall be notified promptly".²⁵³ The allowable duration of suspension is a maximum of ten working days from the date of notifying the applicant of approval.²⁵⁴ After this period, the suspended goods are released unless an interested party has notified the customs of initiation of a legal case, or provisional measures are ordered.²⁵⁵ The suspension period could be extended another ten days with approval by the competent authority.²⁵⁶

The TRIPS obliges the applicant to pay all injured parties compensation for harms caused by invalid applications.²⁵⁷ Beneficiaries could include the "importer, the owner, or the consignee".²⁵⁸ This compensation would primarily be settled out of the security deposited by the applicant. Additional amounts other than the security could also be paid to make up for all the injuries.

Applicants and importers have equal rights to inspect the suspended goods.²⁵⁹ Trade secrets must, nevertheless, be respected.²⁶⁰ The TRIPS makes it optional for members to provide the applicant with information concerning all parties involved in

²⁵¹TRIPS, *supra* note 2, at Article 52.

²⁵²TRIPS, *supra* note 2, at Article 53.1.

²⁵³TRIPS, *supra* note 2, at Article 54.

²⁵⁴TRIPS, *supra* note 2, at Article 55.

²⁵⁵TRIPS, *supra* note 2, at Article 55.

²⁵⁶TRIPS, *supra* note 2, at Article 55.

²⁵⁷TRIPS, *supra* note 2, at Article 56.

²⁵⁸TRIPS, *supra* note 2, at Article 56.

²⁵⁹TRIPS, *supra* note 2, at Article 57.

²⁶⁰TRIPS, *supra* note 2, at Article 57.

the infringement.²⁶¹ This could happen if the applicant wins a case regarding the substance of the application. The information could cover "names and addresses of the importer, consignor and the consignee".²⁶² The applicant could also be provided with information about the quantity of the suspended goods.²⁶³

Members may also provide for *ex officio* actions by the competent authorities to suspend goods suspected of *prima facie* infringements.²⁶⁴ In such a case, both the importer and the right holder shall be promptly notified of the suspension.²⁶⁵ The competent authority may then ask the right holder to provide additional evidence in support of the suspension.²⁶⁶ In the case of wrongful suspension, the competent authorities alone may be exempted from the obligation to pay compensation for the importer.²⁶⁷ This exemption applies in the case where the authorities had no deliberate intention to harm the importer.²⁶⁸ However, this exemption must be handled cautiously, as this *ex officio* action is subject to abuse.

The same procedures for disposing of the infringing goods out of domestic markets are also to be adopted at the borders. Judicial authorities are required to order the infringing goods to be either confiscated or destroyed.²⁶⁹ The re-exportation of the counterfeit goods is prohibited by the TRIPS, unless the infringement is removed.²⁷⁰ *De minimis* imports for non - commercial use can be exempted from the application of border measures. However, the TRIPS does not specify the exact amount of this *de minimis* level.

iv. Criminal Remedies

²⁶¹TRIPS, *supra* note 2, at Article 57.

²⁶²TRIPS, *supra* note 2, at Article 57.

²⁶³TRIPS, *supra* note 2, at Article 57.

²⁶⁴TRIPS, *supra* note 2, at Article 58.

²⁶⁵TRIPS, *supra* note 2, at Article 58(b).

²⁶⁶TRIPS, *supra* note 2, at Article 58(a).

²⁶⁷TRIPS, *supra* note 2, at Article 58(c).

²⁶⁸TRIPS, *supra* note 2, at Article 58(c).

²⁶⁹TRIPS, *supra* note 2, at Article 59.

²⁷⁰TRIPS, *supra* note 2, at Article 60.

Criminal remedies are left to be determined by the legal system of each member. The intangible benchmark for such remedies is that they serve as a deterrent to IPR infringement.²⁷¹ Members are free to limit the application of such remedies to trademarks and copyrights.²⁷² The application of criminal remedies to other forms of IPR is only optional for members.²⁷³ Expansion of those remedies to other forms is suggested by the TRIPS wording where bad faith and commercial scale infringement occur.²⁷⁴ The remedies could be either imprisonment and/or monetary fines.²⁷⁵ Infringing goods must be disposed out of the market by "seizure, forfeiture or destruction of the goods".²⁷⁶ This disposal must also be done to tools predominantly assigned to the infringement process.²⁷⁷

B. Bilateral Treaties

Egypt is a party of both the Association Agreement with the European Communities²⁷⁸ and the free trade agreement with the EFTA Group.²⁷⁹ Both agreements have very few IPR commitments compared to those endorsed by the multilateral treaties. The only TRIPS Plus provisions that occur in both agreements are those obliging their parties to accede to a number of IPR treaties, predominantly belonging to the WIPO. This outcome is the result of the Egyptian reluctance to accept further IPR obligations. This policy is influenced by the view that IPR may be

²⁷¹TRIPS, *supra* note 2, at Article 61.

²⁷²TRIPS, *supra* note 2, at Article 61.

²⁷³TRIPS, *supra* note 2, at Article 61.

²⁷⁴TRIPS, *supra* note 2, at Article 61.

²⁷⁵TRIPS, *supra* note 2, at Article 61.

²⁷⁶TRIPS, *supra* note 2, at Article 61.

²⁷⁷TRIPS, *supra* note 2, at Article 61.

²⁷⁸Euro-Mediterranean Agreement Establishing An Association Between The European Communities And Their Member States, Of The One Part, And The Arab Republic Of Egypt, Of The Other Part, June 25, 2001 http://ec.europa.eu/external_relations/egypt/aa/06_aaa_en.pdf, (last visited Dec. 4, 2007).

²⁷⁹The European Free Trade Association: Iceland, Liechtenstein, Norway and Switzerland, Free Trade Agreement EFTA - Arab Republic of Egypt, http://secretariat.efta.int/Web/ExternalRelations/PartnerCountries/EG%20%28Folder%29/Annexes/EG_FTA_Annex_V.pdf, EFTA – Egypt FTA, Annex V (last visited Dec. 4, 2007).

a burden rather than a factor of attraction of foreign investors to the Egyptian market. In all cases, both agreements, compared to the U.S. FTAs, include very few IPR obligations. This is because the European Continent has other interests in Egypt, like trade in agricultural goods and combating illegal immigration.

III. Egypt's Compliance with its International IPR Obligations _

A. Introduction to the Egyptian IPR Law

Amending national laws and regulations is an explicit TRIPS obligation that is to be carried out within one year of entry into force of the Agreement. This period was extended to the year 2000 for developing countries, but the Law was delayed by two years due to its onerous preparatory process. Egypt was thus obligated to have issued its IPR Law by the year 2000. However, Egypt finally complied with its international IPR obligations by issuing its new IPR Law in 2002.²⁸⁰ This Law was mainly drafted to endorse all measures of the TRIPS Agreement.

The 2002 Law replaces former IPR laws, namely, the Trademarks Law of 1939, the Patents Law of 1949 and the Copyrights Law of 1954. The Law is divided into four Books.²⁸¹ Book 1 covers patents, utility models, layout designs for integrated circuits and undisclosed information. Book 2 covers trademarks, geographical

²⁸⁰Egypt, Law on the Protection of Intellectual Property Rights (Law No. 82), 2002, available at: <http://www.wipo.int/clea/en/fiche.jsp?uid=eg001> (last visited Sept.18, 2007).

²⁸¹*Id.*, at Issuance at Article 2.

indications and, industrial designs and models. Book 3 covers copyrights and related rights. Book 4 covers new plant varieties. The main question is the level of standards embodied by the new Law, and whether it complies with the TRIPS or also includes TRIPS Plus provisions. The TRIPS only provides a set of minimum standards of IPR protection that have to be respected by all WTO members. Adoption of additional levels of IPR protection is left to the freedom of each member. However, it is not acceptable to provide less than the TRIPS level of protection.

In fact, the Law not only complies with the TRIPS measures, it also includes provisions to meet standards of other IPR treaties where Egypt is a member. For example, the TRIPS does not include any provisions concerning the relationship between patents, and the rules governing access to genetic resources and associated traditional knowledge as provided by the CBD²⁸². This issue is still stuck in negotiations in the TRIPS Council. However, the Egyptian Law complies with the CBD by directly linking patentability to disclosure of genetic resources and associated traditional knowledge. This link is made in compliance with Egyptian obligations under both the TRIPS and the CBD, and according to the Egyptian interpretation of their provisions. The Law thus complies with the CBD regardless of the results of the negotiations in the TRIPS Council on this issue.

In addition, Egypt is currently in the final stage of its accession to the Convention for the Protection of New Varieties of Plants (UPOV).²⁸³ Amendments to Book 4 to make it comply fully with the UPOV are currently being considered by the Government of Egypt. Notably, the TRIPS obliges the WTO members only to protect new plant varieties by any adequate approach. Accession to a particular international

²⁸² United Nation, the Convention on Biological Diversity, Jun 5, 1992,(hereinafter CBD).

²⁸³ Convention for the Protection of New Varieties of Plants (UPOV), March 19, 1991, available at: <http://www.upov.int/en/publications/conventions/1991/act1991.htm> (last visited Sept.18, 2007), hereinafter the UPOV.

treaty on the protection of new plant varieties is not obligatory under the TRIPS. This particular obligation to accede to the UPOV emanates from the Association Agreement and the FTA with the EFTA Group.

The Law also includes provisions that account for any future IPR developments, like the protection of copyright and related rights on the internet. This newly emerging area of copyright is not covered by the TRIPS, which was drafted at a time where many developing and least developed countries lacked sufficient technical and human capacities to deal with internet related issues. It was thus impossible to require these countries to be multilaterally committed to offering protection in this highly technical area. The most prominent international treaties in this new area are the WIPO Internet Treaties known as the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).²⁸⁴ Egypt is not yet a member in either of those two treaties as this membership is not required by the TRIPS. However, the Egyptian legislature drafted the Law in a manner that would make Egypt ready for acceding to these two Treaties.

However, the Law has been subject to strong criticism from several developed countries. The U.S vigorously criticizes the Law, primarily in its USTR annual reports. The U.S. has raised its criticism through numerous unilateral, bilateral and multilateral channels. The grounds of this criticism vary from non compliance with the TRIPS to non – conformity with the U.S. IPR standards. The legal validity of the criticism depends on its reasons. In regard to the accusation of non compliance to the TRIPS, Egypt finds itself in an embarrassing situation. In contrast, Egypt strongly rejects the criticism founded on the U.S. standards. In all cases, the U.S. criticism

²⁸⁴WIPO Copyright Treaty, December 20, 1996, available at: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (last visited Feb 30, 2008), and WIPO Performances and Phonograms Treaty, December 20, 1996, available at: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html (last visited Feb 30, 2008).

signals Egypt's ineligibility for an FTA unless substantive legal reform is carried out, especially in areas of concern for the U.S.

B. U.S. Unilateral Criticism of Egypt's Compliance with International IPR Obligations

The importance of this section for the objectives of this paper is that it determines whether Egypt is legally eligible to join an FTA with the U.S. If the Egyptian IP Law is fully compliant with only its international obligations, then the next matter is to examine Egypt's eligibility to join the FTA. If Egypt is not complying with its current obligations, then points of deficiency in the Law should be highlighted first, before it considers the adoption of TRIPS Plus measures. Such points of deficiency must be evaluated in proportion to their significance in terms of trading partners' interests. This significance may depend upon the assertiveness of demands by these trading partners. For example, the Law has already many TRIPS Plus measures like raising the term of protection for trademarks to ten years instead of seven as required by the TRIPS. Another example of the TRIPS Plus in the Law is raising priority rights for trademarks to one year instead of six months as required by the Paris Convention. However, developed countries like the U.S. are not very interested in these TRIPS Plus measures endorsed by the Law. The U.S. would prefer Egypt's adoption of data exclusivity instead of undisclosed information.

Therefore, this section explains mainstream international criticism of IPR protection in Egypt in terms of legality and enforceability. Special attention must be given to criticism raised by the U.S., since its FTAs provide the most sophisticated TRIPS Plus measures at the international level. In addition, Egypt has not yet joined an FTA with the U.S. It may thus be useful to examine Egypt's conformity with the U.S. rather than countries like the E.C that are taken for granted as Egypt's bilateral trading partners.

Criticism from the U.S. takes several forms, the most significant of which may be found in the official annual reports issued by the USTR, the main U.S. body concerned and authorized with proclaiming FTAs.²⁸⁵ The USTR annual reports negatively categorize various countries in terms of their deficiencies in IPR protection. Those reports are also collective in terms of gathering all USTR comments for all countries in a single report. The key USTR reports are Section 301 and the National Trade Estimate Report on Foreign Trade Barriers. Those reports are partially inspired by the annual reports issued by the IIPA.²⁸⁶ The IIPA is a coalition of U.S. copyright holders and it issues its annual reports per each country accused of copyright infringements including Egypt.

1. The USTR Report

a. Section 301

Section 301 Reports for Egypt considered by this paper date from 2002 to 2007. Earlier reports are insignificant to this research as they were issued prior to the new Egyptian IPR Law.²⁸⁷ The 2002 Report urged Egypt to expeditiously issue the Law and to make some modifications to its drafts that were being publicly considered.²⁸⁸ The 2002 Report listed Egypt at the "Priority Watch List" which implies serious deficiencies in IPR protection.²⁸⁹

The 2003 Report elevated Egypt to the "Watch List".²⁹⁰ This improvement of Egypt's classification came as the U.S. was then gratified by the issuance of the Law,

²⁸⁵The Office of the United States Trade Representative.

²⁸⁶The International Intellectual Property Alliance.

²⁸⁷SPECIAL 301 REPORT, USTR, 2002, available at:

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2002/2002_Special_301_Report/asset_upload_file567_6367.pdf (last visited Sept.18, 2007).

²⁸⁸*Id.*, at 20.

²⁸⁹USTR Special 301 Report for 2002, *supra* note 287, at 20.

²⁹⁰SPECIAL 301 REPORT, USTR, 2003, available at:

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_Special_301_Report/asset_upload_file665_6124.pdf (last visited Sept.18, 2007), at 21.

as well as, Egypt's ratification of the Patent Cooperation Treaty (PCT).²⁹¹ Enforcement efforts by Egypt to combat copyright piracy were also praised.²⁹² However, the U.S. was dissatisfied with some of the Law provisions like those covering the protection of undisclosed information, as it expected the application of the data exclusivity instead.²⁹³ The Government of Egypt was encouraged to consider the inclusion of data exclusivity in the Executive Regulations of the Law that had not yet been released.²⁹⁴

The classification of Egypt deteriorated in the 2004 Report.²⁹⁵ In this Report, Egypt was downgraded back to the "Priority Watch List".²⁹⁶ The main reason for the downgrade was the issuance of marketing approvals for generic versions of U.S. patented pharmaceuticals.²⁹⁷ The U.S. considered these marketing approvals as violations of its patents registered in its territory, as Egypt was still under the transitional period prescribed by the TRIPS for developing countries to grant such patents by the year 2005.²⁹⁸ Direct reference to this violation of the TRIPS was deliberately avoided, since Egypt was not yet obliged under the TRIPS to provide patents for final products of pharmaceuticals. The principle of territoriality requires that registered patents are by no means obligatory or enforceable outside the country of registration. The US criticism was founded on a mixed TRIPS and TRIPS Plus grounds. The U.S also expressed frustration with the delay in issuing the Executive Regulations for Book 3 of the Law covering copyrights and related rights.²⁹⁹ The U.S. had another concern about the deficiency in copyright enforcement in Egypt.³⁰⁰

²⁹¹*Id.*, at 21.

²⁹²²⁹⁵ USTR Special 301 Report for 2003, *supra* note 290, at 20 -21.

²⁹³ USTR Special 301 Report for 2003, *supra* note 290, at 20 -21.

²⁹⁴ USTR Special 301 Report for 2003, *supra* note 290, at 20 -21.

²⁹⁵ SPECIAL 301 REPORT, USTR, 2004, available at:

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_5995.pdf (last visited Sept.18, 2007).

²⁹⁶*Id.*

²⁹⁷ USTR Special 301 Report for 2004, *supra* note 295, at 15.

²⁹⁸ TRIPS, *supra* note 2, at Article 65.4.

²⁹⁹ USTR Special 301 Report for 2004, *supra* note 295, at 15.

³⁰⁰ USTR Special 301 Report for 2004, *supra* note 295, at 15.

The 2005 Report maintained Egypt on the "Priority Watch List", alleging violations by the Egyptian Ministry of Health and Population of its TRIPS obligations to protect test data from unfair commercial use.³⁰¹ The Report did not mention the fact that this obligation is limited by a series of conditions including the secrecy of the submitted data. The Report was made with the aim of pressuring Egypt to apply TRIPS Plus measures. The U.S. also sought a new requirement: coordination between the Ministry of Health and the Patent before granting marketing approvals for pharmaceuticals.³⁰² The U.S. was still dissatisfied with enforcement in other fields of copyrights like software and books.³⁰³ However, improvements in copyright enforcement for musical works were noted.³⁰⁴

The 2006 report repeated most of the contents of its predecessor.³⁰⁵ This repetition included complaints about protection of test data and enforcement of copyrights. Egypt remained on the "Priority Watch List".³⁰⁶ Some positive changes like the issuance of the Executive Regulations for Copyrights and the Law of Importation and Exportation covering border measures for IPR, were noted.³⁰⁷ The latter Law closed a serious loophole in the Egyptian legal system that had not provided for border measures as required by the TRIPS. Such improvements were still insufficient, thus the U.S. began to demand more explicitly the application of TRIPS Plus like the accession to the WIPO Internet Treaties.³⁰⁸ Such Treaties provide TRIPS Plus measures for the protection of copyrights on the internet.

³⁰¹SPECIAL 301 REPORT, USTR, 2005, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf (last visited Sept.18, 2007), at 27.

³⁰²USTR Special 301 Report for 2005, *supra* note 301, at 27.

³⁰³USTR Special 301 Report for 2005, *supra* note 301, at 27.

³⁰⁴USTR Special 301 Report for 2005, *supra* note 301, at 27.

³⁰⁵SPECIAL 301 REPORT, USTR, 2006, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf (last visited Sept.18, 2007).

³⁰⁶*Id.*, at 28.

³⁰⁷USTR Special 301 Report for 2006, *supra* note 305, at 28.

³⁰⁸USTR Special 301 Report for 2006, *supra* note 305, at 28.

Finally, the 2007 Report continued Egypt's status on the "Priority Watch List".³⁰⁹ This report of 2007 provides insight into the U.S. judgment of the current state of the IPR protection in Egypt. The only difference from the preceding reports was the addition of a request for Egypt to apply border measures to goods in transit.³¹⁰ This TRIPS Plus request is a common denominator in all of the U.S. FTAs. The U.S. was probably encouraged by the issuance of the Egyptian border measure regulations through a ministerial decree (Minister of trade and Industry). Further amendments of the Regulations are easy to make as they fall under the competency of a minister. Thus, the complexities of presenting the amendments required by the USTR to the Egyptian Parliament (The People's Assembly) could be avoided.

b. USTR National Trade Estimate Report on Foreign Trade Barriers³¹¹

This annual report is more comprehensive than the Section 301 Report. Those NTE reports issued prior to 2003, focused on the pending IPR Law.³¹² Those early reports were critical about the delay in the issuance of the Law, in addition to other procedural issues concerning patents, trademarks and undisclosed information. Since 2003, the NTE comments were directed at the newly issued IPR Law. The 2003 report claimed that Egypt's new Law did not comply with its commitments under the TRIPS to protect "confidential test data".³¹³ The Section 301 report remarks that Egypt granted marketing approvals for generic versions of patented U.S. pharmaceuticals

³⁰⁹SPECIAL 301 REPORT, USTR, 2007, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf (last visited Sept.18, 2007), at 25.

³¹⁰*Id.*, at 26.

³¹¹ Hereinafter NTE Report.

³¹²2001 National Trade Estimate Report on Foreign Trade Barriers, 2001, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2001/2001_NTE_Report/asset_upload_file903_6565.pdf (last visited Dec.5, 2007),

2002 National Trade Estimate Report on Foreign Trade Barriers, 2002, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2002/2002_NTE_Report/asset_upload_file56_6391.pdf (last visited Dec.5, 2007).

³¹³2003 National Trade Estimate Report on Foreign Trade Barriers, 2003, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_NTE_Report/asset_upload_file857_6190.pdf (last visited Dec.5, 2007), at 98.

were reiterated.³¹⁴ The U.S. once again refused to acknowledge the fact that Egypt was not obliged at that point to grant patents for final products of pharmaceuticals. The Report also included U.S. complaints about enforcement in the area of copyright.³¹⁵ Similar complaints existed for trademarks and industrial designs.³¹⁶

The 2004 NTE Report included similar comments. But it altered its approach to strategic criticism of test data protection. It claimed that Egypt violates its own laws concerning data exclusivity.³¹⁷ The fact is that the Egyptian Law does not refer to the terminology of data exclusivity. The Law rather adopts the same concept of the TRIPS Agreement of the protection of undisclosed information.³¹⁸

The 2005 Report emphasized the worsening situation for the protection of test data.³¹⁹ It also introduced new comments concerning the protection of new plant varieties.³²⁰ The U.S. accused the Ministry of Agriculture of being unable to register any new plant variety till December 2004, due to the onerous procedures required by the IPR Law.³²¹ The biggest procedural concern was the requirement that the applicant must deposit a sample of its new variety with the Egyptian Bank of Genes.³²² This requirement is accompanied by the disclosure of the genetic resources or traditional knowledge associated with this new variety.³²³ The U.S. breeders have been refraining

³¹⁴*Id.*, at 98.

³¹⁵USTR NTE Report for 2003, *supra* note 313, at 98.

³¹⁶USTR NTE Report for 2003, *supra* note 313, at 98.

³¹⁷2004 National Trade Estimate Report on Foreign Trade Barriers, 2004, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/asset_upload_file82_4764.pdf (last visited Dec.5, 2007), at 127.

³¹⁸The Egyptian IPR Law, *supra* note 280, at Articles 55-61 & TRIPS, *supra* note 2, at Article 39.

³¹⁹2005 National Trade Estimate Report on Foreign Trade Barriers, 2005, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file858_7466.pdf (last visited Dec.5, 2007), at 175.

³²⁰*Id.*

³²¹USTR NTE Report for 2005, *supra* note 319, at 175.

³²²USTR NTE Report for 2005, *supra* note 319, at 175..

³²³USTR NTE Report for 2005, *supra* note 319, at 175.

from exporting their new varieties to Egypt because of such concerns, fearing that their breeds would be exposed to piracy.³²⁴

The granting of marketing approval of generic drugs continued in Egypt.³²⁵ The 2006 Report added new dimensions to previous U.S. complaints about the protection of test data.³²⁶ The new element was that some of the approvals affected pending patent applications filed with the Egyptian Patent Office.³²⁷ This problem was aggravated by the prolonged patent approval procedures.³²⁸ An interim alternative to patents is exclusive marketing rights provided by both the TRIPS and the Egyptian Law.³²⁹ A U.S. pharmaceutical company was denied such exclusive marketing rights by an Egyptian court.³³⁰ The Report raised more comments about the substance of the Law itself rather than its implementation.³³¹ It mentioned that the Law does not provide for the exclusive commercial rights conferred to trademarks owners according to the TRIPS.³³² The Law only referred to these rights in the context of the exhaustion of trademarks rights.³³³ This is a peculiar type of legal drafting of denying or terminating rights that were never stipulated by the Law. Other concerns were raised in the Report about the absence of the additional level of geographical indications protection granted by the TRIPS to wines and spirits.³³⁴ The only level that is provided by the Law is the initial level, which protects the GIs to the extent that the public is

³²⁴The Egyptian IPR Law, *supra* note 280, at Article 200.

³²⁵The Egyptian IPR Law, *supra* note 280, at Article 200.

³²⁶2006 National Trade Estimate Report on Foreign Trade Barriers, 2006, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_NTE_Report/asset_upload_file102_9241.pdf (last visited Dec.5, 2007), at 210.

³²⁷*Id.*

³²⁸USTR NTE Report for 2006, *supra* note 326, at 210.

³²⁹USTR NTE Report for 2006, *supra* note 326, at 210.

³³⁰USTR NTE Report for 2006, *supra* note 326, at 210.

³³¹USTR NTE Report for 2006, *supra* note 326, at 210.

³³²USTR NTE Report for 2006, *supra* note 326, at 210. & TRIPS, *supra* note 2, at Article 16.1.

³³³The Egyptian IPR Law, *supra* note 280, at Article 71 & TRIPS, *supra* note 2, at Article 16.1.

³³⁴USTR NTE Report for 2006, *supra* note 326, at 210, The Egyptian IPR Law, *supra* note 280, at Articles 104 -114 & TRIPS, *supra* note 2, at Article 23.

not misled about the true origin of the good.³³⁵ The 2007 Report was almost the same as its predecessor.³³⁶

2. The IIPA Annual Reports

The IIPA reports help inform about of the USTR judgment of IPR protection in various countries. The 2003 IIPA Report included direct criticism of the Egyptian IPR Law³³⁷. Later reports just reiterated the basic content of that of in 2003 Report.³³⁸ For example, the Report stated that the criminal penalties for copyright infringements are derived from those stipulated by the former copyright law of 1954.³³⁹ The penalties in the Law range from 5000 to 10000 L.E. and/or a minimum period of imprisonment of one month.³⁴⁰ This penalty lags behind the TRIPS objective of criminal remedies to provide deterrence to IPR violations.³⁴¹ The fines should be proportionate to the size of business involved, while the fixed financial penalties of the Law only put a ceiling on the damage inflicted by the infringer.³⁴²

The Law also enables the judicial authorities to seize materials that are fully assigned to the act of copyright infringement.³⁴³ This requirement contradicts the

³³⁵USTR NTE Report for 2006, *supra* note 326, at 210, The Egyptian IPR Law, *supra* note 280, at Articles 104 -114 & TRIPS, *supra* note 2, at Article 23.

³³⁶2007 National Trade Estimate Report on Foreign Trade Barriers, 2007, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_NTE_Report/asset_upload_file846_10941.pdf (last visited Dec.5, 2007).

³³⁷International Intellectual Property Alliance 2003 Special 301 Report, Egypt, <http://www.iipa.com/rbc/2003/2003SPEC301EGYPT.pdf> (last visited Sept.18, 2007).

³³⁸International Intellectual Property Alliance 2004 Special 301 Report, Egypt, available at: <http://www.iipa.com/rbc/2004/2004SPEC301EGYPT.pdf> (last visited Sept.18, 2007), International Intellectual Property Alliance 2005 Special 301 Report, Egypt, available at: <http://www.iipa.com/rbc/2005/2005SPEC301EGYPT301.pdf> (last visited Sept.18, 2007), International Intellectual Property Alliance 2006 Special 301 Report, Egypt, available at: <http://www.iipa.com/rbc/2006/2006SPEC301EGYPT.pdf> (last visited Sept.18, 2007), International Intellectual Property Alliance 2007 Special 301 Report, Egypt, available at: <http://www.iipa.com/rbc/2007/2007SPEC301EGYPT.pdf> (last visited Sept.18, 2007).

³³⁹ *Id.*, IIPA Report for 2003 at 101.

³⁴⁰The Egyptian IPR Law, *supra* note 280, at Article 181.

³⁴¹TRIPS, *supra* note 2, Article 61 & International Intellectual Property Alliance 2003 Special 301 Report, Egypt, available at: <http://www.iipa.com/rbc/2003/2003SPEC301EGYPT.pdf> (last visited Sept.18, 2007), at 101.

³⁴² IIPA Report for 2003, *Supra* note 341.

³⁴³The Egyptian IPR Law, *supra* note 280, at Article 179(3).

TRIPS which requires the seizure of the implements and materials that are predominantly used in infringement.³⁴⁴ The Law allows judicial authorities to order a custodian to make use of the disputed copyrighted works, with revenues deposited at the court till the case is judicially decided.³⁴⁵ This provision contradicts the TRIPS obligation that the seized products shall be disposed outside of the market.³⁴⁶

The right of translation into Arabic lapses under the Law if the copyright owner doesn't make within three years from the date of publication.³⁴⁷ Egypt has no right to make this exception to the right of translation under the Berne Convention since it didn't fulfill the requirement of notifying the WIPO first.³⁴⁸ The limited exceptions to copyrights under the Law don't provide for the three step conditions stated in the TRIPS.³⁴⁹ The three conditions were only stated in the Law for one particular exception to copyrights, making a personal copy.³⁵⁰ The conditions should have been located at the "Chapeau" of the whole provision covering these limited exceptions.³⁵¹ The interests of the copyright owner could thus be jeopardized by a broad interpretation of the Law by the courts which might approve seriously infringing acts.³⁵²

The Law also enables broadcasting organizations to broadcast publicly performed works as long as an adequate remuneration is paid to the author.³⁵³ This

³⁴⁴IIPA Report for 2003, *supra* note 341, at 102.

³⁴⁵The Egyptian IPR Law, *supra* note 280, at Article 181.

³⁴⁶TRIPS, *supra* note 2, at Article 46.

³⁴⁷The Egyptian IPR Law, *supra* note 280, at Article 148.

³⁴⁸IIPA Report for 2003, *supra* note 341, at 103.

³⁴⁹The Egyptian IPR Law, *supra* note 280, at Article 171, TRIPS, *supra* note 2, at Article 13 & IIPA Report for 2003, *supra* note 341, at 104.

³⁵⁰The Egyptian IPR Law, *supra* note 280, at Article 171, TRIPS, *supra* note 2, at Article 13 & IIPA Report for 2003, *supra* note 341, at 104.

³⁵¹The Egyptian IPR Law, *supra* note 280, at Article 171, TRIPS, *supra* note 2, at Article 13 & IIPA Report for 2003, *supra* note 341, at 104.

³⁵²IIPA Report for 2003, *supra* note 341, at 104.

³⁵³The Egyptian IPR Law, *supra* note 280, at Article 169 & IIPA Report for 2003, *supra* note 341, at 105.

payment could be "in cash or in kind".³⁵⁴ IIPA requests that "this provision provides a compulsory license and should be deleted".³⁵⁵ Another peculiar aspect of this provision of the Law is that it doesn't refer to an equivalent remuneration to be paid to the performers.³⁵⁶ This is despite the fact that the Law refers to other types of remunerations that should be also paid if necessary.³⁵⁷ A better wording in the Law would have referred directly to the performers' remunerations.³⁵⁸

C. Criticism Raised by the U.S. against Egypt in the WTO Trade Policy Review

WTO members are subject to periodic reviews of their trade policies in all economic fields including IPR. Such reviews are carried out by the WTO Secretariat under the "Trade Policy Review Mechanism".³⁵⁹ A different time frequency for the reviews is assigned for each of the WTO members according to its share in international trade.³⁶⁰ For Egypt, this review takes place every six years.³⁶¹ Part of this review takes the form of an exchange of questions and replies between Egypt and its main trading partners.³⁶²

Certainly, all questions pertaining to IPR in the trade policy review are posed by developed countries like the U.S. The particular importance of examining the questions raised by the U.S. is that they give indications about its areas of concern about IPR protection in Egypt. The U.S. raised IPR questions in the Trade Policy Review of Egypt, which cover the same issues raised at the bilateral level.³⁶³ The

³⁵⁴The Egyptian IPR Law, *supra* note 280, at Article 169 & IIPA Report for 2003, *supra* note 341, at 105.

³⁵⁵The Egyptian IPR Law, *supra* note 280, at Article 169 & IIPA Report for 2003, *supra* note 341, at 105.

³⁵⁶The Egyptian IPR Law, *supra* note 280, at Article 169.

³⁵⁷The Egyptian IPR Law, *supra* note 280, at Article 169.

³⁵⁸The Egyptian IPR Law, *supra* note 280, at Article 169.

³⁵⁹Hereinafter TPRM.

³⁶⁰Trade Policy Reviews, available at: http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (last visited Feb.18, 2008).

³⁶¹*Id.*

³⁶²Trade Policy Reviews, *supra* note 360.

³⁶³Trade Policy Review Body - Trade Policy Review - Egypt - Minutes of Meeting – Addendum, WT/TPR/M/150/Add.1 (Jul. 31, 2005), available at: http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (last visited Feb.18, 2008), at 23 – 29.

repeated questions included areas of data exclusivity, exceptions of copyrights, rights conferred by trademarks, and enforcement of IPR.³⁶⁴ The only additional question was about the exceptions of patentability under the Egyptian IPR Law.³⁶⁵ The U.S. was concerned about the exception of "organs, tissues, viable cells and DNA" from patentability.³⁶⁶ Egypt replied that these areas are interrelated with the areas exempted from patentability under the TRIPS, like plants and animals.³⁶⁷ The Egyptian argument was that if the whole animal or plant is exempted, then its cells are subject to the same rule.³⁶⁸ Moreover, Egypt referred to other ethical and religious factors preventing the grant of patents to these areas.³⁶⁹

³⁶⁴*Id.*

³⁶⁵Trade Policy Review - Egypt, *supra* note 363, at 24.

³⁶⁶Trade Policy Review - Egypt, *supra* note 363, at 24.

³⁶⁷Trade Policy Review - Egypt, *supra* note 363, at 24.

³⁶⁸Trade Policy Review - Egypt, *supra* note 363, at 24.

³⁶⁹Trade Policy Review - Egypt, *supra* note 363, at 24.

IV. A comparison of Egypt's IPR Law with IPR Standards in the U.S. FTAs

The critical point of this thesis is a comparison of the Egyptian IPR Law with the U.S. FTAs. There are many divergences in the different U.S. FTAs terms with different countries regarding substantive standards and language. Still, it is possible to compare the common denominators.

However, one must decide whether the comparison should be made between the Egyptian IP Law and the U.S. FTAs with low or high TRIPS Plus standards. The specific FTAs terms that will be the appropriate point for comparison are unknown till the negotiations are launched between Egypt and the U.S. The start of negotiations will reveal the significant interests motivating the two countries. A general trade negotiation rule is that later negotiated agreements are more difficult for the weaker party. This is obvious from all WTO accessions in all international trade files including IPR. Accordingly, the U.S. is more likely to request high IPR standards in the FTA negotiations with Egypt.

The focus of this comparison of the US FTAs is with countries sharing common economic conditions with Egypt. Levels of economic status vary widely among developing countries. Guiding factors for the similarity of economic conditions of a given country and Egypt might include population, income per capita and unemployment rate. The more socially vulnerable a country is, the less it is able to accept TRIP Plus provisions. This rule applies despite all counter arguments suggesting that adequate and effective IPR protection is a prerequisite to investment promotion and economic growth.

The US FTA with Morocco furnishes a good platform for comparison. Morocco like Egypt has a relatively large population, with World Bank country data for the year 2005 indicating the Moroccan population to be 30.2 million compared to 74 in Egypt.³⁷⁰ GNI per capita in 2005 was 1730 annually for Morocco and 1250 for Egypt.³⁷¹ The closeness of the GNI figures indicates Egypt's potential to accept the TRIPS Plus measures. Moreover, the Morocco FTA would be likely to be used by the US as a template since it has been used almost exactly in other FTAs with countries such as Bahrain and Oman.

A. Gaps in IPR Standards between the U.S. FTAs and the Egyptian IPR Law

1. Trademarks

a. Eligibility for Registration__

The FTAs require more legal levels regarding trademarks distinctiveness than the visual perception criterion that is stipulated by the TRIPS.³⁷² FTA parties are obliged to approve registration of peculiar types of trademarks like sound and smell of the mark.³⁷³ The TRIPS is flexible enough in this regard as it is optional for members to choose whether to apply the visual perception criterion as prerequisite for trademark registration or not.³⁷⁴ TRIPS gives WTO members the option of requiring the registration of trademarks to be contingent upon use or not.³⁷⁵ In fact, the current Egyptian Law makes use of the TRIPS. In defining trademarks, the Law lists a number of examples such as names, colors and numbers or combinations thereof.³⁷⁶

³⁷⁰Egypt, Arab Rep. Data Profile, available at: <http://devdata.worldbank.org/external/CPProfile.asp?PTYPE=CP&CCODE=EGY> and Morocco Data Profile, available at: <http://devdata.worldbank.org/external/CPProfile.asp?PTYPE=CP&CCODE=MAR> (last visited April 1, 2008).

³⁷¹*Id.*

³⁷²US – Morocco Free Trade Agreement, June 15, 2004, available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html (last visited April. 3, 2008), Article 15.2.1 & TRIPS, *supra* note 2, at Article 15.

³⁷³US – Morocco FTA, *supra* note 372, at Article 15.2.1.

³⁷⁴TRIPS, *supra* note 2, at Article 15.1.

³⁷⁵The Egyptian IPR Law, *supra* note 280, at Article 63.

³⁷⁶The Egyptian IPR Law, *supra* note 280, at Article 63

The definition is succeeded by a condition that all types of trademarks must be visually perceptible.³⁷⁷ The Law also links ownership of trademarks to use within five years from the registration date.³⁷⁸ Otherwise, competent courts are entitled to cancel the registration upon the request of any interested party.³⁷⁹ The owner may still request the restoration of this cancelled registration within three years in exchange for an additional formality and according to the same requirements of the initial registration.³⁸⁰ Restoration is always feasible unless the cancellation is the outcome of a judicial decision.³⁸¹

b. Rights Conferred to Trademarks Owners

The FTAs extended rights conferred to trademark owners under the TRIPS. The TRIPS grants such rights with respect to identical or similar signs for identical or similar goods or services.³⁸² The FTAs oblige their parties to apply the trademark classifications of the WIPO Nice Agreement.³⁸³ These classifications prescribed by the Nice Agreement put trademarks assigning different goods or services into interrelated groupings. However, the FTAs extend trademark rights to "related goods or services", which is beyond the Nice classifications.³⁸⁴ This extension reverses the objectives of the Agreement as the registration of a trademark for one or more classifications will be automatically extended to neighboring classifications. Egypt is already a member

³⁷⁷The Egyptian IPR Law, *supra* note 280, at Article 65.

³⁷⁸The Egyptian IPR Law, *supra* note 280, at Article 65.

³⁷⁹The Egyptian IPR Law, *supra* note 280, at Article 91.

³⁸⁰The Egyptian IPR Law, *supra* note 280, at Article 92.

³⁸¹The Egyptian IPR Law, *supra* note 280, at Article 92

³⁸²TRIPS, *supra* note 2, at Article 16.1.

³⁸³US – Morocco FTA, *supra* note 372, at Article 15.2.9.

³⁸⁴World Intellectual Property Organization, Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, of June 15, 1957, as revised at Stockholm on July 14, 1967, and at Geneva on May 13, 1977, and amended on September 28, 1979 (hereinafter Nice Agreement).

of the Nice Agreement³⁸⁵. The current practice in Egypt is that the registration is only approved for classifications specified in the applications.

c. Intersection between Trademarks and Geographical Indications

The U.S. FTAs favor trademarks over geographical indications. In other words, the intersectional relationship between trademarks and geographical indications is transformed by the FTAs to an interchangeable one, in favor of the former. This has been the consistent U.S. position in all international trade forums. In WTO negotiations, the U.S. always opposes the E.C.'s attempts to upgrade the current international level of GIs protection. The FTAs give trademark owners exclusive rights preventing all third parties from commercially using their marks without their consent.³⁸⁶ In the abstract, this condition is nothing more than what is already required by the TRIPS.³⁸⁷ The prevalence of trademarks over GIs is only acknowledged by the TRIPS in one of two cases: use prior to the TRIPS or lack of protection of the GI in question in its country of origin.³⁸⁸ The only difference is that under the FTAs, the use of GIs is subject to prevention by trademarks owners of similar or identical products.³⁸⁹

Further, the FTAs are clear in exempting the common name from the protection of GIs.³⁹⁰ The TRIPS avails WTO members of the possibility of exempting customary names from GIs protection, which is the U.S. approach.³⁹¹ To the contrary, proponents of GIs usually choose to apply GIs to such customary names.³⁹² Many

³⁸⁵WIPO Bodies, Assembly (Nice Union), available at: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=B&bo_id=10 (last visited April 1, 2008).

³⁸⁶U.S. – Morocco FTA, *supra* note 372, at Article 15.2.4.

³⁸⁷TRIPS, *supra* note 2, at Article 16.1.

³⁸⁸TRIPS, *supra* note 2, at Articles 24.5 & 24.9.

³⁸⁹U.S. – Morocco FTA, *supra* note 372, at Article 15.2.4.

³⁹⁰U.S. – Morocco FTA, *supra* note 372, at Article 15.2.3.

³⁹¹TRIPS, *supra* note 2, at Article 24.6.

³⁹²TRIPS, *supra* note 2, at Article 24.6.

parties to FTAs belong to the so - called Old World. The element of accumulation of the marketing reputation of a given good is necessary for a GI to develop in any territory; this is only enjoyable by Old World countries. Rich biodiversity in a given country along with the presence of large indigenous communities such as those in Morocco are important elements that makes GIs more advantageous than trademarks. The FTAs thus deprives Morocco of the advantages of its heritage which contributes to its economic strength and well being.

New World countries such as the U.S., Canada and Australia, care less for the protection of GIs. Accordingly, the U.S. FTAs deprive their Old World partners from pursuing internal protection for their own customary names under the GIs system³⁹³. In addition, the definition of GIs under the TRIPS refers only to goods³⁹⁴. Interested members can choose to apply GIs to services as well³⁹⁵. The U.S. FTAs are specific in including GIs for services³⁹⁶. This inclusion of services provides trademark owners with further advantages, thus promoting the U.S. FTAs' approach which favors trademarks for all types of GIs, whether goods or services. The Egyptian Law is deficient in GI provisions and its definition of GIs doesn't include services anyway, therefore this point is irrelevant³⁹⁷.

d. E – Filing for Trademarks

E - filing is the most challenging TRIPS Plus requirement in the U.S. FTAs regarding trademarks, as it requires advanced facilities often unavailable in developing countries.³⁹⁸ The FTAs mandate that their parties establish an e-filing system for trademarks.³⁹⁹ This system includes application, registration, opposition

³⁹³U.S. – Morocco FTA, *supra* note 372, at Article 15.2.3.

³⁹⁴TRIPS, *supra* note 2, at Article 22.1.

³⁹⁵TRIPS, *supra* note 2, at Article 1.1.

³⁹⁶U.S. – Morocco FTA, *supra* note 372, at Article 15.2.4.

³⁹⁷The Egyptian IPR Law, *supra* note 280, at Articles 104 – 112.

³⁹⁸U.S. – Morocco FTA, *supra* note 372, at Article 15.2.7.

³⁹⁹U.S. – Morocco FTA, *supra* note 372, at Article 15.2.7.

and renewing of the trademarks.⁴⁰⁰ In tandem, an online database is to be available to the public presenting applications and registrations of trademarks submitted to the competent authorities.⁴⁰¹ This substantive requirement is already in place in Egypt with the Commercial Registry thus satisfying the U.S. standards.

e. Recordation of Trademarks Licenses

The TRIPS grants WTO members the right to regulate licensing and assignment of trademarks, as long as compulsory licenses are not involved.⁴⁰² In contrast, the U.S. FTAs deny registration of trademark licenses as a prerequisite of their legal validity.⁴⁰³ The Egyptian IPR Law requires, through elaborate provisions, that all trademarks licenses be registered or else they will not be recognized.⁴⁰⁴

This registration requirement of the Egyptian IPR Law is included in its Executive Regulations listing all data related to the licensing process. The registration data includes all the information about the licensor and licensee.⁴⁰⁵ The licenses are non assignable except with consent of the owner.⁴⁰⁶ To this end, all the signatures included in the licensing contracts need first to be judicially certified.⁴⁰⁷ Registrability can't be satisfied by registration of the licensing act itself. The registration must also include an authentic copy of the contract.⁴⁰⁸

Like all trademarks legal transactions, registration must be published for transparency reasons.⁴⁰⁹ The calculation of all terms of IPR protection commences from the publication date.⁴¹⁰ The same publication requirement is mandatory for all

⁴⁰⁰U.S. – Morocco FTA, *supra* note 372, at Article 15.2.7.

⁴⁰¹U.S. – Morocco FTA, *supra* note 372, at Article 15.2.7.

⁴⁰²TRIPS, *supra* note 2, at Article 21.

⁴⁰³U.S. – Morocco FTA, *supra* note 372, at Article 15.2.11.

⁴⁰⁴The Egyptian IPR Law, *supra* note 280, at Article 96.

⁴⁰⁵The Egyptian IPR Law, *supra* note 280, Executive Regulations, at Article 102.

⁴⁰⁶The Egyptian IPR Law, *supra* note 280, at Article 96.

⁴⁰⁷The Egyptian IPR Law, *supra* note 280, at Article 96.

⁴⁰⁸The Egyptian IPR Law, *supra* note 280, Executive Regulations, at Articles 102 – 103.

⁴⁰⁹The Egyptian IPR Law, *supra* note 280, at Article 96.

⁴¹⁰The Egyptian IPR Law, *supra* note 280, at Article 96.

legal transactions. Accordingly, the legal effects of licensing contracts of trademarks are in suspension till their publication.⁴¹¹

2. Geographical Indications

Countries adopt numerous individual approaches to the TRIPS definition of GIs thus making it one of the most controversial IPR issues, since GIs are interrelated with other concepts such as appellations of origin and false indications of sources. The differences among these concepts are ill defined. That's why the U.S. FTAs do not include extensive GIs provisions. The FTAs instead reiterate what is already mentioned in their trademarks sections about the prevalence of trademarks over GIs where conflict occurs. Additionally, the FTAs extend the GIs definition under the TRIPS to include elements that are classically designated for identifying or defining trademarks.⁴¹² For instance, the FTAs definition of GIs states that "any sign or combination of signs including geographical and personal names shall be eligible to be a geographical indication".⁴¹³ Purportedly, this definition expands the scope of GIs, but in reality, it strengthens the reach of trademark owners over GIs. As a practical matter, this definition makes trademarks eligible for all privileges currently enjoyable by GIs under the TRIPS while the converse is not true.

3. Copyright and Related Rights

a. Exclusive Rights of Reproduction

The U.S. FTAs grant holders of copyright and related rights the exclusive rights to prevent all third parties from any sort of reproduction of protected works.⁴¹⁴ This prevention includes the act of making temporary copies in electronic forms without the holder's consent.⁴¹⁵ No specifications for computer programs are

⁴¹¹The Egyptian IPR Law, *supra* note 280, at Article 96.

⁴¹²U.S. – Morocco FTA, *supra* note 372, at Article 15.3.3.

⁴¹³U.S. – Morocco FTA, *supra* note 372, at Article 15.3.3.

⁴¹⁴U.S. – Morocco FTA, *supra* note 372, at Article 15.5.1.

⁴¹⁵U.S. – Morocco FTA, *supra* note 372, at Article 15.5.1.

mentioned in the FTAs.⁴¹⁶ Accordingly, the prevention clause extends to all types of reproductions.⁴¹⁷ The Egyptian IPR Law, in turn, endorses a vast array of exceptions that are frequently criticized by the U.S. Such exceptions include the making of single and personal copies for some forms of literary or artistic works.⁴¹⁸ Temporary copies of computer programs are also exempted by the Law, as long as they are being carried out by a legal possessor.⁴¹⁹

b. Exhaustion of Rights

Exhaustion of exclusive rights is usually included in developing countries' IPR laws in order to offer the public alternative channels of distribution of copyrighted works. The TRIPS is neutral with respect to exhaustion of IPR rights. It explicitly mentions that its provisions do not prevent WTO members from the right to apply exhaustion.⁴²⁰ This exhaustion may take place outside the territory of the member, when the copyright owner transfers this right abroad. It is then presumed that the original copies of this work are possessed legitimately abroad unless otherwise is established by the owner. This owner can, in case of copyright infringement, request the competent authorities to apply border measures to imported products. The FTAs extend the exclusive rights of the copyright holders, by preventing the FTAs parties from applying exhaustion to imports. In contrast, exhaustion is repeated in all sections of the Egyptian Law including for copyright.⁴²¹

c. Term of Protection

Extension of the term of copyright protection as prescribed by the TRIPS is a common factor in most FTAs. This term is extended from 50 to 70 years computed

⁴¹⁶U.S. – Morocco FTA, *supra* note 372, at Article 15.5.1.

⁴¹⁷U.S. – Morocco FTA, *supra* note 372, at Article 15.5.1.

⁴¹⁸The Egyptian IPR Law, *supra* note 280, at Article 171, Second.

⁴¹⁹The Egyptian IPR Law, *supra* note 280, at Article 171, Third.

⁴²⁰TRIPS, *supra* note 2, at Article 6.

⁴²¹The Egyptian IPR Law, *supra* note 280, at Article 147.

from the author's death.⁴²² This extension applies to all forms of copyright indiscriminately, including works of applied arts.⁴²³ The protection of such applied arts is limited by the Egyptian Law to 25 years from the date of publication or public availability, whichever comes last.⁴²⁴ The FTAs apply the same extension of the term of protection to performers and producers of phonograms.⁴²⁵

4. Patents

a. Scope of Patentability

Patent is one of the key IPR fields. The FTAs require higher levels of protection than those provided by the TRIPS. The TRIPS offers WTO members some optional exceptions from patentability in some sensitive fields of technology, or *ordre public* concerns.⁴²⁶ The FTAs maintained only the latter exceptions.⁴²⁷ Exceptions from patentability are restricted by the FTAs to "protect the *ordre public* or morality, including human, animal, or plant life or health, or to avoid serious prejudice to the environment".⁴²⁸ This exception is unavoidable even by the most zealous IPR *demandeurs* like the U.S.⁴²⁹ This area of exceptions is a matter of serious sensitivity aligning most developing countries in their concerns about boundaries for patentability.

The same is not true for other areas acknowledged by the TRIPS to be sensitive, with patentability left to the choice of each member.⁴³⁰ The FTAs are silent about excluding these areas like "diagnostic, therapeutic or surgical methods for humans or animals" from patentability.⁴³¹ Accordingly, parties of the FTAs are

⁴²²U.S. – Morocco FTA, *supra* note 372, at Article 15.5.5.

⁴²³U.S. – Morocco FTA, *supra* note 372, at Article 15.5.5.

⁴²⁴The Egyptian IPR Law, *supra* note 280, at Article 164.

⁴²⁵U.S. – Morocco FTA, *supra* note 372, at Article 15.5.5.

⁴²⁶TRIPS, *supra* note 2, at Article 27.2.

⁴²⁷U.S. – Morocco FTA, *supra* note 372, at Article 15.9.1.

⁴²⁸U.S. – Morocco FTA, *supra* note 372, at Article 15.9.1

⁴²⁹U.S. – Morocco FTA, *supra* note 372, at Article 15.9.1

⁴³⁰TRIPS, *supra* note 2, at Article 27.3.

⁴³¹TRIPS, *supra* note 2, at Article 27.3.

obliged to offer patents in these areas and to cease availing themselves of the TRIPS options in this regard.⁴³² The FTAs explicitly extend this patent obligation to even more controversial areas like plants and animals.⁴³³

b. Limitations to Patent Rights

The FTAs provide that the patent owner has exclusive rights that are unlimited by the principle of exhaustion.⁴³⁴ In this context, the FTAs state that those rights, in particular with respect to importation, are not impaired by the act of selling the patented product abroad by the patent owner.⁴³⁵ Importation of the patented products by third parties would thus always require the consent of the owner.⁴³⁶ The Egyptian Law has made use of exhaustion as granted by the TRIPS to WTO members.⁴³⁷ The Law states that "the owner's right to prevent third parties from importing, using, selling or distributing a product shall lapse when he commercializes the product in any country or authorizes a third party to do so".⁴³⁸

c. Term of Patent Protection

Patents is one of the most frequent fields for imposing TRIPS Plus measures in the FTAs. The TRIPS provides only a term of patent protection of twenty years computed from the filing date.⁴³⁹ FTAs negotiators have not managed to increase the term of protection in normal circumstances. Instead, if an unreasonable delay occurs in the process of patent application, the FTAs grant the owner a compensatory term of protection.⁴⁴⁰ The owner is only entitled to this compensation if the delay is not his fault. For instance, the right holder has no privilege to this compensatory term if the

⁴³²U.S. – Morocco FTA, *supra* note 372, at Article 15.9.1.

⁴³³U.S. – Morocco FTA, *supra* note 372, at Article 15.9.2.

⁴³⁴U.S. – Morocco FTA, *supra* note 372, at Article 15.9.4.

⁴³⁵U.S. – Morocco FTA, *supra* note 372, at Article 15.9.4.

⁴³⁶U.S. – Morocco FTA, *supra* note 372, at Article 15.9.4.

⁴³⁷TRIPS, *supra* note 2, Article 6.

⁴³⁸The Egyptian IPR Law, *supra* note 280, Article 10.

⁴³⁹TRIPS, *supra* note 2, Article 33.

⁴⁴⁰U.S. – Morocco FTA, *supra* note 372, Article 15.9.7.

cause of delay is unfurnished documentation from his side.⁴⁴¹ The FTAs define this delay to be a period of "more than four years from the filing date or two years from the request of examination of the application, whichever, lasts longer".⁴⁴² This compensation shall only be equal to the delay period.⁴⁴³ For example, if the application inspection takes five years from the filing date, the patent owner is compensated for one year, making the overall net patent duration equal to sixteen years. Moreover, the compensation is contingent on the request of an interested party, like the patent owner.⁴⁴⁴ Thus, the competent authorities are not burdened by an *ex officio* obligation under the FTAs to adjust the term of protection for the delays.⁴⁴⁵

The Egyptian Law, in contrast, does not include any such time compensation. The interested party has only an opportunity to resort to the competent administrative court to complain about unreasonably prolonged inspections of his patent application. However, having the Law void of specific provisions about the time compensation leaves the whole matter to the power of decision of the judge. This is disadvantageous to the applicant because the Egyptian judge will seldom decide against an overburdened government authority like the Patent Office.

5. Measures Related to Certain Products

a. Data Exclusivity versus Undisclosed Information

This is the most controversial IPR issue and a serious hindrance to Egypt's eligibility to join an FTA with the U.S. As previously noted in chapter 3, the U.S. criticism of the IPR protection in Egypt centers on this issue. In fact, the FTAs' provisions are drafted in a manner that avoids provoking the public opinion in developing countries towards data exclusivity. The real heading of this part in the

⁴⁴¹U.S. – Morocco FTA, *supra* note 372, Article 15.9.7.

⁴⁴²U.S. – Morocco FTA, *supra* note 372, Article 15.9.7.

⁴⁴³U.S. – Morocco FTA, *supra* note 372, Article 15.9.7.

⁴⁴⁴U.S. – Morocco FTA, *supra* note 372, Article 15.9.7.

⁴⁴⁵U.S. – Morocco FTA, *supra* note 372, Article 15.9.7.

FTAs should have been the protection of data exclusivity. However, data exclusivity is disguised in the FTAs under the heading "Measures Related to Certain Products".⁴⁴⁶ The vague wording of this heading in the FTAs does not really specify its scope of application. This scope would have to be inferred from the context of the underlying provisions, as the straightforward definition of the "certain products" is not provided by the FTAs. The kind of protection offered or even the exact field of IPR under which this part falls is deliberately avoided by the FTAs. Normally, international IPR legal texts provide a specified terminology for any form of IPR they tackle. The TRIPS calls this form of IPR "undisclosed information", while the U.S. legal system and its reports use the term "data exclusivity". The Egyptian IPR Law adopts the term undisclosed information and almost copycats its definition from the TRIPS.⁴⁴⁷

b. Rights Conferred by Data Exclusivity_

The right conferred to owners of test data is the most controversial aspect of data exclusivity. The FTAs grant applicants exclusivity of reference to their test data in the course of marketing approval for pharmaceuticals and agricultural chemicals.⁴⁴⁸ In other words, the owners are treated as first come first protected. A person must submit such data upon request of the competent authority as a condition for getting the marketing approval of his pharmaceutical product. Consequently, data exclusivity gives him the right to prevent third parties from referring to his data to get their own marketing approvals.⁴⁴⁹ This right also works even if such data is not confidential, or is being published in publicly available official documents or websites. In this case, third parties are obliged to submit their own data to get marketing approval. This data is inspected for its efficacy and safety apart from the inspection that has already been

⁴⁴⁶U.S. – Morocco FTA, *supra* note 372, at Article 15.10.

⁴⁴⁷The Egyptian IPR Law, *supra* note 280, Articles 55 - 62.

⁴⁴⁸U.S. – Morocco FTA, *supra* note 372, Article 15.10.

⁴⁴⁹U.S. – Morocco FTA, *supra* note 372, at Article 15.10.1.

carried out by the competent authority for the data submitted by the original person. The net result of this process is redundancy in administrative costs and efforts, and prolongation of time for approval for submitted data. All extra costs would be levied on the third parties, who in turn, pass the costs on to the consumers. In some cases, third parties' competitiveness is hampered by the additional time period for the new inspections, and thus reducing product option for consumers.

The Egyptian Law has been decisive in preventing this redundancy of procedures or costs of marketing approvals for pharmaceuticals.⁴⁵⁰ It adopts the conditions of the secrecy of data as provided for by the TRIPS.⁴⁵¹ Accordingly, if the submitted data is publicly available, no exclusivity is granted to the initial submitter.⁴⁵² The FTAs are clear that exclusivity also applies to documents proving marketing approval abroad.⁴⁵³ The strict application of undisclosed information is a significant point of free riding for third parties marketing approval for pharmaceuticals in Egypt. To elaborate, if the U.S. Food and Drug Administration or any other credible entity in a developed country approves a certain drug, the Egyptian Ministry of Health would probably accept the circulation of this drug in the Egyptian market. The outcome of this procedural flexibility is enjoyed equally by both the initial submitter and third parties. They are both exempted from some documentation requirements.

c. Term of Protection

The term of protection is specified by the FTAs, making use of the TRIPS silence this regard⁴⁵⁴. The term under the FTAs is five years for pharmaceuticals and ten years for agricultural chemicals, computed from the approval date.⁴⁵⁵ This computation trigger under the FTAs assures that the long administrative procedures do

⁴⁵⁰U.S. – Morocco FTA, *supra* note 372, at Article 15.10.1.

⁴⁵¹The Egyptian IPR Law, *supra* note 280, Articles 55 - 62.

⁴⁵²The Egyptian IPR Law, *supra* note 280, at Article 55 and TRIPS, *supra* note 2, Article 39.

⁴⁵³U.S. – Morocco FTA, *supra* note 372, Article 15.10.1.

⁴⁵⁴U.S. – Morocco FTA, *supra* note 372, Article 15.10.1.

⁴⁵⁵U.S. – Morocco FTA, *supra* note 372, Article 15.10.1.

not affect the rights holders.⁴⁵⁶ The TRIPS does not include any provisions regulating this computation process either.⁴⁵⁷

The Egyptian Law literally abides by the wording of the TRIPS on this issue to comply with Egypt's international obligations without applying any TRIPS Plus measures. In other areas where the TRIPS is not specific, like the term of protection, the Law adopts a lower standard compared to the level of protection offered by the FTAs. The Law provides five years of protection of undisclosed information regardless, whether such data belong to pharmaceuticals or agricultural chemicals.⁴⁵⁸ Computation starts from the date of submission or till such data are disclosed, whichever comes first.⁴⁵⁹

The FTAs also provide for a compensatory period to the duration of the patent in the case of unreasonable curtailment resulting from the marketing approval process.⁴⁶⁰ However, there is no FTA definition of unreasonable curtailment or any time limits for the competent authority to decide on marketing approval applications.⁴⁶¹ In practice, this time compensation is useless if the marketing approval takes less time than that taken for patent approval.⁴⁶² In this case, the owner of the test data will be granted the time compensation already determined by the FTAs for the curtailment in patent procedures. A problem still exists if there is no such patent curtailment, as it will be difficult to compute time compensation due to the curtailment in the marketing approval procedures because of the lack of the FTA definition. The

⁴⁵⁶U.S. – Morocco FTA, *supra* note 372, Article 15.10.1.

⁴⁵⁷TRIPS, *supra* note 4, Article 39.

⁴⁵⁸The Egyptian IPR Law, *supra* note 280, Article 56.

⁴⁵⁹The Egyptian IPR Law, *supra* note 280, Article 56.

⁴⁶⁰U.S. – Morocco FTA, *supra* note 372, Article 15.10.3.

⁴⁶¹U.S. – Morocco FTA, *supra* note 372, Article 15.10.3.

⁴⁶²U.S. – Morocco FTA, *supra* note 372, Article 15.10.3.

Egyptian Law, as in the case for patent procedures, does not provide for any time compensation of any kind.⁴⁶³

d. Linking Marketing Approval to Patents

The FTAs include provisions linking marketing approval to existing patents.⁴⁶⁴ The absence of this link in Egypt is one of the frequent points of U.S. criticism against IP protection in Egypt. This link should be made if a patent is still in force for the same product that is the subject matter of a marketing approval application.⁴⁶⁵ The FTAs require that the competent authority prevent the applicant from marketing the product till the patent lapses.⁴⁶⁶ Alternatively, an FTA party may allow for the application of such marketing approvals, but the patent owner must be notified of the applicant's identity.⁴⁶⁷

The Egyptian Law provides for measures that are not necessarily contradictory to the wording of the FTAs but still are not fully compatible with their spirit. The FTAs aim at limiting the practice of "the Bolar exemption". This practice allows third parties to prepare for marketing approval for the patented product within the patent duration, but the marketing itself should not start until after the protection expires.⁴⁶⁸ The FTAs might also be targeting, without explicitly stating, the application of extra - territorial jurisdiction for patents registered in the U.S. This is absolutely out of the question under the Egyptian Law which only recognizes patents registered in the Egyptian Patent Office.⁴⁶⁹

6. Enforcement of Intellectual Property Rights

⁴⁶³The Egyptian IPR Law, *supra* note 280, Article 56.

⁴⁶⁴U.S. – Morocco FTA, *supra* note 372, Article 15.10.4.

⁴⁶⁵U.S. – Morocco FTA, *supra* note 372, Article 15.10.4

⁴⁶⁶U.S. – Morocco FTA, *supra* note 372, Article 15.10.4

⁴⁶⁷U.S. – Morocco FTA, *supra* note 372, Article 15.10.4

⁴⁶⁸The Egyptian IPR Law, *supra* note 280, Article 10.5.

⁴⁶⁹The Egyptian IPR Law, *supra* note 280, at Article 5.

a. Enforcement of Copyright

The FTAs obligate their parties to apply enforcement measures to copyrights and related rights regardless of their registration with the competent authorities.⁴⁷⁰ The entitlement to copyright or related right could thus be proven by any available evidence, like the direct designation of the right holder's name on the product.⁴⁷¹ Other sorts of evidence like licensing contracts could also be sufficient for the right holder to be able to claim the right to protection for enforcement measures. In contrast, the Egyptian Law requires the holders of copyrights and related rights to register their products with the competent authorities. For all types of copyrights, the competent authority is the Egyptian Ministry of the Culture, while the Ministry of Telecom is responsible for computer programs and data bases.⁴⁷² The Ministry of Media is only responsible for the protection of broadcast organizations.⁴⁷³

b. Compensation under Civil Remedies

The FTAs adopt a system of damage calculation that is completely derived from a U.S. legal system and that cannot be fitted to the Egyptian Civil law. Profits gained by the infringer are considered by the FTAs in determining the amount of the compensation.⁴⁷⁴ This profit consideration must occur for infringements of trademarks and, copyrights and related rights.⁴⁷⁵ Those fields of IPR must also be protected by pre-established damages.⁴⁷⁶ In case of patents, judicial authorities are authorized to raise the amount of the compensation to at least triple the damage.⁴⁷⁷ This damage may be either proven or just assessed.⁴⁷⁸ The damages must also include the retail value of the

⁴⁷⁰U.S. – Morocco FTA, *supra* note 372, Article 15.11.4.

⁴⁷¹U.S. – Morocco FTA, *supra* note 372, Article 15.11.4.

⁴⁷²The Egyptian IPR Law, *supra* note 280, Article 138,19.

⁴⁷³The Egyptian IPR Law, *supra* note 280, Article 138,19.

⁴⁷⁴U.S. – Morocco FTA, *supra* note 372, at Article 15.11.6(a)(ii).

⁴⁷⁵U.S. – Morocco FTA, *supra* note 372, at Article 15.11.7.

⁴⁷⁶U.S. – Morocco FTA, *supra* note 372, at Article 15.11.7.

⁴⁷⁷U.S. – Morocco FTA, *supra* note 372, at Article 15.11.7.

⁴⁷⁸U.S. – Morocco FTA, *supra* note 372, at Article 15.11.7.

product assigned to the infringed IPR.⁴⁷⁹ The consideration of both the profits and retail values will lead to the duplication of the calculation process. Damages to be paid by the infringer will thus be maximized, leading to stronger deterrence.

The Egyptian Legal system has not gone as far as the FTAs in punishing the infringer. The amount payable in Egyptian IPR cases must be in harmony with other violations of the law. The Egyptian IPR law provides for very few provisions of civil remedies leaving the whole matter to the Civil Law. Obviously, the IPR Law provisions in this regard are complementary to the remedies provided by the latter Law.⁴⁸⁰ The most important contribution of the IPR Law to the civil remedies is that it allows the judge to order the sale of goods infringing trademarks.⁴⁸¹ Civil remedies for other forms of IPR infringement are not clear from the IPR Law. The revenue from the selling process is not necessarily given to the right holder as a direct compensation.⁴⁸² Rather, this revenue will only cover all fines and compensations.⁴⁸³ The principal amount of compensation ordered for the right holder under the civil filing shall not be deemed to be subject to an increase generated by this revenue.

The Civil Law specifies the general principle for damage computation.⁴⁸⁴ This principle adopts the right holder's interest as the standpoint for computing the damages.⁴⁸⁵ The process of determination of the exact amount of the compensation is left to the discretion of the judge.⁴⁸⁶ The only guiding principle for the Egyptian judge under the Civil Law is to take into consideration two factors: the damages and the profit opportunity lost by the right holder.⁴⁸⁷ It is worth mentioning that the holder's

⁴⁷⁹U.S. – Morocco FTA, *supra* note 372, at Article 15.11.6(b).

⁴⁸⁰The Egyptian IPR Law, *supra* note 280, at Article 117.

⁴⁸¹The Egyptian IPR Law, *supra* note 280, at Article 117.

⁴⁸²The Egyptian IPR Law, *supra* note 280, at Article 117.

⁴⁸³The Egyptian IPR Law, *supra* note 280, at Article 117.

⁴⁸⁴The Egyptian Civil Law, Law no 131 for the Year 1948, at Article 221,1.

⁴⁸⁵The Egyptian Civil Law, Law no 131 for the Year 1948, at Article 221,1.

⁴⁸⁶The Egyptian Civil Law, Law no 131 for the Year 1948, at Article 221,1.

⁴⁸⁷The Egyptian Civil Law, Law no 131 for the Year 1948, at Article 221,1.

loss usually exceeds the profits taken by the infringer, because the whole rationale of infringement in Egypt is to offer the public cheaper prices and lower quality. Egyptian consumers tend to be more price than quality sensitive. The same applies in considering the retail value of the product bearing the infringing IPR. It is usually but not always, very cheap.

c. Destruction of Seized Goods

The FTAs limit the TRIPS options for dealing with seized goods to the act of destruction.⁴⁸⁸ This destruction is to take place without compensation of any sort in accordance with the TRIPS instructions.⁴⁸⁹ Other options provided by the TRIPS such as the confiscation and disposal of the infringing goods outside the channels of commerce are provided by the FTAs only ambiguously.⁴⁹⁰ These other options are only permitted by the FTAs under exceptional circumstances.⁴⁹¹ The FTAs provide only for the option of confiscation of materials and implements used in the course of infringement.⁴⁹² The trademarks provisions in Egyptian IPR Law make use of all the TRIPS Options for both the goods and associated materials and implements.⁴⁹³ This Egyptian system of confiscation is likely to be given more international consideration. The act of destruction of goods bearing infringing trademarks has unpleasant environmental costs that are not recognized as generally affordable. The copyright provisions in the Law are less explicit as they only refer to confiscation.⁴⁹⁴ Recycling of copyright infringing goods is less likely, as the removal of the infringement is not practically feasible in most cases.

d. Border Measures

⁴⁸⁸U.S. – Morocco FTA, *supra* note 372, at Article 15.11.10.

⁴⁸⁹U.S. – Morocco FTA, *supra* note 372, at Article 15.11.10.

⁴⁹⁰U.S. – Morocco FTA, *supra* note 372, at Article 15.11.10.

⁴⁹¹U.S. – Morocco FTA, *supra* note 372, at Article 15.11.10.

⁴⁹²U.S. – Morocco FTA, *supra* note 372, at Article 15.11.10.

⁴⁹³The Egyptian IPR Law, *supra* note 280, at Articles 117.

⁴⁹⁴The Egyptian IPR Law, *supra* note 280, at Article 181.

Border measures are one of the most common issues in any TRIPS Plus text, as they provide for an enforcement efficiency that is not attainable in the domestic market where infringing goods may be widely dispersed. The TRIPS offers a wide range of options with respect to the scope of application of such border measures.⁴⁹⁵ The FTAs require that border measures be applied either by the request of an interested party or *ex officio* by the competent authorities.⁴⁹⁶ A security is to be paid by the applicant for the application of such border measures.⁴⁹⁷ However, this security shall not be burdensome to the extent that would "deter the right holders from resorting to border measures".⁴⁹⁸ The measures are also applicable under the FTAs to "importation, exportation and goods in transit".⁴⁹⁹

The Egyptian IPR Law is silent about the border measures, a matter of harsh criticism by Egypt's trading partners from the developed world. However, in 2005, Egypt endorsed border measures in the Executive Regulations for the Law of Importation and Exportation, the Law no 118 for the Year 1975.⁵⁰⁰ These Regulations give the government great flexibility in deciding on the level of enforcement measures applied at Egyptian borders. They are issued and amendable by a decree of the Minister of Trade and Industry. The issuance of the Regulations relieved the concerns of other countries like the U.S. about IPR enforcement in Egypt.

The current Egyptian Regulations fall short of the level presented by the FTAs. For instance, Egypt does not apply border measures for exportation and transit, so as not to burden its competent authorities with non mandatory measures.⁵⁰¹ *Ex Officio*

⁴⁹⁵TRIPS, *supra* note 2, at Articles 51 – 60.

⁴⁹⁶U.S. – Morocco FTA, *supra* note 372, at Articles 15.11.20 & 15.11.23.

⁴⁹⁷U.S. – Morocco FTA, *supra* note 372, at Article 15.11.21.

⁴⁹⁸U.S. – Morocco FTA, *supra* note 372, at Article 15.11.21

⁴⁹⁹U.S. – Morocco FTA, *supra* note 372, at Article 15.11.23.

⁵⁰⁰The Egyptian Law of Importation and Exportation, the Law no 118 for the Year 1975, available at: <http://www.customs.gov.eg/LAW/menu.html> (last visited April 1, 2008).

⁵⁰¹*Id.*, Executive Regulations, at Article 27.

application is also limited to receipt of a notification from other governmental agency.⁵⁰² This notification is to be proceeded by a complaint filed by the interested party, after being promptly notified by the competent customs about the *ex officio* procedures.⁵⁰³ In contrast, Egypt applies border measures to a wider range of IPR forms than that required by the FTAs. It applies the measures to patents, layout designs for integrated circuits and industrial designs, while the FTAs only cover trademarks and, copyrights and related rights.⁵⁰⁴ However, this detailing in the Egyptian Regulations is of little practical value. All the additional IPR forms in the Egyptian Regulations, except the industrial designs, require laboratory inspection that is not available for the customs facilities. A border complaint for a patent violation is to be diverted to the Patent Office, where it will be moved through a long procedure for decision making. The U.S. will thus be less interested in this addition by Egypt, favoring the application of its FTAs standards.

V. Policy Concerns and Conclusions

⁵⁰²Law of Importation and Exportation, , Executive Regulations, at *supra* note 500, at Article 31.

⁵⁰³Law of Importation and Exportation, , Executive Regulations, at *supra* note 500, at Articles 27-28 & 33.

⁵⁰⁴Law of Importation and Exportation, , Executive Regulations, at *supra* note 500, at Article 27.

A. Policy Concerns Regarding Elevating the IPR Protection Standards to Those Endorsed by the U.S. FTAs

1. Overview

This chapter examines policy concerns that would currently prevent Egypt from accepting TRIPS Plus provisions. Chapter 4 served to highlight the legal differences between the TRIPS Plus provisions in the U.S. FTAs and the Egyptian IPR Law. However, policy issues preventing Egypt's adoption of the TRIPS Plus aren't necessarily evident from the legal comparison. A country formulates its policy first then it promulgates the implementing law. Countries go into international trade negotiations with policy priorities. Some of the points they hope to keep non negotiable while some other areas are open for tradeoffs. A country might be successful in accomplishing all of its policy priorities or it could lose some of them in the course of negotiations. The key question remains: which compromises would be problematic for the vital areas of policy of a country?

The level of development in a given country will define its areas of sensitivity. Those areas need to be protected from any substantive compromises. For a developing country, sensitivity problems will emanate from concerns for social and economic vulnerability. These problems are usually shared by countries at the similar levels of development. Reports issued by international organizations, such as the World Health Organization (WHO), address TRIPS Plus in general and possible policy problems for the protection of public health in developing countries⁵⁰⁵. If a specific country is mentioned in a WHO report, the conclusion usually applies to other developing countries as well. For a developed country, industry lobbying pressures might prohibit changes by any administration or political party seeking reelection. Such pressures

⁵⁰⁵Hereinafter the WHO.

may prevent the conclusion of an FTA in the first place, where the interested lobbies are sufficiently influential in legislative bodies.

2. Policy Concerns for Specific IPR Forms

a. Geographical Indications

The U.S. favors trademarks over GIs in its FTAs as was pointed out by Vivas-Eugui and Spennemann⁵⁰⁶. Other IPR areas like patents for pharmaceuticals and copyrights for software and entertainment are of even more importance to the U.S.⁵⁰⁷ In the instance of GIs, the U.S. uses the TRIPS flexibility to implement its obligations through its trademark laws.⁵⁰⁸ However, some U.S. agricultural interests like the "Napa valley producers", have begun requesting U.S. positions that are more favorable towards GIs.⁵⁰⁹ Thus far, these parties with GI interests have not been influential in the U.S. IPR policy making process.

The U.S. position stems from the logical argument that GIs are public designations, while IPR deals with private rights.⁵¹⁰ In the context where GIs intersect with an IPR, trademarks are the preferred option as illustrated by the FTAs.⁵¹¹ Here the U.S. places GIs on the same footing as trademarks.⁵¹² This practice is commonly known as "first in time, first in right".⁵¹³ This means that a trademark could be given priority over a GI if applied first.⁵¹⁴ A counter argument could be that GIs develop by accumulation through generations, and thus should be offered priority.⁵¹⁵

⁵⁰⁶ David Vivas-Eugui & Christophe Spennemann, UNCTAD/ICTSD Project on Intellectual Property and Sustainable Development, *The Treatment of Geographical Indications in Recent Regional and Bilateral Free Trade Agreements* (May 2006), available at: http://www.bilaterals.org/article.php3?id_article=4812 (last visited Sept. 18, 2007).

⁵⁰⁷ *Id.*, at 19.

⁵⁰⁸ Vivas-Eugui & Spennemann, *supra* note 506, at 19.

⁵⁰⁹ Vivas-Eugui & Spennemann, *supra* note 506, at 19.

⁵¹⁰ Vivas-Eugui & Spennemann, *supra* note 506, at 19.

⁵¹¹ Vivas-Eugui & Spennemann, *supra* note 506, at 19.

⁵¹² Vivas-Eugui & Spennemann, *supra* note 506, at 23.

⁵¹³ Vivas-Eugui & Spennemann, *supra* note 506, at 23.

⁵¹⁴ Vivas-Eugui & Spennemann, *supra* note 506, at 23.

⁵¹⁵ Vivas-Eugui & Spennemann, *supra* note 506, at 23.

This area is not one of great policy concern to Egypt, as it has already incorporated GIs in its IPR Law under the trademarks provisions. An outstanding problem is that this Law does not include the additional level of protection currently granted for wines and spirits, pursuant to Articles 23 – 24 of the TRIPS. A TRIPS Minus Law would make a country ineligible to join an FTA with the U.S. This is even true in areas of little interest for the U.S like GIs. Recognizing a TRIPS deficient legal system and concluding an FTA with Egypt could potentially embarrass the U.S. government before its public. The U.S. cannot afford to forgo any opportunity to pressure Egypt into compliance with its international IPR obligations and thus open the door to further legal enhancements in areas such as data exclusivity.

b. Copyright and Related Rights

One critical policy issue of the FTAs is the prohibition of parallel importation even if the right holder has already sold its product abroad. Third parties cannot then import such legitimately acquired products from abroad, unless they have the holder's consent. Abbott explains that the issue of parallel importation is not covered by U.S. case law.⁵¹⁶ The U.S. Supreme Court affirmed only the exhaustion of copyright for the first sale inside the U.S.⁵¹⁷ The texts of the FTAs, which are binding to the U.S. courts, have now become complementary on the issue of exhaustion by prohibiting parallel importation.⁵¹⁸

In contrast, Egypt enables exhaustion in copyrights and related rights, for both selling inside its territory and abroad. Egyptian IPR legislators want to provide consumers with wider varieties of prices offered by parallel importation. This may

⁵¹⁶Frederick M. Abbott, ICTSD Programme on IPRs and Sustainable Development, International Centre of Trade and Sustainable Development (ICTSD), Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law (January 2006), available at: http://www.3dthree.org/pdf_3D/3DCESCRMorocco_April06Eng.pdf (last visited Sept.18, 2007), at 21.

⁵¹⁷*Id.*, at 21.

⁵¹⁸Abbott, *supra* note 516, at 22.

lead to the availability of the copyrighted works at cheaper prices in Egypt. This can happen if the right holder has already sold his work in a country with a more cost efficient capacity. Egypt may also be able to advantageously compare prices among several countries if the copyright holder has authorized publication in all of them. Accordingly, there is little chance that Egyptian policy makers would be ready to sacrifice such an advantage. The only exception would be if all key areas of copyrights are adequately covered by distribution agreements between the right holders and Egypt at reduced prices. This would make parallel importation of minimal significance for Egypt, which is not yet the case.

c. Patents

TRIPS Plus patent provisions constitute serious threats to public health protection efforts in developing countries, and thus cannot be accepted by Egypt. Berger and Prabhala point out that FTAs favor patent holders, even beyond their initial expectations when they acquired their exclusive patent rights.⁵¹⁹ This happens because the scope of patentability is extended to areas that were not included under the patent when the patent holders applied for their patents.⁵²⁰ The same fact is true of even more essential areas like "fixed-dose combination (FDC)".⁵²¹ This kind of treatment relies on new combinations of existing pharmaceuticals.⁵²² Such combinations are now patentable under the FTAs as therapeutic methods.⁵²³

FTAs also prohibit parallel importation of patented products. This prohibition of parallel importation limits price options in developing countries.⁵²⁴ Another

⁵¹⁹Jonathan Berger & Achal Prabhala, Assessing The Impact of TRIPs-Plus Patent Rules in The Proposed US-SACU Free Trade Agreement, (Feb. 17, 2005), available at: http://www.who.int/hiv/amds/capacity/tza2_oxfamreport_pricing_financing.pdf (last visited April 2, 2008), at 8.

⁵²⁰*Id.*, at 8.

⁵²¹Berger & Prabhala, *supra* note 519, at 8.

⁵²²Berger & Prabhala, *supra* note 519, at 8.

⁵²³Berger & Prabhala, *supra* note 519, at 8.

⁵²⁴Berger & Prabhala, *supra* note 519, at 9.

problem of this prohibition is that it overrides, in practice, the results of the difficult WTO negotiations on the "Relationship between the TRIPS and Public Health".⁵²⁵ In these negotiations, developing countries managed to get the approval from their developed trading partners to provide more TRIPS flexibilities.⁵²⁶ Such flexibilities enabled countries, without capacity or with insufficient capacity in their pharmaceuticals industry, to import patented products produced under the compulsory licensing system.⁵²⁷ Applying the FTAs prohibition to parallel importation prevents developing countries from using the TRIPS flexibilities to get pharmaceutical supplies.⁵²⁸ To the contrary, Egypt's IPR Law grants parallel importation thus creating another problem that needs to be resolved.

Revocation of patents is limited under the FTAs to the same reasons that would justify the refusal of the original patent application.⁵²⁹ Grounds for refusal are usually founded on insufficiency of the patent conditions or misrepresentation of information by the applicant. Article 5(A)(3) of the Paris Convention enables revocation of patents if the compulsory licensing is insufficient.⁵³⁰ This would normally occur in cases of abuse of the patent by its holder.⁵³¹ The revocation of the patent would still enable the holder to use the formerly patented product, but without exclusivity.⁵³² Therefore, this limits the options for developing countries if abuse of the patents rights occurs.⁵³³ The Egyptian IPR Law does not accept this limitation, as it endorses the revocation options offered by both the TRIPS and Paris Convention.⁵³⁴ A

⁵²⁵Berger & Prabhala, *supra* note 519, at 9.

⁵²⁶Berger & Prabhala, *supra* note 519, at 9.

⁵²⁷Berger & Prabhala, *supra* note 519, at 9.

⁵²⁸Berger & Prabhala, *supra* note 519, at 9.

⁵²⁹Berger & Prabhala, *supra* note 519, at 9.

⁵³⁰Berger & Prabhala, *supra* note 519, at 9.

⁵³¹Berger & Prabhala, *supra* note 519, at 9.

⁵³²Berger & Prabhala, *supra* note 519, at 9.

⁵³³Berger & Prabhala, *supra* note 519, at 9.

⁵³⁴Berger & Prabhala, *supra* note 519, at Article 26.

further aspect is that the Law allows expropriation of patents with relatively flexible conditions.⁵³⁵

Linking patents to marketing approvals for pharmaceuticals is a big challenge to developing countries as it requires sophisticated database facilities.⁵³⁶ This link, as required by the FTAs, would oblige the authority which issues marketing approvals to confirm whether the product of concern is patented.⁵³⁷ This cross checking process aims to prevent the issuance of marketing approval for non - patent holders.⁵³⁸ The problem with this issue is that the status of the patent tends to be dynamic in terms of its termination or additions.⁵³⁹ An equivalently dynamic patent database must be available for developing countries to be able to comply with such an obligation. Another limitation is the one concerning the suspension of the Bolar Provision if this link is applied. This Provision allows third parties to prepare for marketing approval during the patent duration. However, they cannot start marketing the patented product except after the lapse of the patent period.

The Egyptian Law acknowledges none of the above mentioned TRIPS Plus aspects. The language of the Law on patents is drafted to make maximum use of the TRIPS flexibilities. The main reason for this flexible language is to alleviate public skepticism about the monopolistic effects of patents, and their consequences on prices. Egyptian policy makers still adhere to negotiating positions that favor TRIPS flexibilities. This is self - evident from the terms of Egypt's preferential agreements with the E.C., EFTA and Turkey.

d. Data Exclusivity

⁵³⁵Berger & Prabhala, *supra* note 519, at Article 25.

⁵³⁶Intergovernmental Working Group on Public Health, Innovation and Intellectual Property, EGA Submission to Section 1, Draft Global Strategy and Plan of Action, available at: http://www.egagenerics.com/doc/ega_IGWG-contrib-Sep07.pdf (last visited April 2, 2008), at 2.

⁵³⁷*Id.*, at 2.

⁵³⁸Intergovernmental Working Group on Public Health, *supra* note 536, at 2.

⁵³⁹Intergovernmental Working Group on Public Health, *supra* note 536, at 3.

Egyptian policy makers are most wary of attempts by developed countries to force Egypt to adopt the concept of data exclusivity instead of undisclosed information. International reports strongly warn developing countries about the negative effects of data exclusivity on access to medicines. The warning reports are released by credible U.N. international organizations such as the WHO and the UNCTAD.

For example, the WHO issues a series of reports under the name "WHO Policy Perspectives on Medicines". The third report in the series explained that trade liberalization can increase developing countries access to non - patented pharmaceuticals.⁵⁴⁰ This would be the result of lowered tariffs on pharmaceuticals that would definitely push down their prices.⁵⁴¹ However, if the countries do not draft their IPR laws properly they might not enjoy this advantage in pharmaceutical prices.⁵⁴² Developing countries must be accordingly cautious about the adoption of TRIPS Plus measures like data exclusivity.⁵⁴³

Another WHO report explains that pharmaceuticals are governed by two main legal systems: drug regulatory and intellectual property.⁵⁴⁴ The former governs the safety and efficacy of pharmaceuticals, while the latter protects the fruits of creativity in general.⁵⁴⁵ Data exclusivity is defended by its advocates because it bridges the two systems.⁵⁴⁶ This bridging may lead to some unethical results such as the redundancy of

⁵⁴⁰Globalization, TRIPS and Access to Pharmaceuticals, WHO Policy Perspectives on Medicines, March 3, 2001, available at: <http://www.who.int/hiv/amds/regulations1.pdf> (last visited Jan. 30, 2008), at 1-2.

⁵⁴¹*Id.*, at 1-2.

⁵⁴²Globalization, TRIPS and Access to Pharmaceuticals, *supra* note 540, at 3.

⁵⁴³Globalization, TRIPS and Access to Pharmaceuticals, *supra* note 540, at 1.

⁵⁴⁴Briefing Note on access to Medicine, Regional Office for South east Asia, World Health Organization, March 2006, available at: http://www.searo.who.int/LinkFiles/Prevention_and_Control_BF_MAR06.pdf (last visited Jan. 30, 2008), at 3.

⁵⁴⁵*Id.*, at 3.

⁵⁴⁶Briefing Note on access to Medicine, *supra* note 544, at 3.

administrative costs pertaining to marketing approval.⁵⁴⁷ This repeated cost might also push many generic based companies out of the market because they would have less competitive capacity compared to the original manufacturers.⁵⁴⁸ Eventually, consumer access to medicines would be more limited.⁵⁴⁹ In addition, data exclusivity could make compulsory licensing pointless, since generic pharmaceuticals would be denied registration altogether during the protection period.⁵⁵⁰ Other effects of data exclusivity might be the practical extension of patent terms, or to create *de facto* patents for non patented products.⁵⁵¹

Interestingly, the WHO report asserts that data exclusivity is a TRIPS Plus measure.⁵⁵² This conclusion is derived from the objectives of Article 39 of the TRIPS Agreement.⁵⁵³ These objectives are centered around the concept of prevention of unfair commercial use.⁵⁵⁴ The acceptance of the original "full clinical trials" by the competent authorities is sufficient under the TRIPS to grant marketing approval for pharmaceuticals. In case of this acceptance, third parties are waived from the requirement of submitting their own test data. This waiver should not be understood as an act of unfair commercial use.⁵⁵⁵ If third parties rely on previously accepted test data, then, no claims of unfair commercial use on grounds of "industrial espionage" can be proven.⁵⁵⁶ Regardless, no such espionage is possible if the data isn't secret.⁵⁵⁷ This point is confirmed in a UNCTAD⁵⁵⁸ – ICTSD⁵⁵⁹ publication.⁵⁶⁰ Despite the

⁵⁴⁷Briefing Note on access to Medicine, *supra* note 544, at 1.

⁵⁴⁸Briefing Note on access to Medicine, *supra* note 544, at 1.

⁵⁴⁹Briefing Note on access to Medicine, *supra* note 544, at 3.

⁵⁵⁰Briefing Note on access to Medicine, *supra* note 544, at 2.

⁵⁵¹Briefing Note on access to Medicine, *supra* note 544, at 2.

⁵⁵²Briefing Note on access to Medicine, *supra* note 544, at 2.

⁵⁵³Briefing Note on access to Medicine, *supra* note 544, at 2.

⁵⁵⁴Briefing Note on access to Medicine, *supra* note 544, at 2.

⁵⁵⁵Briefing Note on access to Medicine, *supra* note 544, at 2.

⁵⁵⁶Briefing Note on access to Medicine, *supra* note 544, at 2.

⁵⁵⁷Briefing Note on access to Medicine, *supra* note 544, at 2.

⁵⁵⁸United Nations Conference on Trade and Development.

⁵⁵⁹International Centre for Trade and Sustainable Development.

⁵⁶⁰ UNCTAD – ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, 2005.

several interpretations of Article 39, developing countries are facilitating the entry of new generic drugs to their markets.⁵⁶¹ This is done by conforming to the secrecy criteria set out in Article 39.⁵⁶²

At the WTO level no cases have been filed on grounds that data exclusivity has been violated. The only exception has been a request for consultation with Argentina submitted by the U.S. to the WTO DSB.⁵⁶³ This submission enumerated a number of IP violations including data exclusivity.⁵⁶⁴ This case, however, was not elevated to a DSB panel since the two parties reached a common resolution that was notified to WTO.⁵⁶⁵ This case resolution did not include any obligations by Argentina to apply data exclusivity. However, it allowed the U.S. to preserve the right to resort to the DSB in the future for the same issue.⁵⁶⁶ The question remains, does the U.S. have a viable legal position in its interpretation of Article 39 of the TRIPS? If the answer is affirmative, why hasn't the U.S. taken the issue to the DSB instead of directly pressuring developing countries to adopt data exclusivity? The logical answer is that the U.S. policy makers know that they will not win on their position in the WTO.

B. Conclusion

The Egypt has two levels of IPR protection to consider, the TRIPS and TRIPS Plus. Egypt is already a WTO member, but its IPR Law still does not comply with TRIPS provisions. Egypt's required compliance must be given priority by Egyptian

⁵⁶¹ *Id.*, at 538.

⁵⁶² UNCTAD – ICTSD Project on IPRs and Sustainable Development, at 538.

⁵⁶³ Argentina – Certain Measures on The Protection of Patents and Test Data, Request for Consultations by the United States, June 6, 2000, Doc WT/DS196/1, IP/D/22, available at: <http://docsonline.wto.org/DDFDocuments/t/IP/d/22.DOC> (last visited Jan. 30,2008).

⁵⁶⁴ *Id.*

⁵⁶⁵ Notification of Mutually Agreed Solution According to the Conditions Set Forth in the Agreement, June 20, 2002, Doc WT/DS171/3, WT/DS196/4, IP/D/18/Add.1, IP/D/22/Add.1, available at: <http://docsonline.wto.org/DDFDocuments/t/IP/d/22A1.doc> (last visited Jan. 30,2008).

⁵⁶⁶ *Id.*

policy makers despite TRIPS opposition. Many critics of the TRIPS fail to put the overall advantages of the international trade context into consideration. The critics take their short sighted views to a public that falls victim of stereotyped propaganda messages about the negative effects of globalization. The TRIPS is a fact of Egyptian foreign policy. Non – compliance with the TRIPS can thus affect any trade interest for Egypt. Critics must know that non - compliance with the TRIPS can only lead to discrediting the image of Egypt in international forums. Any clear IPR violation that is met with inaction by trading partners is a sign of devaluation of Egypt as a developing country. This would only damage foreign direct investment (FDI) opportunities, and consequently, hinder Egypt's economic growth.

As explained in Chapter 3, Egypt's IPR Law does not comply with its international obligations. Some provisions of the Law are poorly drafted. Inconsistencies among the 4 Books are rife in terms of arrangement and language used. Areas of deficiency in the Law must be remedied before Egypt undertakes any serious joint FTA preparations with the U.S. Otherwise, negotiating with the U.S. would only expose the Law's weaknesses, and the U.S. administration will never be able to convince the Congress to approve an FTA with Egypt. Accordingly, a review of the Law with is recommended with special emphasis on the following aspects:

1. Stating patent holders' rights in explicit terms in accordance with Article 28 of the TRIPS.
2. Reconsidering the expansive grounds for compulsory licensing endorsed by Article 23 of the Law.
3. Reflecting the amendment of Article 31 of the TRIPS in Article 24.1 of the Law to enable the

importation and exportation of pharmaceuticals produced under the compulsory licensing system.

4. Stating the rights conferred to trademarks holders in explicit terms in accordance with Article 16 of the TRIPS.
5. The inclusion of the additional level of GIs protection for wines and spirits in the Law, in accordance with Articles 23-24 of the TRIPS.
6. Specifying whether GIs shall be applied for services.
7. Reconsidering the necessity of including compulsory licensing for industrial designs.
8. Applying the conditions stipulated in Article 13 of the TRIPS for limitations on copyrights.
9. Assuring that Egypt has the right to apply the translation exceptions of copyrighted works into Arabic, otherwise this provision must be omitted.
10. Strengthening criminal remedies in the Law.
11. Expediting accession to the UPOV and amending Book 4 of the Law in accordance.

When Egyptian policymakers assure that the Law is in conformity with international obligations, the FTA could be considered. Comparatively, the Law falls short of FTA standards. Some potential areas of sacrifices must be determined. Egypt

needs to select its policy options for FTA negotiations in view of its public interests. The most critical point is to protect its citizens' access to medicines as already provided by the TRIPS. Data exclusivity measures must be avoided at all costs. The same is true for putting serious limitations on compulsory licensing grounds. Meanwhile, the unnecessary extensiveness of compulsory licensing grounds in the Law should be reconsidered. Linking patents to marketing approvals could also have negative effects on public health policy, and thus must be avoided. The consequences of time compensation for the unreasonably prolonged patent or marketing approval procedures lack clarity. In all cases, TRIPS Plus measures regarding undisclosed information and patents must be nonnegotiable. The Government of Egypt would face strong resistance if it tries to negotiate in these two areas.

In contrast, other IPR forms might be improved by applying some FTAs measures. Areas like trademarks have no public interests contraindicating further protection. The only point of question is the government's capacity to carry out any further commitments. For example, the FTAs oblige their parties to apply e – filing for trademarks applications. The implementation of this obligation by Egypt could be facilitated by technical assistance provided by the U.S. Likewise, there is also no social dimension to applying TRIPS Plus measures to industrial designs. Enhanced copyright protection could be a point of FDI attraction, especially for the computer software industry. Egypt has sufficient skilled labor in this field which would benefit by more job opportunities if foreign investment inflows increase. Another point of comparative advantage for Egyptian software professionals is their ability to develop Arabic software, which is in highly demand in Arab countries. Fears about dissemination of knowledge if the current level of copyright protection is elevated could be avoided by concluding agreements with publishers at reduced prices.

It is pointless to adhere to the TRIPS level of border measures which are only complementary to enforcement efforts already exerted in the domestic market. Better border enforcement can rather relieve such domestic efforts by blocking surges of IPR infringing imports from entering the market. Egypt can apply border measures to exportation and free zones at minimal costs, and thus be more eligible to join an FTA with the U.S. Border measures are issued in Egypt by a ministerial decree. The inclusion of the TRIPS Plus border measures is easy compared to the amendment of the IPR Law, which would have to be passed by the People's Assembly (the Parliament) pending a presidential decree for the official issuance. The better enforcement of IPR also has other important roles in consumer protection.

Finally, Egypt can consider some of the TRIPS Plus provisions in areas of less social sensitivity. These could be offered instead of the U.S. demands of TRIPS Plus measures in patents or data exclusivity. Another approach might be to trade off other international trade areas like investment facilitation or trade in services with IPR. However, if the U.S. insists during the negotiations on applying TRIPS Plus to these fields, Egypt should make a clear assessment of the exact negative consequences for its social interests. The results of this assessment would constitute a stronger ground for bargaining with the U.S. than the absolute rejection of the whole matter. Empirical evidence of these negative effects could constitute persuasive arguments for Egypt that the ensuing costs of the U.S. demands are intolerable to its current level of development. Egypt can also request the U.S. to provide aid to Egyptian segments that would be seriously affected by the adoption of the TRIPS Plus provisions in health related fields. Many programs could be planned in this regard like the participation of the U.S. pharmaceuticals companies in offering their products at reduced prices to the

most vulnerable social segments. Another alternative is expanding and improving the health insurance coverage programs to make them more reliable for Egyptians.

The remaining challenge to concluding an FTA between Egypt and the U.S. is the role of any hidden political agendas of the respective White House administrations. It is probable that these agendas played a critical role in aborting former FTA plans, and preventing officials on both sides from even starting the negotiations process. If the political barriers are still in place, then there is little chance that any FTA can be concluded. The mystery remains as to reasons behind the U.S. introduction of the FTA preparations in the first place. The withdrawal by the U.S. of the FTA preparations without disclosure of reasons leaves the Egyptians with questions about wasting time and efforts in pursuing the FTA. With this withdrawal, did the U.S. intend then to convey a message to the Egyptians that the democracy achievements of Egypt are still weak to enable an FTA conclusion? If so, is Egypt deficient in terms of democracy in comparison with other Arab countries that are already parties to FTAs with the U.S.? Some of these countries have human rights records that are the same or even worse than that of Egypt. U.S. reasons remain veiled.

In conclusion, the U.S. highly politicizes its decisions for joining FTAs with Arab countries. The political factor is crucial for all U.S. FTAs regardless of the level of development of its trading partners. However, this political factor is magnified while making FTA decisions concerning the Middle East, currently the most turbulent region in the world. The U.S. decision making process becomes more complicated for key Middle Eastern countries like Egypt which is endowed with a large population, strategic location and great role in the Middle East stability. Egypt's advantages should facilitate the conclusion of an FTA with the U.S. Objective assessment of the

commercial and political benefits of an FTA with Egypt would probably encourage the U.S. to seek its conclusion. A clear indication of the greater potential for the FTA to come into being is the elevation of Egypt in the 2008 USTR Special 301 Report from the "Priority Watch List" to the "Watch List".⁵⁶⁷ In addition, the 2008 NTE Report has diluted its criticism of IP protection in Egypt.⁵⁶⁸ In its 2008 conclusions, the USTR acknowledged Egyptian improvements in the fields of patent inspection and marketing approvals.

The biggest obstacle to this FTA seems to be the confused policy of the Bush Administration in the Middle East. The offensive agenda of this Administration may obscure the U.S. vision of its bilateral interests with these countries. This agenda also deprives the U.S. of developing a clear regional approach for the Middle East, especially compared with that of the E.C. The coming U.S. presidential elections may result in a more rational Administration that would reform the U.S. foreign policy and lead to greater trade opportunities.

⁵⁶⁷SPECIAL 301 REPORT, USTR, 2008, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file553_14869.pdf (last visited May 14, 2008), at 40.

⁵⁶⁸2008 National Trade Estimate Report on Foreign Trade Barriers, 2008, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_NTE_Report/asset_upload_file288_14647.pdf (last visited May 14, 2008), at 4 - 5.