

MODERNIZING INTERNATIONAL TRADE LAW TO SUPPORT INNOVATION AND SUSTAINABLE DEVELOPMENT

Legal Reform In Light of the Saudi Arabian Vision 2030 –

The Interplay between Trade, Intellectual Property Rights and Innovation

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Abstract

The protection and enforcement of intellectual property rights (IPRs) is widely regarded as central to increasing trade and innovation, better economic growth and the development of a robust knowledge-based global economy. IPR regimes regulate the creation and international transfer of new products and processes, and therefore, the levels of protection and enforcement available have a profound impact on global economic efficiency and income distribution between developed and developing countries.

In April 2016, and in light of the aggressive quest for economic diversification, Saudi Arabia has issued its most ambitious vision yet, dubbed Vision 2030, for building a sustainable economic growth, promoting innovation and international trade and investment. Thus far, development in international intellectual property (IP) law over the past decades has seen an attempt to isolate cultural, ideological, political and religious issues from the substantive discussion of transnational topics and ignore the interests and capacities of different nations. Past literature has often overlooked these factors despite their importance in shaping IPR and innovation incentives, and the fact that they play a major role in informing policy and enforcement. As the international influence of IPR protection expands, an examination of the interplay between these factors and enhancing the enforcement and regulation of IPRs in order to achieve the goals of Vision 2030 is warranted.

Introduction

It is often argued that international trade is a key component of sustainable development. Trade facilitates the efficient allocation of scarce resources whilst enabling countries of varying levels of development to access environmental goods, services and technologies. This was recognised in both the United Nations (UN) Addis Ababa Action Agenda and UN Sustainable Development Summit in 2015 which underlined the notion of sustainable development as central to the resolving of the environment and development dichotomy.

The Summit produced the “Transforming our world: the 2030 Agenda for Sustainable Development” where all participating states committed to a total of 17 Sustainable Development Goals and assumed a collective responsibility to address the challenge of financing and creating an enabling environment at all levels – local, national, regional and global – for sustainable development in its three dimensions of inclusive economic growth, environmental protection and the promotion of social inclusion.¹ Economically, states declared that they will advance “fully towards an equitable global economic system in which no country or person is left behind, enabling decent work and productive livelihoods for all, while preserving the planet for...future generations”.²

There is a pressing need for a multilateral trading system that promotes economic growth whilst supporting sustainable development, and so it follows that in 2015 the United Nations Commission on Trade Law (UNCITRAL) as the core legal body within the UN system in the field of international trade law endorsed its support of the Sustainable Development Goals and selected a number of goals that are related to the Commission’s work. These included building resilient infrastructures, promoting inclusive and sustainable industrialization and fostering innovation; reducing inequality within and among countries; ensuring sustainable consumption and production patterns; and strengthening the means of implementation and revitalizing the global partnership for sustainable development.³

Among the various engines of economic growth, none has received as much attention as innovation. The importance of innovation and the vital role intellectual property rights (IPR) play in promoting economic development and trade has been recognised by the World Trade Organization (WTO) along with many other international institutions.⁴ It should be noted that open trade is not an end in itself, but that it is intertwined with human values and welfare goals, including those mentioned above. Thus, there is a well-established connection between sustainable development, disciplined trade and the promotion of innovation in order to ensure that economic and trade objectives go hand-in-hand with environmental and social objectives.⁵ The purpose of the present study is to shed some light on the interplay between

¹ UN Sustainable Development Summit, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, 2015, <<https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>>, last accessed: 02.10.2017

² The Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) The final text of the outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015, p6.

³ 2030 Agenda for Sustainable Development: UNCITRAL’s role, <http://www.uncitral.org/uncitral/en/about/SDGs/Sustainable_Development_Goals.html>, last accessed: 01.01.2017.

⁴ Keith E. Maskus, Intellectual Property Rights and Economic Development, 32 *Case W. Res. J. Int’l L.* 471 (2000). See also Robert E. Evenson, ‘Intellectual Property Rights and Economic Development, by Keith Maskus’, 33 *Case W. Res. J. Int’l L.* 187 (2001).

⁵ WTO, ‘Harnessing trade for sustainable development and a green economy’, <https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf>, last accessed: 02.01.2017

trade, IPR and innovation whilst using the case of Saudi Arabia to highlight the need to strike a balance between national and international IPR regulations to promote and facilitate sustainable development.

Trade, Intellectual Property Rights and Innovation

Globalisation has ensured that intellectual property (IP) increasingly assumes a central role in global and regional trade. A high degree of international trade transactions encompass knowledge-based intangible IP products such as patents, trademarks, copyright, designs and related products.⁶ As the barriers to globalisation disappear, international IP transactions transcending jurisdictional borders continue to grow and evolve as innovations in modern technology develop. It has been advanced that the growth in IP transactions has rendered IPR a key element in all levels of trade diplomacy.⁷

The ease of third-party accessibility and unauthorised transmission inherent in the intangible nature of IP products warranted the need for establishing robust legal, regulatory and enforcement regimes at both the national and international levels with the aim of prohibiting unauthorised copying and counterfeiting. From a legal standpoint, the need to establish effective IP regulations and effective enforcement mechanisms at national, regional and international levels has become an imperative policy consideration as countries compete for foreign investment and conveying a secure local business and trade environment where inventors and creativity is protected. International efforts to protect IPR commenced with the signing of the Paris Convention for the Protection of Industrial Property in 1883. Developments in IPR protection saw the birth of further multilateral initiatives including the Berne Convention for the Protection of Literary and Artistic Works in 1886, and The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995. The World Intellectual Property Organization (WIPO) established in 1967 has always been viewed as an instrumental international institutions for the global regulation of IP.⁸

The mechanisms by which IPR is protected include a number of legal frameworks for copyrights, patents, trademarks, industrial designs, and geographic indications. IPR protections globally have been consistently expanding both in terms of rights and jurisdictions. Governments and certain international bodies are entrusted with striking a balance between the interests of various stakeholders to IPR. For example, WIPO provides

⁶ The Organisation for Economic Co-operation and Development (OECD), 'Enquiries Into Intellectual Property's Economic Impact', Chapter 1, 2015, <<http://www.oecd.org/sti/ieconomy/Chapter1-KBC2-IP.pdf>>, last accessed: 02.01.2017.

⁷ George Ndi, 'The Legal Challenges which should be considered by GCC Countries, when joining International Conventions and Treaties on Intellectual Property', In: GCC Conference on Intellectual Property, 29th - 31st March 2013, Kuwait.

⁸ Matthew David and Debora Halbert, 'IP and Development' in *'The Sage Handbook of Intellectual Property'*, Chapter 5, p.89.

that “By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.”⁹

Nevertheless, striking the right balance and the process by which it is, or can be, achieved is the source of continuous debate.¹⁰ This is mainly due to the fact the aforementioned mechanisms of IP protection and enforcement majorly exist within the developed world. Developing countries and less industrialised countries such as the emerging economies and markets of Asia, the Middle East and Latin America traditionally lack one or more of the elements of modern, enforced or efficient IP systems. The IP system of a country is often evaluated solely in legal terms; whether it complies with international standards and whether the enforcement mechanisms in place are stringent or otherwise. The comparison of local copyright, patent, trademark, and other laws to international standards would not produce a detailed picture of the IP regime in question. Recent literature on the development of IP regulation globally has condemned the current “one size fits all” approach to IP regulation and IPR enforcement. The observations of the UK Commission on Intellectual Property illustrate the current difficulties in reconciling international objectives with national infrastructures, needs and interests of developing countries:

“Intellectual property systems may, if we are not careful, introduce distortions that are detrimental to the interests of developing countries. Developed countries should pay more attention to reconciling their commercial self-interest with the need to reduce poverty in developing countries, which is in everyone's interest. Higher IP standards should not be pressed on developing countries without a serious and objective assessment of their impact on development and poor people. We need to ensure that the global IP system evolves so that the needs of developing countries are incorporated and, most importantly, so that it contributes to the reduction of poverty in developing countries by stimulating innovation and technology transfer relevant to them, while also making available the products of technology at the most competitive prices possible.”¹¹

The domination of the ‘one size fits all’ approach to IP regulation is seen to continue as a result of the narrow debate on IP policy, the relatively small number of participating groups

⁹ See The World Intellectual Property Organization (WIPO), ‘What is Intellectual Property?’, <http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf>, last accessed: 29.12.2016.

¹⁰ William Daley, ‘In search of Optimality: Innovation, Economic Development, and Intellectual Property Rights’, GSDR Prototype Briefs, 2014, <<https://sustainabledevelopment.un.org/content/documents/5580Innovation,%20Economic%20Development%20and%20Intellectual%20Property%20Rights.pdf>>, last accessed: 01.01.2017.

¹¹ UK Commission on Intellectual Property Rights, ‘Integrating Intellectual Property Rights and Development Policy’, Report of the Commission on Intellectual Property Rights, Executive Summary, London – September 2002.

and the focus on reforming national legal systems so as to be seen as compliant with international IP rules and standards.¹² In order to foster innovation and encourage economic and trade development there is a need to examine IP systems from a broader perspective than mere comparisons. Therefore, in order to deduce a comprehensive understanding of an IP system in a given country, there is a need to contextualise the IP system in light of factors such as the legal system, culture, ideology, and political economy. The complex role of these factors can be illustrated by looking at the development of IP law in Saudi Arabia.¹³

The Kingdom of Saudi Arabia was founded in 1932 and is considered as one of the main players in the Arab world. Saudi Arabia joined WIPO in 1982, and both the Paris and Berne Conventions in 2004. It also became a member of the WTO in 2005. The development of IP law in the Kingdom has been largely shaped by these international conventions and Saudi Arabia is now considered to be compliant with global IP standards. As a *Shari'ah*-based jurisdiction that applies Islamic Law, the Saudi legal system protects and facilitates the acquisition and disposition of all property, consistent with the Islamic practice of upholding private property rights.¹⁴ Additionally, in line with international objectives, in April 2016 and in light of the aggressive quest for economic diversification, Saudi Arabia has issued its most ambitious vision yet, dubbed Vision 2030, for building a sustainable economic growth, stimulating innovation and promoting international trade and investment.¹⁵

As the Kingdom of Saudi Arabia continued to develop and become economically prosperous, and having achieved its policy aspirations with respect to establishing a national IP regime, it has begun to shift its interests away from a resource-based development strategy to a knowledge-based one by establishing and reinforcing initiatives that create an attractive business environment for foreign investors. The Kingdom seeks in its quest to implement an economic diversification strategy, through the production of and trade in intangible knowledge-based IP products and services, to create global IP alliances via trade diplomacy involving the conclusion of international agreements and accession to multilateral conventions.¹⁶ This shift in interest clearly demonstrates that Saudi Arabia views IP to have

¹² See Michael W. Carroll, "One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights." *Ohio State Law Journal*, 70, 6 (2009): 1361-1434. Also, Jerome H. Reichman, 'Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead Or Follow?', 31 *Houst Law Rev.* 2009 January 31; 46(4): 1115–1185; and Anna B. Laakmann, 'Intellectual And Regulatory Property', Intellectual Property Scholars Conference (IPSC), University of California, Berkeley School of Law, Berkeley, CA, August 8, 2014, <https://www.law.berkeley.edu/files/Laakmann_Anna_IPSC_paper_2014.pdf>, last accessed: 29.12.2016.

¹³ For example, the current Saudi Arabian Trademarks Act of 2002 prohibits the registration of trademarks covering alcoholic beverages or services related to the sale thereof. Also, the Islamic calendar is used in determining the validity of a trademark registration. In this sense, a trademark is valid for a period of 10 years according to the Islamic *Hijri* calendar and is renewable for successive periods of equal length.

¹⁴ United States Bureau of Economic and Business Affairs, 'Saudi Arabia', 2016 Investment Climate Statements Report, July 5, 2016, <<https://www.state.gov/e/eb/rls/othr/ics/2016/nea/254461.htm>>, last accessed: 27.12.2016.

¹⁵ Saudi Arabia Visio 2030, <<http://vision2030.gov.sa/en>>, last accessed: 20.12.2016

¹⁶ *Supra*, n.7

an important and significant future role to play in the economic development of the Kingdom.¹⁷ Saudi Arabia is currently undertaking a comprehensive revision of its laws covering IPR to further bring them in line with international standards, specifically in the areas of IPR enforcement and application. Practical difficulties continue to exist in finding ways to make the police, prosecutors and other law enforcement officials, and indeed the population at large, aware of the developing issues regarding IPR.¹⁸ Additionally, the low number of investigators and inspectors employed at IP law enforcement institutions, the lack of resources at such institutions and the need to invest in the training of lawyers and judges dealing with IPR violations has been noted to impede the effective enforcement of IP regulations.¹⁹

However, such conclusion of bilateral and multilateral IP – related agreements via trade diplomacy does not come free of potentially negative legal implications. The requirement to adopt higher standards of IPR protection for IP products and services originating from developed countries in the absence of the legal infrastructure to meet such high standards needs to be addressed with caution. Such “localisation or domestication of international norms and rules on IPR protection” is argued to impose significant challenges to the local IP regime in Saudi Arabia.²⁰ There is a need for Saudi Arabia to constantly address whether there is a necessity to accede to higher standards of IP protection in light of the current legal infrastructure, and the legislative changes required for such high standards. Additionally, such considerations should not neglect the social, political, and cultural interests and characteristics of the Kingdom, and whether the adoption of higher standards of IPR protections is likely to stifle technological innovation or adaptation in the Kingdom, or restrict access to alternative and cheaper technologies e.g. in the areas of medicine and education.

It has increasingly been argued that the current international IP regulatory system gives rise to extensive “globalised localism” whereby developed countries through trade diplomacy attempt to “embed” their national standards of IPR protections through international IP treaties agreements.²¹ This in turn transforms what has been previously regarded as local

¹⁷ See Mohammad S. Khorshed, ‘Saudi Arabia: From Oil Kingdom to Knowledge-Based Economy’, Middle East Policy Council, Fall 2015, Volume XXII, Number 3, < <http://mepc.org/journal/middle-east-policy-archives/saudi-arabia-oil-kingdom-knowledge-based-economy?print>>, last accessed: 03.01.2017

¹⁸ WIPO, ‘WIPO National Workshop For Judges - Difficulties In The Enforcement Of Intellectual Property Rights And Possible Solutions’, Riyadh, December 13 to 15, 2004, < http://www.wipo.int/edocs/mdocs/arab/en/wipo_ip_ju_ryd_04/wipo_ip_ju_ryd_04_5.pdf>, last accessed: 12.12.2016

¹⁹ The International Intellectual Property Institute (IIPi), ‘Study on Specialized Intellectual Property Courts’, 2012, <<http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf>>, last accessed: 07.12.2016.

²⁰ *Supra*, n.7

²¹ See Graham Dufield, ‘Harnessing Traditional Knowledge And Genetic Resources For Local Development And Trade’, Draft paper presented at the International Seminar on Intellectual Property and Development Organised by WIPO jointly with UNCTAD, UNIDO, WHO and WTO, May 2005, < http://www.wipo.int/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103975.pdf>, last accessed: 01.12.2016.

laws into international norms without taking into consideration the ability of the legal infrastructures to accommodate such norms, and whether these norms will facilitate incremental innovation and industrial adaptation in other nations.²² In essence, the development of the international IP regulatory system in this “one size fits all” manner is not viewed to address the social, legal, political interests and capacity of developing countries and emerging economies, nor enable them to become established producers of IP products and services.²³

As the Kingdom of Saudi Arabia engages in further reforms that aim to stimulate innovation, trade and sustainable development, there is a need to match the interests and requirements of the Saudi 2030 vision including accelerating reforms across key economic sectors, the privatization of key industries and the creation of a globally competitive small- and medium-sized Enterprise sector, attracting inward investments and promoting innovation, with the Kingdom’s interests and requirements from international IP agreements and IPR reforms. This may entail negotiating and agreeing possible derogations and exceptions to very high standards of international IPR protections in selected or important sectors. Flexibility and exceptions are built into various international instruments. For example, the TRIPS agreement includes important exceptions focusing on minimum standards, non-discrimination policies, and enforcement and dispute settlement mechanisms. Nevertheless, developing countries and emerging economies often lack the technical and legal expertise to utilise efficiently and effectively these exceptions. Recent literature argues that the internationally optimum solution to the polarising and controversial nature of the ‘one size fits all’ approach to IP regulation lies not at the extremes, but somewhere in between.²⁴

Concluding Remarks

The international harmonisation of IPR is a substantial tool for policymakers and, when employed correctly, has the power to motivate innovation and economic development to all countries involved in the process as it ensures that IP products and services can be traded globally whilst offering global protection to the owners of these products and services. Nonetheless, the current international IP legal framework is mostly indifferent to local needs. Thus far, development in international IP law over the past decades has seen an attempt to isolate cultural, ideological, political and religious issues from the substantive discussion of transnational topics. Past literature has often overlooked these factors despite their importance in shaping IPR and innovation incentives, and the fact that they play a major role

²² *Ibid.*

²³ *Ibid*, see also Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar, 2008), p 3-10.

²⁴ *Supra*, n.10. See also Yongmin Chen and Thitima Puttitanun, “Intellectual property rights and innovation in developing countries,” *Journal of Development Economics* 78 (2005); Theo S. Eicher and Monique Newiak, “Intellectual Property Rights as Development Determinants,” *Canadian Journal of Economics* 46 (2013).

in informing policy and enforcement. As the international influence of IPR protection expands, an examination of the interplay between these factors and enhancing the enforcement and regulation of IPRs in order to achieve the goals of sustainable development is warranted.

When reviewing the IP system in a given country against international standards, it should be considered whether the particular IP law has emerged from within that country or whether it was acquired as a result of acceding an international agreement. The review should evaluate the legal ramifications along with the local characteristics, attributes and needs of that country. Instead of adopting a technocratic comparative doctrinal approach to the analysis of IP regimes in different countries to determine compliance with international standards, international efforts should be directed at encouraging developing countries and emerging economies from making use of the flexibility built into the current system.

Sustainable development is widely premised on principles of integration and conciliation.²⁵ Therefore at national, regional and international levels, actors concerned with IP regulation actors including states and international organizations should attempt to establish and create an integrative economic and social developmental approach. In the case of IP regulation, the incorporation of sustainable development as a treaty objective may allow and facilitate the use of the flexibility and exceptions present in the current system and remedy the structural imbalance between the different actors, their interests and capacities. This step would give negotiators the power to raise and address the intersections between IPR protections and innovation with economic, social and environmental interests. Indeed, in the area of regulating such intersections UNCITRAL would be an excellent forum for action due to its extensive technical and legal knowledge in the area of international trade.

On the national level, and certainly in the case of Saudi Arabia, countries need to develop and reform national IP systems and align them with their national strategies for sustainable development. IP protection needs to be tailored to cultural, social, ideological, political and religious concerns and needs. The integrative and conciliatory approach of sustainable development could facilitate the conciliation between domestic measures and these interests and needs. The freedom to protect national factors would promote a richer evaluation of different IP systems and would foster innovation, technology diffusion and promote economic and trade growth. These measures taken together may ensure a robust and rigorous IP system whilst seeking to protect vital cultural and religious interests.

²⁵ Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm', *Eur J Int Law* (2012) 23 (2): 377-400. See also Rachel Emas, 'The Concept of Sustainable Development: Definition and Defining Principles', *Global Sustainable Development Report 2015*; and John C Dernbach, 'Achieving sustainable development: The Centrality and multiple facets of integrated decisionmaking', *Indiana Journal of Global Legal Studies*, (2003), 247-285.