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A Critique of Intellectual Property Research

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Abstract
This article is first of its kind in that it provides a survey of intellectual property (IP) literature and suggestions for future research on IP issues for Arab countries using Jordan as a case study. A review of IP literature, which identifies how international scholars perceived the effect of harmonised IP standards on access to common knowledge, is followed by a review of literature pertaining to Jordan. Areas of controversy and questions are identified. Finally, an outline of outstanding questions and gaps in the existing IP literature on Jordan is offered as a template for the creation of future research objectives.

Keywords
Jordan; intellectual property (IP);Trade-Related Aspects of Intellectual Property Rights (TRIPS); TRIPS-plus, Jordan-US free trade agreement; Jordan-EU association agreement; foreign direct investment; foreign direct investment

1. Background

The advent of the twenty-first century brought dramatic changes to the global governance of intellectual property (IP). The seeds of this change were sown in the 1980s and 1990s, as the United States (US) and the European Union (EU) championed the establishment of universal rules to govern IP practices. Their goal was and remains the globalisation of IP standards perpetuated by the Organization for Economic Cooperation and Development (OECD) IP regimes, which emphasise greater protection of intellectual property rights (IPR) at the expense of more public access to those rights. The most significant milestone towards harmonising national IP standards with OECD-style IP standards was the inclusion of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the

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World Trade Organization (WTO), which, as examined by various scholars, was the direct result of intense lobbying by corporate executives who gained full backing from trade negotiators from developed countries.[2]

In assessments of TRIPS, scholars have concluded that, notwithstanding the limitations on setting national IPRs policies imposed by TRIPS, countries could exhibit diminished variations in their IP laws in accordance with their specific economic and social conditions.[3] Such early assessments, however, were prematurely optimistic, as they did not take into account the advent of multilateral and regional and bilateral treaties (RBT), which further pushed the pendulum toward higher IPR protection. RBTs were introduced by the US and the EU because they realised that the ultimate goal of IPR harmonisation was not fully achieved through TRIPS and because they both became increasingly aware of the blocking power that developing countries enjoyed by virtue of the consensus requirement for any TRIPS amendment. As a result, the US and the EU moved to a RBT approach to achieve IPR harmonisation outside the multilateral approach of the WTO.

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

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[2] See, e.g., P. Drahos, "Global Property Rights in Information: The Story of TRIPS at the GATT", *Prometheus*, 13/1 (1995): 6-19; D. Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (London: Routledge, 2002); S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003); C. May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (Taylor & Francis, 2007).

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

Many scholars are critical of TRIPS and the increasing integration of IP into RBTs, but much of that criticism is not country-specific; rather, it is focused on general rules and legal provisions.[4] While the criticism of the increased integration of IP into RBTs was at times based on the threat the RBTs pose to eliminate national capacities to tailor IP management to national conditions,[5] it did not go further into an analysis of country-specific, local political and cultural frameworks. I argue that without such an analysis, it is not possible to understand the tensions between technologically advanced countries' push for greater rights protections and less-developed countries' resistance to the resulting increased cost of regulation. At stake is the significant impact that IP policies and laws can have on country-specific human development and the allocation of limited resources.

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

[4] See, e.g., P. Drahos, "Information Feudalism in the Information Society", *The Information Society*, 11/3 (July 1995): 209-222; C. May and S.K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, CO: Lynne Rienner Publ., 2005); Sell, *supra* note 2; K.E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington, DC: Peterson Institute, 2000); C.M. Correa, *Intellectual Property Rights, the WTO, and Developing Countries: The TRIPS Agreement and Policy Options* (London: Zed Books, 2000); Matthews, *supra* note 2; Shadlen, *supra* note 3.

[5] See, e.g., K.C. Shadlen, "Intellectual Property, Trade, and Development: Can Foes Be Friends", *Global Governance*, 13 (2007): 171. This author concluded that making the IP and trade regimes work for development is a challenging task and is not a direct result of either.

balanced system of IP laws that provides limited exclusivity and sufficient access that is consistent with the public interest.[6]

A balanced system should be dynamic and adaptive to new technologies as well as to economic shifts and global developments. An adaptive system is an open system that is able to alter its behaviour according to changes in its environment because it is closely linked to that environment. For IP systems, such a system requires that governments and legislators reflect more closely upon and achieve a better understanding of the local needs of the societies to which those IP systems are applied.

This article presents a literature review, which starts with the evolution of IPRs, followed by the critique of the current IPR system. Next, literature pertaining to the effects of RBTs on IPRs is reviewed. Finally, the article reviews literature pertaining specifically to Jordan and concludes with an outline of outstanding questions and gaps in the existing intellectual property literature on Jordan.

2. Evolution of Intellectual Property Rights in Jordan

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

Pursuing WTO membership was mainly a political rather than an economic decision, and it was an outlook influenced by the principles advocated by the International Monetary Fund (IMF) during its support program of the Jordanian economy and currency, which began in 1989 and ended in 2004.[7] The economic impact and value of such decisions were not evaluated beyond the promises made by the developing countries

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[6] T. Wong and G. Dutfield, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge: Cambridge University Press, 2010).

[7] See, "Independent Evaluation Office (IEO) of the IMF—Evaluation Report IMF Support to Jordan, 1989-2004", 14 April 2010, http://www.imf.org/External/NP/ieo/2005/jor/

of more access to world markets, increased foreign direct investment (FDI), and the improvement of the Jordanian standard of living.[8]

The adoption of TRIPS as part of the WTO accession resulted in sweeping changes to IP laws. A new patent law granting 20 years of patent protection was enacted in 1999, incorporating TRIPS-consistent standards into its language.[9] A new copyright law was enacted in 1992,[10] while the law on trademarks, which dates back to 1952,[11] was amended several times throughout 2007.[12] Additionally, in the span of three years (2000-2003), Jordan went from having only four IP laws before 2000 to having twelve such legislations. As a result, the traditional laws covering Copyright (Law No. 22 (1992)), Patents (Law No. 32 (1999)), Trademarks (Law No. 33 (1952)), and Service Marks (Law No. 19 (1953)), were joined by an additional eight legislations covering various aspects of IP.[13]

These developments were not made without controversy. The Parliament was suspended for the period when the new IP laws were enacted, thus the process was deprived of a full debate by the legislative branch. Additionally, civil-society organizations were not involved in their enactment, which limited the input of economic and social costs associated with their implementation.[14]

Shortly after the WTO accession, Jordan embarked on negotiations with the United States to conclude the Jordan-US Free Trade Agreement (JUSFTA), and with the European Union (EU) to conclude the Jordan-EU Association Agreement (JEUAA). The JUSFTA which entered into force on 17 December 2001,[15] and the JEUAA entered into force on

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eng/index.htm; M. Halaiqah, "Interview", 9 August 2011; R. Madanat, "Interview", 9 August 2011; H. Sboul, "Interview", 26 July 2011; A. Hammed, "Interview", 18 August 2011.

[8] Halaiqah, *ibid*.; Sboul, *Ibid*.; Hammed, *ibid*.

[9] Patent Law No. 32, 1999. TRIPS stands for "The Agreement on Trade Related Aspects of Intellectual Property".

[10] Copyright Law No. 22, 1992.

[11] Trademarks Law No. 33, 1952.

[12] *Ibid*., Art. 40.

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

[14] H. Abu Rahmeh, "Interview", 7 August 2011; Sboul, *supra* note 7.

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

1 May 2002, both have a strong IP component with a significant TRIPS-plus dimension.

This rapid progression of protection levels from pre-WTO to post-WTO TRIPS standards resulted in increased emphasis on protections for right-holders, certainly to levels not seen previously in Jordan. Did the transition to IP laws that meet TRIPS standards make sense for a country like Jordan?[16] Were those IP new laws evenly enforced in Jordan? To what degree does that question's answer depend on the new IP laws' compatibility with Jordanian culture and Jordan's economic stage of development? Adoption of TRIPS standards and stronger IP protection was mainly based on IP's presumed positive effect on attracting FDI. To what extent have IP laws had an economic impact on the Jordanian economy? These and similar question must be asked, and scholars should be looking into their answers because laws do not exist in a vacuum, rather they are based and organically connected to their environments, and the economic and cultural realities underlying those environments. This article presents a review of IP literature on Jordan and examines that literature from the critical perspective of whether it provides answers that are supported by facts and analysis. The article also provides a road map for future research on IP issues for Jordan, which can be equally useful for almost all developing countries that adopted or will consider the adoption of IP laws that are compatible with IP standards.

3. Evolution of Intellectual Property Rights

The evolution of IP laws and standards that culminated in TRIPS is viewed by scholars as a shift in the direction of maximising private rights over public interests. Sell and May view TRIPS as the latest episode in a long process of expansion of IP protection.[17] They argue that TRIPS has resulted in the shifting of IPRs toward monopolies of the right-holders at the expense of the public interest.[18]

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[16] F.K. Nesheiwat, "The Adoption of Intellectual Property Standards Beyond TRIPS—Is It a Misguided Legal & Economic Obsession by Developing Countries?", *Loyola of Los Angeles International and Comparative Law Review*, 32 (2010).

[17] S. Sell and C. May, "Moments in Law: Contestation and Settlement in the History of Intellectual Property", *Review of International Political Economy*, 8/3 (Sept. 2001): 467-500.

[18] *Ibid*.

May takes this argument one step further by arguing that developed countries and multinational companies (MNC) are pushing for the reification of IPRs in order to depoliticise the IP discourse and to emphasis a technocratic policy-making approach to IPRs.[19] In this context, May uses *reification* to refer to the process of transforming an abstract idea or concept (in this case IP standards) into a concrete concept that is not subject to debate in terms of the reduction of its scope or limits.[20] In other words, reification will cause the discussion on decreasing the limits of protection of IPRs to be considered unorthodox; the society will only accept increased—and not decreased—protection of IPRs.[21] He argues that reification should be resisted if we are to establish a meaningful global politics of information and knowledge.[22] He submits that IPRs are not natural but rather the result of a historical process of political-legal developments, whereas their reification aims to place the harmonisation of IPRs into an ahistorical context.[23]

The shift towards higher protection of IPRs is explained by Machlup and Penrose in the historical context of a decline in support for the idea of free trade.[24] While Shadlen attempts to explain this shift through the idea of political diffusion, which depicts policy making as an interdependent and interactive process that results in developing countries' rush to harmonise IP standards similar to those adopted by the US and the EU.[25] Other important factors include framing, socialisation, and selective use of capacity development and trade dependency, all of which were shown by Shadlen et al., to have statistically significant effects on shaping the level of

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[19] C. May, "The Denial of History: Reification, Intellectual Property Rights and the Lessons of the Past", *Capital & Class*, 30/1 (Spring 2006): 33-56. Another consequence of reification is the cementing of the 'natural' status quo, such that criticism of the 'natural state' becomes unnatural, which can be portrayed by MNCs and developed countries as destabilizing and even dangerous.

[20] *Ibid*.

[21] *Ibid*.

[22] *Ibid*.

[23] *Ibid*.; C. May, "The Hypocrisy of Forgetfulness: The Contemporary Significance of Early Innovations in Intellectual Property," *Review of International Political Economy*, 14/1 (2007): 1-25.

[24] F. Machlup and E. Penrose, "The Patent Controversy in the Nineteenth Century", *Journal of Economic History*, 10/1 (1950): 1-29.

[25] K.C. Shadlen, "The Politics of Patents and Drugs in Brazil and Mexico: The Industrial Bases of Health Policies", *Comparative Politics*, 42/1 (2009): 41-58.

protection provided through IPRs.[26] In addition to ideas from the US and EU, those factors were used by entities holding opposing views to the US and EU's official stand on IPRs, such as Oxfam and academic scholars.[27]

The literature shows that such harmonisation of IP standards through TRIPS has the effect of restricting the space for national IP policy setting.[28] This is a significant departure from the traditional role of having national IP laws reflect levels of economic development. Developing countries, including Jordan, have traditionally made private ownership of knowledge difficult to obtain and had weaker IPRs than developed countries.[29] This has been evident in shorter patent terms, as well as in Jordan's refusal to patent pharmaceuticals and setting concurrent requirements for national registration for copyright and trademark protections. This variation in protection and enforcement standards, which was not uncommon in the pre-TRIPS era (e.g., the Paris Convention for the Protection of Industrial Property, which was the principal international convention on IP for most of the twentieth century) allowed countries a significant degree of flexibility in designing their patent regimes.[30] Under TRIPS, such variation and flexibility are no longer available, as all but the poorest countries are subjected to the same standards for IP management under a one-size-fits-all approach.[31]

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[26] K.C. Shadlen, A. Schrank and M.J. Kurtz, "The Political Economy of Intellectual Property Protection: The Case of Software", *International Studies Quarterly*, 49/1 (2005): 45-71.

[27] See, e.g., H. El-Said and M. El-Said, "TRIPS-Plus Implications for Access to Medicines in Developing Countries: Lessons from Jordan-United States Free Trade Agreement", *Journal of World Intellectual Property*, 10/6 (1 November 2007): 438-475; A.H. Khoury, "'Measuring the Immeasurable'—The Effects of Trademark Regimes: A Case Study of Arab Countries", *Journal of Law and Commerce*, 26/1/2 (2006): 11; M. El-Said, "From TRIPS-minus to TRIPS to TRIPS-plus: Implications of IPRs for the Arab World", *Journal of World Intellectual Property*, 8/1 (2005): 53-65; Oxfam, *All Costs, No Benefits: How TRIPS-plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines*, Briefing Paper (Oxfam, March 2007); F.K. Nesheiwat, "The Adoption of Intellectual Property Standards Beyond TRIPS—Is It a Misguided Legal & Economic Obsession by Developing Countries?".

[28] K.C. Shadlen, "Policy Space for Intellectual Property Management: Contrasting Multilateral and Regional-Bilateral Arrangements", *Econômica*, 10/2 (2008): 55-81.

[29] Christopher May, *A Global Political Economy of Intellectual Property Rights*, 1st edn. (Routledge, 2000).

[30] Shadlen, *supra* note 28.

[31] *Ibid*.

Harmonisation also is criticised for resulting in increased commodification of intellectual products and for emphasising proprietary usage at the expense of non-proprietary areas, such as fair use for copyright and compulsory licensing for patents.[32] Halbert uses this criticism as the philosophical basis for opposing the harmonisation model, which she views as making the public good residual to the exercise of private rights, with commodification given primary importance.[33] Within the broad political economy debate, the commodification argument is specifically based on the assumption that within the commodity culture no one creates for free and the assumption that culture is only created by professionals who, because they make a living from their work, always demand compensation.[34] Halbert rejects both assumptions and draws parallels between the unfair treatment of women in developed countries and the unfair treatment of developing countries by developed countries under the commodification model of IPRs.

Halbert argues that the commodification model has historically benefited developed countries and men. She believes the ultimate threat posed by the current commodification of IPRs is the further erosion of the value that can still be found in the types of creative endeavours that developing countries and women produce.[35] For example, Halbert views the introduction of copyright law into areas of creative activity for females (e.g., quilting) as commodification at the expense of the gift/sharing aspect of creative endeavours.[36] Halbert's articles while clearly preferential of an IPR model that allows for more sharing of the creative endeavour than currently allowed under the harmonisation model, never seems to define the borders of such an IPR model.

Scholars like Halbert and Gill see the resistance of such forms of commodification as part of the global fight against IPR, which has become part of the resistance to the neo-liberal form of globalisation.[37] In resisting this

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[32] May, *supra* note 19; D. Halbert, "Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights", *Vanderbilt Journal of Entertainment and Technology Law*, 11 (2009/2008): 921.

[33] May, *ibid*.

[34] Halbert, *supra* note 32.

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

[36] *Ibid*.

[37] S. Gill, *Power and Resistance in the New World Order* (Basingstoke, UK: Palgrave Macmillan, 2003); F. Gurry and D. Halbert, "Globalization, Development, and Intellectual

form of globalisation, Drahos and Braithwaite argue that developing countries' bargaining and negotiation positions will be improved if they adopt a networked governance approach rather than relying on traditional coalition building.[38] Through networking, they argue that weak parties become connected to other pools of capacity and power pools that can then flow through the network to achieve the goals of the members of the network.[39] However, they do not explain how a country like Jordan, which is heavily dependent on foreign aid from developed countries, can create or participate in such a network without jeopardising its socio-economic stability.

May sees the commodification of IPRs as self-defeating because increased commodification will cause rational people to reject the role of IPRs. He argues that such a rejection will occur because IPRs construct a scarcity model that is neither natural nor self-evidently beneficial to all, thus creating a non-efficient model of supply and demand focused on the protection of rights for the express purpose of raising prices.[40] This is a point that merits further consideration at a country-specific level and has not been addressed.

4. Critique of the Current IPR System

As a result of the increased harmonisation of IPRs, the theoretical criticism of harmonisation has escalated and various critiques of the current IP system have emerged, including calls for new IP models. Halbert calls for the deconstruction of the current power/domination relationship that does not recognise reciprocity and treats IP standard setting as the domain of developed countries; in place of the current system, Halbert calls for IPRs to be based on mutual understanding and a social construction of knowledge, but she does not describe the limits for the scope of protection of IPRs, if any, under this scenario.[41]

Property: New Challenges and New Opportunities", *American Society of International Law Proceedings*, 99 (2005): 298.

[38] P. Drahos, "Four Lessons for Developing Countries from the Trade Negotiations Over Access to Medicines", *Liverpool Law Review*, 28/1 (May 2007): 11-39; J. Braithwaite, "Responsive Regulation and Developing Economies", *World Development*, 34 (2006): 884.

[39] Drahos, *supra* note 38; Braithwaite, *ibid.*

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

[41] Halbert, *supra* note 32 at 924; Halbert, *supra* note 35 at 434.

Drahos, on the other hand, has been especially active in elaborating a proposal for a new framework of IPRs grounded in a human rights framework, which does not circumscribe the freedom of developing countries to set efficient standards of IP protection.[42] Drahos argues that the current IP regimes' monopoly rights actually fail to avoid the 'tragedy of the commons' for IPRs (i.e., that property held in common and not otherwise rationed through proprietary use is subject to overuse, abusive use, and subsequent ruin because information cannot be depleted through use).[43] However, he makes this leap without explaining what harm would result from monopoly rights even if they fail to avoid the tragedy of commons for intangible information. I have found both Halbert's and Drahos' arguments against the harmonisation model of IPRs to be morally appealing, but they have not provided tools for suggesting what limits should be applied. In other words, should countries completely forsake IPRs, and, if not, what are the boundaries of a new system? I would argue that such queries can only be answered through country-specific research similar to that called for by this article.

May is more helpful in that regard, as he argues for jettisoning the globally harmonised IP standard model to allow social costs at the national level to play a larger role in determining global IPR protections.[44] He argues for this approach because until there is a more equal global society, a global regime that attempts to treat access to knowledge in all countries and regions similarly cannot be justified.[45] I find the argument for using country-specific social costs to determine the limits of each country's IPR system to be a sound basis for an alternative to the globally harmonised IP standard and, therefore, I have argued for it in the case of Jordan.

The globally harmonised IP regime has also been criticised for presupposing that third-world countries are more developed than they are in reality and, thus, capable of generating and absorbing inventions at a rapid pace.[46]

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[42] P. Drahos, "An Alternative Framework for the Global Regulation of Intellectual Property Rights", *Austrian Journal of Development Studies*, 1 (October 2005).

[43] P. Drahos, "A Defence of the Intellectual Commons", *Consumer Policy Review*, 16/3 (May 2006): 101-104.

[44] C. May, "Why IPRs Are a Global Political Issue", January 2003 at http://eprints.lancs.ac.uk/35544/.

[45] *Ibid.*

[46] K.C. Shadlen, "Intellectual Property for Development in Mexico", in: Prof. A. Najam (Series Ed.), The Pardee Center Task Force Reports, *The Future of North American Trade Policy: Lessons from NAFTA* (Boston: Boston University, 2009), 53-59.

Shadlen finds that the IP regimes in general and the patent systems advocated by TRIPS in particular do not fit with developing countries' scientific and technological capacities.[47] The challenges of such a mismatch translate into less funds being allocated to enforcement because increased protection, and, therefore, benefit, accrues disproportionately to foreign right holders. Developing countries are learning that enforcement entails significant fiscal costs. Moreover, since the majority of IP is imported by developing countries, they are realising that IPR protection is effectively the use of local resources to protect foreign right holders.[48]

Specific to that disproportionate benefit, Haunss and Shadlen fault the patent system because the majority of its benefits accrue to a tiny minority of foreign actors; they challenge the notion that patents serve the industry as a whole.[49] In addition to that fault, they argue that the US and EU patent systems are functionally unfit for developing countries because both systems are built around allowing litigation to correct for errors in patent examination and granting, whereas developing countries generally do not have a robust patent prosecution or litigation practice.[50] This point needs to be validated for Arab countries.

5. Critique of RBTs

Drahos accuses RBTs of weakening the multilateral trading system[51] and further criticises RBT drafting because differences in interpretation are built into the agreement, thus planting the seeds for future differences in

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

[48] A. Schrank, "The Software Industry in North America: Human Capital, International Migration, and Foreign Trade", in: M. Kagami and M. Tjusi Chiba (Eds.), *Industrial Agglomeration: Facts and Lessons for Developing Countries*, (IDE, 2003); Shadlen, Schrank, and Kurtz, *supra* note 26.

[49] S. Haunss and K.C. Shadlen (Eds.), "Introduction: Rethinking the Politics of Intellectual Property," in: *Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information* (Cheltenham/Camberley, UK: Edward Elgar Publishing, 2009), 1-12.

[50] *Ibid*.

[51] P. Drahos, "Assessing the Impact of the Australia-United States Free Trade Agreement on Australian and Global Medicines Policy", *Globalization & Health*, n.d., http://www.globalizationandhealth.com/content/1/1/15; P. Drahos, "Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution", *Journal of World Trade*, 41/1 (2007).

expectations and obligations.[52] Scholars, therefore, should examine the expectations and obligations under the JUSFTA.

Another problem with RBTs is that their dispute resolution mechanisms provide a forum-shifting opportunity, which weakens the multilateral WTO dispute-resolution system. Because they are less legally sophisticated, developing countries are disadvantaged by RBTs' forum shifting because it removes from the legal precedents under the WTO's dispute-resolution mechanism.[53] Choice of forum provisions in RBTs does not strengthen the multilateral trading system under the WTO.

RBTs also restrict the flexibilities available under TRIPS. Shadlen notes that few countries take advantage of their rights under TRIPS and that, in combination with the proliferation of RBTs, the *de facto* opportunities for policy innovation in IP are significantly fewer than suggested by TRIPS.[54] Shadlen also argues that the proliferation of RBTs is a *de facto* (if not explicit) effort to create a TRIPS-plus system (i.e., an IPR system that is even more protective of IP than TRIPS is).[55]

Matthews supports the point that developing countries are slow to take full advantage of the full scope of TRIPS flexibilities, including those aimed at ensuring access to medicines, such as compulsory licensing, exceptions to exclusive patent rights, and parallel importation.[56] Reasons suggested for developing countries not taking advantage of the full TRIPS flexibilities include: (1) absence of institutional capacity and local technical expertise to put the TRIPS flexibilities into practice; (2) bilateral pressures, especially through RBTs that have IP provisions that go far beyond those under TRIPS; and (3) the prevailing form of technical assistance and capacity building in the area of IP.[57] The points made by Shadlen and

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[52] Drahos, "Assessing the Impact", *supra* note 51.

[53] Drahos, "Weaving Webs of Influence", *supra* note 51.

[54] Shadlen, *supra* note 28.

[55] K.C. Shadlen, "Resources, Rules and International Political Economy: The Politics of Development in the WTO", in: S. Joseph, D. Kinley and J. Waincymer (Eds.), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham/Camberley, UK: Edward Elgar Publishing, 2009), 109-132.

[56] D. Matthews, "TRIPS Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements", *European Intellectual Property Review*, 27/11 (2005).

[57] C. May, "Capacity Building and the Re-production of Intellectual Property Rights," *Third World Quarterly*, 25/5 (July 2004): 821-837; T. Pengelly, "Technical Assistance for the Formulation and Implementation of Intellectual Property Policy in Developing Countries and Transition Economies", *UNCTAD/ICTSD, Issue Paper*, 11 (2005); D. Matthews,

Matthews should be addressed in the case of Jordan in an attempt to discover whether Jordan hindered its ability to benefit from flexibilities under TRIPS as it moved into a TRIPS-plus IP model.

RBTs also usually call for increased levels of technical assistance to the developed countries as an additional tool to support the commodification and harmonisation of IPRs. Drahos challenges the way technical assistance provided by the United States Patent and Trademark Office (USPTO) and the European Patent Office (EPO) has been used. He argues that instead of building local capacity, such assistance has focused on creating integration with developing countries' patent offices, which ultimately leads to reliance on the USPTO's and EPO's searches and granting decisions.[58]

May criticises the WIPO for being a politicized organization that uses its capacity development and technical assistance programmes to engender, through socialisation, IPR views similar to those under RBTs.[59] WIPO socialisation of policy makers through training and education is thought to produce advocates for enhanced IPR protections among domestic policy decision makers.[60] Such local advocates are used to overcome local opposition to increased IPR protections and to formulate public policy that increases the security of property owners while minimising the uncertainty of investors.[61]

The UK Commission on Intellectual Property Rights, and Matthews and Tellez conclude that the design and delivery of IP-related technical assistance to developing countries is not integrated with the overall national development strategy of each individual developing country.[62] Matthews finds that, instead of being used to help remedy issues related to institutional capacity, technical assistance is used by developed countries to highlight the need to safeguard the interests of right-holders and to achieve

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

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

[59] C. May, "The World Intellectual Property Organization", *New Political Economy*, 11/3 (September 2006): 435-445.

[60] May, *supra* note 57; May, *ibid*.

[61] Gill, *supra* note 37.

[62] The Commission on Intellectual Property Rights (UK), *supra* note 3; D. Matthews and V. Munoz-Tellez, "Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in Comparative Perspective", *Journal of World Intellectual Property*, 9/6 (1 November 2006): 629-653; D.N. Matthews, "NGOs, Intellectual Property Rights and Multilateral Institutions", *SSRN eLibrary* (December 2006).

improved IPR enforcement standards by emphasising the best practices to protect IPRs.[63] For example, the 2002 WIPO-drafted patent law for Cambodia did not even take into account any TRIPS flexibilities in its mandate for the issuing of pharmaceutical patents, although, as a least-developed country, Cambodia was not expected to meet that requirement until 2016. Scholars should focus on examining if technical assistance provided to the Jordanian patent office was geared toward best enforcement practices and not toward the use of any flexibilities available under TRIPS.

6. Literature Pertaining to Jordan

Developing countries like Jordan would like to open US and EU markets to their products, but, in return, they are asked by the US and the EU to enter into RBTs and accept the regulatory norms that come attached to the RBTs.[64] As Shadlen points out, in the case of RBTs, in exchange for even greater access to the developed countries' markets, developing countries relinquish yet more regulatory instruments.[65]

Analysis of the effect of RBTs on the Arab world in general was previously presented by M. El-Said,[66] but no detailed analysis has yet been performed for Jordan specifically. Malkawai provided an analysis of the JUSFTA, but only in the context of deciding if its terms can serve as a template for a proposed US-Middle East free-trade agreement, not to examine the local context of those terms.[67]

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[63] Matthews, *supra* note 56.

[64] Shadlen, *supra* note 3; S. Haggard, *Developing Nations and the Politics of Global Integration* (Washington, DC: Brookings Institution Press, 1995); R.Z. Lawrence, *Regionalism, Multilateralism, and Deeper Integration* (Brookings Institution Press, 1996); J.A. Frankel, E. Stein, and S.-J. Wei, *Regional Trading Blocs in the World Economic System* (Peterson Institute, 1997).

[65] Shadlen, *supra* note 3.

[66] M.K. El-Said, "The European Trips-Plus Model and The Arab World: From Co-Operation to Association—A New Era in the Global IPRS Regime?", *Liverpool Law Review*, 28/1 (2007): 143-174; M. El-Said, "The Implementation Paradox: Intellectual Property Regulation in the Arab World", *Journal of International Trade Law and Policy*, 9/3 (2010): 221-235.

[67] B.H. Malkawi, "The Intellectual Property Provisions of the United States-Jordan Free Trade Agreement: Template or Not Template", *Journal of World Intellectual Property*, 9/2 (1 March 2006): 213-229.

Similarly, El-Said and El-Said's examination of the terms of the JUSFTA and cautioning against the negative effects of TRIPS were only related to access to medicines.[68] They challenged the claim that the RBTs bring general and specific benefits to developing countries and suggested that benefits from the JUSFTA have been largely exaggerated, while the costs have been underestimated.[69] Their analysis, however, needs to be extended to areas beyond access to medicines. Also, Malkawi and Haloush's review of Jordan's protection of plant variety law is limited to plants and not intended to address IPRs in Jordan from a broader perspective.[70] A contextualisation of the JUSFTA and the JEUAA within Jordan is, therefore, missing from the literature.

Nawafleh's approach to IPRs enforcement in Jordan, on the other hand, sees the need for even stronger IPRs.[71] He argues that stronger IPRs will increase foreign direct investment (FDI) into Jordan as well as investment in the information technology (IT) sector.[72] He bases his recommendations on foreign reports and reviews by agencies like the US Agency for International Aid (USAID); he does not provide any local analysis to support his conclusions. I disagree with his findings and provide the missing local analysis of FDI inflows to show that there has been little impact of IP laws on FDI inflows. Al-Dajani also makes the unsubstantiated link between increased FDI inflows into Jordan for a period of time and Jordan's upgrading of its IP laws to TRIPS standards.[73]

In two separate works, Sirhan and Al-Sharari follow Nawafleh's trend by recommending stronger IPR enforcement in Jordan and the allocation of

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[68] H. El-Said and M. El-Said, "TRIPS-Plus Implications for Access to Medicines in Developing Countries: Lessons from Jordan-United States Free Trade Agreement", *Journal of World Intellectual Property*, 10/6 (2007): 438-475.

[69] H. El-Said and M. El-Said, "TRIPS, Bilateralism, Multilateralism & (and) Implications for Developing Countries: Jordan's Drug Sector", *Manchester Journal of International Economic Law*, 2 (2005): 59.

[70] B.H. Malkawi and H.A. Haloush, "Intellectual Property Protection for Plant Varieties in Jordan", *Journal of World Intellectual Property*, 11/2 (2008): 120-138.

[71] A. Nawafleh, "Development of Intellectual Property Laws and Foreign Direct Investment in Jordan", *Journal of International Commercial Law Technology*, 5/3 (2010): 142-153.

[72] *Ibid*.

[73] E.M. Al-Dajani, "Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan", *J. Marshall Review of Intellectual Property Law*, 6 (2006): i.

more human resources to such enforcement.[74] They both see weaker IPRs leading to fewer jobs, less research and development, and increased costs in all sectors.[75] Their work, however, does not provide any basis for such a conclusion other than citing foreign scholars who have written generally about the benefits of IPRs. Because they fail to provide a local context for their conclusion, the reader is left wondering if a one-size-fits-all IPR model is applicable.

At one level, there are two weaknesses in the current literature. First, over-generalisations have been made regarding the pros and cons of TRIPS and RBTs, with too much attention paid to rules and legal provisions at the expense of country-specific analysis. Specifically there is no detailed examination of the effect of TRIPS, the JUSFTA, or the JEUAA on Jordan's IP policies and economic development. There is an abundance of literature on the origins of TRIPS and the integration of IP into RBTs.[76] However, there is a gap in the literature on country-specific analysis of IP policy making. A second problematic weakness in the literature, which arguably results from the first one, is insufficient contextualisation of local political and cultural frameworks and the extent to which they influence IP policies. Future research should address the question of whether there are good reasons to assume that country-specific knowledge and information is likely to lead to different sorts of policies.

Addressing the two above-mentioned shortcomings is important because it is not sufficient to discuss IPRs from a global perspective. Rather, there must be a localised approach to resolving the tension between the competing social objectives of encouraging innovation by recognising private rights and encouraging diffusion of knowledge to a broad range of people. The next logical step is localised contextualisation, which will strongly complement all the work surveyed throughout this chapter. Localised analysis provides the required validation or refutation of the theory that a one-size-fits-all harmonised approach to IPRs can address the tension between the social objectives discussed. Competing interpretations of IP

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[74] A.A. Sirhan, "Intellectual Property and Copyright Laws and Their Impact on Digital Resources in Jordan", *Infromationstudies.net* (May 2011), http://www.informationstudies.net/issue_list.php?action=getbody&titleid=120; S. Al-Sharari, "Intellectual Property Rights Legislation and Computer Software Piracy in Jordan", *Journal of Social Sciences*, 2/1 (2006): 7-13.

[75] Sirhan, *supra* note 74; Al-Sharari, *supra* note 74.

[76] See, e.g., Drahos, *supra* note 4; May and Sell, *supra* note 4; Sell, *supra* note 2; Maskus, *supra* note 4; Correa, *supra* note 4; Matthews, *supra* note 2; Shadlen, *supra* note 3.

policies and the tensions and human consequences that arise from them can only be resolved locally and at the domestic level. Such local-level understanding can then, in turn, be used to influence the more general discussion of international IP and trade agendas.

Future research should examine the notion that true and proper enforcement should not be confused with changes in laws and policies, and that direct pressure to adopt IP laws from developing countries may lead to little change in behaviour.[77] Such research will confirm whether Jordan's approach to IP enforcement was based on acquiescence on paper to do just enough—but no more than necessary—to free itself from US pressure.[78]

7. Conclusion

This article identified several areas that require further research in the IP area. This is unique in that it represents the first attempt to review the existing literature on IP and identify areas that require further research for Jordan. It does so by identifying several central research areas that can serve as a road map for scholars. The areas outlined below draw the attention of legal scholars to outstanding questions and gaps in the existing intellectual property literature on Jordan and can be used as a template to create future research objectives for other Arab countries as well.

1. Future research should examine the notion that true and proper enforcement should not be confused with amendments in local laws and policies, and that direct pressure to adopt IP laws from developing countries may lead to little change in enforcement behaviour.
2. Future research should address the question of whether there is good reason to assume that country-specific knowledge and information is likely to lead to a different set of policies, thereby rendering a one-size-fits-all IP approach similar to TRIPS ineffective.

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[77] S.K. Sell, "Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice", *International Organization*, 49/2 (1995): 315-349. Finding that USTR pressure in the late 1980s and early 1990s was effective in getting countries to change their laws and policies (inputs), but not the actual IPP (outputs) provided, Sell concluded that USTR pressure "largely has failed in intellectual property protection".

[78] *Ibid.*; M. Noland, "Chasing Phantoms: The Political Economy of USTR", *International Organization*, 51/3 (1997): 365-387.

3. Future research should focus on country-specific contextualisation of RBTs, such as the JUSFTA and the JEUAA, in order to examine expectations and obligations and to determine which, if any, of the RBTs objectives were reached.
4. Future research should extend IP analysis to areas beyond access to medicines, which has been a main focus thus far, one such area should be the examination of the effect, if any, of TRIPS and TRIPS-plus IP laws on attracting direct foreign investments as that is one of the main reasons used by developed countries in urging developing countries to adopt such laws.
5. Scholars should focus on examining whether technical assistance provided to patent offices was geared towards US and EU best enforcement practices at the expense of exploring flexibilities available under TRIPS and RBTs.
6. Future research should address the question of whether US and EU patent systems are functionally unfit for developing countries because both systems are built around allowing litigation to correct for errors in patent examination and granting, whereas developing countries generally do not have robust patent prosecution or litigation practices.
7. Future research should focus on developing a sound economic basis for IP analysis because all the benefits promised by TRIPS and RBTs are based on economic factors. To be relevant and meaningful, economic analysis should focus on country-specific research to establish direct correlations, and less so on works of a more general nature.