

**IMPLEMENTING TRIPS IN EGYPT: A POSTCOLONIAL ANALYSIS. THE
CONTINUING RELEVANCE OF EGYPT'S JURIDICAL HISTORY TO
UNDERSTANDING DEVELOPMENTS IN EGYPTIAN INTELLECTUAL
PROPERTY LAW**

Thesis submitted by Bronwen Hilary Jones for the qualification of Doctor of Philosophy, School of Law, Faculty of Humanities and Social Sciences, Newcastle University, April 30, 2014

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ABSTRACT

This study sets out to investigate Egyptian implementation of international intellectual property (IP) obligations, in the context of Egypt's legislative and juridical history, particularly considering post-colonial implications. It examines the extent to which the effects and experience of colonialism may continue to shape the Egyptian response to unwelcome international pressure to reform its domestic law. It further considers whether Orientalism can help to explain some external perceptions of Egypt's approach to the protection of IP.

The study (while it does not offer a comprehensive analysis of the law) examines the historical context in which Egypt's IP law has emerged, identifies aspects of the current IP law that have attracted controversy and attempts to uncover explanations for controversial aspects of the law. The investigation is largely conducted through an examination of relevant literature and black letter analysis of the law but, additionally, summer 2008 was spent immersed in an Egyptian law firm to update current awareness, collect documents and conduct a small number of elite interviews.

The study finds that external explanations of Egypt's approach to IP do appear to have been distorted by Orientalist interpretation and (focusing mainly on the patent and copyright provisions) that Egypt's IP law reflects postcolonial tensions in its attempt to satisfy irreconcilable demands.

Egypt has experienced a period of major social and political upheaval since 2011, with many unresolved consequences. Eventually, the question of IP reform will be raised again. Issues raised here will likely be relevant to future developments in Egyptian IP law.

This thesis is dedicated to my parents Doreen (née Farrall) and Peter Jones to
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CHAPTER 1: INTRODUCTION

THESIS AIMS

This thesis examines how Egypt has managed its commitments to protect intellectual property (IP)¹ and enforce Intellectual Property Rights (IPRs) following accession to the World Trade Organization (WTO)² and implementation of the Trade Related Aspects of Intellectual Property (TRIPS) agreement.³ In drawing upon postcolonial analysis, it argues that an understanding of Egypt's history, both political and juridical is necessary for an adequate critique of Egypt's IP law. A postcolonial framework makes it possible to look beyond the purely economic values of international IP regulation and to expose more easily a repeating theme in which competing visions of modernization remain in conflict over how to protect IP. Within this theme, three broad approaches can be identified. They are the Orientalist approach, the religious approach and the secular-nationalist approach. While there is necessarily overlap among these groupings, nevertheless, they help to reveal a pattern in Egypt's IP management.

THE MOVE TOWARDS GLOBAL REGULATION OF IP: TRIPS AND ITS EFFECTS

TRIPS sets minimum standards for the regulation of IP among all members of the WTO. This marks a significant change in approach compared with previous international IP regimes. By requiring the harmonization of domestic laws regulating IP at a minimum level of protection among all WTO states, it goes further than any of the earlier treaties dealing with copyright, patents and trademarks as well as other related subject matter (now referred to collectively as IP). A World Bank report, in 1996, predicted that the effect of increasing standards of IP protection would be the most significant result of WTO membership for Egypt.⁴ Egypt is a founder member of the organization, which was created in 1994. The Trade Related Aspects

¹ The acronym IP will be used where appropriate although abbreviating the term is in itself problematic and may cause, 'people [to]"forget" what the acronym stands for.' Duffy, John F 'Intellectual Property Isolationism and the Average Cost Thesis' (2005) 83 *Texas Law Review* 1077 at 1078. Issues relating to IP terminology will be discussed in Chapter 2

² Egypt became a member of the WTO on 30 June, 1995 See 'Understanding the WTO: the Organization, Members and Observers, WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 2014

³ In Law 82/2002 on Intellectual Property (hereafter Law 82/2002)

⁴ Hoekman, Bernard and Arvind Subramanian 'Egypt and the Uruguay Round' (1996) *Policy Research Working Paper 1597* (May 1996) The World Bank Europe and Central Asia and Middle East and North Africa Technical Department, Private Sector and Finance Team at 19 <<http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-1597>> accessed 2014

of Intellectual Property (TRIPS) agreement, which has required significant changes to be made to the laws of developing countries, is one of the WTO agreements and, as such, binds all WTO members. Thus, serious consequences seem likely, although, as Dr Basma Abdelgafar correctly points out, it is not possible to accurately calculate the way in which the benefits and detriments of IP measures will eventually materialize.⁵

Even if it were possible to assess the nature of any likely effects, no investigation of the potential impact could be carried out in Egypt prior to agreeing TRIPS, since TRIPS was sprung on the negotiators as 'very much a last minute affair.'⁶ There was insufficient time in which to undertake any such studies. The World Bank findings came too late to be of assistance. Abdelgafar's concerns about gauging the effects of TRIPS are supported by eminent scholar, Professor Frederick Abbott, who affirmed that there had 'been virtually no before-the-fact effort to objectively quantify and assess the impact of changes in IPRs and related regulatory regimes.'⁷ This lack of precise information regarding the implications of TRIPS, at the time the treaty was signed is of considerable importance because of the seriousness of potential harm. Without any precise means of assessing the impact of IP measures it is very difficult to determine exactly how best to apply IP law in order to harness creativity most effectively or to spread beneficial knowledge. Carsten Fink, Chief Economist at the World Intellectual Property Organization (WIPO), and Patrick Reichenmiller, Senior Communications Manager at Swiss Re, acknowledge that it is 'inherently difficult to quantify the implications of changing intellectual property standards, let alone to compare them in monetary values to the gains derived from improved market access abroad.'⁸ As American Professor Keith Maskus has said, only 'time will tell whether the [TRIPS] agreement is biased toward generating and diffusing pro-competitive growth or toward anti-competitive rent transfer on behalf of intellectual property developers.'⁹ A consequence of this

⁵ Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) at 179

⁶ Drahos, P 'Global Property Rights in Information: the Story of TRIPS at the GATT (1995) 13 *Prometheus* 6 at 14

⁷ Abbot, Frederick 'Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism' (2011) 8 *Journal of International Economic Law* 77 at 79

⁸ Fink, Carsten and Patrick Reichenmiller 'Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements' in Richard Farmer Ed. *Trade, Doha and Development: a Window on the Issues* (World Bank 2006) 285 at 299
<<https://openknowledge.worldbank.org/bitstream/handle/10986/7135/396500PAPER0Tr10082136437501PUBLIC1.pdf?sequence=1>> accessed 2014

⁹ Maskus, Keith E 'The International Regulation of Intellectual Property' (1998) 134 *Review of World Economics* 186 at 203

indeterminacy is that IP is very vulnerable to political manipulation by those who stand to benefit.¹⁰

WHY PROTECT IP?

IPRs are intended to protect the interests of innovators (creators and inventors who have put time, energy and money into their creations) and to stop others from unjustifiably benefiting from their work.¹¹ Much controversy surrounds who should be able to benefit from creative work and on what terms. The protection offered by most forms of IPRs is in the form of a time-limited monopoly over new creations with the proviso that the work is shared with the public and that the know-how to create it eventually lapses into the public domain on expiry of the monopoly term. The owner is thereby rewarded for their contribution made to society in adding to the sum of knowledge and motivated to engage in further creative activity. Others may also be encouraged by the lure of IPRs to innovate and to disseminate their work. The justifications for IP protection draw on concepts of both natural right and utilitarianism.

THE PROBLEMS WITH GLOBAL IP PROTECTION

A reason for granting IP protection is, therefore, that the knowledge embodied is useful. Indeed, 'many people need, use and depend'¹² on IP protected subject matter. The exclusive nature of IPR monopolies, however, can impede access to useful knowledge during the monopoly period, by putting control into private hands, potentially making the products expensive and putting them out of reach of those who cannot afford to pay. With IP standards raised and globalized, access to new and useful ideas by the less well off may be considerably delayed. This is likely to severely affect those in countries, such as Egypt, who may be unable to freely use the IP protected work to contribute to improvements in key areas of importance such as health care, food and education. It was for this reason that the standard of protection in IP law was, until TRIPS, largely decided at national level, although international IP agreements have existed since the 19th century. The TRIPS agreement, by setting an enforceable minimum standard allowable for IP protection among WTO member

¹⁰ Abdelgafar, Basma | *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) at 179

¹¹ The underlying origins and interpretations of the philosophical basis for IPRs is discussed in more detail in Chapter 2

¹² Drahos, Peter A *Philosophy of Intellectual Property* (Ashgate 1996) at 1

states, has radically altered the power that member states have to decide on the appropriate level of protection.

WHO STANDS TO GAIN FROM GLOBAL IP PROTECTION

Arguments in favour of raising IP standards have come mainly from the United States (US), the European Union (EU) and its member states (including the United Kingdom (UK)), and Japan, which form a triangle of key players called by Australian academic Professor Peter Drahos 'the IP triumvirate'.¹³ This group of pro-IP countries calls upon statistics and studies that, apparently, provide evidence of economic damage caused to IP owners, whose products have been copied, and economies that rely to a large extent on IP. In the US, organizations¹⁴ and government bodies¹⁵ collate records citing claims of IP infringing activities and actively promote increased IP regulation based on such information. In fact, US businesses led the drive to include IP in the WTO trade negotiations and were instrumental in crafting the TRIPS agreement.¹⁶ However, the statistics that purport to show damage caused by copying can be questioned in part because of the difficulties of accurately assessing such damage, but also because of a tendency to inflate the figures.¹⁷ As Professor Michael Blakeney points out, 'there is an understandable tendency for traders to exaggerate the profits they might have made, if not for the presence of factors over which they have no control.'¹⁸ The self-interest of IP producing countries is likely, at the very least, to cause them to look more assiduously for evidence that supports stronger IP protection.

¹³ Drahos, Peter 'Global Property Rights in Information: the Story of TRIPS at the GATT (1995) 13 *Prometheus* 6 at 11

¹⁴ The International Intellectual Property Alliance (IIPA) is one such trade organization. It comprises 3,200 US companies and aims to protect their copyright interests see <<http://www.iipa.com/aboutiipa.html>> accessed 2014. Its activities are discussed in more detail in Chapter 5;

¹⁵ The Office of the United States Trade Representative (USTR) was created in 1962 and aims 'to ensure that U.S. trade policy and trade negotiation objectives adequately reflect U.S. commercial and economic interests.' Its IP focus is on 'reflecting the importance of intellectual property and innovation to the future growth of the U.S. economy.' Under its auspices, reports are published on countries' performance in relation to protection of US IP assets and this is reflected in trade relations. This, too, is discussed in more detail in Chapter 5

¹⁶ Drahos, Peter 'Global Property Rights in Information: the Story of TRIPS at the GATT (1995) 13 *Prometheus* 6

¹⁷ See e.g. Patry, William *Moral Panics and the Copyright Wars* (Oxford University Press 2009) especially at 32-36

¹⁸ Blakeney, Michael 'A Critical Analysis of the TRIPS Agreement' in Meir Perez Pugatch Ed. *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Edward Elgar 2006) at 17

Drahos has noted that when the WTO agreement was being negotiated US global power had dipped. He attributes to the consequent, what he calls, 'diminished giant syndrome,'¹⁹ both the aggression and stealth with which it pursued IP as a means to re-establish US global power, and achieve 'leverage'.²⁰ The US had seen, in the example of Japan, how a country could use copying in several areas of technology to match US technological advances²¹ and, ultimately, even to exceed US expertise. Following Japan's success, other aggressive competitors also began to emerge among the newly industrialized countries in the Asian region. The US rationalized that increasing the protection given to IP holders by lengthening and strengthening monopolies, and thereby preventing copying, would not only result in greatly increased financial return but also give the rights holding nation greater power. In this way, stronger and more effective protection of IPRs would help to preserve and strengthen the US economy. Indeed, as Drahos asserts, 'by helping its multinational clientele to achieve *dominium* over the abstract objects of intellectual property, the US goes a long way to maintaining its *imperium*.'²² TRIPS, therefore, represents much more than just the economic interests of the US but is very much intended to continue and extend US hegemony and, although in its wake, that of other postcolonial (Western) powers.

By generalizing and raising the standards by which IP law regulates the exchange and use of innovation globally, TRIPS has the potential to entrench further inequality and unevenness among WTO member states that have emerged from colonialism. In this way, international IP law can be seen both as a legacy of colonialism and a means by which previous colonizer countries can regain lost power. Studies that predict potential damage, resulting from higher levels of IP protection, to economies that consume more IP products than they produce, are readily available and it is widely thought 'that the case for the globalisation of intellectual property rights is anything but persuasive [... and may] be an obstacle to development.'²³ The inability to afford the latest medicines may have severe detrimental

¹⁹ Bhagwati, Jagdish 'The Diminished Giant Syndrome: How Declinism Drives Trade Policy' (1993) 72 *Foreign Affairs* 22 Cited by Peter Drahos in 'Global Property Rights in Information: the Story of TRIPS at the GATT (1995) 13 *Prometheus* 6 at 7

²⁰ Drahos, Peter 'Global Property Rights in Information: the Story of TRIPS at the GATT (1995) 13 *Prometheus* 6 at 8

²¹ Correa, Carlos María *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options for Developing Countries* (Zed Books 2000) at 4

²² Drahos, Peter 'Global Property Rights in Information: the Story of TRIPS at the GATT (1995) 13 *Prometheus* 6 at 16

²³ See Drahos, Peter and Ruth Mayne Eds *Global Intellectual Property Rights* (Oxfam 2002) at 1

effects on health,²⁴ education may be negatively affected without adequate access to new ideas in expensive textbooks,²⁵ and food security and the environment may suffer if traditional agricultural methods are outlawed by new rules regarding the uses of seeds,²⁶ for example. However, until the damage is evident, it is difficult to calculate exactly what the outcome will be and therefore there is great uncertainty surrounding any forecast.

There is no persuasive evidence to suggest that Egypt will benefit from a stronger IP system, without sufficient ability to counterbalance negative effects, and many analyses indicate the contrary. Proponents argue that increased trade and foreign investment as a result of WTO membership will compensate for any detriments.²⁷ However, this optimistic view is similarly unsupported. Expectations of extensive trade liberalization in the US and EU are susceptible to political fluctuations, so while preferential market access is politically vulnerable and likely to diminish over time, IPRs, once implemented, will remain.²⁸ Thus, it is very unlikely that the institutionalising of IP through TRIPS, in the WTO, will benefit countries that are not already industrialized. As Professor Bryan Turner has argued, 'once the global centres of capitalism had been established, the conditions on the periphery were fundamentally changed.'²⁹ In this way, the future development of Egypt remains tied to the fortunes of the ex-colonial powers.

Power politics remain very evident in international relations and within the context of the WTO the benefits of membership tend to favour the strong. Although the WTO was

²⁴ AbdelGafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) at 195; Dina Iskander offers a slightly more nuanced view of the impact of implementing TRIPS in which she acknowledges that 'IPR may possibly develop into a factor impeding access to medicines in Egypt.' However, she also acknowledges that, possibly an even more pressing problem is that of 'weak know-how and training facilities.' See Iskander, Dina 'TRIPS and Access to Medicines in Egypt' in Löfgren, Hans and Owain David Williams Eds *The New Political Economy of Pharmaceutical Production, Innovation and TRIPS* (Palgrave MacMillan 2013) at 106

²⁵ see e.g Rizk, Nagla and Lea Shaver Eds *Access to Knowledge in Egypt* (Bloomsbury Academic 2010)

²⁶ As Philippe Cullet has rightly said, 'the introduction of IPRs in agriculture can only be justified if IPRs foster food security' in Cullet, Philippe 'Food Security and Intellectual Property in Developing Countries' (2003) International Environmental Law Research Centre <<http://www.ielrc.org/content/w0303.pdf>> accessed 2014 at 29

²⁷ See e.g. *TRIPS Agreement: A Guide for the South. The Uruguay Round Agreement on Trade-Related Intellectual Property Rights* (South Centre 1997)

²⁸ Fink, Carsten and Patrick Reichenmiller 'Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements' in Richard Farmer Ed. *Trade, Doha and Development: a Window on the Issues* (World Bank 2006) 285 at 298 <<https://openknowledge.worldbank.org/bitstream/handle/10986/7135/396500PAPER0Tr10082136437501PUBLIC1.pdf?sequence=1>> accessed 2014

²⁹ Turner, Bryan S *Marx and the End of Orientalism* (George Allen and Unwin 1978)

supposed to bring Egypt the benefits of rule-based international trade, this expectation was, perhaps, based on a 'utopian' goal of an international rule of law bringing with it the benefits of development. However, the international legal system has been criticised as 'too apologetic' to the wielders of power.³⁰ Attempts to lessen inequalities are widely viewed with justifiable cynicism. This is a major reason why the experience of colonialism³¹ still forms an important part of the international and domestic setting for lawmakers in Egypt today.

IP A NEW FORM OF COLONIALISM?

Indian scientist and activist Vandana Shiva sees in international IP regulation a new type of colonialism. She explains how IP protection operates to ensure that profits flow from developing to developed countries justified by 'the garb of reward for inventiveness.'³² Shiva is not alone in believing that the global harmonization of IP protection excessively rewards the Northern developed countries. Many other prominent academics agree that there is a 'colonizing role' behind the trend to extend the protection for IP and to ensure the enforcement of intellectual property rights (IPRs) globally.³³ More than ten years before the conclusion of the TRIPS agreement, American philosopher Noam Chomsky predicted that 'the North-South conflict will not subside, and new forms of domination [would] have to be devised to ensure that privileged segments of Western industrial society maintain substantial control over global resources, human and material, and benefit disproportionately from this control.'³⁴ In this he was prescient. Cambridge IP Professor, William Cornish, too, has referred to 'the quest of advanced economies to conserve superior knowledge as a weapon in international trade.'³⁵

³⁰ Koskenniemi, Martti 'The Politics of International Law' (1990) 4 *European Journal of International Law* 1

³¹ The terms colonialism and imperialism are explored further later in chapter 2. Although frequently used interchangeably, colonialism strictly speaking refers to domination via territorial occupation while imperialism refers to the exercise of control and domination from a distance without the need for actual territorial occupation.

³² Shiva, Vandana *Protect or Plunder? Understanding Intellectual Property Rights* (Zed Books 2001) at 13

³³ Rahmatian, Andreas 'Neo-Colonial Aspects of Global Intellectual Property Protection' (2009) 12 *The Journal of World Intellectual Property* 40; and Drahos, Peter *A Philosophy of Intellectual Property* (Dartmouth 1996) at 91 among many others

³⁴ Chomsky, Noam *Towards a New Cold War: Essays on the Current Crisis and how we got there* (Pantheon 1982) at 84

³⁵ Cornish, William R 'The International Relations of Intellectual Property' *The Cambridge Law Journal* 52 (1993) 46 at 49

This recognition that there are conflicting interests at stake among developed and developing countries in the IP domain, led the Chief Executive Officer (CEO) of the United Kingdom Intellectual Property Office (UKIPO), Ron Marchant, to advise developed countries to be less aggressive in their dealings with developing countries since without better mutual understanding, 'we won't have a global IP system.'³⁶ Now retired, he again reiterated his concerns at a meeting in Hong Kong in July 2012 where he restated his belief that it is unreasonable for developed countries to insist that less developed countries instantly harmonize their IP rules to match theirs.³⁷

Egypt's membership of the WTO reflects a perception among those who entered into the agreement that membership of the global trading community is capable of potentially benefiting Egypt. In this context, harmonization of rules relating to trade has been accepted as a necessary part of the international law regulating transactions. However, at the same time, suspicion of international law and, in particular, treaty law, persists. There is justifiable concern that some treaties are perceived as benefiting the 'great powers' of the colonial era to the detriment of developing countries.³⁸ As Egypt is still a developing country, it is feared that aspects of IP harmonization could severely disadvantage Egypt.

Professor Ikechi Mgbeoji points out that despite claims of universality often accorded to concepts of IP protection the 'specific forms of IPRs' protected in the TRIPS agreement derive from the 'cultural, legal and economic traditions of continental Europe and of Western jurisprudence and economic tradition.'³⁹ Their colonial origins mean that, where raised standards of IP protection fail to provide benefits, postcolonial analysis can be useful to critique difficulties arising from their implementation.

Implementing the changes required to comply with TRIPS has been complex and costly. According to Mgbeoji, just updating the Egyptian patent office has been 'conservatively put

³⁶ 'Marchant Urges Action Over IP Divide' *Managing Intellectual Property* (November 8, 2004)

³⁷ Leung, Peter 'Ron Marchant Sparks Debate on IP and Emerging Economies' (*Managing Intellectual Property* (July 24, 2012)

³⁸ The reasons Egyptians might distrust aspects of International Law will be discussed in more detail in later chapters

³⁹ Mgbeoji, Ikechi 'TRIPS and TRIPS-plus: Impacts in Africa' in Gervais, Daniel Ed. *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press 2007) at 263

at about US\$2 million'.⁴⁰ Transitional provisions to allow developing countries time to implement the TRIPS agreement have expired much more quickly than the preparations to develop the capacity to handle the newly heightened IP regulation have advanced.⁴¹

Treaties should not endanger Egypt as an independent state nor should they negatively impact upon Egyptians in the quest for development. While the concept of development is perceived differently according to political or religious perspective and it may be critically analysed as historicist in nature,⁴² some fundamental expectations include that it will bring increased economic prosperity and a more equitable sharing of benefits both between and within states. The preamble to the GATT 1947 states that the contracting parties entered into the agreement because they

Recogniz[ed] that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world [...]⁴³

In joining the GATT, Egyptian experience of the nineteenth century has taught that, while the principle of *pacta sunt servanda*⁴⁴ is the general rule to be applied and is respected as such by Egyptian jurists,⁴⁵ there is also a consciousness that unequal treaties have resulted in loss of national sovereignty in the past and could do so again. There is a strong desire in Egypt for 'fairness' in international law and a perceived need to ensure that treaty agreements embrace this as a principle.

FAIRNESS IN TREATY-MAKING

In order to assess whether a particular treaty meets the basic requirements of fairness Drahos has established a test to be applied. The elements of the test are that

⁴⁰ Mgbeoji, Ikechi 'TRIPS and TRIPS-plus: Impacts in Africa' in Gervais, Daniel Ed. *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press 2007) at 276

⁴¹ The issue of time allowed for transition is addressed in more detail in Chapter 6

⁴² Historicism will be discussed in more detail in Chapter 2

⁴³ GATT 1947 Preamble <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> accessed 2014

⁴⁴ Agreements must be honoured

⁴⁵ The principle is discussed further in Chapter 5

- all relevant interests have to be represented in the negotiating process (*the condition of representation*)
- all those involved in the negotiation must have full information about the consequences of various possible outcomes (*the condition of full information*)
- one party must not coerce the others (*the condition of non-domination*). The use of coercion to overcome the will of another is the very antithesis of negotiation.⁴⁶

On these criteria, he finds that the TRIPS agreement (as well as other IP treaties) fails the test for ‘democratic bargaining.’ There are, therefore, grounds for further questioning the ‘fairness’ of the agreement.

There has already been recognition of intrinsic problems with the TRIPS agreement from within the WTO in the area of access to medicines. The profound injustice it is capable of causing was exemplified in the South Africa case of access to HIV AIDS medication.⁴⁷ This raised international awareness of the issue and forced an acknowledgment of defects in international IP regulation under TRIPS and, subsequently, an attempt to mitigate aspects of the resulting unfairness to a limited extent in the Doha Declaration of 2001⁴⁸ and later Decision implementing paragraph 6 of the Declaration.⁴⁹

IP AND DEVELOPMENT

IP proponents claim that the presence of IP protection, as well as the specific level of protection it offers to creators of protected material, fosters creativity as well as enabling access to new knowledge that can help to resolve problems. A number of studies suggest, however, that IP benefits do not necessarily accrue without a strong research culture and infrastructure; even with supportive research environment strong IPRs may be problematic.

⁴⁶ Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) at 15

⁴⁷ See Chapter 5 for further discussion and e.g. Barnard, David ‘In the High Court of South Africa, Case No. 4138/98: Politics of Access to Low-Cost AIDS Drugs in Poor Countries’ (June 2002) 12 *Kennedy Institute of Ethics Journal* 159

⁴⁸ Doha WTO Ministerial Declaration on the TRIPS agreement and public health 2001: TRIPS WT/MIN(01)/DEC/220 November 2001 This is discussed further in Chapter 5

⁴⁹ Decision of the General Council of 30 August 2003 Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health WT/L/540 and Corr.1 1 September 2003 <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> accessed 2014. Discussed further in Chapter 5

⁵⁰ A culture capable of nurturing innovation 'is one in which innovation and creativity are valued and appreciated, adequately funded and channeled to specific needs.'⁵¹ This requires both the resources and political will. Where this is lacking IP may not be beneficial and 'stronger IPRs will not contribute to growth merely by being codified into laws.'⁵² Professor Keith Maskus, who is generally optimistic about the contribution of IP specifically in attracting foreign direct investment (FDI) to developing countries,⁵³ nevertheless warns that 'IPRS could play either a positive or negative role in fostering growth and development.'⁵⁴

According to its protagonists, IP law is a key factor in development. In a WIPO publication by Director General Kamal Idris, IP is described as 'a power tool for economic development and wealth creation.'⁵⁵ WIPO formally recognized development as a goal in its development agenda proposed by Argentina and Brazil in 2004 with its recommendations adopted in 2007 by the WIPO General Assembly. However, such a one-dimensional definition, expressed in purely economic terms, may not encapsulate all developing country needs. The United Nations Development Programme (UNDP) takes a more multi-dimensional approach in its Human Development Reports.⁵⁶ This too can be criticised on the basis that it does not sufficiently address all aspects of subjective well-being.⁵⁷ However, a utilitarian view of development, solely concerned with economic gain, is certainly not the only way of understanding development.

⁵⁰ See among others Hargreaves, Ian *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) <http://www.ipo.gov.uk/ipreview-finalreport.pdf> at para 3.23 and Maskus, Keith E 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer' (1998) 9 *Duke Journal of Comparative and International Law* 128 at 152

⁵¹ Idris, Kamal and Hisamitsu Arai *The Intellectual Property Conscious Nation: Mapping the Path from Developing to Developed* (WIPO 2008) at 10

⁵² Park, Walter G and Juan Carlos Ginarte 'Intellectual Property Rights and economic Growth' (2007) 15 *Contemporary Economic Policy* 51 at 60

⁵³ Maskus, Keith E 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer' (1998) 9 *Duke Journal of Comparative and International Law* 128 at 152

⁵⁴ Maskus, Keith E 'Intellectual Property Rights and Economic Development' (2000) 32 *Case Western Reserve Journal of International Law* 471 at 502

⁵⁵ Idris, Kamil *Intellectual Property: a Power Tool for Economic Growth* (WIPO 2003) <http://www.wipo.int/export/sites/www/freepublications/en/intproperty/888/wipo_pub_888_1.pdf> accessed 2014

⁵⁶ See UNDP Human Development Reports <<http://www.undp.org/content/undp/en/home/librarypage/hdr/>> accessed 2014; also Desai, Meghnad 'Human Development: Concepts and Measurement' (1991) 35 *European Economic Review* 350

⁵⁷ Kenny, Charles 'Does Development Make You Happy? Subjective Wellbeing and Economic Growth in Developing Countries' (2005) 73 *Social Indicators Research* 199

The elusive nature of development and its connection with law is important since the fact that states of the world are categorised into developed, developing and least developed countries has far-reaching consequences. After World War II and during the ensuing Cold War American international assistance was conceived of as a way to spread American influence in opposition to the Soviet ideology. This led to an academic discipline promoting an American concept of development rooted in 'rule of law' rhetoric. The American scholars originally involved in law and development programs saw the American ideal of overseas development as encompassing 'the promise of a life that would be richer in all ways for all Third World people.'⁵⁸ Professors David Trubeck and Mark Galanter, in 1974, summarised the descent into disillusion of law and development advocates who increasingly came to question both the liberal understanding of development and the contribution of law to development. Trubeck and Galanter explained that, at the outset, many scholars sincerely believed that law could contribute to development and was, therefore, 'good'.⁵⁹ However, closer analysis and actual experience revealed 'that many legal "reforms" can deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being.'⁶⁰ In fact, it has been shown that, in some instances, law was more likely to bolster the rich than support the poor. Additionally, the idea of transplanting aspects of the US legal system in order to promote development through the reform of law as a 'morally worthy'⁶¹ goal has been discredited by critics who see the US development model as a 'subtle tool of domination and a 'mask for imperialism.'⁶² Trubeck and Galanter's critique from 1974 predated the establishment of the WTO by twenty years but can be seen as prophetic.

The 'crisis' over law and development in the 1970s was followed with renewed vigor by another wave of proponents. According to Professors Daniel Berkowitz, Katharina Pistor and

⁵⁸ Trubeck, David M and Mark Galanter 'Scholars In Self-Estrangement: Some Reflections on The Crisis in Law and Development Studies in the United States' (1974) 4 *Wisconsin Law Review* 1062 at 1073

⁵⁹ Trubeck, David M and Mark Galanter 'Scholars In Self-Estrangement: Some Reflections on The Crisis in Law and Development Studies in the United States' (1974) 4 *Wisconsin Law Review* 1062 at 1074

⁶⁰ Trubeck, David M and Mark Galanter 'Scholars In Self-Estrangement: Some Reflections on The Crisis in Law and Development Studies in the United States' (1974) 4 *Wisconsin Law Review* 1062 at 1080

⁶¹ Trubeck, David M and Mark Galanter 'Scholars In Self-Estrangement: Some Reflections on The Crisis in Law and Development Studies in the United States' (1974) 4 *Wisconsin Law Review* 1062 at 1069

⁶² Trubeck, David M and Mark Galanter 'Scholars In Self-Estrangement: Some Reflections on The Crisis in Law and Development Studies in the United States' (1974) 4 *Wisconsin Law Review* 1062 at 1095

Jean-Francois Richard, 'nobody has yet stood up and declared the death of the second law and development movement,'⁶³ but there are concerns about its health. The WTO treaty mechanism has caused extensive legal transplantation through widespread treaty adherence in order to achieve its goals. However, where transplantation of law is not entirely voluntary, Berkowitz et al argue that the law is less likely to be successfully integrated. 'Where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weaker.'⁶⁴ In the light of the findings of the Berkowitz study, it remains necessary to be deeply skeptical when the preamble to the Marrakesh Agreement establishing the WTO opens by stating that the contracting parties recognize that

Relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the parties] respective needs and concerns at different levels of economic development.⁶⁵

The rhetoric hides a reality in which these goals are mere stated aspirations, unlikely to be realized. This makes it all the more important to ascertain who, in fact, will reap the benefits. The aspirational wording of the preambular aim, it is interesting to note, could be read to suggest the entrenching of 'different levels of economic development.'⁶⁶ Unless adherence to the treaty can be demonstrated to actually cause substantive improvements

⁶³ Berkowitz, Daniel, Katharina Pistor and Jean-Francois Richard 'The Transplant Effect' (2003) 51 American Journal of Comparative Law 163 at 164

⁶⁴ Berkowitz, Daniel, Katharina Pistor and Jean-Francois Richard 'The Transplant Effect' (2003) 51 American Journal of Comparative Law 163 at 189

⁶⁵ Preamble to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) April 15 1994 Marrakesh Agreement Establishing the World Trade Organization (WTO) Annex 1C <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> accessed 2014

⁶⁶ Preamble to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) April 15 1994 Marrakesh Agreement Establishing the World Trade Organization (WTO) Annex 1C <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> accessed 2014

in real conditions in developing countries it is unlikely that there will be a high level of compliance in reality even if the laws on the books reflect the WTO language.

DEVELOPED V DEVELOPING COUNTRIES AND IP

Professor James Boyle of Duke Law School has described IP laws as ‘the legal sinews of the information age,’ pointing out the breadth of activities on which they have an effect. These range, as he explains, from ‘the availability and price of AIDS drugs, to the patterns of international development, to the communications architecture of the Internet.’⁶⁷ He is critical of the ‘one size’, which he describes as “extra-large,” ‘fits all’ approach on the basis that it may be detrimental to developing countries and recommends that ‘higher IP standards should not be pressed on developing countries without a serious and objective assessment of their impact on development and poor people.’⁶⁸ It is, thus, reasonable to question whether international IP regulation does indeed serve the interests of developed over developing countries and to consider what impact it may have in Egypt.

It is evident that IP is not a topic of merely technical legal significance. In the post-TRIPS era the consequences of IP protection are far reaching, affecting both the developed and developing world, and there is a great deal of complexity involved in assessing what should be an appropriate level of protection. The 2006 Gowers review of intellectual property in the UK acknowledged that, ‘the UK’s economic competitiveness is increasingly driven by knowledge-based industries, especially in manufacturing, science-based sectors and the creative industries.’⁶⁹ As a result, a high level of international IP protection is very much in UK interests. The Hargreaves report that followed the Gowers review in 2011, *Digital Opportunity: A Review of Intellectual Property and Growth*, recognized that what is good for the UK does not necessarily benefit developing countries. Hargreaves stated that:

The evidence suggests that developed economies such as the UK’s benefit from effective IPR regimes, and in particular from effective enforcement regimes, in

⁶⁷ Boyle, James ‘A Manifesto on WIPO and the Future of Intellectual Property’ (2004) 3 *Duke Law & Technology Review* 1

⁶⁸ Boyle, James ‘A Manifesto on WIPO and the Future of Intellectual Property’ (2004) 3 *Duke Law & Technology Review* 1 at 3

⁶⁹ *Gowers Review of Intellectual Property* (HM Treasury Archived Content The National Archives July 4, 2010) http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/gowers_review_index.htm accessed 2014

markets for their goods. It also appears to be the case that for low income countries with a weak scientific and technological infrastructure, stronger IP protection has little effect on their own economic growth and may even hinder it – while having no significant effect on the likelihood of developed country industry seeking to sell goods there.⁷⁰

Hargreaves' recognition of the potential for high standards of IP protection to negatively impact on developing countries is telling. However, the acknowledgement of possible detriment is unlikely to translate into IP concessions on the part of the UK. On the contrary, the UK, as part of the EU, benefits from the TRIPS-plus provisions included in the EU-Egypt Association agreement.⁷¹

The US has an even greater economic interest in intellectual property. The US Department of Homeland Security's task force known as the National Intellectual Property Rights Coordination Center cites President Barack Obama as saying, 'Our single greatest asset is the innovation and the ingenuity and creativity of the American people. It is essential to our prosperity and it will only become more so in this century.'⁷² Activities considered to infringe on US IPRs are therefore perceived as potentially economically damaging. Figures backing up the enormity of the impact of global IP infringement on US interests have arguably been exaggerated in order to bolster arguments for stronger protection and may not stand up to close scrutiny,⁷³ nevertheless, they are regularly relied upon to justify strengthening IPRs globally. The US views IP violations as a serious threat to its security and aggressively follows a strategy intended to diminish the perceived threat. The US Special 301 report system established by the 1974 Trade Act, and amended by the 1988 Omnibus Trade and Competitiveness Act, requires the Office of the United States Trade Representative (USTR) to monitor foreign countries for IP behaviour that may affect US interests, including reviewing IP law and policy, and classifying states according to perceived threat. The Priority Watch List for IP issues of high concern to the US and the Watch List for

⁷⁰ Hargreaves, Ian *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) <http://www.ipo.gov.uk/ipreview-finalreport.pdf> at para 3.23

⁷¹ Egypt Euro-Med Association Agreement 2004 <http://eeas.europa.eu/egypt/eu-egypt_agreement/index_en.htm> accessed 2014

⁷² *Intellectual Property Rights Violations: A Report on Threats to United States Interests at Home and Abroad* National Intellectual Property Rights Coordination Center (November 2011) *Intellectual Property Rights Violations: A Report on Threats to United States Interests at Home and Abroad* at v

⁷³ Patry, William *Moral Panics and the Copyright Wars* (Oxford University Press 2009) at 30-36

lesser, alleged, violations or to reward compliance with US demands, are infamous tools to pressurize the listed states into acquiescence. Egypt has figured on the Priority Watch List and is currently on the Watch List, where it has been for some time.

The idea that IP should be protected to the same degree in all countries, regardless of level of development remains problematic. As Professor May rightly states, ‘the protection of IPRs only makes policy sense once a certain level of technological momentum has been achieved.’⁷⁴ It may be desirable for there to be more certainty with respect to IP protection globally but there is a lack of consensus regarding what constitutes the right balance, as illustrated by developing country objections to TRIPS at the Uruguay Round. The fact that, ultimately, all the developing country dissenters eventually conceded and accepted the TRIPS agreement cannot be attributed to persuasive argument. Acceptance of TRIPS was a pragmatic concession in the face of developed country market strength.⁷⁵ Arguments over IPRs remain fierce and can in part explain the reasons why the Doha round of trade negotiations, which began in November 2001,⁷⁶ has been so lengthy, proving extremely difficult to conclude.

The developed-developing country distinction reveals that colonial history remains relevant to the regulation of IP. Professor Rochelle Dreyfuss described the Uruguay Round of trade negotiations that led to the formation of the WTO as a process in which the interests of the United States (US) and Europe converged and were pitted against those of developing countries. In the TRIPS negotiations, where IP was concerned, she describes the US and EU as being together, ‘on the other-or perhaps, better, on *another* side.’⁷⁷ Developed countries seek increased standards of IP protection while developing countries struggle to restrain them. Thus, IP debate is largely polarised between ex-coloniser, self-designated, ‘developed’ countries and the ‘other’ self-diagnosed ‘developing’ countries.

⁷⁴ May, Christopher ‘The Hypocrisy of Forgetfulness: The Contemporary Significance of Early Innovations in Intellectual Property (2007) 14 *Review of International Political Economy* 1 at 19

⁷⁵ Correa, Carlos María *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Zed Books 2000); Deere, Carolyn *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2008)

⁷⁶ The Doha Round WTO <http://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed 2014

⁷⁷ Dreyfuss, Rochelle and Andreas F Lowenfeld ‘Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together’ (1996-1997) 37 *Virginia Journal of International Law* 275 at 276

There is no truly neutral, accurate terminology to refer to the way in which wealth and power is distributed unevenly between states; West-East, North-South, Developed-Developing, and First World-Third World are all problematic in different ways.⁷⁸ However, what is unarguable is that there is an imbalance between the respective IP related interests of developed countries,⁷⁹ comprising in the main, the US the EU and Japan, and the interests of developing countries. Although applying such broad terms in binary opposition to each other hides a great deal of nuance and complexity the groups have sufficient commonality to make the historical reasons behind the division remain worthy of exploration.

DEVELOPMENT IN THE WTO SYSTEM

In the WTO system, states are able to self-nominate their own developing country status, thus underlining its subjectivity. On the WTO website, in a section entitled 'Understanding the WTO,' it explains that

There are no WTO definitions of “developed” or “developing” countries. Developing countries in the WTO are designated on the basis of self-selection although this is not necessarily automatically accepted in all WTO bodies.⁸⁰

It is therefore open to any state to choose developing country status and to claim the differential treatment allowed under that category. However, inevitably, the choice reflects and deepens the power imbalance among those countries.

OPPOSITION TO TRIPS

TRIPS was agreed without resolving the opposition of the developing countries present at the GATT negotiations leading to formation of the WTO.⁸¹ Although Egypt was a participant, Egypt strongly opposed the inclusion of TRIPS in the WTO agreement, as did other

⁷⁸ I shall use developed-developing to reflect the WTO terminology and East-West to reflect the continuing relevance of Orientalist rhetoric

⁷⁹ There is no truly neutral, accurate terminology to refer to the way in which wealth and power is distributed unevenly between states; West-East, North-South, Developed-Developing, and First World-Third World are all problematic in different ways. See e.g. Abu-Lughod, Janet 'Disappearing Dichotomies: Firstworld-Thirdworld; Traditional-Modern' (1992) 3 *Traditional Dwellings and Settlements Review* 7

⁸⁰ 'Understanding the WTO: The Organization, Least Developed Countries' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm accessed 2014>; A critique of the meaning of development is outside the scope of this thesis.

⁸¹ Deere, Carolyn *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) at 56

developing countries.⁸² Egypt was one of fewer than 20 developing countries⁸³ to participate in the WTO negotiations. (Currently there are approximately 150 developing country members⁸⁴ out of the total 159 members of the WTO).⁸⁵ There was, apparently, no clear policy and, according to Abdelgafar, 'lack of coordination between Egypt's ministries caused much confusion in the Uruguay Round.'⁸⁶ Some Egyptian negotiators, who understood the implications of the TRIPS agreement, were at the forefront of those who warned of dangers. However, others represented the concerns of Egyptian interest groups that expected to benefit. Abdelgafar suggests that concessions were made without full understanding of the implications and that 'the Egyptian delegation often found itself referring to foreign information sources [...] even when it knew full well that [the information providers] did not share Egypt's interests'.⁸⁷ Concerns were raised before TRIPS was ratified, in 1994, about the extent to which the agreement would constrain Egypt's ability to regulate IP domestically. However, the repercussions of joining TRIPS were not subject to widespread public debate. Moreover, as Abdelgafar has suggested, it seems that the Egyptian ambassador heading the negotiations may not have fully appreciated the full significance of attaching the TRIPS agreement to the WTO, while the pressure coming from the United States was, clearly, intense. American President Reagan himself intervened to quell the opposition to TRIPS and, with 'its arm twisted,' Egypt backed off from confrontation with the US over IP in order to avoid retaliatory measures.⁸⁸ Given that TRIPS was a surprise tactic introduced at the last minute into the negotiations, as Drahos has asserted, it is clear that there was only limited opportunity for opponents to the agreement to press their case. There was also extremely weighty pressure from developed country parties. Developing country negotiators, therefore, insufficiently informed about the

⁸² See eg Abdel Latif, Ahmed 'Egypt's Role in the A2K Movement: An Analysis of Positions and Practices' in Nagla Rizk and Lea Shaver Eds *Access to Knowledge in Egypt* (Bloomsbury Academic 2010) at 28

⁸³ Deere, Carolyn *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) at 56

⁸⁴ Numbers as of March 2, 2013 'Understanding the WTO: the Organization Members and Observers' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 2014

⁸⁵ 'Understanding the WTO: Developing Countries' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm> accessed 2014

⁸⁶ Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) at 25

⁸⁷ Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) at 26

⁸⁸ Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) at 27

possible consequences,⁸⁹ accepted TRIPS obligations simply in order to obtain access to markets for their products.⁹⁰

Ultimately, Egypt did join the WTO. In becoming one of the founding members of the organization, Egypt accepted the obligation to implement TRIPS from the outset and, as one of the many member states whose IP laws did not meet TRIPS standards before joining the WTO, would therefore be required to amend domestic law to bring it into compliance. Although TRIPS is an agreement made between states it, therefore, has a direct impact on how individuals in member states are able to use IP protected products, restricting access to less expensive copies of protected goods and potentially negatively affecting the lives of Egyptian citizens. With the WTO bargain potentially not even resulting in the anticipated benefits of market access, a historical pattern of engagement followed by disenchantment with and disengagement from international trade rules, resulting partly from the adoption of unreasonable terms in agreements is likely to be repeated.

THE WTO DISPUTE SETTLEMENT MECHANISM

It is extremely significant that, as TRIPS is one of the WTO agreements, IP disputes between states fall under the WTO's Dispute Settlement Mechanism (DSM), which was established to decide disputes among states under the Dispute Settlement Understanding (DSU).⁹¹ This represents an enormous change in the culture of IP law, which, under the more flexible pre-TRIPS system, was a largely territorial matter whose enforcement was essentially voluntary. Under the previous system of international agreements on IP issues, administered by WIPO, there was no effective means of compelling members of those treaties to comply with their rules. The International Court of Justice (ICJ), which has international jurisdiction and can be used by all 192 UN Member States, might once have been considered an option. However, 'the States concerned must also [...] have accepted its jurisdiction [and] must consent to the

⁸⁹ Gervais, Daniel 'TRIPS and Development: Negotiation Narratives' in Gervais, Daniel Ed. *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press 2007) at 7-8

⁹⁰ Deere, Carolyn *The Implementation Game* (Oxford University Press 2009) at 56

⁹¹ Understanding on Rules and Procedures Governing the Settlement of Disputes: Annex 2 of the WTO Agreement Annex 2 of the WTO Agreement for the Establishment, Terms of Reference and Composition of Panels

Court's considering the dispute in question.⁹² In reality, therefore, states make very little use of the ICJ, and it has not been used at all for IP cases.⁹³

In contrast, WTO member states must comply with TRIPS. The mechanism for achieving compliance is the Dispute Settlement Body (DSB), which comprises a tribunal with compulsory jurisdiction and a two-tier panel system. This was previously unknown in international trade law. The DSB has 'the authority to establish panels, adopt panel and Appellate Body reports, [and] maintain surveillance of implementation of rulings and recommendations.'⁹⁴

Article 1 of the DSU states that

The rules and procedures of this Understanding shall [...] apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization [...] and of this Understanding taken in isolation or in combination with any other covered agreement.

A panel can be requested where it is alleged that a country has violated one of the WTO agreements. Additionally, in some circumstances non-violation complaints are also considered.⁹⁵ However, in the context of TRIPS, non-violation complaints are excluded from adjudication, meaning that a violation is essential before a case can be considered. The exemption of TRIPS from complaints alleging 'nullification or impairment of benefits was initially an exemption intended to last five years.⁹⁶ However, there does not seem to be any appetite to remove the ban on such complaints and 'the moratorium has been extended from one ministerial conference to the next, the latest being the extension from the 2011 Geneva Ministerial Conference to the next meeting, which ministers agreed to hold in

⁹² International Court of Justice (ICJ) Practical Information <<http://www.icj-cij.org/information/index.php?p1=7&p2=2>> accessed 2014

⁹³ Jeffrey L. Dunoff 'Institutional Misfits: the GATT, The ICJ & Trade-Environment Disputes' (1994) 15 *Michigan Journal of International Law* 1043 at 1089

⁹⁴ Article 2(1) Understanding on Rules and Procedures Governing the Settlement of Disputes

⁹⁵ Article XXIII(1)(b) General Agreement on Tariffs and Trade; Article 26 DSU

⁹⁶ Article 64(2) TRIPS

2013.⁹⁷ At the WTO ministerial conference in Bali in December 2013 it was decided to further continue the practice.⁹⁸

Panels act as courts of first instance⁹⁹ and the Appellate Body (AB)¹⁰⁰ addresses unresolved points of law arising from the WTO agreements. The structure of the DSM and the large number of member states who have accepted its jurisdiction give it a great deal of authority. This contrasts sharply with the previous treaty regime, under the General Agreement on Tariffs and Trade (GATT) 1947, which had no effective enforcement mechanism so compliance with treaty rules was 'widely regarded as toothless.'¹⁰¹ The WTO has, therefore, superseded it with a much more robust approach. By bringing IP subject matter within the WTO under TRIPS IP is no longer a merely domestic concern. The remit of the dispute settlement body (DSB) to 'authorize suspension of concessions and other obligations under the covered agreements'¹⁰² means a real possibility of trade sanctions, signifying that under the TRIPS regime IP regulation has become a very serious matter with consequences.¹⁰³

PROVISION FOR FLEXIBILITY IN TRIPS

TRIPS seems to provide some flexibility for states when implementing the agreement and amending domestic law to comply with the international rules. Article I states that 'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.'¹⁰⁴ The provision

⁹⁷ TRIPS: 'Non-Violation' Complaints (Article 64.2): Background and the current situation' WTO http://www.wto.org/english/tratop_e/trips_e/nonviolation_background_e.htm accessed 2014

⁹⁸ TRIPS Non-violation and Situation Complaints Ministerial Decision of December 2013 Ministerial Conference: Ninth Session, Bali, 3-6 December 2013 WT/MIN(13)/31, WT/L/906 11 December 2013 <http://wto.org/english/thewto_e/minist_e/mc9_e/desci31_e.htm> accessed 2014

⁹⁹ Article 11 Understanding on Rules and Procedures Governing the Settlement of Disputes See Articles 6-8 Understanding on Rules and Procedures Governing the Settlement of Disputes

¹⁰⁰ Article 17 Understanding on Rules and Procedures Governing the Settlement of Disputes

¹⁰¹ May, Christopher and Susan K Sell *Intellectual Property: A Critical History* (Lynn Rienner Publishers 2006) at 4

¹⁰² Article 2 Understanding on Rules and Procedures Governing the Settlement of Disputes

¹⁰³ Detailed criticism of the effect of states adjudicating, at international level, disputes that concern essentially private interests, is outside the scope of this thesis, but see the work of Abbott, Frederick and Thomas Cottier 'Dispute Prevention and Dispute Settlement in the Transatlantic Partnership - Case Studies, Analyses and Policy Recommendations' in Ernst Ulrich Petersmann and Mark A Pollack Eds *Transatlantic Economic Disputes: the EU, the US and the WTO* (Oxford University Press, 2003)

¹⁰⁴ Article 2 Understanding On Rules And Procedures Governing The Settlement Of Disputes

makes it appear possible to incorporate TRIPS rules in a way that suits the requirements of a particular jurisdiction. However, as will be seen, this apparent elasticity is limited.¹⁰⁵

MINIMUM BUT NOT MAXIMUM STANDARDS IN TRIPS

That TRIPS represents a minimum standard of protection is also made clear in Article 1, whose language mandates that 'Members shall give effect to the provisions of this Agreement.' This represents a fundamental cultural change caused by TRIPS and a huge power shift away from Egypt when it comes to setting IP rules. The IP subject matter covered by the agreement is established in Articles 1-39. Much of the substance of the rules is found elsewhere in treaties such as the Paris, Berne and Rome Conventions.¹⁰⁶ TRIPS relies to a great extent directly on the international IP treaties whose subject matter TRIPS has brought together. Its contribution is that it ensures that the rules established under those agreements are enforceable under the DSM.¹⁰⁷ There is now a clearly established, enforceable baseline for IP standards among WTO members.

TRIPS-Plus

There is no going back if the rules prove too onerous, and the trend in international IP law is to increase the protection for IP owners. This is borne out in the increasing number of bilateral agreements that have followed TRIPS and include IP provisions deemed to be TRIPS-Plus, exceeding the minimum standards agreed in TRIPS. The raising of IP standards above TRIPS levels is possible because TRIPS allows for higher standards to be implemented, thus establishing the foundation for a trajectory upwards in standards of IP protection. Article 1 states that, 'Members may, but shall not be obliged to, implement in their law

¹⁰⁵ This issue will be discussed in more detail in Chapter 5

¹⁰⁶ Article 1(3) TRIPS explains that, in the agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989.

¹⁰⁷ Paris Convention for the Protection of Industrial Property Stockholm 14 July 1967; Berne Convention for the Protection of Literary and Artistic Works Paris Act 24 July 1971; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome 26 October 1961; Treaty on Intellectual Property in Respect of Integrated Circuits, Washington 26 May 1989.

more extensive protection than is required by this Agreement,'¹⁰⁸ with the proviso that any higher standards, known as TRIPS-Plus measures, 'do [...] not contravene the provisions of this Agreement.' The Most Favoured Nation (MFN) principle, provides that

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.¹⁰⁹

This makes entering into bilateral agreements an efficient means of spreading the increased standards among the industrialized, developed countries.

Egypt is now party to a number of treaties containing TRIPS-plus provisions, including the Egypt-EU Association agreement, which includes many TRIPS-Plus requirements¹¹⁰ and the Egypt-European Free Trade Association (EFTA) agreement.¹¹¹ The spectre (or opportunity, depending on point of view) of a US FTA including significantly raised IP measures remains,¹¹² although the proposed agreement has been rebuffed by both sides at different points in negotiations. Eminent Egyptian economist Ahmed Gala and Harvard Professor Robert Lawrence acknowledged, in 2005, in their study into the potential for a US-Egypt FTA, that the issue of IP protection remained contentious. They further noted that IP requirements likely to be embedded in a US-Egypt FTA would tie Egypt to even greater levels of IP protection and therefore warned that 'it would behove Egyptian negotiators to be particularly wary.'¹¹³

¹⁰⁸ Article 1 TRIPS

¹⁰⁹ Article 4 TRIPS

¹¹⁰ Article 37 of the Egypt Euro-Med Association Agreement requires Egypt to join a number of other agreements set out in Annex VI. These are: the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961); Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1977, amended 1980); the Patent Cooperation Treaty (Washington 1970, amended in 1979 and modified in 1984); the International Convention for Protection of New Varieties of Plants (UPOV) (Geneva Act 1991); Nice Agreement concerning the international Classification of Goods and Services for the Purpose of the Registration of Marks (Geneva Act 1977 and amended in 1979); Protocol relating to the Madrid Agreement concerning the international registration of Marks (Madrid 1989). These treaties, with the exception of the UPOV agreement are now in force in Egypt

¹¹¹ Egypt Euro-Med Association Agreement 2004 <http://eeas.europa.eu/egypt/eu-egypt_agreement/index_en.htm> accessed 2014

¹¹² Abou El Farag, Mohamed Salem 'TRIPs, TRIPs-PLUS, Developing Countries and Public Health: The Case of Egypt' (2008) 5 *Journal of International Biotechnology Law* 1 at 14

¹¹³ Galal, Ahmed and Robert Z Lawrence *Anchoring Reform with a US-Egypt Free Trade Agreement* (Institute for International Economics 2005) at 38

Middle East specialist Jeremy Sharp, in a report prepared for Members and Committees of the US Congress refers to Egypt's 'lack of protection for intellectual property' as one of the reasons for the breakdown of U.S.-Egypt FTA negotiations.¹¹⁴ However, in an earlier report, he also pointed to Egypt's rejection of other US conditions.¹¹⁵ More specifically, Bilaterals.Org, an organization of activists which monitors bilateral trade activities, noted that in 2003, when George W Bush was still US President, the USTR 'punished' Egypt by 'suspending all overtures towards an FTA when Egypt withdrew its support for a US dispute against the European Union on trade in genetically modified crops at the WTO.'¹¹⁶ The 'revolution' of January 25, 2011¹¹⁷ and subsequent events have meant that, while discussions over trade have continued between the US and Egypt, conditions have not been appropriate for concluding a deal. However, the most favoured nation clause in the TRIPS agreement¹¹⁸ means that, even though the US has not managed to negotiate its own FTA with Egypt, it can rely on the TRIPS-plus provisions negotiated between Egypt and the EU.

Much of the academic commentary has tended to recommend acceptance of the TRIPS agreement and advocate maximizing use of TRIPS flexibilities, even though the flexibility is progressively narrowing.¹¹⁹ TRIPS-plus measures could completely erase any breathing space. For this reason the trend among developed countries to continue to push for stronger IP protection using bilateral agreements is rightly subject to a great deal of criticism.¹²⁰ However, this trend is likely to persist as long as states continue to accept increased standards of IP regulation as part of trade bargains.

¹¹⁴ Sharp, Jeremy M *Egypt: Background and US Relations* (Congressional Research Service 2014) <<http://www.fas.org/sgp/crs/mideast/RL33003.pdf>> accessed 2014; see also Galal, Ahmed and Robert Z Lawrence *Anchoring Reform with a US-Egypt Free Trade Agreement* (institute for International Economics 2005) at 38

¹¹⁵ Sharp, Jeremy M *Egypt: Background and US Relations* (Congressional Research Service 2007) <<http://fpc.state.gov/documents/organization/99530.pdf>> accessed 2014

¹¹⁶ 'Egypt' Bilaterals.Org <<http://www.bilaterals.org/?-Egypt->> accessed 2014; see also Galal, Ahmed and Robert Z Lawrence *Anchoring Reform with a US-Egypt Free Trade Agreement* (institute for International Economics 2005) at 3

¹¹⁷ The Egyptian Constitution of January 18, 2014 refers to the 'Jan 25- June 30 Revolution' I have used quotation marks around the term 'revolution' because the term has been disputed and because it is indicative of the problematic relationship between the religious and secular approaches to law described here.

¹¹⁸ Article 4 TRIPS

¹¹⁹ See eg. Correa, Carlos María *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options for Developing Countries* (Zed Books 2000)

¹²⁰ For example 'All Costs, No Benefits: How TRIPS-plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines' (22 March 2007) OXFAM Briefing Paper OXFAM International <http://www.oxfam.org/en/policy/bp102_jordan_us_fta> accessed 2014; El Said, Mohammed 'The Morning

While many western commentators consider that the experience of colonialism is now irrelevant and that the only really relevant considerations are found in the present, the legacy of colonialism and the shadow of imperialism remain vivid in Egypt. It may be tempting to imagine that the days of colonialism are so distant that the colonial period is no longer relevant to a modern approach to international law.¹²¹ However, in reality, there are enduring effects. The view that colonialism was ‘an unfortunate—but perhaps necessary—historical episode whose effects have been largely reversed by the role that international law has played’¹²² certainly does not reflect the experience and outlook of the ex-colonies. As the prominent Palestinian-American academic, Edward Said, has explained, while ‘direct colonialism has largely ended, imperialism [...] lingers.’¹²³

In the context of IP, Drahos has argued that history is an important counterbalance to predominantly economic approaches to IP, which tend not to deal with ‘linkages between values and property, or with themes of power and domination, exploitation and control.’ These are among the themes that are addressed here. Egyptian author and political analyst Tarek Osman argues that, as part of its strategy for development, ‘Egypt needs to rediscover the heritage of its international relations and study the experience of its regional positioning in the past 150 years.’¹²⁴ Understanding the Egyptian response to colonization and imperialism is key to analyzing Egypt’s approach to IP and will provide the lens through which international and domestic legislation can be properly appreciated. Past experience may be enlightening in appreciating Egypt’s approach to IP agreements and likely future engagement with attempts to further harmonize international IP law and to raise IP

After: TRIPS-Plus, FTAs and Wikileaks - Fresh Insights on the Implementation and Enforcement of IP Protection in Developing Countries’ (2012) *Program on International Justice and Intellectual Property* Research Paper no. 2012-03 American University Washington College of Law, Washington D.C. <<http://digitalcommons.wcl.american.edu/research/25/>> accessed 2014; Drahos Peter, ‘BITS and BIPS: Bilateralism in Intellectual Property’ (2001) 4 *Journal of World Intellectual Property* 791; Mohammed El-Said, The Road from TRIPS-Minus to TRIPS to TRIPS-Plus: Implications of IPRs for the Arab World (2005) 8 *Journal of World Intellectual Property* 53 ; Correa, Carlos (2004) Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines 36 *Case Western Reserve Journal of International Law* 73

¹²¹ Anghie, Antony ‘The Evolution of International Law: colonial and postcolonial realities’ *Third World Quarterly*, 27 (2006) 739 at 740

¹²² Anghie, Antony ‘The Evolution of International Law: colonial and postcolonial realities’ *Third World Quarterly*, 27 (2006) 739 at 740

¹²³ Said, Edward *Culture and Imperialism* (Vintage Books 1994) at 8

¹²⁴ Osman, Tarek *Egypt on the Brink: from the Rise of Nasser to the Fall of Mubarak* (Yale University Press 2011)

standards globally. This forms the context in which legislation relating to the protection of IPRs in Egypt will be examined. There is a repeating pattern of events that remains largely beneath the surface but which, when revealed, show a pattern in Egyptian IP law development running through ancient history and the colonial experience of the nineteenth century to the 21st century.

EARLY PROTECTION OF IP IN EGYPT

Embryonic forms of intellectual property protection are evident in Egypt from the earliest times, but not in the way that we know it today.¹²⁵ Early forms of trade mark can be traced back to the brick makers of Pharaonic times.¹²⁶ Early brick marking regulation acted as a quality assurance mechanism, and was of great importance to the guild system.¹²⁷ Manufacturers were obliged to use a distinctive sign providing the name of the seller as well as the slave who actually made the bricks¹²⁸ 'so that responsibility for defective bricks could be fixed.'¹²⁹ As a guarantee of quality, it was, therefore, the personality of the producer that mattered. Any reward would be linked to the fact that a reputation for good quality was borne out in reality, while failure to live up to the standard required would be likely to result in punishment. Although the marking of the bricks can be seen as a precursor to modern trademark law, and it is possible to see a connection between the old forms of quality and origin marks and the current trademark approach, the early Egyptian approach did not give a property right in the work, so the fundamental underpinning of the concept differs.

Trade Marks can be distinguished from copyright and patents in that Trade Marks serve the identification and quality assurance goals, outlined above,¹³⁰ and prevent false or misleading

¹²⁵ Firth, Alison Ed. *Perspectives on Intellectual Property Vol 1: The Prehistory and Development of Intellectual Property Systems*. (Sweet and Maxwell 1997); Khoury, Amir H 'The Development of Modern Trademark Legislation and Protection in Arab Countries of the Middle East' (2003) 16 *Transnational Law* at 249 and 253

¹²⁶ Bowman, Alan K and Eugene Rogan Eds *Agriculture in Egypt from Pharaonic to Modern Times* (Oxford University 1999) at

¹²⁷ Rogers Edward S 'The Lanham Act and the Social Function of Trade-marks' (1949) 14 *Law & Contemporary Problems* at 173

¹²⁸ Khoury, Amir H 'The Development of Modern Trademark Legislation and Protection in Arab Countries of the Middle East' (2003) 16 *Transnational Law* 249 at 249 and 253; In the same article Khoury refers to the development of copyright law in the early Islamic period at 183; see also Azmi, Ida M, Spyros M Maniatis, and Sodipo, B 'Distinctive Signs and Early Markets: Europe, Africa and Islam' in Firth, Alison (ed) *Perspectives on Intellectual Property: the Prehistory and Development of Intellectual Property Systems* (Sweet and Maxwell 1997)

¹²⁹ Rogers, E. S 'The Lanham Act and the Social Function of Trade-marks' (1949) 14 *Law & Contemporary Problems*) 173 at 173.

¹³⁰ The other functions of Trade Marks are duly noted here. See e.g. the Opinion of Advocate General

attribution.¹³¹ However, copyright and patents both provide for ‘intellectual monopoly,’¹³² which has social costs. It is, therefore, worth asking whether ‘it also creates social benefits commensurate with these social costs.’¹³³

The protection of copyright, trademarks and patents was endorsed in modern times in the nineteenth century, most notably in the Mixed and Native¹³⁴ Courts of Egypt.¹³⁵ Although it would be wrong to entirely discount Egyptian agency in the creation of these courts, it is important to note that the Mixed Courts were set up at a time when foreigners had a great deal of influence in Egypt, and before Egyptian independence. They were established, in 1876, largely to protect foreign interests (the Mixed Courts dealt exclusively with cases involving foreign interests, while Native Courts dealt with those between Egyptian litigants where there was no foreign interest) and maintained a majority of foreign judges on the benches of both the courts of first instance and the appeals court.¹³⁶

IP law was not codified until the second half of the twentieth century. This has been attributed to the privileges accorded to foreigners.¹³⁷ Special arrangements with foreign States, known as capitulations, meant that it was not possible to subject foreigners living in Egypt to criminal law locally. Criminal jurisdiction was the sole preserve of their respective consulates even after civil jurisdiction was transferred to the Mixed Courts.¹³⁸ Although the Mixed Court penal law¹³⁹ did have provisions relating to IP infringement no regulations

Sharpston, who stated that “... marks frequently perform functions which go beyond linking goods or services to a uniform source. They present a powerful image of quality, exclusivity, youth, fun, luxury, adventure, glamour or other reputedly desirable lifestyle attributes, not necessarily associated with specific products but capable of presenting a strong marketing message in itself” in *Intel Corporation Inc v CPM United Kingdom Ltd* (C-252/07) June 26, 2008 <http://curia.europa.eu/juris/document/document.jsf?docid=66892&doclang=EN#Footref1> accessed 2014; See also e.g. Naser, Mohammad Amin ‘Recent Developments of Dilution in the US and UK’ (2010) 32 *European Intellectual Property Review* 332

¹³¹ Boldrin, Michele and David K Levine *Against Intellectual Monopoly* (Cambridge University Press 2008) at 7

¹³² Boldrin, Michele and David K Levine *Against Intellectual Monopoly* (Cambridge University Press 2008) at 8

¹³³ Boldrin, Michele and David K Levine *Against Intellectual Monopoly* (Cambridge University Press 2008) at 9

¹³⁴ The Native Courts became the National Courts following Egyptian independence

¹³⁵ The Mixed and Native Courts will be discussed in more detail in Chapter 4

¹³⁶ Règlements D’Organisation Judiciaire Pour Les Procès Mixtes En Egypte (Charter of the Mixed Courts) 1875

¹³⁷ El Badrawi, Hassan ‘Role of the Judiciary in the Enforcement of Intellectual Property Rights’ WIPO Advisory Committee on Enforcement Second Session Geneva (June 28 to 30 2004) at 2

¹³⁸ Grisby, W.E. ‘The Mixed Courts of Egypt’ (1896) *Law Quarterly Review* 252 at 252

¹³⁹ The Codes administered by the Mixed Courts were ‘(1) the Civil Code, (2) the Commercial Code, (3) the Maritime Code, (4) the Code of Procedure as regards the foregoing Codes, [and] (5) the Penal Code.’ See Grisby, W.E. ‘The Mixed Courts of Egypt’ (1896) *Law Quarterly Review* 252 at 256

could be passed in order to implement criminal remedies due to the capitulations.¹⁴⁰ Therefore, only civil remedies were available. These remedies were derived on the basis of principles of natural law and justice.¹⁴¹ Lack of provision in the Courts' codes did not, therefore, prevent the protection of IP.

In the absence of specific legislation, both Mixed and Native courts¹⁴² applied principles of natural law and equity to protect IP subject matter, holding that creators have rights in relation to their creations. The Mixed Courts, however, went further in protecting IP. According to Counselor and Vice-President of the Supreme Court in Cairo, Dr Hassan El Badrawi, the Mixed Courts 'not only provided protection through dispute settling decisions, but established an administrative system for the registration of trademarks and commercial names, in order to facilitate evidence of ownership and determine priority on the basis of such registration.'¹⁴³ Badrawi confirms that the Mixed Courts, in a decision on February 21, 1912, 'confirmed protection for all categories of industrial property (commercial names, trademarks, patents, industrial designs and any means for attracting clients), asserting that legal protection for the rights of manufacturers was ensured in Egypt by principles of natural law.'¹⁴⁴ Immediately following Egyptian independence IP legislation was passed protecting both industrial property and author's rights, illustrating that those principles of IP law were accepted by the Egyptian state.

Notably, in relation to the protection of foreign IP, after independence Egypt was keener even than the United States to respect the international treaties dealing with industrial property and author's rights. This is remarkable because the US is now, perhaps, the most aggressive pursuer of IP infringement internationally, and also constantly pushes for increased protection for IP owners. In the negotiations for the TRIPS agreement the United States together with other Western states pushed strongly for harmonization of IP rules

¹⁴⁰ El Badrawi, Hassan 'Role of the Judiciary in the Enforcement of Intellectual Property Rights' WIPO Advisory Committee on Enforcement Second Session Geneva (June 28 to 30 2004 at 3. The capitulations will be discussed in more detail in Chapter 4

¹⁴¹ Article 34 Règlements D'Organisation Judiciare Pour Les Procès Mixtes En Egypte (Charter of the Mixed Courts 1875); Article 11 Civil Code of the Mixed Courts (28th June 1875)

¹⁴² The Native Courts were established under the British Occupation (which began in 1882), in 1883

¹⁴³ El Badrawi, Hassan 'Role of the Judiciary in the Enforcement of Intellectual Property Rights' WIPO Advisory Committee on Enforcement Second Session Geneva (June 28 to 30 2004 at 3

¹⁴⁴ El Badrawi, Hassan 'Role of the Judiciary in the Enforcement of Intellectual Property Rights' WIPO Advisory Committee on Enforcement Second Session Geneva (June 28 to 30 2004 at 3

upwards. The resulting text means that IP is protected at a much higher level of protection than before.

EGYPT'S ECONOMIC SITUATION

Egypt has been promoted from low income to lower-middle income in the World Bank classification system.¹⁴⁵ However, it is still a developing country, and remains at an early stage in acquiring the infrastructure necessary to benefit from strong IP regulation.

Egypt is a country that has long embraced and sought modernization. Both before and after periods of French and British colonization, as well as subsequently as an independent state, Egypt has engaged actively with other states to gain the expertise necessary for development. Nevertheless, lack of development and extreme poverty among the majority of Egyptians remain problems that still need to be addressed. While the broader aspects of these issues are largely outside the scope of this work, the latent continuing effects of the colonial period mean that there is a sense in which Egyptians expect the, still powerful, well-developed, ex-colonial states to redress the imbalance and aid in development.

As a developing country, and a country that has endured colonization, the January 25, 2011 'revolution' offered an opportunity for radical change, although the speed with which the Muslim Brotherhood regime under President Mohamed Morsi was removed¹⁴⁶ has meant that IP issues, pending at the time of the 'revolution', have still not been addressed. Nevertheless, there are likely to be amendments to Egyptian IP law in the near future, as these have been pending, now, for a number of years.¹⁴⁷ Egypt has an opportunity to ensure that measures protecting IP strike an appropriate balance between rights holders and the Egyptian public interest. The Mubarak regime has left a legacy of constraints in the form of international IP commitments but some modification may be possible. Reflecting on the historical context of IP law in Egypt may be helpful in order to expose some myths and raise pertinent issues before more legislation is passed.

¹⁴⁵ The World Bank Data Egypt 2013 <<http://data.worldbank.org/country/egypt-arab-republic>> accessed 2014

¹⁴⁶ President Morsi ruled from June 30, 2012 until July 3, 2013, when he was removed by a wave of protests and army intervention. See Blair, Edmund, Paul Taylor and Tom Perry 'Special Report: How the Muslim Brotherhood Lost Egypt' (Jul 25, 2013) *Reuters* <<http://www.reuters.com/article/2013/07/25/us-egypt-mistakes-specialreport-idUSBRE96O07H20130725>> accessed 2014

¹⁴⁷ Legislative Agenda News: Egypt, Politics November 4 2009 Masrawy Portal <<http://www.masrawy.com>> accessed 2010

THE ROLE OF RELIGION IN EGYPTIAN LAW

Islamic law has remained central to all legal developments in Egypt, although the interplay of religion and secularism has been important in the development of Egyptian law, as it has elsewhere. Difficulties of determining how IP should be protected in Egypt arose during the nineteenth century when the precise relationship between Islamic law and the evolving state of Egypt was intertwined with the struggle against colonialism. Thus, many features of the debate derive from the colonial era, when the notion of nationalism evolved. It is therefore, essential, as colonial legal historian John Strawson has indicated, that 'a cultural reading of colonial history' should be part of 'any contemporary engagement with Islamic Law.'¹⁴⁸ The study of law in Egypt must aim to comprehend the complex and symbiotic relationship between Islamic law and Egyptian law in its historical context; this includes Egypt's IP legislation.¹⁴⁹

COMPATIBILITY OF IP LEGISLATION WITH ISLAMIC LAW

When IP law was first enacted in the 1930s, according to Egyptian lawyer and academic Dr Heba Raslan, there was 'not [...] much debate as to its legality under Shari'a law.'¹⁵⁰ More recently, however, certain groups have begun to invoke arguments that contest the compatibility of IP with Islamic principles. The international Islamic group Hizb-ut-Tahrir for example, while proclaiming as a banner headline that 'thoughts are the greatest wealth of any nation,'¹⁵¹ hosts on its Islamic Revival website an analysis of IP law. This states that 'secular laws, like the law of protecting intellectual property,' have been imposed on Muslims by the West 'to prevent her [the Islamic Ummah]¹⁵² from the means of power and to distance her from her ideology.'¹⁵³ Therefore, they claim, 'Muslims are obliged to reject these laws and not adhere to them for they are not from Islam and were legislated to cause

¹⁴⁸ Strawson, John 'Revisiting Islamic Law: Marginal Notes from Colonial History' (2003) 12 *Griffith Law Review* 362 at 362

¹⁴⁹ This relationship will be discussed in more detail in chapter 2 and subsequent chapters.

¹⁵⁰ Raslan, Heba A 'Shari'a and the Protection of Intellectual Property: the Example of Egypt' (2006-2007) 47 *IDEA* 497 at 501

¹⁵¹ 'The Shariah rule on patents, copyrights & trademarks: Protection of intellectual property: its reality and its Shar'i rule' *Hizb ut-Tahrir, Wilayah of Jordan* 21 Shawwal 1421AH 16/Jan/2001 Posted on *Islamic Revival Website* Tuesday December 23, 2008 <<http://islamicsystem.blogspot.co.uk/2008/12/shariah-rule-on-patents-copyrights.html>> accessed 2014

¹⁵² The Ummah is the supra-national community of Islamic peoples

¹⁵³ Hizb-ut-Tahrir *Wilayah of Jordan* 21 Shawwal 1421AH 16/Jan/2001 Posted on *Islamic Revival Website* Tuesday December 23, 2008 <<http://islamicsystem.blogspot.co.uk/2008/12/shariah-rule-on-patents-copyrights.html>> accessed 2014

them harm.’ The website goes on to condemn IP law as ‘economic and cultural colonialism’ in which IP law is used by the West to ‘hoard’ knowledge and prevent others from benefiting. It is possible to understand this response, but the conclusions drawn are overbroad and extreme. Nevertheless, where IP is protected excessively, there is a danger that in enforcing rules that are perceived to be unfair the whole system of IP protection is undermined.

It has been suggested that on some interpretations of an Islamic approach, IP would not be protected at all. Al Dajani cites one writer as saying that ‘there should be no obstruction to the duplication of original material since the most widespread dissemination of knowledge is for the good of all’,¹⁵⁴ Richard Vaughan cites the same source¹⁵⁵ to make the same point.¹⁵⁶ The suggestion is that ‘the Islamic system regards property as communal and owned by God, thus making it impossible to view piracy as stealing’.¹⁵⁷ However, this view seems to be based on a misrepresentation of Islamic law. More critically, academics, such as, Dr Mohammad Amin Naser and Dr Suhail Haitham Haddadin resist the endorsement of a Western approach to protecting IP and look exclusively to Islamic Law to justify IP protection and merely argue against maintaining the current system of IP law within a civil law framework.¹⁵⁸ In seeking a much more explicitly Islamic legal framework, they argue against the legitimacy of existing IP legislation, which has mainly been developed in the West.

In contrast, American IP lawyer Stephen Zimowksi has reasoned that Western based IP law still falls squarely within even the most conservative Islamic law parameters and points to the example of Saudi Arabia, widely considered to be among the most traditional of Islamic nations, which has joined the WTO and implemented IP legislation. However, his

¹⁵⁴ Buckingham, Simon ‘In Search of Copyright Protection in the Kingdom’ (1988) 11 *Middle East Executive Reports* cited in Al-Dajani, Elizabeth Mirza ‘Post Saddam Restructuring of Intellectual Property Rights in Iraq through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan’ (2007) 6 *The John Marshall Review of Intellectual Property Law* 250 at 257

¹⁵⁵ Buckingham, Simon In Search of Copyright in the Kingdom *Middle East Executive Reports* (May 8, 1988)

¹⁵⁶ Vaughan, Richard ‘Defining Terms in the Intellectual Property Protection Debate: are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison’ (1996) 2 *ILSA Journal of International & Comparative Law* 307 at 356

¹⁵⁷ Al-Dajani paraphrasing Vaughan, Richard ‘Defining Terms in the Intellectual Property Protection Debate: are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison’ (1996) 2 *ILSA Journal of International & Comparative Law* 307 at 355-356

¹⁵⁸ Naser, MA and WH Muhaisen (2008-2009) ‘Intellectual Property: An Islamic Perspective’ 56 *Journal of the Copyright Society of the USA*

perspective clearly reflects a very pro-IP stance and is driven by the need to reassure businesses concerned about uncertainty in the current situation.¹⁵⁹ Zimowski has not accounted for the reasoning of those who fundamentally oppose any implementation of Western-inspired law. His conclusion, that IP is of unqualified benefit for Egypt and that since Islam does not prohibit IP protection 'Egypt can continue IP protection and ride its revolution to economic prosperity and social equality, a vision that the Egyptian people yearn to experience,'¹⁶⁰ seems excessively optimistic and either naïve or insidious depending on the conviction with which the views are held.

These examples illustrate some of the extreme positions taken. A more measured approach is exemplified in the work of Professor Steven Jamar,¹⁶¹ Dr Amir Khoury,¹⁶² Dr Heba Raslan¹⁶³ and Professor Dr. Ida Madieha Abd. Ghani Azmi.¹⁶⁴

Nasr and Haddadin criticize the work of Jamar,¹⁶⁵ Khoury¹⁶⁶ and Raslan,¹⁶⁷ on the basis that they have 'fallen into the error of attempting to justify current protection under Islamic Principles.'¹⁶⁸ Jamar, Khoury and Raslan have all argued that the way in which IP is currently protected can be justified with reference to Islamic law, but within the existing system.

Naser and Haddadin are particularly critical of Raslan who, they say, 'claim[s] an unfounded justification that overrides the *Al-Maslaha* [public interest] doctrine', and underestimates

¹⁵⁹ Zimowski, Stephen S 'Consequences of the Arab Spring: How Shari'ah Law and the Egyptian Revolution Will Impact IP Protection and Enforcement' (2013) 2 *Penn State Journal of Law and International Affairs* 150 at 180

¹⁶⁰ Zimowski, Stephen S 'Consequences of the Arab Spring: How Shari'ah Law and the Egyptian Revolution Will Impact IP Protection and Enforcement' (2013) 2 *Penn State Journal of Law and International Affairs* 150 at 181

¹⁶¹ Jamar, Stephen The Protection of Intellectual Property under Islamic Law 21 (1992) *Capital University Law Review* 1079 at 1106

¹⁶² Khoury, Amir 'Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks' (2003) 43 *IDEA* 152

¹⁶³ Raslan, Heba A 'Shari'a and the Protection of Intellectual Property: the Example of Egypt' (2006-2007) 47 *IDEA* 497

¹⁶⁴ Azmi, Ida Madieha Abd. Ghani *Intellectual property laws and Islam in Malaysia* Thesis submitted to Queen Mary, University of London <<https://qmro.qmul.ac.uk/jspui/handle/123456789/1418>> accessed 2014

¹⁶⁵ Jamar, Stephen The Protection of Intellectual Property under Islamic Law 21 (1992) *Capital University Law Review* 1079 at 1106

¹⁶⁶ Khoury, Amir 'Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks' (2003) 43 *IDEA* 151

¹⁶⁷ Raslan, Heba A 'Shari'a and the Protection of Intellectual Property: the Example of Egypt' (2006-2007) 47 *IDEA* 497

¹⁶⁸ Naser, Mohammad Amin and Suhail Haitham Haddadin 'On the Recognition of the Public Domain in Intellectual Creations under Islamic Sharia' (2012) 2 *Intellectual Property Quarterly* 94

the 'role of the public in intellectual creations.' However, it seems that they have not read Raslan carefully.

Raslan does find that that 'shari'a calls for a strong protection and a strict adherence to intellectual property laws by the governments and the members of society.'¹⁶⁹ She also clarifies that this protection extends to foreigners, saying that

Shari'a does not provide an excuse for denying national and foreign intellectual property owners their rights. Nor does it provide an excuse for implementing lax enforcement of intellectual property laws. To the contrary, the principles of Shari'a enjoin any transgression of these rights and oblige Muslim governments to strongly guard and enforce them.¹⁷⁰

However, what Naser and Haddadin seem to overlook, is that she accepts that this is only the case where, 'the balance between exclusive rights and the public need'¹⁷¹ is met. Thus, the fact that intellectual property is capable of protection under Islamic law, notwithstanding 'some minor issues,'¹⁷² does not mean that such protection should be without limits; balance is an essential requirement.

There is, thus, widespread agreement that intellectual property rights are indeed limited by reference to the public interest and this is reflected in Raslan's analysis. Since this is not a point of contention, the arguments that find IP legislation to be consistent with Islamic law, albeit with a strong emphasis on the public interest, are more convincing than the arguments of Naser and his co-writers who suggest to the contrary that current IP laws are inconsistent with Islamic law.¹⁷³ An Islamic blog hosted by Mufti Taqi Usmani provides an analysis that strongly accords with the views of Raslan, Jamar and Azmi.¹⁷⁴

¹⁶⁹ Raslan, Heba A 'Shari'a and the Protection of Intellectual Property: the Example of Egypt' (2006-2007) 47 *IDEA* 497 at 558

¹⁷⁰ Raslan, Heba A 'Shari'a and the Protection of Intellectual Property: the Example of Egypt' (2006-2007) 47 *IDEA* 497 at 558

¹⁷¹ Raslan, Heba A 'Shari'a and the Protection of Intellectual Property: the Example of Egypt' (2006-2007) 47 *IDEA* 497 at 559

¹⁷² Raslan, Heba A 'Shari'a and the Protection of Intellectual Property: the Example of Egypt' (2006-2007) 47 *IDEA* 497 at 554

¹⁷³ Naser, M. A and W. H Muhaisen 'Intellectual Property: An Islamic Perspective' (2008) 56 *Journal of the Copyright Society of the USA* 571

¹⁷⁴ Usmani, Mufti Taqi 'Copyright According to Shariah' *Albalagh* <<http://www.albalagh.net/qa/copyright.shtml>> accessed 2014

Jamar concludes that Islamic law protects IP in a number of different ways.

To the extent the protections are contractually based, the sacred trust and bond accorded an agreement under Islamic law should protect the contracting party. To the extent the protections are premised on concepts of ownership of property, the *shari'a* solicitude for owners of property should protect the owner. To the extent the protections are based upon statutes duly enacted by the government, the recognition of the legitimacy of governmental legislation within Islam should protect the person claiming under it.¹⁷⁵

Professor Ida Azmi goes further in supporting the similarities between an Islamic approach and the IP norms expressed in Western legal systems in the TRIPS agreement. She finds that even where the public interest is concerned there is no great difference in approach between Western and Islamic law.

Muslim scholars have already stressed the need to strive for a balance; one that promotes both the authors' private right over his economic endeavour, but also the "maslahah ammah"¹⁷⁶ in the continued access to information and knowledge. From this perspective, we can see that there is no divergence in view between the western literature and Islamic scholarship as far as the elevation of public interests is concerned.¹⁷⁷

There is, therefore, general agreement that it is acceptable under Islam to provide some form of reward for those who create works that contribute to human understanding, entertainment, or wellbeing, although there remains some debate regarding the precise extent and type of protection. However, despite the high degree of agreement among the majority of IP academics with Islamic law backgrounds on this point, it is likely that dissenting voices will continue to be raised regarding the compatibility of IP protection with Islamic law. Thus, the 'minor issues', acknowledged by Raslan, as well as the Islamic

¹⁷⁵ Jamar, Stephen The Protection of Intellectual Property under Islamic Law 21 (1992) *Capital University Law Review* 1079 at 1106

¹⁷⁶ Public interest doctrine

¹⁷⁷ Azmi, Ida 'The Philosophy of Intellectual Property Rights over Ideas in Cyberspace: A Comparative Analysis between the Western Jurisprudence and the Shariah' (2004) 19 *Arab Law Quarterly* 191 at 207

mechanisms for providing balance, may have a key role to play in the way that IP law is regulated in Egypt, even if this results in some conflict with the TRIPS agreement.¹⁷⁸

POST 'REVOLUTION' INTERPRETATION OF IP LAW IN EGYPT

The debate over the religious basis for protecting IP has had increased importance since the election of Mohamed Morsi of the Muslim Brotherhood to power following the January 25 'revolution'. Although ex-President Morsi and the Muslim Brotherhood were removed from power on July 3, 2013, the future direction of Egypt's legal system is still unclear. Significantly, ex-President Morsi presided over the drafting of a new constitution to replace Egypt's 1971 constitution. While the very complex reasons behind the swift removal of their leader, denomination of the Muslim Brotherhood as a terrorist group and large-scale detention of Muslim Brotherhood members, are outside the scope of this thesis, the antagonism provoked by President Morsi's actions in power illustrates the strong divergence of opinion in Egypt regarding the respective roles of religion and the state in Egypt. The dominance of religious parties in Morsi's government led to controversial articles being included in the revised constitution concerning the interpretation of Islamic law. Consequently, the Egyptian Constitution 2012, with its complex wording, religious content and conservative approach provoked speculation regarding the compatibility of aspects of Egyptian legislation with Islamic law (*Sharia*). Before Morsi's downfall, Professor Nathan Brown, commenting on the Egyptian Constitution of 2012 concluded that 'while it is clear that religion will play a significant role in Egypt's political future, it remains unclear what that role will be, who will shape it, how it will be characterized.'¹⁷⁹

The language of Egypt's constitution has changed to reflect the increasing centrality of Islam to Egypt's constitution over time. In the Egyptian constitution of 1971 *Sharia* law was described as 'a source of legislation' in Egypt. After amendment, in 1980, *Sharia* law became *the* primary source of law. The English translation of the amended version states 'the principal source of legislation is Islamic Jurisprudence (*Sharia*).'¹⁸⁰ However, in Morsi's

¹⁷⁸ These issues are discussed in more detail in Chapter 6

¹⁷⁹ Brown, Nathan J *Islam and Politics in the New Egypt* (Carnegie Endowment for International Peace 2013) http://carnegieendowment.org/files/islam_politics.pdf accessed 2014

¹⁸⁰ Article 2 The Constitution of The Arab Republic of Egypt, 11 Sep. 1971 and amendments May 22nd 1980, May 25th 2005, and March 26th 2007 *The Constitution* (The Middle East Library for Economic services April 2007)

controversial 2012 constitution (drafted mainly by the MB) article 2 was altered to say that 'Principles of Islamic *Sharia* are the principal source of legislation.'¹⁸¹ This shift to the 'principles' of Islamic Law suggested a markedly different approach to the legal application of *Sharia*, potentially requiring interpretations of legislation previously thought settled in Egypt to be revisited.

Under the 2012 constitution, the judiciary would not have had the authority to determine interpretations of Islamic Law. This role was reserved for *Al Azhar* in Article 4 of the constitution, which required '*Al-Azhar* Senior Scholars [...] to be consulted in matters pertaining to Islamic law'. In addition, Article 219, in clarifying the reference to the principles of Islamic law in Article 2, stated that these would 'include general evidence, foundational rules, rules of jurisprudence (*usul al-fiqh*), and credible sources accepted in Sunni doctrines and by the larger community (*madhahib*)'. The radical nature of these constitutional changes may have introduced an element of uncertainty. However, the Muslim Brotherhood would not necessarily have been able to directly influence any outcomes. As Professor Nathan Brown pointed out, 'the bulk of *al-Azhar* scholars seem to feel that their proper role is to serve as an independent voice for Islam and the public interest.' It will remain unclear in what way that independence would have been exercised under the 2012 constitutional arrangement. The Egyptian army removed the Morsi government after only a year in power, on July 3, 2013, following a further popular uprising that began on June 30, 2013.¹⁸² The 2012 constitution was immediately suspended.

CONSTITUTIONAL PROTECTION FOR IP

Among the significant changes made in Egypt's Constitution of 2014, is that it refers directly, for the first time, to the protection of IP, and it does so using mandatory language. Article 69 states that

¹⁸¹ The Constitution of The Arab Republic of Egypt 2012 <<http://www.sis.gov.eg/newvr/theconstitution.pdf>> accessed 2014 hereafter Egyptian Constitution 2012

¹⁸² Perry, Tom and Yasmine Saleh 'Egypt army topples president, announces transition' *Reuters* (Cairo July 3, 2013) <http://www.reuters.com/article/2013/07/03/us-egypt-protests-idUSBRE95Q0NO20130703> accessed 2014

The State shall protect all types of intellectual property rights in all fields, and establish a specialized agency to uphold such rights and their legal protection as regulated by Law.¹⁸³

This major alteration to the constitutional basis for the protection of IP suggests that, since the military take-over¹⁸⁴ on July 3, 2013 the drafters of the new constitution under the interim regime have deliberately chosen to take a more hard-line approach to the protection of IP that is certainly in keeping with TRIPS and is likely to be well-received by the US and EU. It is also consistent with the declared goal to develop a ‘knowledge economy’,¹⁸⁵ committing the government to ring-fence financial support at a minimum of 1% of GDP and an obligation to increase that support to reach international levels. Egyptian former IP negotiator, Ahmed Abdel Latif points out that the explicit provision for institutional support in Article 69, as well as the strength of the constitutional backing for scientific, technological and cultural development ‘shows an awareness of the weaknesses that have characterized the national innovation system in a country like Egypt and the need to address them.’¹⁸⁶ However, he goes on to comment that ‘it remains to be seen the extent to which this priority will have a tangible impact on the ground, particularly in light of the difficult economic circumstances [...] and the limited resources available for allocation to competing public policy objectives.’¹⁸⁷

¹⁸³ Article 69 Constitution of The Arab Republic of Egypt 2014 <<http://www.sis.gov.eg/Newvr/Dustoren001.pdf>> accessed 2014 hereafter Egyptian Constitution 2014

¹⁸⁴ The nature of the military take over continues to be hotly contested. Professor Ozan Varol argued, in the context of President Mubarak’s removal from power on February 11, 2011, that the process of removing a dictator from power was not necessarily anti-democratic. In his words, ‘not all coups are equally antidemocratic; some coups are distinctly more democracy-promoting than others because they depose an authoritarian or totalitarian regime and transfer power to democratically elected leaders. Following this assessment he determined that the coup that removed Mubarak from power was essentially democratic. See Varol, Ozan O ‘The Democratic Coup d’E’tat’ (2012) 53 *Harvard International Law Journal* 292 at 299. On the contrary, Varol’s assessment of the July 3, 2013 military take over is that is ‘does not constitute a democratic coup. The Egyptian military deposed a president who was elected just a year ago via elections characterized by many as free and fair.’ See Varol, Ozan Egypt’s Non-Democratic Coup d’Etat (July 16th, 2013) *Opinio Juris* <<http://opiniojuris.org/2013/07/16/guest-post-egypts-non-democratic-coup-detat/>> accessed 2014

¹⁸⁵ Article 69 Egyptian Constitution 2014

¹⁸⁶ Abdel Latif, Ahmed ‘Egypt and Tunisia’s New Constitutions Recognize the Importance of Knowledge Economy and Intellectual Property Rights’ Center for Mediterranean Integration <<http://beta.cmimarseille.org/blog/egypt-and-tunisia-s-new-constitutions-recognize-importance-knowledge-economy-and-intellectual-pr>> accessed 2014

¹⁸⁷ Abdel Latif, Ahmed ‘Egypt and Tunisia’s New Constitutions Recognize the Importance of Knowledge Economy and Intellectual Property Rights’ Center for Mediterranean Integration

Abdel Latif notes that IP rights are to be interpreted in a human rights context.¹⁸⁸ The most explicit reference to such rights in an IP context is found in Article 27 of the 2014 constitution, which states that

The economic system shall adhere to transparency and good governance standards; enhance pillars of competitiveness, encourage investment, [...] prohibit monopolistic practices, maintain financial and trade balances, [...] in the context of a regulated economy guaranteeing the various types of ownership and striking a balance between the interests of various stakeholders preserving the rights of workers and protecting consumers.

An interpretation of this provision suggests that, in determining the weight to be given to competing interests, IP rights may be limited where a dominant market position results in higher prices or negatively affects state finances.

The 2014 constitution retains the wording of the 2012 constitution in Article 2, stating that ‘the principles of Islamic *Sharia* are the principal source of legislation,’¹⁸⁹ maintaining the change in language from the Egyptian Constitution 1971. American lawyer Peyman Yousefzadeh warned of ‘real risks’ caused by the change in emphasis in Article 2 under the Egyptian Constitution 2012.¹⁹⁰ In his opinion, reference to the ‘principles’ of Islamic law would lead to a degree of ‘opacity’ in the law that meant that only Islamic scholars would be able to properly interpret the law. He was concerned at the consequent indeterminacy that would be likely to generate difficulties. Detailed discussion of the potential for uncertainty that may be introduced by this provision is outside the scope of this work but it could certainly be considerable. It may be that the constitutional relationship between Islamic law and secular law will have to be clarified once more. This may have some bearing on the regulation of IP.

<<http://beta.cmimarseille.org/blog/egypt-and-tunisia-new-constitutions-recognize-importance-knowledge-economy-and-intellectual-pr>> accessed 2014

¹⁸⁸ Abdel Latif, Ahmed ‘Egypt and Tunisia’s New Constitutions Recognize the Importance of Knowledge Economy and Intellectual Property Rights’ Center for Mediterranean Integration <<http://beta.cmimarseille.org/blog/egypt-and-tunisia-new-constitutions-recognize-importance-knowledge-economy-and-intellectual-pr>> accessed 2014

¹⁸⁹ Article 2 The Egyptian Constitution 2014

¹⁹⁰ Yousefzadeh, Pejman ‘The Hart-Dworkin Debate and Egyptian Legal Reform’ (27 Feb 2013) *The New Atlanticist* <http://acus.org/new_atlanticist/hart-dworkin-debate-and-egyptian-legal-reform> accessed 2014

The stated method of interpretation for Article 2, however, differs between the 2012 and the 2014 Constitutions. In the 2014 Constitution, clarification of the principles of Islamic law will be achieved by reference to the Supreme Constitutional Court, suggesting a return to a more secular legal system. Although based on Islamic law, the judiciary do not have to defer to *Al Azhar* for interpretations of the law. The Egyptian Constitution 2014 makes it clear that the Court's rulings are to be followed in this respect. Article 192 states that

The Supreme Constitutional Court shall be solely competent to decide on the constitutionality of laws and regulations, to interpret legislative provisions.

There are no equivalents to articles 4 and 219 of the Egyptian Constitution 2012 in the Egyptian Constitution 2014.¹⁹¹ Nevertheless, there is still likely to be debate concerning the compatibility of IP with Islamic law. The nature of the removal of the Morsi regime may or may not result in longer-term instability, but the question of the Islamic consistency of the law is unlikely to disappear completely.

LAW 82/2002

Egypt's law passed in 2002 to implement the TRIPS agreement has critics from all sides. While it is largely compliant with TRIPS, certain key provisions can be described as non-compliant, or TRIPS-minus. Other provisions exceed the minimum standards set by TRIPS. The TRIPS-minus provisions have been particularly heavily criticized by the US, while the TRIPS-plus provisions promoted by both the EU and the US are worrying because they increase the burden on Egypt.¹⁹² The text itself is indicative of the inherent tension between a number of radically different approaches that clash, but nevertheless overlap in some respects: the desire to modernize as part of the international community by embracing the globalization project embodied by the WTO, the desire to remain true to Islamic principles, and the desire to promote goals of social justice and development.

¹⁹¹ See discussion above

¹⁹² See for example Abou El Farag, Mohamed Salem 'TRIPs, TRIPs-PLUS, Developing Countries and Public Health: The Case of Egypt' (2008) 5 *Journal of International Biotechnology Law* 1; Mohammed El-Said, The Road from TRIPS-Minus to TRIPS to TRIPS-Plus: Implications of IPRs for the Arab World (2005) 8 *Journal of World Intellectual Property* 53; Abdelgafar, Basma I *The Illusive Trade-off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) among many others

RESEARCH QUESTIONS

The questions raised by this study and which form the focus of the thesis are the following.

1. Is postcolonial analysis a useful tool in helping to explain Egypt's approach to the protection of IP following decolonization, in the 20th and 21st centuries, and if so, to what extent?
2. Can Egypt's juridical history help to explain the unique way in which IP law has developed in Egypt and, if so, in what ways could there be a recognizable pattern?
3. In the context of multilateral and bilateral IP agreements to which Egypt is a party, does Egypt's implementation of the TRIPS agreement, entirely fulfil the requirements of the agreement? Where inconsistency with TRIPS exists is there any explanation/justification for such inconsistency?
4. Does an understanding of Orientalism help assess the international perception of Egypt's approach to the protection of IP?

STRUCTURE OF THE PRESENT STUDY

CHAPTER 2: RESEARCH ISSUES AND METHODS

This chapter aims to explain the methods used in addressing the research questions. It begins by focusing on postcolonial analysis explaining its theoretical basis and applying it to the question of IP in Egypt. The rationale for the use of black letter textual analysis, comparative methods, and the use of interviews to a limited extent, is also explained as well as any constraints that affect the study. These include the researcher's background and the linguistic challenges as well as the difficulty of obtaining information, particularly access to case law in a jurisdiction that has not been particularly transparent.¹⁹³

CHAPTER 3 HISTORICAL AND COLONIAL CONTEXT

This chapter aims to identify themes in the recent historical context of occupation and colonization, from the late eighteenth century onwards, during which Egypt's modern legal

¹⁹³ On 6/12/2012, Egypt dropped six places in the Corruption Perceptions Index, a global league table compiled by Transparency International, and in terms of perceived transparency in the public sector, is now at 118th out of 176 countries. This strongly suggests that where transparency is concerned the situation in Egypt has worsened since the January 25, 2011 'revolution' '2012 Corruption Perceptions Index' *Transparency International* <<http://cpi.transparency.org/cpi2012/>> accessed 2014

system and approach to IP has developed, which may be helpful in deciphering Egypt's response to current International IP (IIP) trends.

CHAPTER 4 NINETEENTH AND TWENTIETH CENTURY LEGAL DEVELOPMENTS IN EGYPT

This Chapter attempts to delineate the complex set of interrelationships that contributed to the very significant legal reforms that took place in Egypt in the nineteenth century. It is argued that patterns evident in Egypt's juridical history are reprised in Egyptian responses to international pressure in the context of international trade where there are competing strategic interests among and between both international and local actors. This can be seen in the implementation of the TRIPS agreement in domestic law.

CHAPTER 5 INTERNATIONAL LEGAL CONTEXT

This Chapter sets out the international legal context for IP regulation and explores Egypt's engagement in the international law-making process. It identifies some tensions, both within Egypt and internationally, regarding Egypt's approach to implementing IIP commitments domestically.

CHAPTER 6 DOMESTIC IP LAW: LAW 82/2002

This chapter aims to examine the unique way in which Egypt has enacted its domestic IP provisions to conform with WTO/TRIPS commitments to protect IP, and to identify particular areas of concern from both a domestic and foreign perspective. It identifies and tests possible explanations, reasons and justifications for anomalous provisions in Egypt's approach to IP regulation.

CHAPTER 7 CONCLUSIONS AND RECOMMENDATIONS

This Chapter aims to draw together the conclusions from earlier chapters and make useful recommendations drawn from their analysis.

CHAPTER 2: RESEARCH ISSUES AND METHODOLOGIES

In this work, the focus has been on establishing strands of legal argument in which doctrinal, theoretical and comparative material can be interwoven in a sustained critique of the issues examined. Egypt's particular legal history and culture is mapped onto traditional justifications of intellectual property law as part of the examination of Egypt's domestic law implementing the TRIPS agreement. This is an entirely different project from an empirical study; nevertheless, it is hoped that the analysis may yield useful outcomes regarding the interpretation of, and suggestions for possible amendment of Egypt's intellectual property law. This may shed light on the distinctive characteristics of Egypt's current domestic approach to intellectual property. This chapter aims to set out the issues, approaches and methods that together form the framework and constraints of the analysis.

COMPARATIVE METHOD: THE SOURCES OF LAW IN EGYPT

The essence of comparative legal study has been extensively discussed by many academics.¹⁹⁴ Somewhat self-evidently, comparative law is not merely the study of one foreign law. Therefore, comparisons are made between different systems. Egypt remains a mixed jurisdiction, meaning that it is a hybrid of different systems. The relevant legal systems for comparison are the Islamic *Sharia* law system, the civil law system, the common law system, and the multilateral international legal system of the WTO.

Much of Egyptian law is the result of the substantive transplantation of law derived from the French civil system in the nineteenth century; however, it is, as set out in all Egyptian Constitutions, an Islamic system.¹⁹⁵ Nevertheless, French influence has remained pervasive into the twentieth and twenty-first centuries. A trace of the English common law, though evidence for its influence is much less obvious, is arguably, nevertheless present through the exposure of the Egyptian legal system to the British and American legal systems. The French and the British, as well as Americans have been instrumental in developing IP rules and international IP treaties largely reflect the way in which IP protection has developed in Europe and the US. The TRIPS agreement means that, to a very large extent, foreign derived rules must be adopted as domestic law. Egyptian IP law, as well as comprising the received

¹⁹⁴ See for example Reimann, Matthias and Reinhard Zimmerman Eds *The Oxford Handbook of Comparative Law* (Oxford University Press 2006)

¹⁹⁵ Article 2 Egyptian Constitution

rules as required, is likely also to reflect, to an extent, the way in which the law was received. Legal historian Professor Alan Watson explains that comparative law is not merely a matter of simply putting the rules of one system in juxtaposition with another. Its real function is to reveal more about 'the nature of law and especially about the nature of legal development.'¹⁹⁶ It is also a tool for analysing whose interests and which interests the law protects.

The focus in this study is mainly on Egyptian IP law but it must be considered in the context of the Egyptian legal system, which remains a mixed jurisdiction in which both Islamic law and the historically French-derived civil law are sources of law. The amendment of Article 2 of the Egyptian Constitution altered the constitutional emphasis among the sources of law, from being essentially secular to explicitly religious. The codified civil law transplanted from the French and adapted for the Egyptian system has been largely accepted as long as it has been viewed as being consistent with *Sharia* law principles, but the assessment of its consistency with Islamic law is on-going and may be subject to challenge even after the transplanted rule has been apparently long-accepted.

DEALING WITH SIMILARITIES AND DIFFERENCES

In any research project there may be evident reasons for choosing to examine either similarities or differences and, to an extent, the particular instances in which differences or similarities arise are likely to be determined by the project itself. However, it is likely to be worthwhile reflecting on both. English philosopher John Stuart Mill pointed out that 'the 'method of agreement' and the 'method of difference' do not work in isolation, but in combination.'¹⁹⁷ Professor Gerhard Danneman emphasizes the value of studying both¹⁹⁸ as does Professor Cheryl McEwan.¹⁹⁹ They are among those who consider that it is potentially

¹⁹⁶ Watson, Alan *Legal Transplants: An Approach to Comparative Law* 2nd Ed (University of Georgia Press 1993)

¹⁹⁷ Cited in Danneman, Gerhard 'Comparative Law: Study of Similarities or Differences?' (2006) in Reimann, Matthias and Reinhard Zimmerman Eds *The Oxford Handbook of Comparative Law* [Oxford University Press 2006] at 387

¹⁹⁸ Danneman, Gerhard 'Comparative Law: Study of Similarities or Differences?' (2006) in Reimann, Matthias and Reinhard Zimmerman Eds *The Oxford Handbook of Comparative Law* [Oxford University Press 2006] at 399

¹⁹⁹ McEwan, Cheryl 'Cleavage and Intersection: Postcolonial interventions in development studies' (February 25, 2009) Keynote Speech, ISG Seminar Series, *Postcolonialism: intersections and Interdisciplinary Implications* at Newcastle University

fruitful to identify 'useful points of contact and connection as well as disjuncture'²⁰⁰ in the texts and study the relationship between them. In this study Egypt's IP law is examined in the light of the international agreements to which Egypt is party, in order to assess how closely it corresponds to treaty requirements. In this way it is possible to assess the degree to which the Egyptian rules reflect Egypt's commitments, as well as how much use Egypt has made of the flexibilities inherent in the agreements. Egypt's IP regime is also compared to an extent with the regimes of other developing countries and with more developed ones. It is also necessary to identify any recurring themes between Egypt's law today, and the law under previous colonial regimes.

FALSIFIABILITY

British-Austrian philosopher Karl Popper's theory of falsifiability is generally seen as key to the validity of research.²⁰¹ He has noted the tendency for proponents of a position to actively seek support for their arguments, but to ignore, or look less assiduously for information that might refute their proposition. However, such one-sidedness in avoidance of counter arguments is not helpful and to ensure a valid result it is essential to vigorously search for contrary evidence. To that end, Popper said that 'we should select for our tests those crucial cases in which we should expect the theory to fail if it isn't true.'²⁰² Ideas that do not stand up to scrutiny must fall, in the process providing valuable information that, when taken into account, may amend and, thus, strengthen the proposed theory. Particularly relevant to this research in considering historical parallels is the question of whether one should expect to find strong similarities between the past and present. Popper pointed out that it is equally likely that 'the future will be very different from the past in many vitally important aspects.'²⁰³ This is clearly true.

Similarities across time must be approached with caution. Popper states that,

History may sometimes repeat itself in certain respects [...] the parallelism between certain types of historical events [...] can be significant [...] But [...] all these instances

²⁰⁰ McEwan, Cheryl 'Cleavage and Intersection: Postcolonial interventions in development studies' (February 25, 2009) Keynote Speech, ISG Seminar Series, *Postcolonialism: intersections and Interdisciplinary Implications* at Newcastle University

²⁰¹ Popper, Karl *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge 1963)

²⁰² Popper, Karl *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge 1963) at 150

²⁰³ Popper, Karl *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge 1963) at 75

of repetition involve circumstances which are vastly dissimilar, and which may exert an important influence upon further developments. We therefore have no valid reason to expect of any apparent repetition of a historical development that it will run parallel to its prototype.²⁰⁴

However, even though modern conditions may have no exact parallels in the past, there is value in understanding their evolution. The question of protecting IP interests has intersected at crucial moments in Egypt's struggle to modernize and to achieve, regain and maintain independence, particularly in the face of European colonialism. Thus, the way in which IP rights have evolved is likely to have been influenced by both the historical struggle and the contact between legal systems. It is important, however, to avoid oversimplifying and attributing causal relationships where there is merely evidence of a strong coincidence. This should not mean ignoring similarities over time altogether, merely that any attempt to attribute a causal relationship in terms should be very well considered. Evidence of the effect of contact between legal systems has to be treated with the same caution.

Eminent Egyptian jurist, former judge and Professor of Islamic Law, Gamal Moursi Badr, for example, is highly skeptical of any claim that suggests the influence of one legal system on another.²⁰⁵ In particular, he refuses to countenance any evidence of external influence on Islamic law or, indeed, of the influence of Islamic law on other legal systems. Badr concedes only insofar as the claim is made to the mere possibility of influence.

Popper's approach coincides with Badr's in cautioning that an interpretation is exactly that, and not a theory that may be easily generalizable to other situations, nor from which predictions may be made. Thus, Popper distrusts large projects and dismisses them as utopian and dangerous considering that they tend to be blind to their own omissions and errors. He advocates small, incremental, systematic investigation together with a critical approach that constantly seeks to find its own errors.

²⁰⁴ Popper, Karl 'The Poverty of Historicism III' (1945) 12 *Economica New Series* 69 at 71

²⁰⁵ Badr, Gamal Moursi 'Islamic Law: Its Relation to Other Legal Systems' (1977-1978) *American Journal of Comparative Law* 187

TRANSPLANTS

Professor Alan Watson has investigated the reasons different legal systems borrow from each other, calling the results of legal borrowing 'legal transplants'.²⁰⁶ Where transplantation occurs there is likely to be controversy over the extent and depth of any such borrowing as well as the desirability of looking to other jurisdictions for legal formulations. What is not transplanted is also informative and the choice not to transplant may provide similarly interesting insights.

Professor Pierre Legrand, on the other hand, doesn't believe that it is possible to transplant rules at all. In his opinion, law is not like baggage²⁰⁷ that can be transported around the world and put down whenever convenient. He concludes therefore, that 'legal transplants are impossible.'²⁰⁸ In transit, he believes, law is altered to the extent that the rules becomes meaningless except as interpreted in the target society. In describing Watson's work as 'facile'²⁰⁹ and lacking in complexity, Legrand states that law 'can only reflect the localized and particularized outlooks of culturally-situated individuals as members of historically and epistemologically conditioned interpretive communities.'²¹⁰ He dislikes a narrow focus on formalism that focuses on the words that make up rules and thinks that a proper study of comparative law should problematize the question of law in its social context.

'Law is part of the symbolic apparatus through which entire communities try to understand themselves better. Comparative legal studies can further our understanding of other peoples by shedding light on how they understand their law.'²¹¹

His analysis, I think, has merit. Meaning and interpretation of terms certainly do differ over time and in different spatial and cultural contexts. However, his focus on differences rather than similarities and his insistence on a distance between 'us' and 'them' as illustrated by

²⁰⁶ Watson, Alan *Legal Transplants: An Approach to Comparative Law* 2nd Ed (University of Georgia Press 1993)

²⁰⁷ Legrand, Pierre 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 114

²⁰⁸ Legrand, Pierre 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 114

²⁰⁹ Legrand, Pierre 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 119

²¹⁰ Legrand, Pierre 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 119

²¹¹ Legrand, Pierre 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 124

the above quotation, while not necessarily Orientalist in its intention,²¹² could have the effect of over-emphasizing dissimilarities.

Legrand is quite right, however, to highlight the importance of how transplanted law is received. Where law is derived from foreign legal systems, as Berkowitz et al found, whether the law is accepted or not may depend on the method of transplantation.²¹³ The factors identified by Drahos,²¹⁴ determining fairness in treaty making, of non-domination, full representation and full information are, therefore, highly relevant to the reception of TRIPS in Egypt. The law is likely to be better received where it has not been externally 'imposed'²¹⁵ but has, rather 'develop[ed] internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties.'²¹⁶ Adaptation of the law to local circumstances is likely to ensure a higher level of acceptance. Similarities or differences between the Egyptian IP law and international IP treaties, in particular the TRIPS agreement, are, therefore, examined carefully in order to see the extent to which it has, or has not, been possible to adapt TRIPS to suit domestic circumstances.

Watson warns against making extravagant claims about the results of comparative analysis²¹⁷ and also about insufficient knowledge of multiple legal systems leading to uninteresting results. He warns that the, 'fragility of conclusions dependent on a superficial knowledge combined with frequent errors of law should be underlined.'²¹⁸ Likewise, Badr cautions against attributing direct causal links between similarities in one system and another. Having said that, Watson does believe it is possible to derive much that is useful from a comparison of law and legal systems, while Badr is very resistant to the idea.

²¹² See discussion on Orientalism later in this Chapter

²¹³ Berkowitz, Daniel, Katharina Pistor and Jean-Francois Richard 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163 at 167

²¹⁴ See discussion of Fairness in Treaty Making in Chapter 1

²¹⁵ Berkowitz, Daniel, Katharina Pistor and Jean-Francois Richard 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163 at 189

²¹⁶ Berkowitz, Daniel, Katharina Pistor and Jean-Francois Richard 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163 at 189

²¹⁷ Watson, Alan *Legal Transplants: An Approach to Comparative Law* 2nd Ed (University of Georgia Press 1993) at 13

²¹⁸ Watson, Alan *Legal Transplants: An Approach to Comparative Law* 2nd Ed (University of Georgia Press 1993) at 11

There is a deep distrust of comparative law in Egypt most likely because of its associations with modernization, westernization and colonization. Badr argues forcefully that there has not been any influence of foreign law whatsoever on the Islamic legal system. He argues equally strongly that there has been no influence in the other direction either.²¹⁹ While he acknowledges parallels to an extent between aspects of other legal systems and *Sharia*, he does not accept that there is any convincing evidence of influence. This extreme position of total impermeability seems unlikely and is refuted by another ex judge and prominent Egyptian Islamist legal thinker Tarek El Bishri (who chaired the committee drafting Egypt's constitution following the January 25, 2011 'revolution'). El Bishri believes that comparative law has caused 'cultural alienation' and has, further, 'contributed to the deracination of Arab law and the loss of *asalah* or authenticity from the Arab legal system.'²²⁰ These charges are serious. El Bishri is among those who would like an Islamic system of law, cleansed of foreign elements. He would, ideally, resurrect the system which predated colonialism. The degree of his concern demonstrates, as Professor Amr Shalakany explains, that for some Egyptian jurists the impact of comparative law and consequent reforms in Egyptian law has been, 'traumatizing'.²²¹ The manner in which law has been transplanted in Egypt under colonisation is a good reason to be distrustful, but the concept of returning to a pure, essentialized form of Islam, cleansed of the history of the last two centuries seems unrealistic and potentially very destabilizing.

Those who seek a return to an authentic Islamic legal system predating Western colonialism in the Middle East are idealizing the past and failing to recognize the contribution Egyptians made to the modernization of the Egyptian legal system in the nineteenth and twentieth centuries. Shalakany, on the other hand, in contrast to El Bishri, emphasizes the 'agency' of the Egyptian legal reformers whose work in 'cynically manipul[at]ing the Orient/Occident

²¹⁹ Badr, Gamal Moursi 'Islamic Law: Its Relation to Other Legal Systems' (1977-1978) *American Journal of Comparative Law* 187

²²⁰ Tarek El Bishri cited in Shalakany, Amr 'Sanhuri and the Historical Origins of Comparative law in the Arab World (or How Sometimes Losing your Asalah can be Good for You)' (2001) in Annelise Riles *Re-thinking the Masters of Comparative Law* [Hart Publishing 2001] at 154

²²¹ Tarek El Bishri cited in Shalakany, Amr 'Sanhuri and the Historical Origins of Comparative law in the Arab World (or How Sometimes Losing your Asalah can be Good for You)' (2001) in Annelise Riles *Re-thinking the Masters of Comparative Law* [Hart Publishing 2001] at 154

fantasy of their Western colonizer' demonstrates that Egyptian legal reforms reflect more than just a foreign transplantation of law.²²²

Professor Shannon Roesler similarly points to the importance of recognizing the Islamic content in legal reform since the time of Mohamed Ali and warns against exaggerating the influence of European law. She notes that, 'accounts that do not pay attention to the larger historical and cultural context of Egyptian reform leave out a substantial portion of the story.'²²³

Many of the reforms of the nineteenth century took place outside the periods of colonization under the French and subsequently the British. It was the Ottomans who led reform of Islamic Law in the *Tanzimat*,²²⁴ a period of reform that led to the adoption of Western inspired Codes. The reformers seem to have decided that looking outside the Islamic world to find solutions to intractable legal problems was more practical than 'profane meddling'²²⁵ with *Sharia*, which would be unthinkable. An effect of taking this approach, however, was to diminish the sphere of Islamic law. This seems to have been a conscious choice. As Professor, Sir Norman Anderson has suggested, it is surprising and significant that such reforms were introduced by the Ottoman regime and not the French or British. Such an approach might be more easily expected of a colonial, non-Muslim power.²²⁶ Egyptians 'resisted application of these earlier Ottoman Codes'.²²⁷ They chose, instead to implement the reforms in a way more suited to local circumstances.²²⁸

In Shalakany's view, this means that the modernization and secularization of Egyptian law cannot merely be dismissed as wholesale abandonment of traditional values because of

²²² Tarek El Bishri cited in Shalakany, Amr 'Sanhuri and the Historical Origins of Comparative law in the Arab World (or How Sometimes Losing your Asalah can be Good for You)' (2001) in Annelise Riles *Re-thinking the Masters of Comparative Law* [Hart Publishing 2001] at 154

²²³ Roesler, Shannon 'Modern Legal Reform in Egypt: Shifting Claims to Authority' (2006) 14 *Cardozo Journal of International and Comparative Law* 393 at 394

²²⁴ Discussed in more detail in Chapter 4

²²⁵ Anderson, Norman D *Law Reform in the Muslim World* (Athlone 1976) cited in Barton, John H et al *Law in Radically Different Cultures American Casebook Series* (West Publishing Company 1983) at 437

²²⁶ Anderson, Norman D *Law Reform in the Muslim World* (Athlone 1976) cited in Barton, John H et al *Law in Radically Different Cultures American Casebook Series* (West Publishing Company 1983) at 437

²²⁷ Barton, John H et al *Law in Radically Different Cultures American Casebook Series* (West Publishing Company 1983) at 435

²²⁸ This is discussed in more detail in Chapter 4

colonial intervention. He argues that Egyptians have been engaged at all stages of the process of reform.

Egyptians actively used comparative law methods as part of the process of modernization in the nineteenth century and they also utilized comparative law as a political tool in the quest for independence. French law, for example, was used to counter British imperialism, since 'For Egyptian nationalists [...] the enemies of the British were perceived as friends.'²²⁹ This is illustrated by the numbers of Egyptian lawyers who followed Edouard Lambert, Dean of the Khedivial Law School in Cairo, to France after his dismissal by the British. Among those who went to France to study law was Abdel Razzak al Sanhuri, drafter of Egypt's post-independence civil code of 1949.²³⁰ Lambert was al Sanhuri's mentor and as a result, despite al Sanhuri's clearly stated aim to use the civil code to revive Islamic law, his comparative law background inevitably led him to produce something of a hybrid. This has been criticised as such despite his best intention to ensure that it would be Islamic in its ethos.²³¹

Comparative law is, therefore, highly charged in its application to the Egyptian context but similarly cannot be ignored. Mere comparison for its own sake may not yield particularly meaningful results. However, the 'hybrid relation between the different historical layers of a legal system [...] might provide alternative tools [...].'²³² At a minimum, for a non-Egyptian scholar attempting a postcolonial analysis, an attempt at such historical understanding is essential before entering into the postcolonial discourse. Endeavouring to understand Egypt's law in its fuller historical context is certainly a worthwhile pursuit because, as Ian Edge has put it 'Egyptian law strides the Arab world like a colossus and has not yet been adequately treated by Western academics.'²³³

²²⁹ Bechor, Guy *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* Studies in Islamic Law and Society 29 (Brill 2007) at 53

²³⁰ Bechor, Guy *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* Studies in Islamic Law and Society 29 (Brill 2007) at 53

²³¹ Shalakany, Amr 'Sanhuri and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing your Asalah can be Good for You) in Annelise Riles, Ed., *Rethinking the Masters of Comparative Law* (Hart Publishing: 2001) at 153

²³² Shalakany, Amr 'The Closeted HR Lawyer: On How to Pass for Human Rights Material' (2007) 20 *Harvard Human Rights Journal* 41 at 42

²³³ Edge, Ian 'Comparative Commercial Law of Egypt and the Gulf' (1985-1986) 34 *Cleveland State Law Review* 129 at 144

Where IP is concerned foreign influence has certainly been a factor historically in the development of Egyptian law and remains a factor in today's IP law. The choices made by Egyptian legislators are examined and informed by postcolonial critique.

HISTORICISM

Popper has usefully pointed out that in selecting certain moments or key events in history to support an argument, they are inevitably selected according to the researcher's own interests and prejudices. By necessity, many events will not be selected, some of which may be relevant.²³⁴ This, in Popper's view, is not necessarily fatal to such an enquiry, but the consequence is that the researcher must be alert to instances and explanations that run counter to her own. Popper has, therefore, strongly criticised historicism as an approach that is fraught with the inherent dangers identified by Badr and Popper himself.²³⁵ Historicism is an approach that suggests that there is a continual movement in human history towards a better, more developed, more civilized future. It has been defined by American philosopher Maurice Mandelbaum as

[...] the belief that an adequate understanding of the nature of any phenomenon and an adequate assessment of its value are to be gained through considering it in terms of the place which it occupied and the role which it played within a process of development.²³⁶

It therefore analyses historical events and trends to explain their contribution to this idealized goal. Law is particularly vulnerable to the idea of improvement over time and frequently statutory legislation embodies this approach by attempting to resolve social problems through legal intervention, with each new piece of legislation representing an advance, or improvement in the law. IP law can be seen as especially characterized by historicist principles in the way that it is so intimately tied to the concept of development, with the ever-increasing strength of IP protection representing incremental advancements

²³⁴ Badr, Gamal Moursi 'Islamic Law: Its Relation to Other Legal Systems' (1977-1978) *American Journal of Comparative Law* 187

²³⁵ Popper, Karl 'The Poverty of Historicism I' (1944) 11 *Economica New Series* 86; Popper, Karl 'The Poverty of Historicism II A Criticism of Historicist Methods' (1944) 11 *Economica New Series* 119; Popper, Karl 'The Poverty of Historicism III' (1945) 12 *Economica New Series* 69

²³⁶ Mandelbaum, Maurice *History, Man and Reason* (The Johns Hopkins Press 1971) at 42

towards a perfect system. This can be seen in the proliferation of TRIPS-Plus bilateral free trade agreements following the conclusion of the TRIPS agreement. Susan Sell characterizes the proponents of such 'upward ratchet' of IP protection as 'IP maximalists'.²³⁷ This maximalist agenda, as will be seen, is a problem for developing countries for which the increasing IP standards are less than ideal.

Mandelbaum identifies the 'concept of development' as being central to a historicist approach and to illustrate he cites a number of influential but radically different thinkers whose work espouses aspects of what he considers historicism. Defining 'development', he points out that it involves a 'linear' process in which events unfold in a way that suggests movement towards a perfect goal. The effect of this approach is to suggest that the changes that occur through development lead to 'progress'. Mandelbaum associates this type of reasoning with a Darwinian view of evolution.²³⁸ However, even Darwin's view of evolution is more complicated than a simple view of evolutionary theory might suggest²³⁹ and the way in which law evolves is similarly complex.

Historicism, as a progressive movement towards a utopian goal, has been used as a justification for colonial rule. Strawson draws attention to the British appointment of Frederic Goadby to the Khedivial Law School in Cairo, part of whose job was surely to promote acceptance of British legal supremacy among Egyptian law students. Strawson points out how in Goadby's *Introduction to the Study of Law*, a textbook for Egyptian law students,²⁴⁰ he carefully glosses over the complexity of the British legal relationship in Egypt. He invites Egyptian students to see the British occupation as an opportunity for advancement, both personal and national, through which they could become more modern and less 'traditional' (backward) in their outlook. Assessing their positive influence on the occupied territory, 'the British [saw] the law as one of their major contributions, not just to

²³⁷ Sell, Susan 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play' (2010) Program of Information Justice and Intellectual Property Research Paper no. 15. American University Washington College of Law, Washington, DC.

²³⁸ Mandelbaum, Maurice *History, Man and Reason* (The Johns Hopkins Press 1971) at 47

²³⁹ Mandelbaum, Maurice *History, Man and Reason* (The Johns Hopkins Press 1971) at 366

²⁴⁰ Goadby, Frederic *Introduction to the Study of Law: a Handbook for the Use of Egyptian Law Students* (Butterworth 1910) University of Toronto Library <<https://archive.org/stream/introductiontost00goaduoft#page/ii/mode/2up>> accessed 2014

assuring their power, but to [... Egypt's] development.'²⁴¹ According to Goadby 'a system of law adequate for the needs of a people emerging from barbarism, for example, will obviously be unfit for one which has attained civilisation.'²⁴² Legal progress was, thus, considered to be an important part of attaining civilisation. Britain was clearly associated with the standard of civilization and colonial subjects with near-barbarism at best. Thus, the subjects of British colonies were expected, in aspiring towards a more civilized future, to emulate the British.

There is a tendency for academic commentary on IP protection to be somewhat polarized, with both pro-IP and anti-IP activists being similarly utopian in their views. An IP minimalist approach comprising an entirely open system offering no reward at all for invention and allowing entirely unrestrained copying may cause a different set of problems from those anticipated as a result of an IP maximalist approach. The extreme views can make it difficult to appreciate the subtlety in between that a more 'piecemeal' approach, acknowledging difficulties and complexity, may discover. Thus, it is important to limit the goals of research so that the results may be more reliable. While it is submitted that the particular choices made in Egypt's IP regime as evidenced in the enactment of Law 82/2002 can only be properly appreciated by understanding the contemporary, historical and international legal and political contexts, it is important to be alert to the danger of generalization.

POSTCOLONIALISM AND ORIENTALISM APPLIED TO IP IN EGYPT

POSTCOLONIALISM

Postcolonialism is a term that describes an analytical approach that examines the continuing effects of colonialism following decolonization.²⁴³ It is used here as a tool to help understand Egyptian concerns regarding the contribution that IP law should make to development in Egypt. The approach aims to deconstruct narratives created from an ex-colonial/developed country perspective, which have continued to dominate the

²⁴¹ Strawson, John 'Orientalism and Legal Education in the Middle East: reading Frederic Goadby's Introduction to the Study of Law' (2001) 21 *Legal Studies* 663 at 670

²⁴² Cited by Strawson, John 'Orientalism and Legal Education in the Middle East: reading Frederic Goadby's Introduction to the Study of Law' (2001) 21 *Legal Studies* 663 at 669

²⁴³ McEwan, Cheryl *Postcolonialism and Development* (2009) London: Routledge on terminology of postcolonialism

international discourse even after the end of colonialism. The term is often hyphenated, as post-colonialism. There has been long debate over the meaning of the hyphen.²⁴⁴ The problem is that use of a hyphen suggests that colonialism is finished, 'post', and therefore no longer relevant. As Dr Vidya Kumar of Birmingham Law School states, 'it seems to suggest that something has elapsed, something has moved beyond, something is different than before.'²⁴⁵ Removing the hyphen, on the other hand, stresses the continued relevance of colonialism in international relationships and in international law today. This approach, emphasizing the unbroken (although striated) link between past and present, could fall into a historicist trap: an unrealistic quest for a perfect future free of the colonial past. However, the current relevance of postcolonial analysis is not merely to trace the history of colonialism into the present, but more importantly to look closely at the power relationships between and within states today. The approach may also help to illuminate differences in attitude found among the complex responses to the colonial legacy of the nineteenth century. Furthermore, as Ella Shohat has, in my view, correctly noted, adopting a 'flexible yet critical usage which can address the politics of location is important not only for pointing out historical and geographical contradictions and differences but also for reaffirming historical and geographical links, structural analogies, and openings for agency and resistance.'²⁴⁶ For that reason, in the present work, the term will be used without a hyphen to indicate accord with the view that it is still necessary to be continually vigilant to manifestations of a colonial mind-set.

THE END OF POSTCOLONIALISM?

The recent Arab Spring²⁴⁷ has caused at least one scholar who previously espoused the postcolonial approach to suggest that postcolonialism is no longer relevant. Professor Hamid Dabashi has claimed that the wave of protests and the profound changes that have

²⁴⁴ Shohat, Ella Notes on the "Post-Colonial" (1992) *Social Text* No. 31/32, Third World and Post-Colonial Issues 99 at 101; Dirlik Arif 'The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism' (1994) *Critical Inquiry* 328-at 329

²⁴⁵ Kumar, Vidya, 'A *Proleptic* Approach to Postcolonial Legal Studies? A Brief Look at the Relationship Between Legal Theory and Intellectual History' (2003) 2 *Law, Social Justice and Global Development Journal* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_2/kumar/ accessed 2014

²⁴⁶ Shohat, Ella 'Notes on the "Post-Colonial"' (1992) *Social Text* No. 31/32, Third World and Post-Colonial Issues 99 at 112

²⁴⁷ Events throughout the Middle East dating from the suicide on the 17 December 2010 of Tunisian Mohamed Bouazizi have been dubbed the Arab Spring.

taken place throughout the Middle East and found expression in Egypt since the January 25, 2011 'revolution', mark 'the end of postcolonialism.'²⁴⁸ His view does find some resonance. There is something intuitively appealing in Dabashi's depiction of the discourse of postcolonialism as being an, 'exhausted and depleted paradigm.'²⁴⁹ It should, by now, surely be possible to cut ties to the colonial era as the process of revolutionary change continues. However, unfortunately his argument is ultimately unconvincing and it seems that he was premature to be so definitive in declaring, as he does, that we have, entered the 'post-ideological age'²⁵⁰ and are now seeing 'the implosion of "the West" as a catalyst of knowledge and power production.'²⁵¹ There does not seem to be any real evidence in support of this contention. The international power imbalance remains, even while acknowledging that the concept of power itself must be understood in all its complexity.²⁵² Indeed the disproportionate share of resources and power held by the west is barely diminished, or entirely undiminished, suggesting that there is still value in examining the historical legacy of colonialism where its effects can be identified. As the revolutions in the Middle East have unfolded it is striking that Western interests continue to play a central role. Thus, postcolonialism is still a useful tool with which to expose aspects of international policy that perpetuate ex-colonial, now developed country, dominance. Its value remains in its ability to confront apparent objectivity by providing a structure for analysis that takes into account the historical power relationships underlining the arguments.

While Dabashi is probably wrong to say that power has moved away from the West, his identification of knowledge as a key element in global power play affirms the role of IP regulation in the continuing global struggle for dominance. The ideas of the west are so fundamental to the structure of international law that it raises the question of how far it is even possible to decolonise the discourse, language and institutions of globalization.

²⁴⁸ Dabashi, Hamid *The Arab Spring: the End of Postcolonialism* (Zed Books 2012) at 4.

²⁴⁹ Dabashi, Hamid *The Arab Spring: the End of Postcolonialism* (Zed Books 2012) At 170

²⁵⁰ Dabashi, Hamid *The Arab Spring: the End of Postcolonialism* (Zed Books 2012) At 11

²⁵¹ Dabashi, Hamid *The Arab Spring: the End of Postcolonialism* (Zed Books 2012) At 11

²⁵² Barnett, Michael and Raymond Duvall 'Power in International Politics' (2005) 59 *International Organization* 39 at 66

ORIENTALISM

The term Orientalism was originally applied to a field of study that flourished under colonialism, in which the West studied the East. It is characterized by the way in which it describes the Orient as 'other',²⁵³ exotic, inferior and different from the west. Criticism of this approach has uncovered the essential weakness of such scholarship and exposed its ideological bias. Professor Carolyn Fluehr-Lobban lists Egyptian sociologist Anouar Abdel-Malek and Palestinian historian Abdul Latif Al Tibawi, among others, as early influences on Edward Said's highly influential book *Orientalism*, which is considered the seminal critique of the phenomenon.²⁵⁴ Application of Said's understanding of Orientalism is essential to a postcolonial approach. He used the term to explain the ways in which colonizers have used knowledge in a discourse that saw them always in control. Thus his critique complements and informs postcolonial theory, enabling better understanding of the effects of colonialism by showing how a similar dynamic operates today. It helps to explain how the West (mainly Europe and the United States) continues to manipulate ideas and representations of the East to the advantage of Western interests by characterizing Eastern culture as 'other', alien and inferior. It also helps to explain some western perceptions of and response to IP, in particular, TRIPS implementation in Egypt.

Said's great achievement²⁵⁵ has been to expose the heavily politicized and one-sided nature of colonial discourse in order to encourage alternative discourses to develop and counter the hegemony of the colonizer nations. His analysis builds on that of French philosopher Roland Barthes'²⁵⁶ whose deconstruction of 'common sense,'²⁵⁷ aimed to identify the 'ideological abuse behind 'the decorative display of what goes without saying'.²⁵⁸ Barthes explained, in his book *Mythologies*, how widespread generalizations have the power to

²⁵³ for an explanation of the derivation and use of the terms Other and Othering see Ashcroft, Bill, Gareth Griffiths, Helen Tiffin *Postcolonial Studies: The Key Concepts* (Routledge 2013) 186-188

²⁵⁴ Fluehr-Lobban, Carolyn *Islamic Law and Society in the Sudan* (Routledge 1987) at 291

²⁵⁵ For examples of Said's most important work see Said, Edward W *Orientalism: Western Conceptions of the Orient* (Penguin 1978); Said, Edward *Culture and Imperialism* (Vintage Books 1994)

²⁵⁶ In Said's review of Barthes' work he said that Barthes was 'one of the few literary critics in any language of whom it can be said that he has never written a bad or uninteresting page' and that he (Said) had 'eagerly read much of his work'. Said, Edward W. 'Critical Essays by Roland Barthes Translated by Richard Howard...Mythologies by Roland Barthes Selected and Translated by Annette Lavers' (July 30 1972) *The New York Times Book Review* 5

²⁵⁷ Barthes, Roland, *Mythologies* Trans Annette Lavers (Paladin 1973) at 155

²⁵⁸ Barthes, Roland, *Mythologies* Trans Annette Lavers (Paladin 1973) at 11

create a falsified reality, leaving no room for counter argument by ‘transform[ing] the products of history into essential types.’²⁵⁹ In colonial rhetoric, the colonizers appeared to ‘know’ about the people they colonized. The dominance of the colonizers’ discourse left such very limited scope for other voices to be heard, that their views easily prevailed. Their ideas became so generalized and convincing, in a Barthe-ian form of ‘common sense,’ that even many colonial subjects believed the narrative created about and for them, including their own inferiority. Thus colonial law ‘made the whole of native society deviant, or always potentially deviant, never secure in any aspect away from supervision, direction and correction.’²⁶⁰ In this narrative the only route to development was to emulate the West.

Said particularly criticized the western tendency to justify their conclusions about the east using pseudo-scientific argument. He pointed out that,

Whenever in modern times there has been an acutely political tension felt between the Occident and its Orient (or between the West and its Islam), there has been a tendency to resort in the West not to direct violence but first to the cool, relatively detached instruments of scientific, quasi-objective representation.²⁶¹

Western theories about the east, therefore, appear plausible, although simplified and distorted, with their own internal consistency ‘despite or beyond any correspondence, or lack thereof, with a "real" orient.’²⁶² Orientalism’s epistemology is ‘essentialist, empiricist and historicist.’²⁶³ Thus the scientific basis of Orientalist assertions is generalized and unsound. Said’s analysis of this phenomenon of Orientalism provides a framework, here, for exposing and refuting such colonial myths.

THE LINK BETWEEN LAW, COLONIALISM AND ORIENTALISM

Law was used as such a myth by the colonial powers to legitimize their presence and their right to superior status in colonized land. Both domestic law and international law were tools used by the colonial powers to ensure an interpretation of rules in the interests of the occupier and the wider empire. The idea that colonial occupation was enshrined in law was

²⁵⁹ Barthes, Roland, *Mythologies* Trans Annette Lavers (Paladin 1973) at 155

²⁶⁰ Fitzpatrick, Peter *The Mythology of Modern Law* (Routledge 1992) at 111

²⁶¹ Said, Edward ‘Islam Through Western Eyes’ (April 26, 1980) *The Nation* 488 at 489

²⁶² Said, Edward *Orientalism: Western Conceptions of the Orient* (Penguin Books 1978) at 5

²⁶³ Turner, Brian S *Marx and the End of Orientalism* (George Allen and Unwin 1978) at 7

given force by relating notions of lawfulness, legitimacy and legality to acceptance of the colonial situation; their antithesis, unlawfulness, illegitimacy and illegality were reserved for the behavior of those who objected to the occupation. The use of law to ensure continued dominance after the formal end of the colonial period has continued²⁶⁴ and it is only recently that developing countries have been able to use law to attempt to gain the elusive equality with ex-colonial nations that independence promised. Formal equality masks inequality in resources and power. The extent to which ex-colonial, developing countries are truly equal in law even now is still unclear.

POSTCOLONIALISM, ORIENTALISM AND IP

A postcolonial approach and an understanding of Orientalist theory can help to understand the Egyptian approach to law-making in the IP field. Attempting to place today's IP law in historical context may, by revealing a pattern of response in this area of legislation, help to explain aspects of Egyptian IP law that are otherwise difficult to understand. It is hoped that it will also further understanding of the role IP law may have in Egypt's future development.

The protection of IP raises specific issues with modernization because IP deals with the regulation of innovation and creativity that is at the core of development and wealth creation. Because of the way that IP law has developed, far greater financial benefits accrue to the owners of IP rights while the costs are largely borne by the users. Intellectual property has been described as today's 'wealth of nations'²⁶⁵ but the balance of financial interest is currently heavily weighted in favour of developed countries.²⁶⁶ With the end of the colonial period, industrial countries that built their wealth on colonization have had to look to other sources of maintaining affluent societies. With comparative advantage in their knowledge base, a narrative has been created that aims to maximize ever-higher returns on inventiveness by increasing IP standards.²⁶⁷ Industrialized countries produce the majority of

²⁶⁴ See eg. Trubeck, David M and Mark Galanter 'Scholars In Self-Estrangement: Some Reflections on The Crisis in Law and Development Studies in the United States' (1974) 4 *Wisconsin Law Review* 1062 for a discussion of this.

²⁶⁵ Warshowsky, Fred *The Patent Wars* (John Wiley and Sons 1993) at 3

²⁶⁶ Any gains for developing countries will depend on a number of factors. For an analysis of these see Su, Evelyn 'The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries' (2000-2001) 23 *Houston Journal of International Law* 170

²⁶⁷ Su, Evelyn 'The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries' (2000-2001) 23 *Houston Journal of International Law* 170

innovative products, and IP law ensures that they benefit from them by giving creators a monopoly over their knowledge and the right to stop others using it.

Developing countries such as Egypt, on the other hand, prevented from copying, have to use their limited assets to purchase innovative goods, which include inventions in the fields of medicine, engineering, science and agriculture. They are also barred by IP law from acquiring the building blocks of knowledge since some IP rights stop the reverse-engineering of products to learn from and copy them. The knowledge may be inaccessible for a considerable period of time. Compared to Western industrialized countries, Egypt is still predominantly a user rather than a creator of IP protected products. According to Alan Story, chair of the Copy South research group, 'IMF statistics reveal that only two countries in the world, the US and the UK, are IP net exporters. Every other country is a net IP importer.'²⁶⁸ As a result profits flow out of Egypt to the developed, IP creating countries.

There is, therefore, both a desire for and a discomfort with modernization in Egypt. Fear of losing autonomy in the process of modernizing through agreeing to protect foreign interests excessively is reinforced by the very real experience of colonialism in the nineteenth and twentieth centuries, and thus loss of sovereignty is a valid concern. Tensions among Egyptian jurists and legislators can be identified in the current IP law, Law 82, 2002 itself, which is marked by enduring concerns about modernization, postcolonialism and Orientalism. The strain is evident where the enactment goes beyond what is absolutely required and where it is demonstrably in conflict with TRIPS.²⁶⁹

OPPOSING ORIENTALISM

In confronting orientalist myths Said is not in favour of adopting a similarly simplistic view of the west.²⁷⁰ Occidentalism is as dangerous as Orientalism. If postcolonial theory is taken to mean a rejection of all Western ideas, it can represent a threat to development and social justice. This danger has been identified by Amr Shalakany, who worries that uncritical

²⁶⁸ Story, Alan 'Balanced' Copyright: Not A Magic Solving Word (February 27, 2012) *Intellectual Property Watch* <<http://www.ip-watch.org/2012/02/27/'balanced'-copyright-not-a-magic-solving-word/>> accessed 2014

²⁶⁹ This is discussed further in Chapter 6

²⁷⁰ For a useful discussion of terminology used to define the relationships among countries see McEwan (2009) above at 11-14. There is no perfect solution to this linguistic conundrum and since all terms used create, 'a binary understanding of the world that is both hierarchical and over simplified' (McEwan at 15).

acceptance of postcolonial theory may lead to unpredictable negative consequences.²⁷¹ Such a response embraces the 'othering' that Orientalism describes and may be used to bolster entrenched attitudes that need to be confronted. An Occidentalist approach can be criticized as just as overly simplistic as an orientalist approach. In undertaking a postcolonial approach to analysis it is, therefore, important to be conscious of the dangers.

Both Orientalism and Occidentalism disguise complexity in the Egyptian context and fail to recognize Egyptian agency. It is not true that Egyptians were completely powerless and merely passive in the face of British and French imperialism. There is frequently, a great deal of complexity in the colonial relationship. Elliott Colla suggests that the real value of postcolonial criticism may, indeed be to, 'rehabilitate the ambiguities posed by the very term "colonial."' ²⁷² Trying to understand the intricate web of interactions is preferable to merely trying to explain it away to suit a single theory. It is important to recognize that throughout the nineteenth and twentieth centuries Egyptians skillfully manipulated their occupiers, playing the colonial powers off against each other. ²⁷³ The French occupation has, therefore, been portrayed as a 'slightly more attractive counterbalance, first to British occupation, [and later] to American neo-imperialism.'²⁷⁴ This was particularly true during the British occupation of Egypt, but has continued ever-afterwards. This does not mean that French colonialism was acceptable to Egyptians but, rather, illustrates the problem of applying a simple binary model to postcolonial analysis.²⁷⁵

²⁷¹ Shalakany, Amr 'On a Certain Queer Discomfort with Orientalism' (2007) *101 Proceedings of the American Society of International Law*

²⁷² Colla, Elliott "'Non, non! Si, si": Commemorating the French Occupation of Egypt (1798-1801)' (2003) 118 *Modern Language Notes* French Issue 1043 at 1051

²⁷³ This is discussed further in Chapter 3

²⁷⁴ Colla, Elliott "'Non, non! Si, si": Commemorating the French Occupation of Egypt (1798-1801)' (2003) 118 *Modern Language Notes* French Issue 1043 at 1047

²⁷⁵ Anghie, Anthony *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) at 316

POSITIVISM

Positivist, natural law and legal realist theories have been drawn upon to justify the dominance of the West. As Anghie puts it, 'each of them reproduces the "dynamic of difference", the "civilising mission."' ²⁷⁶

Legal positivism is distinguished by its emphasis on the way in which legal rules are differentiated from other norms. Legitimacy is, therefore, dependent on a system of rule recognition able to identify legal rules. ²⁷⁷ According to this approach, the content of rules is not determinative of the fact of their legality as long as they have passed through the requisite procedure. It is, therefore, important to distinguish law 'as it is and law as it ought to be.' ²⁷⁸ Law and morals are entirely separate. 'Rules that confer rights, though distinct from commands, need not be moral rules or coincide with them.' ²⁷⁹ An extreme positivist position would accept that all validly executed rules must be applied regardless of how absurd or morally abhorrent the outcome might be. ²⁸⁰ Gustav Radbruch reminds us that in Nazi Germany 'the idea that "a law is a law" [...] knew no restriction whatever.' ²⁸¹ More moderate positivism is capable of denying truly immoral rules the force of law through the intervention of morality. According to Hart, appeals to morality are capable of identifying laws that 'ought not to be law,' ²⁸² but the role of morality remains separate from that of law. Hart's response to the evil done in the name of positivism is to insist that nevertheless, 'law is not morality.' At the heart of Hart's theory is the belief that law is man-made. The state is the source of authority and the ultimate judge of what is legal, thus, 'positivist jurisprudence is premised on the notion of the primacy of the state.' ²⁸³ In this way, the

²⁷⁶ Anghie, Anthony *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) at 316

²⁷⁷ Hart, H. L. A *The Concept of Law* 2nd Ed (Oxford University Press 1997) at 100-110

²⁷⁸ Hart, H. L. A 'The Separation of Law and Morals' (1958) 71 *Harvard International Law Review* 593 at 599

²⁷⁹ Hart, H. L. A 'The Separation of Law and Morals' (1958) 71 *Harvard International Law Review* 593 at 606

²⁸⁰ See eg Radbruch, Gustav 'Statutory Lawlessness and Suprastatutory Law' (1946) Bonnie Litschewski Paulson and Stanley L. Paulson Trans (2006) 26 *Oxford Journal of Legal Studies* 1

²⁸¹ Radbruch, Gustav 'Statutory Lawlessness and Supra-Statutory Law (1946)' Trans. Bonnie Litschewski Paulson and Stanley L. Paulson (2006) 26 *Oxford Journal of Legal Studies* 1

²⁸² Hart, H. L. A 'The Separation of Law and Morals' (1958) 71 *Harvard International Law Review* 593 Hartat 626

²⁸³ Anghie, Anthony 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1

specific rules that supported the supposed legitimacy of British colonialism were given force by the idea of legal positivism and for many years the appeals to morality fell on deaf ears.

In Egypt, the sphere of Islamic law was effectively limited, in the nineteenth century, only to the area designated as private, that of the family,²⁸⁴ which would remain the concern of religious authority. The wider range of activities was governed by the secular principles of the civil legal system.²⁸⁵ This disjunction that occurred in Egyptian law in the nineteenth century was undoubtedly unsettling. Moosa argues that it fundamentally affected the way in which the law operated. He states that the ‘continuous legal transplants from English and French laws as well as the codification of Muslim laws [...] ensured the gradual move of Muslim law towards legal positivism, thus disconnecting it from its ethical and moral moorings.’²⁸⁶ However, Talal Asad suggests that the relationship between law and morality is more complex and ‘should not be seen as a matter of either fusion or separation.’²⁸⁷ He considers that ‘the changes that have taken place should not be taken—in the way that many Islamists and orientalist have taken them—to imply that the Islamic tradition has therefore been broken.’²⁸⁸ On the contrary, in his opinion, the relationship between law, religion and morality is always in a state of flux. However, in the nineteenth century, as a result of law being a core area of contention between the colonisers and the colonised, ‘modernized Muslim elites were caught on the horns of a dilemma’.²⁸⁹ They had to decide whether to engage with the system in order to attempt to shape it, or to completely disengage from it. This dilemma continues to play a part in postcolonial legal discourse today.

As Strawson has pointed out, the British appointed law teacher, Goadby, contributed to the British occupation by embedding a positivist approach to the law among law students

²⁸⁴ Moosa, Ebrahim ‘Colonialism and Islamic Law’ in *Islam and Modernity: Key Issues and Debates* (Edinburgh University Press 2010) at 170; Also see further discussion in Chapter 4

²⁸⁵ See Chapter 4 for further discussion of this point

²⁸⁶ Moosa, Ebrahim ‘Colonialism and Islamic Law’ in *Islam and Modernity: Key Issues and Debates* (Edinburgh University Press 2010) at 168

²⁸⁷ Asad, Talal *Thinking About Law, Morality, and Religion in the Story of Egyptian Modernization* (2006) *Journal of the Interdisciplinary Study of Monotheistic Religions*, Special Issue 13 at 23

²⁸⁸ Asad, Talal *Thinking About Law, Morality, and Religion in the Story of Egyptian Modernization* (2006) *Journal of the Interdisciplinary Study of Monotheistic Religions*, Special Issue 13 at 23

²⁸⁹ Moosa, Ebrahim ‘Colonialism and Islamic Law’ in *Islam and Modernity: Key Issues and Debates* (Edinburgh University Press 2010) at 171

through his teaching and his law textbook.²⁹⁰ The effect of his approach was to reinforce the message, as Strawson says, that colonial subjects only had rights from within the system they had created. They had no choice, according to this approach other than appealing to the colonial ruler according to colonial law, which was *the*²⁹¹ law. Entrenching a positivist philosophy within Goadby's law course was intentionally disempowering. It was 'a neat way of secreting the message that claims to rights to independence or to self-determination are [...] not rights at all.'²⁹² Following the positivist logic, it would make it extremely difficult or impossible for a colonized subject to break free from the colonizer, leaving peaceful persuasion according to the colonial rules the only possible method of dissent, however ineffectual.

The language used to create the impression of colonial power and legitimacy has always been important. Professor Anthony Anghie has explained that in order to bolster their theoretical basis for subjugating other peoples, 'positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission, the discharge of the white man's burden.'²⁹³ This link between positivism and colonialism exemplifies Edward Said's thesis in 'Orientalism,' which shows how colonialists use language calculated to disempower the 'other'.

At the global level, a positivist approach has ensured that only states are subjects of international law. This approach was, unsurprisingly, a feature of the colonial period because it favoured the colonizers, which as subjects of international law had legal personality while occupied territories were denied it. A positivist approach enabled the colonial power to maintain the appearance of legitimacy while entrenching rules that would favour their own interests. In this way the British were able to maintain an apparently legally consistent system for determining which were and were not valid legal rules in Egypt, centring legal authority in London.

²⁹⁰ Goadby, Frederic *Introduction to the Study of Law: a Handbook for the Use of Egyptian Law Students* (Butterworth 1910) University of Toronto Library <<https://archive.org/stream/introductiontost00goaduoft#page/ii/mode/2up>> accessed 2014

²⁹¹ Emphasis added

²⁹² Strawson, John 'Orientalism and Legal Education in the Middle East: reading Frederic Goadby's Introduction to the Study of Law' (2001) 21 *Legal Studies* 663 at 666

²⁹³ Anghie, Anthony 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1 at 7

In the twentieth century, it was thought that the process of decolonization and admission into the club of nations would provide justice for emerging states.²⁹⁴ However, as Anghie explains, colonialism was central to formation of the international legal system,²⁹⁵ and the expectation that international law would protect emerging nations has been demonstrably misplaced. In his words, 'Imperialism is experienced in the Third World, [...] through [...] international economic regimes, supported and promoted by international law and institutions that systematically disempower and subordinate the people of the Third World.'²⁹⁶ This process continued following decolonization, with newly liberated states adhering to existing international treaties, many of which had been initially adopted during the colonial era.²⁹⁷

When the Berne Convention was established, for example, in 1886, the original parties of Belgium France, Germany, Italy, Spain, Switzerland and the UK ensured that its copyright standards would be effective across their occupied territories in order to protect European interests. Article 19 of the original Convention text,²⁹⁸ and reiterated in 1908²⁹⁹ stated that

Countries acceding to the present Convention shall also have the right to accede thereto at any time for their colonies or foreign possessions.

After decolonization the Convention was revised in 1971 to ensure there would be no break in the 'continuity of copyright protection in decolonized territories.'³⁰⁰

According to Alberto Cerda Silva, research associate at Knowledge Ecology International³⁰¹

²⁹⁴ Anghie, Anthony *The Evolution of International Law: Colonial and Postcolonial Realities* (2006) 27 *Arab Law Quarterly* 739 at 741

²⁹⁵ Anghie, Anthony *The Evolution of International Law: Colonial and Postcolonial Realities* (2006) 27 *Arab Law Quarterly* 739 at 739

²⁹⁶ Anghie, Anthony *The Evolution of International Law: Colonial and Postcolonial Realities* (2006) 27 *Arab Law Quarterly* 739 at 750

²⁹⁷ Deere, Carolyn *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) at 40-41

²⁹⁸ Article 19 Berne Convention for the Creation of an International Union for the Protection of Literary and Artistic Works (September 9, 1886) Primary Sources on Copyright (1450-1900) Arts and Humanities Research Council (AHRC) <http://copy.law.cam.ac.uk/cam/pdf/uk_1886c_1.pdf> accessed 2014

²⁹⁹ Article 26 Berne Convention for the Creation of an International Union for the Protection of Literary and Artistic Works (November 13, 1908) Library of Congress, Copyright Office <https://archive.org/details/internationalco00offigoog>

³⁰⁰ Silva, Alberto Cerda 'Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright' (2012) *PIJIP Research Paper no. 2012-08* American University Washington College of Law, Washington, D.C. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1032&context=research>> accessed 2014 at 4

At that time, and still today, developing countries need to disseminate knowledge on a wide basis. The artificial scarcity created by copyright law prevents the achievement of this goal. The high prices of works published overseas hamper the implementation of public policies for the extensive use of copyrighted works to promote educational, cultural, and technical development.

NATURAL LAW

Natural law theory differs from positivism in that it emphasizes the moral content of the rules. However, identifying the source of such morality is a problem with this method of deciding what is law and what is not. Morality is not uniform, and quite different ideas of what is ethically correct co-exist. The morality of the colonizers 'naturally' outweighed that of the colonized.

Natural law theory has been used to justify colonialism. Professor Barbara Arneil, for example, explains how seventeenth century philosopher John Locke's theory, in which he explained the basis for his justification of property ownership, was used to support British imperialism.

According to Locke

Where something is 'removed from the common state [of] nature' in the sense of using labour to create something out of nature, the effect is to give the labourer a property right in the work and to 'exclude[...] the common right of other men [...] at least where there is enough, and as good, left in common for others.'³⁰²

This theory, she claims, was consciously intended to provide ethical backing for the dispossession of the indigenous population of America, 'undermin[ing] the Indian's claims to land by creating a new definition of property.'³⁰³

Locke stated that 'the fruit, or venison, which nourishes the wild Indian, who knows no enclosure, [...] must be his [...] i.e. a part of him, that another can no longer have any right to

³⁰¹ Knowledge Ecology International (KEI) <<http://keionline.org>> accessed 2014

³⁰² Locke, John 'Second Treatise of Government Chapter V "Of Property"' *Two Treatises of Government* Mark Goldie Ed. (J.M. Dent 1993) at 127-140 section 26

³⁰³ Arneil, Barbara 'John Locke, Natural Law and Colonialism' (1992) 13 *History of Political Thought* 587 at 603

it, before it can do him any good for the support of his life.’³⁰⁴ In other words the Indian would have to have exerted some effort to secure rights over the food. Applying this to land, under Locke’s theory, which insisted on the application of labour to nature as a precondition for the ownership of land, the Indians would have had to enclose the land before any right of ownership could apply. This meant that mere occupancy would be insufficient for a claim of ownership. By insisting that property ownership was dependent on land cultivation, the ‘First Nations’ peoples of the Americas, who did not practice agriculture in a way that could be recognised by the colonisers, would be excluded from land ownership. By analogy, Locke’s theory of property has been extended to justify the protection of IP³⁰⁵ and has had similarly disenfranchising effects. In the context of IP, the creative practices of many in developing countries that do not conform to the western model fall foul of western IP norms and are excluded from IP protection.

THE CASE OF TRADITIONAL KNOWLEDGE

Daniel Gervais points out that non-industrialized models of knowledge generation and preservation are not suited to IP rights as ‘there are rarely well-identified authors or inventors of creations, inventions and knowledge passed on and improved from one generation to the next.’ In addition, the vast amount of understanding, about plants, trees and the environment is often passed on orally from person to person, and consequently is not valued in the IP system.

Such diverse areas of knowledge are often lumped together as ‘Traditional Knowledge’ (TK), a term that defies precise definition. The definition put forward by WIPO is exceptionally broad, covering

Knowledge, know how, skills, innovations or practices; that are passed between generations; in a traditional context; and that form part of the traditional lifestyle of indigenous and local communities who act as their guardian or custodian.

It includes ‘agricultural, environmental or medicinal knowledge, or knowledge associated with genetic resources,’ distinguishing but also including Traditional Cultural Expressions,

³⁰⁴ Locke, John ‘Second Treatise of Government Chapter V “Of Property”’ *Two Treatises of Government* Mark Goldie Ed. (J.M. Dent 1993) at 127-140 section 27

³⁰⁵ See Attass, Daniel ‘Lockean Justifications of Intellectual Property’ in Axel Gosseries et al Eds *Intellectual Property and Theories of Justice* (Palgrave 2008) at 29-56

under the general description of “expressions of folklore.” Although it is outside the scope of this work to discuss in detail all the problems inherent in attempting to protect TK,³⁰⁶ it is relevant to note that in defining such knowledge as ‘traditional’, it is thereby explicitly ‘othered’ and set against Modern Knowledge whereby it is viewed either as implicitly inferior or as the superior product of ‘noble savages’.³⁰⁷ In either case, it is not valued in the IP regime until it has been co-opted and made to conform to the Western formulation of IP protectable material.³⁰⁸

The desire to develop a means for communities to profit from their knowledge, using IP as a mechanism, has arisen because ‘Western intellectual property systems have regarded traditional knowledge as information freely available for use by anybody.’³⁰⁹ The consequence has been that ‘traditional knowledge has often been published or exploited without any recognition, moral or economic, to those who originated or preserved the relevant knowledge.’ IP protection has been acquired over knowledge falling into the TK category without prior informed consent and its appropriators have gone on to benefit economically without paying back the originator community. Such behaviour unveils a lack of fairness in the IP system, which benefits only the IP owner and not the body of people past and present that together created the work. It has not been common to find IP owners compensating the community whence the information crucial to their protected work came.

In the context of genetic resources, many developing countries signed up to the United Nations Convention on Biological Diversity (CBD) agreed on June 5, 1992. Egypt signed on June 9, 1992 and ratified the treaty in June 1994, a year before joining the WTO. An incentive for Egypt along with other developing countries to join the CBD was the emphasis, in its stated objectives, on ‘fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by

³⁰⁶ But see Gervais, Daniel ‘Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach’ (2005) *Michigan State Law Review* 1

³⁰⁷ a term made popular by Charles Dickens in his satirical essay ‘The Noble Savage’ *Household Words* (June 11, 1853)

³⁰⁸ See Chapter 3 for the approach taken to Egyptian knowledge in the French occupation of Egypt

³⁰⁹ Correa, Carlos M ‘Access to Knowledge: The Case of Indigenous and Traditional Knowledge’ in Gaëlle Krikorian and Amy Kapczynski *Access to Knowledge: in the Age of Intellectual Property* (Zone Books 2011) at 241

appropriate transfer of relevant technologies.’³¹⁰ Additionally, the assertion of sovereign rights over resources was welcomed. Article 3 states that

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies.³¹¹

On the other hand, developing country signatories may not, at the time, have fully appreciated the expressed responsibility to ‘tak[e] into account all rights over those resources and to technologies,’ particularly because the agreement was concluded a year earlier than TRIPS.

Controversially, Article 8(j) of the CBD, merely encourages states to legislate domestically to preserve TK but imposes no international requirement to do so. Thus, mechanisms to ensure the ‘involvement of the holders of such knowledge, innovations and practices and encourage[ment of] the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices,’³¹² are a matter for national governments only. At international level there is no agreement over how TK should be protected.

Correa notes some of the difficulties of creating a new form of property right to address the protection of TK. However, he also notes that the attempt to do so is part of a ‘quest for the realization [...] of the fundamental principles of justice and economic development.’³¹³ He recognizes that ‘granting rights to holders of traditional knowledge may, in some circumstances, be required purely for equity reasons or to improve their living conditions.’³¹⁴ Thus, the TK issue is, to an extent, a vehicle for trying to offset the unevenness in costs and benefits between developed and developing countries in the TRIPS agreement. TK proponents are therefore pitted against IP proponents in industrialized countries. For this reason, commentators such as Gervais have recommended that TK

³¹⁰ Article 1 CBD

³¹¹ Article 3 CBD

³¹² Article 8(j) CBD

³¹³ Correa, Carlos M *Access to Knowledge: the Case of Indigenous and Traditional Knowledge* Gaëlle Krikorian and Amy Kapczynski *Access to Knowledge: in the Age of Intellectual Property* (Zone Books 201) at 239

³¹⁴ Correa, Carlos M *Access to Knowledge: the Case of Indigenous and Traditional Knowledge* Gaëlle Krikorian and Amy Kapczynski *Access to Knowledge: in the Age of Intellectual Property* (Zone Books 201) at 239

proponents take a 'politically acceptable middle-ground.'³¹⁵ His suggestion that they seek a declaration on Knowledge and Trade was realized in 2007 with the Bandung Declaration On the Protection of Traditional Cultural Expressions, Traditional Knowledge, and Genetic Resources. However, the status of the declaration is merely persuasive and its language, while stressing 'urgent need' and 'resolve',³¹⁶ looks towards an uncertain future rather than present commitment.

Gervais also said that he expected concerned countries to 'experiment [with] possible legal mechanisms'³¹⁷ to protect TK. Such measures can be described as TRIPS-Plus, since there is no provision for the protection of TK in TRIP. Egypt has implemented provisions intended to protect TK both in Law 82/2002 and in Law 117/1983 as Amended by Law 3/2010 Promulgating the Antiquities' Protection Law (Egypt).³¹⁸ This use of TRIPS plus measures is an example of Egypt taking a proactive approach to tackling imbalance in international IP law.³¹⁹

INTELLECTUAL PROPERTY AND PIRACY

Drahos explains that 'because piracy is associated in the popular mind with a history of desperate outlawry and savagery, it has proved to be a particularly effective rhetorical tool.'³²⁰ In a reversal of the usual depiction of pirates as being unremittingly bad he explains that pirates who took to the high seas did so partly in 'response to a system of official power that was based on systematic cruelty and gross inequality.'³²¹ He even suggests that among pirates informal codes developed that established 'fair rules that recognized the contribution of all.'³²² By this analogy, it would be possible to see modern day piracy as a

³¹⁵ Gervais, Daniel 'Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach' (2005) *Michigan State Law Review* at 164

³¹⁶ Preamble to the Bandung Declaration On the Protection of Traditional Cultural Expressions, Traditional Knowledge, and Genetic Resources, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Eleventh Session Geneva, July 3 to 12, 2007 WIPO/GRTKF/IC/11/12 (June 28, 2007) <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_12.pdf> accessed 2014

³¹⁷ Gervais, Daniel 'Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach' (2005) *Michigan State Law Review* at 166

³¹⁸ Law 117/1983 as Amended by Law 3/2010 Promulgating the Antiquities' Protection Law (Egypt) (Published in the Official Gazette on February 14, 2010)

³¹⁹ This will be discussed in more detail in Chapter 5

³²⁰ Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) at 23

³²¹ Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) at 24

³²² Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) at 24

form of anti-establishment heroism seeking a more equitable sharing of wealth. However, this is not the way in which the term is habitually used.

Western, more developed countries have consistently driven the legislative agenda in the context of international IP law so the rhetoric of the IP debate is frequently expressed in their terms. They have adopted the use of the term pirate to describe the unauthorised use of IP. However, the term pirate, used in the context of intellectual property, is an oversimplification of the matter they are trying to describe in an attempt to avoid addressing the complex underlying issues.³²³

Orientalist attitudes towards non-western jurisdictions underly aspects of the IP debate.³²⁴ This rhetoric, and its underlying assumptions need to be challenged because it helps to oversimplify the debate and obscure the real issues.³²⁵ Such rhetoric has styled Egypt and other developing countries as pirates, depriving the West from its riches. However, this moral outrage, at the so-called piratical practices of developing countries, is hypocritical.³²⁶ Developed countries have only relatively recently adopted foreigner-friendly IP legislation.³²⁷ Insufficient allowances have been made for developing countries during the process of harmonizing IP internationally.³²⁸ There may, ultimately, be mutual benefits for both developed and developing countries from increased standards of IP protection but it is necessary to find the right balance, implement necessary adjustments at a manageable pace and resist any manifestations of postcolonialism.

³²³ For a detailed discussion of the complexity behind the use of the term pirate see Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) at 19-36

³²⁴ Jones, Bronwen 'Postcolonialism, Orientalism and IP Law in Egypt' (2012) *The Journal of Comparative Law* 25

³²⁵ The creation of such Orientalist myths about IP in Egypt is discussed further in Chapter 6

³²⁶ See for example Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) especially at 29-38; see also Ituku, Elangi Botoy 'From the Paris Convention to the TRIPS Agreement: A One-Hundred-and-Twelve-Year Transitional Period for the Industrialized Countries' (2004) 7 *The Journal of World Intellectual Property* 115 among others

³²⁷ May, Christopher 'Why IPRs are a Global Political Issue (2003) 25 *European Intellectual Property Review* at 6-8; Matthews, Duncan *Globalising Intellectual Property Rights: the TRIPS Agreement* (Routledge 2002) at 11

³²⁸ Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002); Ituku, Elangi Botoy 'From the Paris Convention to the TRIPS Agreement: A One-Hundred-and-Twelve-Year Transitional Period for the Industrialized Countries' (2004) 7 *The Journal of World Intellectual Property* 115

LEGAL REALISM

Legal realism as it developed in the United States was an approach to understanding how power is embedded in the law, by focusing on the outcome of court decisions.³²⁹ Twining has cautioned that it is necessary to understand US realism in its historical context and also to understand that it was not a unified theory but was, rather, itself indeterminate in that it was represented through a variety of, sometimes conflicting, perspectives.³³⁰ The Scandinavian school of legal realism is chiefly distinguishable by its focus on legislative process and law-making and has been seen as a form of positivism because it insisted on the separation of law and morality. However, it is similarly important not to suggest that they were an entirely homogeneous group. 'The scholars that were later gathered under the label Scandinavian Legal Realists did not represent a static theoretical position whose ideas remained unchanged from the 1910s to the 1950s.'³³¹ It has been argued that the American and Scandinavian realists were closer in approach than was previously thought.³³²

AMERICAN LEGAL REALISM

The US realists have traditionally looked most closely at how individual judges apply the law in actual cases. The approach is, thus, more interested in practice than theory and rejects a formalist³³³ approach to rules, exemplified by positivism, in favour of a more 'dynamic jurisprudence. It does not accept that 'law, as expressed in statutes and precedents, determine[s] the outcomes of particular cases.'³³⁴ In contrast to a positivist approach, which portrays rules as being capable of objective interpretation, realists point to their indeterminacy. Legal rules rely on language, which necessarily contains ambiguity, and judges, whose decisions are unpredictable both as a result of the inherent ambiguity in the rules and the interference of their own personality. Legal realism developed in response to the perceived disempowering effect of positivism, whereby legislation can be viewed as representing the output of a process in which the powerful create rules that reinforce their

³²⁹ Alexander, Gregory S 'Comparing the Two Legal Realisms—American and Scandinavian' (2002) 455 *Cornell Law Faculty Publications Paper 131* at 132 <<http://scholarship.law.cornell.edu/facpub/455>> accessed 2014

³³⁰ Twining, William *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson 1985) at 377

³³¹ Strang, Johan 'Two Generations of Scandinavian Realists' (2009) 32 *Retfærd Årgang* 62 at 63

³³² Spaak, Torben, 'Naturalism in Scandinavian and American Realism: Similarities and Differences' (March 5, 2009). De Lege, Uppsala-Minnesota Colloquium: Law, Culture And Values, Mattias Dahlberg ed. at 33-83 Uppsala: lustus förlag, 2009 <<http://ssrn.com/abstract=1354154>> accessed 2014

³³³ Twining, William *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson 1985) at 8

³³⁴ Thomas J. Miles* and Cass R. Sunstein 'The New Legal Realism' (2008) 75 *The University of Chicago Law Review* at 832

power at the expense of the weak. It was motivated by a desire to bring 'a greater sense of urgency to bear on the problems of adapting the legal system to the needs of the twentieth century.'³³⁵ Thus, the 'rejection of legal rules' by realists was 'an attack on the idea of political obligation and the duty to obey the law.'³³⁶ Instead, realists insist that, to be properly understood, the law 'should be set clearly and consistently in its social and economic context.'³³⁷

The focus on the social role of the law is attractive, but Twining has criticized the naivety of the way in which its proponents have sometimes been 'prepared to rely on common sense, experience and intuition as sources of information and insight'.³³⁸ In rejecting a more theoretical approach there is a danger that in appealing to common sense its proponents might fall into the trap of mythifying in the Barthe-ian sense. Barthes explained that myths were 'based on use';³³⁹ similarly, realists, by focusing their attention exclusively on the application of the law rather than its theoretical base, may fall into the error of failing to recognise complexity.³⁴⁰

Nevertheless, today's American legal realists have asked some interesting questions that have produced thought-provoking results. By conducting extensive empirical studies, they have found that characteristics such as racial background, gender, and political affiliation sometimes have effects on judicial judgments. In particular, by examining the decisions of Democratic and Republican judges, they have uncovered strong evidence that the judges' political persuasion influences their decision-making.³⁴¹ Professors Miles and Sunstein have identified IP as an area in which more attention should be paid to the decisions of judges.³⁴²

SCANDINAVIAN LEGAL REALISM

According to Professor Jes Bjarup the movement known as Scandinavian realism, founded at the turn of the nineteenth and twentieth centuries by Axel Hageström, was based on a

³³⁵ Twining, William *Karl Llewellyn and the Realist Movement* (Weidenfield and Nicolson 1985) at 8

³³⁶ Green, Michael 'Legal Realism as Theory of Law' (2005) 46 *William and Mary Law Review* 1915 at

³³⁷ Twining, William *Karl Llewellyn and the Realist Movement* (Weidenfield and Nicolson 1985) at 377

³³⁸ Twining, William *Karl Llewellyn and the Realist Movement* (Weidenfield and Nicolson 1985) at 381

³³⁹ Fitzpatrick, Peter *The Mythology of Modern Law* (Routledge 1992) at 20

³⁴⁰ Twining, William *Karl Llewellyn and the Realist Movement* (Weidenfield and Nicolson 1985) at 384

³⁴¹ Miles Thomas J. and Cass R. Sunstein 'The New Legal Realism' (2008) 75 *The University of Chicago Law Review* at 840

³⁴² Miles Thomas J. and Cass R. Sunstein 'The New Legal Realism' (2008) 75 *The University of Chicago Law Review* at 842

desire to avoid the ‘distorting influences of metaphysics’ on legal theory.³⁴³ Instead, the Scandinavian realists believed that legal study should focus on social and factual observation. Swedish jurist Vilhelm Lundstedt explained that law has no existence outside its social function, which is encapsulated by the rules governing society. The rules are man made and are the necessary starting point for concepts of natural justice and equity. Property rights, for example are, in his view, not real. Rather, they are brought into being by the power of imagination. Without them, there would be only anarchy and individualism³⁴⁴ so what is important is that they should be socially useful.

This led to a focus, unlike the American realists, on the making of legal rules; something often marginalized as more properly the subject of political and not legal study.³⁴⁵ However, placing the creation of the law at the centre of legal theory means that it is possible to place more emphasis on interpreting the law ‘in the light of the specific social function or use to which it is directed.’³⁴⁶ It also enables a focus on the relationship between ‘interpretive and legislative activities.’³⁴⁷ Professor TT Arvind points out that legislation affects the development of a legal system by:

Altering the manner in which [the law] is interpreted or implemented or by freezing the development of the law by closing off certain paths which its development might otherwise have taken.³⁴⁸

This raises the question, in analyzing a specific law, of exactly how far legislation has determined the direction of travel. To do so, it is necessary, as Arvind argues, ‘to understand the phenomenon of legislation in the real world.’³⁴⁹ In the context of the TRIPS agreement, for example, domestic legislators have discretion regarding its implementation but it is

³⁴³ Bjarup, Jes ‘The Philosophy of Scandinavian Legal Realism’ (2005) 18 *Ratio Juris* 1 at 1

³⁴⁴ Lundstedt, Vilhelm ‘The Relation Between Law and Equity’ (1950-1951) 25 *Tulane Law Review* 68

³⁴⁵ Arvind, TT ‘Vilhelm Lundstedt and the Social Function of Legislation’ (2013) 1 *Theory and Practice of Legislation* 33 at 33

³⁴⁶ Arvind, TT ‘Vilhelm Lundstedt and the Social Function of Legislation’ (2013) 1 *Theory and Practice of Legislation* 33 at 34

³⁴⁷ Arvind, TT ‘Vilhelm Lundstedt and the Social Function of Legislation’ (2013) 1 *Theory and Practice of Legislation* 33 at 34

³⁴⁸ Arvind, TT ‘Vilhelm Lundstedt and the Social Function of Legislation’ (2013) 1 *Theory and Practice of Legislation* 33 at 37

³⁴⁹ Arvind, TT ‘Vilhelm Lundstedt and the Social Function of Legislation’ (2013) 1 *Theory and Practice of Legislation* 33 at 38

shaped by the particular legal system as well as the time and place in which it is interpreted both by the legislature and by the courts.

In the context of international law, Professor Stewart Macaulay rightly insists that 'we cannot limit ourselves to governments as actors and our ideas of what is legal action must expand.'³⁵⁰ Thus, legal realism in the context of international law entails including in the analysis, all the actors participating in making the law, the power relationships among the parties, and the way the law is interpreted.

DOCTRINAL BLACK LETTER METHOD: TEXTUAL ANALYSIS

Textual analysis, as a methodology for addressing questions of law, is well-known in legal research. Known as a black letter, or doctrinal approach, it involves close-reading of legal texts. 'Understanding legislation, its making, and its impact requires a level of descriptive analysis and research.'³⁵¹ Relevant texts have, therefore, been identified and scrutinized as to their consistency, clarity of language, and areas of indeterminacy where vagueness or ambiguity may lead to different interpretations. These texts include the applicable international treaties as well as Egyptian domestic legislation and cases that are relevant to the regulation of intellectual property. As Egypt is a civil law country, the codes are an important source of law, although the primary source of law is Islamic law (*Sharia*).³⁵²

While it is argued that this type of analysis is an appropriate tool for examining the implications and possible interpretations of international and domestic legal texts in order to gain insights and develop a normative position, it must be acknowledged that the approach has attracted criticism. Professor Tony Becher, described as 'a founding father of higher education research in Britain,'³⁵³ has described the difficulties many social scientists

³⁵⁰ Macaulay, Stewart 'The New versus the Old Legal Realism: "Things Ain't What They Used to Be"' (2005) *Wisconsin Law Review* 365 at 401 <<http://ssrn.com/abstract=896757>> accessed 2014

³⁵¹ Arvind, TT 'Vilhelm Lundstedt and the Social Function of Legislation' (2013) 1 *Theory and Practice of Legislation* 33 at 35

³⁵² See eg. El Gawhary, Karim and Ahmad Sayf El Islam 'Sharia or Civil Code? Egypt's Parallel Legal Systems: An Interview with Ahmad Sayf El Islam' (1995) *Middle East Report number 197 Vulnerabilities in the Gulf* 25; Edge, Ian 'Comparative Commercial Law of Egypt and the Gulf' (1985-1986) 34 *Cleveland State Law Review* 129; Roesler, Shannon 'Modern Legal Reform in Egypt: Shifting Claims to Authority' (2006) 14 *Cardozo Journal of International and Comparative Law* 393

³⁵³ Reisz, Matthew 'Obituary Roy Anthony Becher 1930-2009' (2 April 2009) *Times Higher Education* <http://www.timeshighereducation.co.uk/406027.article> accessed 2014

have had in appreciating the methodology of legal research.³⁵⁴ He noted that a major difference between disciplines was the extent to which they were data-based rather than argument-based and that accordingly they are perceived as objective or subjective. This reflects a model developed by psychologist Dr Anthony Biglan that divides disciplines into soft and hard, and applied and pure. Law falls into the soft and applied category.³⁵⁵ Hard subjects are those that are easily susceptible to empirical study, involving experimentation and observation, while 'softer' subjects tend to be more theoretical. This difference in approach among subject areas can lead to what Dr Paul Chynoweth has called a 'communication gap' between disciplines.³⁵⁶

Becher documented attitudes from social scientists towards legal research ranging from incomprehension to distrust and downright animosity to their fellow scholars' output.³⁵⁷ In response, Chynoweth proposes, in order to address the evident gulf in understanding, that, 'In the context of legal scholarship this means that some explanation should always be provided about the nature and purpose of doctrinal analysis if this is being employed in a particular research publication'. Some explanation of the approach is, therefore, required.

NATURE OF DOCTRINAL ANALYSIS

As a basis for analyzing text the starting place is to assume that the text is a rational instrument intended to convey meaning. Thus, in an attempt to interpret that meaning it is logical to start by taking the text at face value. Without evidence to the contrary, the meaning or meanings that are apparent from analyzing the grammar and structure of the text should be taken as having been intended. Further, if claims are made by the author(s) stating that it has been written with a specific purpose it seems reasonable that the resulting text should be consistent with the stated aims. If on further analysis the text

³⁵⁴ Becher, Tony 'Towards a Definition of Disciplinary Cultures' (1981) 6 *Studies in Higher Education* 109 cited in Chynoweth, Paul 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) at 36

³⁵⁵ Biglan, Anthony "The characteristics of subject matters in different academic areas" (1973) 57 *Journal of Applied Psychology* 3 195 cited in Chynoweth Paul 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) at 35

³⁵⁶ Chynoweth, Paul 'Legal Scholarship in the Built Environment: Epistemological Considerations and Cultural Changes' (7-8 Sept 2006) *Proceedings of the Annual Research Conference of the Royal Institution of Chartered Surveyors*; also in Chynoweth, Paul 'Legal Research' in Andrew Knight and Les Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) at 38

³⁵⁷ Becher, Tony 'Towards a Definition of Disciplinary Cultures' (1981) 6 *Studies in Higher Education* 109 cited in Chynoweth, Paul 'Legal Research' in Andrew Knight and Les Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) at 36

appears to differ from those goals, investigation of possible reasons for any divergence would seem to be a logical undertaking, which may reveal useful information. For this study, copies of the relevant laws in Arabic were obtained from the Middle East Library for Economic Services, which also provides translations into English. However, their disclaimer states that the translations, while to the best of their belief correct, are unofficial. This is borne out by the inconsistency among translations found elsewhere. A good source of information is the version filed with WIPO and available on their website.³⁵⁸ It is always necessary to read the Arabic version carefully to ensure a proper understanding of the text.

HERMENEUTICS

In the effort to understand text, different possible interpretations will be examined and this may require some creativity on the part of the interpreter to provide logical connections between ideas. This may be particularly true in the attempt to interpret meanings over a large time span. In the process of choosing certain interpretations, both apparent and underlying, as being more important than others, the author's own perspective inevitably must play a part. Kurt Mueller-Vollmer, in explaining nineteenth century philosopher Wilhelm von Humbolt's approach to hermeneutics, explains that 'if the historian must interpret individual phenomena in the light of an overriding cohesive whole which itself is not directly observable, he must supply the idea of this whole himself'.³⁵⁹ Thus, the 'intuition' of the researcher is key to understanding the phenomenon under research, and provides the 'inner coherence' of the explanation. According to Professor W. A. Wilson, 'a jurists opinion as to what the law is, is of much less importance than his analysis of the setting in which the decision as to what the law is has to be made.'³⁶⁰ Analysis is, thus, at the core of what an academic lawyer does. Scrutinising Egypt's IP law is, in this sense, a worthwhile exercise.

³⁵⁸ Egypt Laws WIPO <<http://www.wipo.int/wipolex/en/profile.jsp?code=EG>> accessed 2014

³⁵⁹ Mueller-Vollmer, Kurt Ed *The Hermeneutics Reader* (Continuum International Publishing Group 1986) at 16

³⁶⁰ Wilson, W. A 'Knowing the Law and Other Things (1982) *The Juridical Review* at 259 cited in Palmer, Vernon Valentine 'Two Rival Theories of Mixed Legal Systems' (June 27, 2007) Wilson Memorial Address Edinburgh University Second Worldwide Congress on Mixed Jurisdictions

It could be argued that more attention should be focused on the enforcement of the law rather than on the substance of the law itself.³⁶¹ However, this would require a level of empirical analysis that falls outside the scope of this study. Similarly, for reasons outlined below, the use of interviews was limited in this study. It is certainly acknowledged, however, that empirical studies examining the effects of increased intellectual property protection, for example, are very valuable and more are sorely needed in general as well as in Egypt. A report commissioned by the United Kingdom Intellectual Property Office (UKIPO) into intellectual property protection in developing countries identified ‘important knowledge gaps in the empirical literature on the effects of strengthening IPRs in developing countries.’³⁶² A recommendation for future researchers would be that more empirical research should be carried out on the impact of increased levels of IP protection in Egypt.

THE TERM INTELLECTUAL PROPERTY

The vocabulary of intellectual property requires some scrutiny because it is used to frame a debate in which the language is not neutral.

THE RANGE OF IP SUBJECT MATTER

David Vaver has pointed out that the expression Intellectual Property is newly coined³⁶³ and covers, ‘a whole slew of disparate rights.’³⁶⁴ It came into common usage following the establishment of WIPO,³⁶⁵ and not only covers the main areas previously grouped together as industrial property but treated separately: trademarks and patents, as well as copyright or author’s rights, but also other topics such as plant variety rights, design rights and geographical indications as well as the very broad category of traditional knowledge, among others. The umbrella term can be criticized for being excessively wide and encouraging

³⁶¹ Ostergard, Robert L Jr ‘The Measurement of Intellectual Property Rights Protection’ (2000) 31 *Journal of International Business Studies* 349 at 349

³⁶² Hassan, Emmanuel, Ohid Yaqub and Stephanie Diepeveen ‘Intellectual Property and Developing Countries A Review of the Literature’ (2009) Report Prepared for the UK Intellectual Property Office and the UK Department for International Development at 47 <<http://www.ipo.gov.uk/ipresearch-ipdevelop-200912.pdf>> accessed 2014

³⁶³ Vaver, David ‘Intellectual Property: the State of the Art’ (2001) 116 *Law Quarterly Review* 621 at 622

³⁶⁴ Vaver, David ‘Intellectual Property: the State of the Art’ (2001) 116 *Law Quarterly Review* 621 at 622

³⁶⁵ Cornish, William *Intellectual Property: Omnipresent, Distracting, Irrelevant?* Oxford University Press 2004) at 2

‘simplistic thinking’.³⁶⁶ Indeed, according to Professor William Cornish it was previously regarded ‘askance.’³⁶⁷ Now, however, it is almost universally accepted. Nevertheless, there are a great many differences among the types of right now categorized as intellectual property.

IP specialists Professor Jeremy Phillips and Dr Ilanah Simon point out that IP law ‘properly consists of many different bodies of law which have developed with little or no reference to each other.’³⁶⁸ Juxtaposing plant variety rights with performer’s rights, as Philips and Simon do, illustrates just how broad and different are the range of interests that fall within the umbrella of IP. Each discrete area raises a range of complex policy issues. It could, therefore, be argued that the topics should be treated separately, as they were before, rather than being all bundled together as they are in Egypt’s Law 82/2002.

INTELLECTUAL

The usefulness of the term intellectual property is that it brings together subject matter that shares important commonality. Common ground can be found in the term intellectual, which refers to the fact that the subject matter claimed is intangible and the product of someone’s imagination. Additionally, it is generally accepted that IP protection is intended not for a physical product but the realization of an idea. Unless they have been expressed in some physical form, ideas per-se are not protectable subject matter for intellectual property. Thus, the property element must be identifiable as the product of an idea and not the idea itself. As Professor Peter Drahos points out, the key attribute of an IP right, as with other property rights, is that it puts the owner, ‘in a juridical relation with others.’³⁶⁹ This means that it is important to know the precise limits of the claimed property in order to determine the legal rights of the owner and those of the purchaser or user of protected subject matter.

³⁶⁶ Yu, Peter ‘The Global Intellectual Property Order and its Undetermined Future’ 1 (2009) *World Intellectual Property Organization Journal (WIPO): Analysis and Debate of Intellectual Property Issues* 1

³⁶⁷ Cornish, William *Intellectual Property: Omnipresent, Distracting, Irrelevant?* Oxford University Press 2004) at 2

³⁶⁸ Phillips, Jeremy and Ilanah Simon ‘Going Down in History: does History have Anything to Offer Today’s Intellectual Property Lawyer?’ (2005) *Intellectual Property Quarterly* 225

³⁶⁹ Drahos, Peter ‘The Universality of Intellectual Property Rights: Origins and Development’ (November 9, 1998) Panel Discussion on Intellectual Property and Human Rights WIPO <http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_inf_1_rev.pdf> accessed 2014

Drahos has investigated the nature and history of intangible legal rights and identified two basic approaches to justifying the grant of IPRs, one that takes a more realist view of the incorporeal thing and the other that focuses more on the 'mental' aspect.³⁷⁰ He also notes differences in the way in which the common law and civil law systems have developed their theories of intellectual property. The English common law has taken the more practical line whereby abstract objects can be materialized by becoming *choses in action* and, through the intervention of equity, assignable. This is important because, 'artists, authors and inventors have to turn their intangible assets into material ones in order to survive economically in the world.'³⁷¹ The civil law approach takes the authors' contribution as the starting point for justification but results in a similar outcome. The maker obtains rights of ownership over an expression of the creator's personality. In both cases, an IP right provides the owner with a monopoly over the protected material. This is a defensive right that means that the IP owner is entitled to prevent third parties from carrying out specified activities using the protected product, including its reproduction and distribution, for the duration of the monopoly period. Makers and distributors of unauthorized copies can, therefore, be stopped and held accountable under IP law. The stronger the IP owners' rights, the more restricted are the activities of consumers. Raising the strength of protection for owners of all forms of IP in Egypt and other developing countries, thus, requires a major cultural shift.

PROPERTY

The concept of property is essential to the common law understanding of IP. The most frequently cited theory in common law jurisdictions in support of a property right in intellectual creations is the Lockean property theory discussed earlier in its colonial context. This establishes that where someone mixes their labour with nature they will be able to lay claim to the result which thus becomes their 'property' as a reward for the effort exerted. Originally Locke applied the theory to real property, whereby someone who works the land to increase its productive capacity adds value to the whole community. It is therefore at its core, a utilitarian justification for rewarding the labourer. In addition, the prospect of reward is said to act as an incentive to further creation.

³⁷⁰ Drahos, Peter *A Philosophy of Intellectual Property* (Dartmouth Publishing Company 1996) at 13-33

³⁷¹ Drahos, Peter *A Philosophy of Intellectual Property* (Dartmouth Publishing Company 1996) at 21

The same approach has, therefore, been co-opted to justify the application of property rights to creations of the mind.³⁷² Although an idea itself is not protectable by intellectual property, an output that results from an idea may be. A creator is deemed to have obtained ownership over what he produces through applying his labour.³⁷³ While the extension of Locke's theory of property to intellectual property may be questioned,³⁷⁴ and indeed has been, it is almost always called upon to provide, 'ideological legitimacy'³⁷⁵ to the concept of IP.

Hegel reaches a similar result but on a different basis. For Hegel the right to property in an individual's creations emanates from a theory of personality, which provides for ownership of expressions of personality. As Justin Hughes points out, 'this view is not very distant from Locke's initial premise that "every Man has a Property is his own Person."³⁷⁶ However, the approach to intellectual property in civil law jurisdictions leans more towards Hegel's theory of personality, which focuses on authorship as the source of rights in creations, than Locke. As a civil law jurisdiction, insofar as the law in Egypt is based to a large extent on a civil code, Egyptian intellectual property law protects authors' rights³⁷⁷ rather than copyright, in keeping with the Hegelian approach.

RIGHTS

The attribution of rights' status, as in intellectual property rights (IPRs) is a further complication. Susan Sell reminds us that 'not all ideas are equally privileged in political life; therefore how one defines "interests" is central to understanding which sets of ideas affect policy'.³⁷⁸ In Europe, in the past, monopolies granted over intellectual creations, useful inventions or books, for example, were privileged exceptions to the rule. Thus, the letters patent granted for inventions, were privileges rather than property rights.

³⁷² Locke, John 'Second Treatise of Government Chapter V "Of Property"' *Two Treatises of Government* Mark Goldie Ed. (J.M. Dent 1993) at 127-140; Hegel, G. W. F *Elements of the Philosophy of Right* (Batoche Books 2001) at 56-57

³⁷³ Locke, John 'Second Treatise of Government Chapter V "Of Property"' *Two Treatises of Government* Mark Goldie Ed. (J.M. Dent 1993) at 127-140;

³⁷⁴ Drahos, Peter *A Philosophy of Intellectual Property* (Dartmouth Publishing Company 1996) at 48

³⁷⁵ Drahos, Peter *A Philosophy of Intellectual Property* (Dartmouth Publishing Company 1996) at 48

³⁷⁶ Hughes, Justin 'The Philosophy of Intellectual Property' (1988-1989) 77 *Georgetown Law Journal* 287 at 332

³⁷⁷ Book 3 of Egypt Law 82/2002 is concerned with Author's Rights and Neighboring Rights

³⁷⁸ Sell, Susan K *Private Power, Public Law: the Globalization of Intellectual Property Rights* (Cambridge University Press 2003) at 8

The shift towards treating ‘the moral and material interests resulting from any scientific, literary or artistic production of which [an individual] is the author’ as belonging to him/her as of right was enshrined in the Universal Declaration of Human Rights (UDHR).³⁷⁹ This right, however, is not unqualified. The UDHR makes it clear that it must be balanced against the right for ‘everyone’...freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’.³⁸⁰

Qualification of the individual’s property right is further seen in the undertakings expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁸¹ to take steps

Includ[ing] those necessary for the conservation, the development and the diffusion of science and culture³⁸² [...and...] to respect the freedom indispensable for scientific research and creative activity.³⁸³

It is not clear from the UDHR provisions to what extent the public should have the right to enjoy and share in the creative output of others, but it is clear, that IPRs are not ‘core’ human rights but are merely relative.³⁸⁴ Article 15 of the ICESCR uses the language of rights. However, there is an apparent hierarchy indicated in the way in which the article is divided. Article 15(a) recognizes the right of everyone ‘to take part in cultural life, while article 15(b) recognizes the right to enjoy the benefits of scientific progress and its applications. The right ‘to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’ is the third item on a descending list.

³⁷⁹ TRIPS Article 27(2)

³⁸⁰ TRIPS Article 27(1)

³⁸¹ International Covenant on Economic, Social and Cultural Rights (ICESR) (1966) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>> accessed 2014

³⁸² Article 15(2) ICESR

³⁸³ Article 15(3) ICESR

³⁸⁴ Islam, Mohammad Towhidul Protection of Public Interests through a Human Rights Framework in the TRIPS Agreement: Realities and Challenges (2009) 4 *Journal of Intellectual Property Law and Practice* 573 referring to General Comment No. 3: The Nature of States Parties Obligations (Article 2.1) adopted 13-14 December 1990, United Nations Committee on Economic, Social and Cultural Rights, 5th Session. UN Doc. E/C 12/1990/8 (1990) at 575

The effect of giving IP status as a right in this way has ‘unfortunate pragmatic consequences’ according to Rochelle Dreyfuss, who points out that, by characterizing IP in this way, the justification for IP on the basis of the utilitarian goal of encouraging creativity and spreading useful knowledge is potentially undermined. She explains that a rights based approach would mean that any derogation from the IP owners’ human right could only be allowed when balanced against another fundamental human right. On this basis, merely ‘socially desirable’ benefits would be insufficient to allow encroachment on the IP right.³⁸⁵

Altering the way in which intellectual property is perceived and moving from a basis and language of privilege to one of rights has been important, and inappropriate, in the development of the regulation of IPRs. Not only has the vocabulary describing interests of creators as rights in intellectual property contributed to its further propertization³⁸⁶ but also to a discourse that has elevated creativity and inventiveness to rank among a higher type of legal norm making it more difficult to find the necessary balance between the rights of individual creators and their contribution to public welfare. The use of the term rights has powerful ‘magic’ myth creating power with postcolonial resonance.

Scandinavian realists rejected the concept of rights, believing that rights only exist in so far as they are provided for by legislation. The protection of rights, therefore, represents a particular perspective; a means of realizing in practice ‘certain institutional strategies.’³⁸⁷ Rights discourse in IP emanates from and, to a large extent, reflects the interests of the West. Following the logic of the Scandinavian realists it is logical to ask the question ‘whose interests [do] they protect’?³⁸⁸

TRIPS ARTICLES 7 AND 8

The TRIPS agreement does not directly address human rights issues although it does so indirectly, acknowledging, in Article 7, the need for balance in the relative advantages

³⁸⁵ Dreyfuss, Rochelle ‘Patents and Human Rights: Where’s the Paradox?’ In William Grosheide Ed *Intellectual Property and Human Rights: A Paradox* (Edward Elgar 2010) at 74

³⁸⁶ Carrier, Michael A ‘Cabining Intellectual Property Through A Property Paradigm’ (2004) 54 *Duke Law Review* 1

³⁸⁷ Arvind, TT ‘Vilhelm Lundstedt and the Social Function of Legislation’ (2013) 1 *Theory and Practice of Legislation* 33 at 56

³⁸⁸ Arvind, TT ‘Vilhelm Lundstedt and the Social Function of Legislation’ (2013) 1 *Theory and Practice of Legislation* 33 at 56

gained by ‘producers’ and ‘users’ of IP protected material, which should be achieved ‘in a manner conducive to social and economic welfare.’³⁸⁹ Article 8 takes account of the right to health, and by extension, life as well as the right to food. Both of these articles, however, focus on the limited nature of any measures that could be taken to promote core human rights over IPRs. Article 7’s highly qualified language means that the apparently socially distributive ‘objectives’ of TRIPS are merely aspirational. Article 8, on the other hand stresses that any measures to protect human rights or address anti-competitive behavior by IPR holders must not conflict with the provisions of the TRIPS agreement.

BALANCING RIGHTS AND PUBLIC BENEFIT

Finding the correct balance between rights and public benefit still seems elusive in both developed and developing countries. In the UK, the two recent reviews into intellectual property commissioned by the government, *The Gowers Report*³⁹⁰ and the *Hargreaves Review*³⁹¹ both repeatedly refer to the importance of balancing interests in their recommendations for UK legislation. Neither, however, has been fully implemented. In Egypt realizing suitable parameters for intellectual property protection is essential for development.³⁹² Basma Abdelgafar argues that one problem is the difficulty of deciding on the right approach. As she points out, ‘there is no robust method of determining the appropriate balance between innovation and technological diffusion, [...] the core intellectual property trade-off.’ This means that decisions regarding IP regulation are ultimately politically motivated rather than evidence based. Abdelgafar expects TRIPS to have a chilling effect on research in Egypt and for consumers to ‘suffer a greater burden.’³⁹³

³⁸⁹ TRIPS Article 7

³⁹⁰ Gowers, Andrew *Gowers Review of Intellectual Property* (2006) <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.asp> accessed 2014

³⁹¹ Hargreaves, Ian *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) <http://www.ipo.gov.uk/ipreview.htm> accessed 2014

³⁹² See for example; Okediji, Ruth L ‘Copyright and Public Welfare in Global Perspective’ (1999) 7 *Indiana Journal of Global Legal Studies* 117; Reichman, Jerome H ‘The TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?’ (2000) 32 *Case Western Reserve Journal of International Law* 441; Okediji Ruth L ‘Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement’ (2003) 17 *Emory International Law Review* 819; Barratt, Amanda ‘The Curious Absence of Human Rights: Can the WIPO Development Agenda transform intellectual property negotiation?’ (2010) 14 *Law Democracy and Development* 1

³⁹³ Abdelgafar, Basma I *The Illusive Trade-off: Intellectual Property Rights, Innovation Systems, and Egypt’s Pharmaceutical Industry* (University of Toronto Press 2006) at 185

It is important that IP legislation should enable and not hinder the development of countries such as Egypt and any remaining options to ensure this is the case must be explored.

REFLEXIVITY

In a postcolonial approach it is important to make the subjective element of analysis explicit rather than claiming a false sense of scientific objectivity. This is in line with German philosopher Hans Georg Gadamer's discussion of the way in which our prejudices condition our understanding. Exposing prejudices in order to avoid their worst effects requires serious reflexive thought.³⁹⁴ Thus, on a personal level, as a British subject and a citizen of a former colonizer of Egypt it is important to acknowledge and constantly challenge the possibility of 'orientalism' in my own work. I agree with Kumar, who suggests that researchers investigating subjects where colonialism is an issue should, at the very least, consider their own ethical position as well as the terminology they use.³⁹⁵ Throughout the process of undertaking this study, self-examination in this respect has been a constant factor.

The formal structure of the study should provide the necessary counter-balance. The reliability of source material is very important, while the mode of interpretation is highly determinative of the results. According to another German philosopher, Johann Martin Chladenius, texts 'yield their meaning once the right kind of knowledge and information ha[s] been brought to bear upon them.'³⁹⁶ This study aims to strike a careful balance between these elements to ensure that any conclusions drawn can withstand scrutiny.

LANGUAGE

For the purpose of this study I have read the relevant texts in Arabic as well as English. Indeed, by reading both it is possible to identify differences in meaning between translation(s) and between translations and the original text. While the English text is not authoritative, and the official text of all Egyptian laws is the Arabic version published in

³⁹⁴ Gadamer, Hans-Georg 'The Historicity of Understanding' (1986) in Mueller-Vollmer Ed *The Hermeneutics Reader: Texts of the German Tradition from the Enlightenment to the Present* (Continuum International Publishing Group 1988) at 257-292

³⁹⁵ Kumar, Vidya 'A Proleptic Approach to Postcolonial Legal Studies? A Brief Look at the Relationship Between Legal Theory and Intellectual History' (2003) 2 *Law, Social Justice and Global Development Journal* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_2/kumar/ accessed 2014

³⁹⁶ Cited by Kurt Mueller-Vollmer in 'Language, Mind, and Artefact: An Outline of Hermeneutic Theory Since the Enlightenment' in Kurt Mueller-Vollmer Ed *The Hermeneutics Reader: Texts of the German Tradition from the Enlightenment to the Present* (Continuum International Publishing Group 1988) at 8

Official Gazette, for many foreigners attempting to understand Egypt's IP law the English version deposited on the WIPO site³⁹⁷ will be the most accessible version.

A NOTE ON TRANSLITERATION

I have used a 'simple transliteration of Arabic names, terms and titles'³⁹⁸ but have pointed to alternative transliterations where relevant and necessary.

IMMERSION

To ensure my language skills were sufficient to undertake a study of Egypt's IP law I chose to spend some time in a law firm in Cairo. This enabled me to gain exposure to the legal environment in Egypt, access to relevant legal materials, and to legal experts who could advise on specific interpretations of IP provisions as well as the opportunity to test my language ability.

Immersion is a technique most commonly associated with anthropological and sociological research whereby a researcher enters a community in order to observe and, ultimately, comment on the people and environment with which she interacts. It is a method with many inherent ethical dilemmas³⁹⁹ and requires pre-planning and a sensitive reflective approach. In the current research the goals of immersion were somewhat limited but nevertheless require explanation and reflection.

I spent three months in Egypt during the summer of 2009 during which I spent one month on a vacation contract in the Cairo office of English law firm Trowers and Hamlins and two months accessing information and discussing intellectual property concerns with key individuals. The study period was facilitated partly by a travel grant from Newcastle Law School, partly by Trowers and Hamlins and partly by myself. Prior to this, and instrumental to my motivation in choosing to study Egypt's intellectual property law, I had lived and worked in Egypt for twenty years, including a period of time teaching English and international Human Rights law to the Egyptian judiciary and, separately, to Human Rights

³⁹⁷ Egypt: Laws WIPO <<http://www.wipo.int/wipolex/en/profile.jsp?code=EG>> accessed 2014

³⁹⁸ Vatikiotis, Panayiotis J *The History of Modern Egypt: from Muhammad Ali to Mubarak* (Johns Hopkins University Press 1991) at x

³⁹⁹ Punch, M 'Politics and ethics in qualitative research' in NK Denzin, and YS Lincoln (Eds) *Handbook of Qualitative Research* (Sage 1994) at 83-97

activists. For the purposes of this thesis it was important to refresh language skills and spend time more specifically embedded within the legal culture in Egypt.

ETHICAL ISSUES

Issues raised by this type of research include 'harm, consent, deception, privacy and confidentiality of data.'⁴⁰⁰ For the purposes of this study, there was full-disclosure to the firm of my reasons for wishing to spend time in a law firm in Egypt and no one from the law firm was formally interviewed. Much of the specific work I undertook at Trowers and Hamblins was confidential. It is not relevant to this study and is not drawn on or discussed at all here. On the other hand, the nature of work carried out by the firm is a matter of public knowledge. Trowers and Hamblins website announces that the firm,

[...] advise[s] in relation to the full spectrum of business sectors, with particular expertise in banking and project finance, capital markets, energy, infrastructure, mergers and acquisitions, oil and gas, corporate, telecoms and media matters. [It] also has a thriving dispute resolution practice advising on matters both through the Egyptian courts and arbitration procedures. ... Clients include both international and local companies active in a broad cross-section of sectors...[as well as] a number of government authorities and multilaterals.⁴⁰¹

Since the January 2011 Egyptian 'revolution' Trowers and Hamblins has merged with Nour Law Office an Egyptian practice with whom they were previously partnered. The new entity is now known as Nour Law Office managed by Trowers & Hamblins.⁴⁰²

The work with which I assisted broadly concerned commercial law, property law and intellectual property law. In particular, I was required to undertake a detailed analysis of the Egyptian intellectual property law⁴⁰³ and write the section on intellectual property for a promotional booklet. This was very helpful for my research purposes as it allowed me time to engage with the law and consult experts to clarify issues of translation and interpretation. The time spent in the firm was a very useful opportunity to test both my understanding of

⁴⁰⁰ Punch, M 'Politics and ethics in qualitative research' in NK Denzin, and YS Lincoln (Eds) *Handbook of Qualitative Research* (Sage 1994) at 89

⁴⁰¹ Trowers and Hamblins Cairo <http://www.trowers.com/offices/cairo>

⁴⁰² Trowers and Hamblins Cairo <http://www.trowers.com/offices/cairo>

⁴⁰³ Egypt Law 82/2002

the law and my language ability. Following my time at Trowers and Hamblins I have maintained a continuing correspondence with the firm.

QUALITATIVE METHODOLOGY: INTERVIEWS

A small number of interviews were carried out with individuals who were highly placed in intellectual property law circles in Cairo. The interviewees who were prepared to go on record were: Dr Maha Bekhiet, Director of Intellectual Property at the Arab League, Mrs Hoda Serageldine, President of the Egyptian Association for the Protection of Intellectual Property (AEIPPI), and Dr Hossam Loutfi, a prominent copyright lawyer who participated in the drafting of Egypt's IP law.

The reason for conducting interviews with key individuals involved in IP decision-making in Egypt was to test whether any of the themes I had identified were perceived as important by individuals in high positions and, therefore, whether my project was worthwhile pursuing. All three indicated that it was. The interviews not only helped corroborate information, but were also helpful in pointing to other key areas of controversy. A subsidiary motivation was as a means of identifying and perhaps obtaining access to resources that may not otherwise have been easy to obtain. The interviewees were very generous both with their time and with providing useful materials such as websites, brochures, catalogues and articles, as well as textbooks written by Professor Loutfi. In addition, the interviewees were able to provide documentary information that may not have been available otherwise, including directories, textbooks and reports.

The three interviewees mentioned above were provided with information regarding the research proposal, its aims and goals and were informed that they could withdraw from the study at any time. They consented to their interviews being used in research and their comments being quoted and attributed. Contacting the individuals for interview was made possible through the British Egyptian Business Association (BEBA),⁴⁰⁴ as well as through other personal contacts.

Those who did speak on the record already held high positions that enabled them to speak freely, as well as, perhaps, largely reflecting the official position at the time. The

⁴⁰⁴ British Egyptian Business Association (BEBA) <http://www.beba.org.eg/index.asp>

interviewees who were happy for their comments to be made public made it clear that they would confine themselves to information that was in the public domain. Nevertheless, some important themes emerged. By using a framework of semi-structured questions to prompt discussion, the interviews were a useful means of testing and validating certain aspects of the study.

This was not true of all the interviewees. Some, despite holding high positions, were unwilling and wary of going on the record although they were happy to hold extensive discussions in private. Those interviewees who did not wish to be identified have been completely excluded from this work. This means that some valuable insights directly communicated by engaged individuals will be missing from the analysis here. Their contribution, however, is present more indirectly in that it may have influenced my thinking on key topics or pointed me in directions I may otherwise have neglected.

ETHICAL CONSIDERATIONS AND FREEDOM OF EXPRESSION IN EGYPT

The unwillingness to go on the record to voice critical views is not entirely surprising. Exercising freedom of speech has long been risky in Egypt despite the Article 47 assurance in the Egyptian Constitution of 1971, which states that

Freedom of opinion shall be guaranteed. Every individual shall have the right to express his opinion and to publicize it verbally, in writing, by photography or by other means of expression within the limits of the law. Self-criticism and constructive criticism shall guarantee the safety of the national structure.

Nevertheless, in 1997, University lecturer Dr Ahmad al-Ahwany was arrested and ‘imprisoned for several weeks in Istiqbal Tora Prison’ for merely possessing information that was critical of the controversial law 92 of 1992.⁴⁰⁵ The consequences of expressing critical opinions as Dr Al-Ahwany’s case illustrates, have at times been demonstrably severe. Other critics of the law were similarly detained with charges leveled against them including ‘possession of printed material critical of Law 96 of 1992.’ In 2002, when the IP law was

⁴⁰⁵ Prisoners of Conscience/Fear of Further *Amnesty International* (June 1997) POCs 19 UA 183/97 Egypt AI Index: MDE 12/36/97 <http://amnesty.org/en/library/asset/MDE12/036/1997/en/6d01ca72-f887-11dd-b378-7142bfbe1838/mde120361997en.pdf> accessed 2014

being discussed, Egypt was joint 102nd together with Azerbaijan, out of 139 countries on the Reporters without Borders World Press Freedom Index.⁴⁰⁶

The 2012 Egyptian Constitution reiterated the guarantee of free expression in Article 45 although with some stated exceptions. The 2014 Constitution states that

Freedom of thought and opinion is guaranteed.

Every person shall have the right to express his/her opinion verbally, in writing, through imagery, or by any other means of expression and publication.⁴⁰⁷

However, in 2013 the World Press Freedom index put Egypt at 158th out of 179 countries, a situation described as 'deplorable,' and even worse than it had been under Mubarak in 2010, when Egypt was at 127th place among 178 countries.⁴⁰⁸

The safety of those who put forward counter narratives is, therefore, at best very uncertain and may even be worsening. The opinions of the interviewees who were prepared to go on record, and are included in this study, were already in the public domain and they were not concerned about the consequences of their opinions being made public.

⁴⁰⁶ 'Reporters Without Borders Publishes the First Worldwide Press Freedom Index' (OCTOBER 2002) Reporters without Borders Press Freedom Index 2002 <<https://en.rsf.org/press-freedom-index-2002,297.html>> accessed 2014

⁴⁰⁷ Article 65 Egyptian Constitution 2014

⁴⁰⁸ Reporters without Borders: for Freedom of Information '2013 World Press Freedom Index: Dashed Hopes After Spring' <http://en.rsf.org/spip.php?page=classement&id_rubrique=1054> accessed 2014

CHAPTER 3: HISTORICAL AND COLONIAL CONTEXT

It has been noted that ‘the history, the sources and the nature of its developments are never effaced from a well-established legal system’⁴⁰⁹ and that ‘how countries remember their pasts conveys information about their future behaviour.’⁴¹⁰ Egypt’s recorded history is exceptionally long, dating back to before 2658 BCE,⁴¹¹ and predates by millennia that of currently more supposedly developed countries. Egypt’s current IP law is just over a decade old and unpicking all the threads of such a weighty history is an impossible undertaking. Nevertheless, while acknowledging the difficulties and dangers of attempting to predict the future and of superimposing an ex-post facto analysis to the past, the statements above contain intuitive truths and, in attempting to understand Egypt’s present, it is important to attempt to appreciate the historical underpinnings. As Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, wrote in his personal diary, ‘a nation cannot rid itself of its past unless it be a nation that is floundering in the dark unable to find the path’⁴¹²

This chapter aims to identify themes in the recent historical context of occupation and colonization, from the late eighteenth century onwards, during which Egypt’s modern legal system and approach to IP has developed, which may be helpful in deciphering Egypt’s response to current International IP (IIP) trends.

LONGEVITY OF THE EGYPTIAN LEGAL TRADITION: ANCIENT EGYPT

Under the rule of the early Pharaohs Egypt enjoyed a period relatively free from invasion, due to the ‘formidable’ geographical barriers of the Mediterranean Sea, the Red Sea, and extensive deserts, in which ‘relative isola[tion]’ a sophisticated society was able to develop.⁴¹³ In the 1800s BC, Egypt was the ‘strongest state in the Near East’.⁴¹⁴ As one of the earliest communities to use written symbols to document public life, there are very early records of domestic legal proceedings preserved in hieroglyphs on temple walls and on

⁴⁰⁹ Dainow, Joseph ‘Civil Law and the Common Law: some Points of Comparison’ (1966-1967) 15 *The American Journal of Comparative Law* at 434

⁴¹⁰ Lind, Jennifer ‘The Perils of Apology’ (May/June 2009) *Foreign Affairs* 132, 133

⁴¹¹ A date often chosen as delineating the beginning of the Old Kingdom in the Pharaonic era, but for controversy over dates see Wenke, Robert J ‘Egypt: Origins of Complex Societies’ (1989) 18 *Annual Review of Anthropology* 132-134

⁴¹² Bechor, Guy *The Sanhuri Code and the Emergence of Modern Arab Civil Law (1932-1948)* (Brill Academic Publishers 2007) at 78

⁴¹³ Bell, Barbara ‘The Dark Ages in Ancient History: the First Dark Age in Egypt’ (1971) 75 *American Journal of Archaeology* 1 at 2

⁴¹⁴ Säve-Söderbergh, Torgny ‘The Hyksos Rule in Egypt’ (1951) 37 *The Journal of Egyptian Archaeology* 53

papyrus. There was also a court system demonstrating a lively local legal environment⁴¹⁵ and there may have been an early civil code, probably similar to that of Hammurabi found in Mesopotamia.⁴¹⁶

The Economic Council of Canada, in its 1971 report on Intellectual and Industrial Property notes that the Egyptian use of marks that could now be described as trademarks goes back, 'for 30 centuries before the Christian era'.⁴¹⁷ The uses include markings on jars, tools and bricks. Thus, underlying modern legal developments in intellectual property protection is a deeply embedded ancient domestic legal footprint for IP protection. However, the idea that such marks gave the owner a property right is implausible.

THE ROLE OF INVENTION IN EARLY FOREIGN OCCUPATIONS

Egypt was first successfully invaded and occupied by foreigners when the Hyksos,⁴¹⁸ using the advantage of the invention of the axle and the wheel, overcame Egyptian opposition to their incursion by virtue of their technical superiority.⁴¹⁹ The Egyptians, at that time, considered this invasion a 'national catastrophe'.⁴²⁰ However, eventually, after learning their skills, the Egyptians repulsed the Hyksos. Thus, as archaeologist and historian Roger Moorey has noted, 'chariots and chariotry are the most evident incidence of military technology transfer in the Late Bronze Age from South West Asia into Egypt'.⁴²¹ The 'shock'

⁴¹⁵ Malek, Jaromir 'In the Shadow of the Pyramids: Egypt during the Old Kingdom' (ORBIS Book Publishing Company 1986) at 96

⁴¹⁶ Shupak, Nili 'A New Source for the Study of the Judiciary and Law of Ancient Egypt: "The Tale of the Eloquent Peasant"' (1992) 51 *Journal of Near Eastern Studies* 1 at 1-18

⁴¹⁷ O'Brian, Peter 'The International Trademark System and the Developing Countries (1977-1978)' (1971) 19 *IDEA* 91; also, citing the Economic Council of Canada, Report on Intellectual and Industrial Property at 181

⁴¹⁸ The Hyksos were a foreign dynasty from the Near East that ruled Egypt for about a hundred years from around 1640 BCE before being removed by force. Precise information regarding their identity and historical events surrounding them remain controversial

⁴¹⁹ Säve-Söderbergh, Torgny 'The Hyksos Rule in Egypt' (1951) 37 *The Journal of Egyptian Archaeology* 53 at 59 explains that there is some controversy about the Hyksos' use of chariots which falls without the scope of this thesis.

⁴²⁰ Moorey, P.R.S 'The Mobility of Artisans and the Opportunities for Technology Transfer between Western Asia and Egypt in the Late Bronze Age' in Shortland, Andrew J Ed. *The Social Context of Technological Change: Egypt and the Near East, 1650-1550 BC* (Oxbow Books 2001) at 12

⁴²¹ Moorey, P.R.S 'The Mobility of Artisans and the Opportunities for Technology Transfer between Western Asia and Egypt in the Late Bronze Age' in Shortland, Andrew J Ed. *The Social Context of Technological Change: Egypt and the Near East, 1650-1550 BC* (Oxbow Books 2001) at 8

of the Hyksos invasion provoked a surge in creativity in Egypt.⁴²² Moorey thinks that, without it, Egypt would probably have continued 'slowly developing traditional indigenous technologies.' Instead, Egypt developed more quickly through copying the technology of the invaders. It was the 'sudden, extremely significant, infusions of foreign knowledge and skill' that fuelled the increasingly complex and technologically impressive society whose achievements we still marvel at today.⁴²³ Thus the inventiveness of the ancient Egyptians was not spurred on by legal incentive but by other, more existential, motivating factors. In the absence of IP law, innovation can and does flourish. This has led some to argue that IP law is 'an unnecessary evil' and adds nothing

THE ATTRACTIONS OF EGYPT FOR OCCUPIERS.

Subsequent occupations of Egypt have included those of the Persians, Greeks, Romans, Byzantines, Arabs, Turkish Ottomans, the French and the British. Foreigners were attracted to Egypt partly because of her strategic position at the confluence of trading routes, straddling the three continents of Asia, Europe and Africa. Egypt also captured the imagination of invaders who, drawn by the great achievements of the Egyptians, no doubt wished to emulate them in some ways and forcibly, or otherwise, acquire Egyptian knowledge for their own purposes. This is certainly evident in the motivation of the French invasion, from which time Egypt's modern history is often dated.

The Arab invasion ousted the previous Byzantine Christian occupiers and, in the year 641 CE, imposed Caliphate rule. The occupations that followed, including the Ummayyas, the Abassis, the Fatimis, the Ayyubis, the Mamlukes, and the Ottomans all governed under various different interpretations of Islamic *Sharia* law. During the Ottoman period, Egypt was ruled from Constantinople, as a province of the Ottoman Empire, from 1517 to 1914. During this period the Ottomans vied for power with the Mamlukes.⁴²⁴ In 1798, Napoleon Bonaparte

⁴²² Moorey, P.R.S 'The Mobility of Artisans and the Opportunities for Technology Transfer between Western Asia and Egypt in the Late Bronze Age' in Shortland, Andrew J Ed. *The Social Context of Technological Change: Egypt and the Near East, 1650-1550 BC* (Oxbow Books 2001) at 12

⁴²³ Moorey, P.R.S 'The Mobility of Artisans and the Opportunities for Technology Transfer between Western Asia and Egypt in the Late Bronze Age' in Shortland, Andrew J Ed. *The Social Context of Technological Change: Egypt and the Near East, 1650-1550 BC* (Oxbow Books 2001) at 2

⁴²⁴ Al-Sayyid Marsot, Afaf Lutfi *A History of Egypt from the Arab Conquest to the Present* 2nd Ed (Cambridge University Press 2007) at 48-64

intervened in Egypt uninvited, invading supposedly to rid Egypt of the Mamluke soldiers on behalf of the Ottomans.

THE FRENCH 'EXPEDITION': THE ROOTS OF FRENCH INFLUENCE

In reality, Napoleon's aim was to oust the Ottoman rulers and to establish a French colony.⁴²⁵ Napoleon's army occupied Egypt for three years before being forced to leave in 1801.

THE 'PIRATING' OF EGYPTIAN TECHNICAL KNOWLEDGE BY NAPOLEON'S ARMY

Unusually, Napoleon's troops were joined by an 'army' of artists and philosophers whose project seems to have been to glean what they could of Egypt's intellectual heritage and to record every detail of Egyptian civilization.⁴²⁶ Gyan Prakash points out, however, that French intentions were clear to observers even at the time.⁴²⁷ Abd-al-Rahman al-Jabarti, the Egyptian chronicler and a witness to Napoleon's invasion of Egypt in 1798, had no doubt that the expedition was, 'as much an epistemological as a military conquest'.⁴²⁸ The body of scientific, agricultural, architectural and cultural knowledge, of the ancient Egyptians was recognised as something worth fighting over. Edward Said considered that the Napoleonic invasion of Egypt 'was in many ways the very model of a truly scientific appropriation of one culture by another, apparently stronger, one.'⁴²⁹ Today it might be deemed 'piracy'; the deliberate and large scale 'theft' of Egyptian intellectual property. The French went to Egypt with the intention of acquiring Egyptian knowledge as well as Egyptian territory.

THE DESCRIPTION DE L'EGYPTE

The, 'Description de l'Egypte'⁴³⁰ is the vast work in many volumes, compiled by Napoleon's academics during their occupation of Egypt. It illustrates, in patent application-like detail, Egyptian innovations in construction, architecture and science as well as the decorative arts. French appreciation of Egyptian knowledge and skill is evident. Nevertheless the understanding of the Orient is clearly tempered by an Orientalist's eye as evidenced through

⁴²⁵ Al-Sayyid Marsot, Afaf Lutfi *A History of Egypt from the Arab Conquest to the Present* 2nd Ed (Cambridge University Press 2007) at 99

⁴²⁶ Neret, Gilles Ed. *Description of Egypt* (Taschen 2001); Description de l'Egypte also available online at Bibliotheca Alexandrina, L'Institut de L'Egypte <<http://descegy.bibalex.org/index1.html>> accessed 2014

⁴²⁷ Prakash, Gyan 'Orientalism Now' (1995) 3 *History and Theory* 34 at 200

⁴²⁸ Cited in Prakash, Gyan 'Orientalism Now' (1995) 3 *History and Theory* 34 at 200

⁴²⁹ Said, Edward *Orientalism: Western Conceptions of the Orient* (Penguin Books 1978) at 42

⁴³⁰ Hereafter *the Description*

the artists' depictions of themselves among the images, in which they show themselves as powerful, cultured and in control.⁴³¹ The ancient world is given a mythological status in which the modern Frenchman is represented as Pharaoh, the modern Egyptians being largely irrelevant.

The French representation of Egypt in *the Description* can be viewed as aiming to impose a particular, 'construction of Egypt designed to replace Egypt itself'.⁴³² Modern Egyptians are largely absent from the Description de l'Égypte.⁴³³ Where they are depicted, they are portrayed as 'dissolute and weak'.⁴³⁴ Modern Egypt is resolutely not the focus of *the Description* because, as Anne Godlewska explains, 'Islamic Egypt was understood as a temporary historical aberration in the geography of Egypt'⁴³⁵ and, the clear view put forward in the preface to *the Description* was that its contemporary population was 'corrupted'.⁴³⁶ The orient is an object of European scrutiny, which is 'watched', while 'the European...is a watcher, never involved, always detached'⁴³⁷ and superior.

Godlewska asserts that *the Description* 'was designed to replace and, indeed, reconstruct Egypt' and was far from being a neutral academic exercise.⁴³⁸ Her analysis is convincing and in keeping with an understanding of Said's deconstruction of Orientalism. In the orientalist's minds the achievements of earlier generations of Egyptians needed to be appropriated and interpreted through a Western lens in order to be useful. In this way, the French reasoned, Egyptian inventions could be 'justifiably' expropriated. Furthermore, the imperialist intentions behind the project included that Egyptians should view themselves as the French did. In Jean-Baptist Fourier's preface to *the Description* he suggests that Egyptians, by

⁴³¹ Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1

⁴³² Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1 at 5

⁴³³ Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1 at 19

⁴³⁴ Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1 at 18 and fig (5)

⁴³⁵ Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1 referring to Jean Baptiste Fourier's preface to *the Description* at 18

⁴³⁶ Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1 at 18

⁴³⁷ Said, Edward *Orientalism: Western Conceptions of the Orient* (Penguin Books 1978) at 103

⁴³⁸ Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1 at 14

acknowledging their modern inferiority to Europe, would benefit from Napoleon's expedition.⁴³⁹ Godlewska notes Fourier's disingenuous reversal in his insistence, 'that a country as blessed by nature as Egypt needs the benefits of French law and [...] technology to realize its full potential'.⁴⁴⁰ In this interpretation Egypt would have to adopt French methods and French law in order to achieve development in the modern age. In effect, this is what happened. However, the French were not able to control the way in which Egyptians used their methods and their law.

It has at times been useful for Egyptians to gloss over the French aggression and 'construct an image of benevolent exchange',⁴⁴¹ for reasons of political pragmatism. The French occupation has often been played down and referred to by Egyptian nationalists as 'an imperfect, perhaps slightly more attractive counterbalance, first to British occupation, now to American neo-imperialism'.⁴⁴² It was convenient to take a positive view of the French occupation while attempting to repulse the British one. As Kamâl Mughîth has pointed out, 'sous l'occupation britannique et la monarchie, l'expédition était considérée comme marquant le début de la modernisation du pays'.⁴⁴³ However, more recently it has been possible to say of the French occupation that, 'elle n'était plus que la première invasion occidentale impérialiste'.⁴⁴⁴ It was nothing less than the first western imperialist occupation.

Irritated by French 'celebration' of the 1998 bi-centenary of the French occupation and, perhaps, influenced by Edward Said's stinging critique of the 'expedition' in *Orientalism*,⁴⁴⁵ some Egyptian analysts have been more critical of the French intervention, than previously. Asim el Disuqi, for example, points out that 'toutes les études qui étaient faites étaient

⁴³⁹ Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1 at 7-8

⁴⁴⁰ Godlewska, Anne 'Map, Text and Image: The Mentality of Enlightened Conquerors. A New Look at the Description de l'Égypte' (1995) 20 *Transactions of the Institute of British Geographers* 1 at 8

⁴⁴¹ Elliott Colla "'Non, non! Si, si": Commemorating the French Occupation of Egypt (1798-1801)' (2003) 118 *Modern Language Notes* French Issue) at 1046

⁴⁴² Colla, Elliott "'Non, non! Si, si": Commemorating the French Occupation of Egypt (1798-1801)' (2003) 118 *Modern Language Notes* French Issue 1043 at 1046

⁴⁴³ Under the British occupation and the monarchy, the French 'expedition' was described as marking the beginning of the modern period in Egypt. Kamâl Mughîth cited by Al-Khuli, Ramadan and Abd Al Raziq 'Isa, 'Un Bilan Controversé: le Point de Vue des Historiens Égyptiens' (1999) 1 *Égypte/Monde Arabe* at para 27

⁴⁴⁴ Kamâl Mughîth cited by Al-Khuli, Ramadan and Abd Al Raziq 'Isa, 'Un Bilan Controversé: le Point de Vue des Historiens Égyptiens' (1999) 1 *Égypte/Monde Arabe* at para 27

⁴⁴⁵ Said, Edward *Orientalism: Western Conceptions of the Orient* 1978 London: Penguin Books

destinées à server le décideur'.⁴⁴⁶ This goes some way towards an understanding that Napoleon's purpose in bringing the scholars and artists along with the military was to acquire Egypt's technical and artistic know-how and use it for the benefit of the French. The encounter also provided, for Egyptians, a powerful insight into the value put on Egypt's 'indigenous knowledge'⁴⁴⁷ by the French as well as into Western attitudes to intellectual endeavour more generally.

THE BRITISH AND FRENCH RIVALRY EXPRESSED IN EGYPT

The British saw the French occupation of Egypt as part of a wider plan to undermine trading relations and to challenge the British in India.⁴⁴⁸ Indeed, as Edward Dicey writes of the late nineteenth and early twentieth centuries 'the annals of Egypt are one long record of French attempts to weaken the supremacy of England.'⁴⁴⁹ From the French perspective, the opposite was true. Thus, in a reversal of fortunes, in March 1801, the British joined forces with the Ottoman Turks to oust the French from Egypt and 'the last French soldier left Egypt at the end of September 1801.'⁴⁵⁰ British military manoeuvres were backed up by successful British diplomacy in Istanbul to ensure the Ottoman imperial rulers of Egypt, sided with them against the French.⁴⁵¹ Following the expulsion of the French the British occupied Egypt for two years, withdrawing in 1803.⁴⁵²

DEVELOPMENT OF A MODERN EGYPTIAN STATE

EARLY EGYPTIAN BID FOR INDEPENDENCE

The British and French rivalry did not go unnoticed among Egyptians, who have often managed, subsequently, to turn it to advantage. Following the departure of the French from Egypt in 1801, an Egyptian delegation petitioned both the British and the French with, what

⁴⁴⁶ Cited in Al-Khuli, Ramadan and Abd Al Raziq 'Isa, "Un Bilan Controversé: le Point de Vue des Historiens Égyptiens" (1999) 1 *Égypte/Monde Arabe* at para 30

⁴⁴⁷ See the discussion of traditional (indigenous) knowledge in Chapter 5

⁴⁴⁸ Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 116

⁴⁴⁹ Dicey, Edward *The Egypt of the Future* (William Heinemann 1907) at 105

⁴⁵⁰ Vatikiotis, P J *The History of Modern Egypt: From Muhammad Ali to Mubarak* (The Johns Hopkins University Press 1991) at 44-45

⁴⁵¹ Hanna, Nelly 'Culture in Ottoman Egypt' in M. W. Daly Ed *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 111

⁴⁵² Dykstra, Darrell 'The French Occupation of Egypt 1798-1801' in M. W. Daly Ed *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 132

George Haddad calls, ‘the first official project and plea for Egyptian independence in modern times.’⁴⁵³ This bid for independence appears to have received little attention at the time from the recipients of the petition but the correspondence has survived. Interestingly, the letters reveal that the same arguments addressed to the British and denigrating the French were rephrased, criticizing the British, and sent in an identical appeal to the French. Such blatant attempts at manipulation, Haddad recognizes, were not an unusual tactic among ‘developing nations to insure as much support for their cause as possible’.⁴⁵⁴ However, this is a particularly revealing episode in that it demonstrates that the system of imperial rule from afar, something common to French, Ottoman and British rule over Egypt, was problematic and a preference for more localized rule, an independent Egypt free also from the Ottoman Empire, was deeply rooted and pre-dated Muhammad Ali’s rule. It also shows that Egyptians were acutely aware of the Anglo-French rivalry and the potential it offered for political manipulation. Egyptians were actively seeking control over the management of their affairs.

The British, however, ignored the Egyptian plan for independence. Instead, the Treaty of London was signed between the French and the British on October 1, 1801⁴⁵⁵, after which the British occupied Egypt for the next two years, until 1803 when they ceded Egypt to the Ottomans once more. This was in compliance with the terms of article V of the Treaty of London which insisted that, ‘Egypt [should] be restored to the sublime Porte, whose territories and possessions [should] be preserved entire, such as they existed previously to the present war.’⁴⁵⁶ Egypt was, thus, passed from hand to hand without the participation of Egyptians in the process, a pattern repeated later in the century when the British occupied Egypt again. It is also reflected in the infamous ‘colonial clause[s]’⁴⁵⁷ in the Berne and Paris

⁴⁵³ Haddad, George ‘A Project for the Independence of Egypt, 1801’ (1970) 90 *Journal of the American Oriental Society* 169

⁴⁵⁴ Haddad, George ‘A Project for the Independence of Egypt, 1801’ (1970) 90 *Journal of the American Oriental Society* 169

⁴⁵⁵ The Treaty of London (Downing Street) *Preliminary Articles of Peace between his Britannic Majesty and the French Republic* signed at London October 1, 1801 in William Cobbett ‘Letters to the Right Honourable Lord Hawkesbury, and to the Right Honourable Henry Addington : on the peace with Buonaparté, to which is added an appendix, containing a collection (now greatly enlarged) of all the conventions, treaties, speeches, and other documents, connected with the subject’ (Cobbett and Morgan 1802)

⁴⁵⁶ The Treaty of London (Downing Street) *Preliminary Articles of Peace between his Britannic Majesty and the French Republic* signed at London October 1, 1801

⁴⁵⁷ Deere, Carolyn *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) at 37

International IP Conventions, which, as Carolyn Deere explains, were the method by which adherence to the Conventions spread ‘across the developing world, primarily through the accessions of the major colonial powers.’⁴⁵⁸

CHALLENGING THE NARRATIVE OF MODERNIZATION

The period of multiple European occupations in nineteenth century Egypt forms the background to the embedding of modern Western standards of protection in Egyptian IP law. Fahmy explains how modernization was, in fact, intended to benefit the rulers of Egypt and not to further Egyptian independence as it is frequently characterized.⁴⁵⁹ On the contrary modernization justified a plethora of evils including massacres⁴⁶⁰ and forced labour⁴⁶¹ and, according to Khaled Fahmy, eventually failed, ingraining the conditions that caused the ‘gap separating [Egypt] from the leading industrial nations of the world’ to widen.⁴⁶²

MUHAMMAD ALI PASHA⁴⁶³ (RULED 1805-1849): THE BEGINNING OF THE MODERN PERIOD?

After the expulsion of the French, and the departure of the British, there followed a period of conflict during which potential Ottoman successors vied for the position of ruler in Egypt. Muhammad Ali, an Albanian, having demonstrated his power and ability, eventually took over as ruler of Egypt under the ultimate sovereignty of the Sublime Porte of the Ottoman Empire in Istanbul. He went on to rule Egypt for forty years and was succeeded by his direct heirs who, after the British occupation, ruled as heads of state until the 1952 Free Officers revolution. His reign is seen as, ‘mark[ing] the end of Egypt’s isolation and its integration into the world economy.’⁴⁶⁴ It is, therefore, a point of constant reference in terms of the

⁴⁵⁸ Deere, Carolyn *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) at 37

⁴⁵⁹ See e.g. (Al)-Sayyid Marsot, Afaf Lutfi *Egypt in the Reign of Muhammad Ali* (Cambridge University Press 1984);

⁴⁶⁰ Fahmy, Khaled *All the Pasha’s Men: Mehmed Ali, his Army and the Making of Modern Egypt* (American University in Cairo Press 2002) at 82-86

⁴⁶¹ See Fahmy, Khaled *All the Pasha’s Men: Mehmed Ali, his Army and the Making of Modern Egypt* (American University in Cairo Press 2002) at 98-99

⁴⁶² Fahmy, Khaled *All the Pasha’s Men: Mehmed Ali, his Army and the Making of Modern Egypt* (American University in Cairo Press 2002) at 13-14

⁴⁶³ The term Pasha (alternative transliteration Basha) is a title of high rank bestowed under the Ottoman Empire

⁴⁶⁴ Mustafa, Ahmed Abdel-Rahim ‘The Breakdown of the Monopoly System in Egypt after 1840 in Peter Malcolm Holt *Political and Social Change in Modern Egypt* Oxford University Press (1968) at 291-293, 301; 303-304

directions that Egypt has taken since. However, in ‘demystify[ing] the aura of Mehmed Ali,’⁴⁶⁵ Fahmy has shown that despite being portrayed as a modernizer Muhammad Ali Pasha’s legacy is much more problematic.⁴⁶⁶ With respect to laws and regulations issued to control the army, Fahmy notes that

In spite of the pretence of texts which enunciated modern notions of power as presenting themselves as if they were primordial, self-contained and self-perpetuating texts, they were in fact negotiated, amended and refined by conscious agents whose conflicting interests and confused, fractured vision of society were reflected in these very same texts.⁴⁶⁷

Although Fahmy is referring to military legislation, the process of negotiating and constructing legislation reveals the potential for resistance which, when confronted by overwhelming power, is capable of undermining it.

As an Albanian, although an Ottoman subject, Muhammad Ali Pasha might have been considered an outsider in Egypt. However, significantly, he enjoyed a substantial degree of local Egyptian support.⁴⁶⁸ He was also able to gain the backing of the Sultan due to his military prowess and his achievement in defeating the Mamlukes and restoring Ottoman control over Egypt. He deposed the previous governor and became *Wali*⁴⁶⁹ of Egypt. The Ottoman governor he deposed was shocked at the effectiveness with which Muhammad Ali had mobilized Egyptians behind his contention for the leadership of Egypt and exclaimed that, ‘he would not be deposed by *fallahin*’.⁴⁷⁰ However, it was the fact that Muhammad Ali, initially, had the Egyptian *fellahin* on his side that gave him power.

⁴⁶⁵ Alternative transliteration for Muhammad Ali

⁴⁶⁶ Fahmy, Khaled *All the Pasha’s Men: Mehmed Ali, his Army and the Making of Modern Egypt* (American University in Cairo Press 2002)

⁴⁶⁷ Fahmy, Khaled *All the Pasha’s Men: Mehmed Ali, his Army and the Making of Modern Egypt* (American University in Cairo Press 2002) at 317

⁴⁶⁸ Al-Sayyid Marsot, Afaf Lutfi *A History of Egypt from the Arab Conquest to the Present* 2nd Ed (Cambridge University Press 2007) at 63

⁴⁶⁹ Alternative transliteration *Vali*. The position of Wali was not as elevated as Muhammad Ali would have liked. It meant that, ‘technically and legally he was only a vali of an Ottoman province, which meant that he had the right to receive consuls (and not ambassadors) of European countries but was denied the right to appoint political representatives to their capitals’ Fahmy, Khaled *All the Pasha’s Men: Mehmed Ali, his army and the making of Modern Egypt* (AUC Press 2004) at 3

⁴⁷⁰ Al-Sayyid Marsot, Afaf Lutfi *A History of Egypt from the Arab Conquest to the Present* 2nd Ed (Cambridge University Press 2007) at 63; The term *fellah* pl. *fellahin*, here transliterated as *fallahin*, can be translated as peasant(s) or the masses.

EGYPTIAN SEMI-INDEPENDENCE UNDER MUHAMMAD ALI PASHA

By the middle of the 19th century Muhammad Ali had largely achieved de-facto independence for Egypt.⁴⁷¹ This is not to say that he was motivated by ideas of Egyptian nationhood for the sake of Egyptians.⁴⁷² He was concerned with strengthening his own position. He was, however, a visionary and foresaw his means of gaining power and influence through a process of modernization. Unlike the more hagiographic accounts of his period in power, the more convincing explanation for his policies is that he 'embarked upon his modernization schemes in order to consolidate his power-base in Egypt and perpetuate his dynasty.'⁴⁷³ His personal concerns happened to coincide with those of the elite among the Egyptian population who would benefit in the process. Many others, the vast majority, would not.

It seems reasonable to note that Muhammad Ali laid the groundwork for Egyptian independent statehood by gradually increasing Egyptian autonomy from the Ottoman Empire and ruling Egypt directly, although the Ottoman Sultan remained, nominally, sovereign. However, in reflecting on the historical causes of the Egyptian revolution in 1952, former president Gamal Abd El Nasser stated that while, 'the nation had sworn allegiance to Mohamed Ali in the attempt to overthrow the rule of the Mamlukes [...] Mohammed Ali and his descendants unfortunately forfeited this loyalty, embarking on despotic enterprises and usurping the rights of the people.'⁴⁷⁴ This same criticism could be levelled at Nasser himself as well as his successors.

⁴⁷¹ This is widely acknowledged by historians but Khaled Fahmy *supra* argues against what he calls the, 'powerful Egyptian nationalist discourse on Mehmed Ali Pasha's reign' exemplified by such writers as Afaf Lutfi Al-Sayyid Marsot *supra* and Al Rafai, Abdel Rahman 'Asr *Muhammad Ali* (Muhammad Ali's Reign) (Dar al-Ma'arif 1989). Fahmy's main challenge to this approach is addressed at the notion, 'that Egypt is an undivided subject and that the Egyptian nation is a primordial eternal entity possessing a unified, conscious will potentially capable of autonomy and sovereignty' see *All the Pasha's Men* at 312-313

⁴⁷² Toledano, Ehud 'Mehmet Ali Paşa or Muhammad Ali Basha? An Historiographic Appraisal in the Wake of a Recent Book' (1985) 4 *Middle Eastern Studies* 142 and Khaled Fahmy *All the Pasha's Men supra*

⁴⁷³ Vatikiotis P. J *The History of Modern Egypt: from Muhammad Ali to Mubarak* 4th Ed (The John's Hopkins University Press 1991) at 49-69

⁴⁷⁴ Abd El Nasser, Gamal 'The Egyptian Revolution' (1954-1955) 33 *Foreign Affairs* 199 at 203

'MODERNIZATION' UNDER MUHAMMAD ALI PASHA

Muhammad Ali Pasha's achievements may have been exaggerated,⁴⁷⁵ and his methods were certainly not humanitarian,⁴⁷⁶ but the momentum towards industrialization under his rule was apparent. In consciously aiming to learn from the French invaders, his method is reminiscent of the Ancient Egyptian response to the Hyksos invasion. Just as the Ancient Egyptians learned to master the technology of the Hyksos in order to overthrow them, releasing in the process a flurry of innovation, the French occupation similarly acted as a catalyst for innovation and change to take place. Muhammad Ali Pasha, whether conscious of the Hyksos precedent, or not, was impressed by Napoleon's scientists and artists and began sending academics, scientists and lawyers to be trained in France. They returned with an occidental vision of advancement through industrialization.⁴⁷⁷ Prior to the French occupation, according to Egyptian sociologist, Professor Saad Eddin Ibrahim,⁴⁷⁸ 'like the other eastern provinces of the Ottoman Empire,' Egypt had been 'stagnating', while Europe flourished with scientific, artistic and technological innovation.⁴⁷⁹

THE IMPACT OF FOREIGNERS IN EGYPT

FRENCH EDUCATION AS A CATALYST FOR DEVELOPMENT

Thus, while the French occupation had been brief, only three years altogether, French influence in Egypt appears to be disproportionately large. By acquiring French knowledge and through commerce and industrialization Muhammad Ali Pasha aimed to transform Egypt into his modern independent fiefdom. Muhammad Ali Pasha, and consequently Egypt, looked to Europe as a model.

FOREIGN ENTERPRISE IN EGYPT AND THE TRANSFER OF TECHNOLOGY

Muhammad Ali encouraged foreigners to do business in Egypt and did everything possible to 'accord [...] strangers the amplest measure of protection'.⁴⁸⁰ This involved the

⁴⁷⁵ Toledano, Ehud 'Mehmet Ali Paşa or Muhammad Ali Basha? An Historiographic Appraisal in the Wake of a Recent Book' (1985) 4 *Middle Eastern Studies* 141

⁴⁷⁶ Toledano, Ehud 'Mehmet Ali Paşa or Muhammad Ali Basha? An Historiographic Appraisal in the Wake of a Recent Book' (1985) 4 *Middle Eastern Studies* 141 at 148, for example

⁴⁷⁷ Colla, Elliott "'Non, non! Si, si": Commemorating the French Occupation of Egypt (1798-1801)' (2003) 118 *Modern Language Notes* French Issue 1043 at 1046

⁴⁷⁸ Founder of the Ibn Khaldun Center for Development Studies and the Arab Organisation for Human Rights

⁴⁷⁹ Ibrahim, Saad Eddin 'An Open Door' (2004) 28 *Wilson Quarterly* 2 at 37

⁴⁸⁰ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 5

continuation of the system of capitulations (unequal treaties) negotiated throughout the Ottoman regime, which gave foreigners certain dispensations as an incentive to trade in Egypt. Unfortunately, however, 'protection spelled privilege and the appetite for privilege grew with what it fed on'.⁴⁸¹ Capitulations may have been essential to encourage foreign investment but the consequential iniquity led to the situation eventually becoming 'intolerable'.⁴⁸²

EGYPT'S VULNERABILITY TO EUROPEAN COLONIAL AMBITION

Egypt's strategy of encouraging foreign participation on such a large scale was a dangerous strategy at a time when European countries were reaching out beyond their boundaries to acquire political and economic advantage. In 1896, the number of European residents in Egypt was estimated to number 112,000⁴⁸³ compared with a national population in 1897 of 9,734,405.⁴⁸⁴ The relatively small number of foreigners was significant because they monopolized so many of the most senior positions. The impact of foreigners on Egypt was quite disproportionate to their numbers. By 1882, 'over a thousand Europeans clogged Egypt's upper bureaucracy'.⁴⁸⁵ This group accounted for 16 percent of the Egyptian treasury' budget despite only representing two percent of the overall number of functionaries. Furthermore, the privileges accorded by the capitulations to Europeans meant that Egyptians were excluded from many other activities.⁴⁸⁶

As the Ottoman Empire weakened European states contrived to maximize their influence in Egypt. Egypt was geographically placed at a critical junction between the West and the East and well placed to benefit from European competition over resources and their need for ease of transit to the East where many European colonial interests were located. However, Egypt was also vulnerable to states that saw an opportunity to increase their imperial scope.

⁴⁸¹ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 5

⁴⁸² Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 4

⁴⁸³ Richardson, Ralph citing Baedeker's Handbook, 4th Ed. 1898 in 'What Britain has done for Egypt' (July 1898) 167 *The North American Review* at 4

⁴⁸⁴ McCarthy, Justin A 'Nineteenth-Century Egyptian Population' (October 1976) 12 *Middle Eastern Studies* 1 at 6

⁴⁸⁵ Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 220

⁴⁸⁶ Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 220

Ultimately Egypt's strategy of engagement with Europe proved disastrous to Egyptian independence.⁴⁸⁷

DEVELOPMENTS IN TECHNOLOGY IN THE ABSENCE OF INTELLECTUAL PROPERTY PROTECTION

Muhammad Ali Pasha was aware of the threat posed by possible further foreign attempts to occupy Egypt.⁴⁸⁸ He, therefore, aimed his initial industrial efforts at bolstering the military. In order to modernize the military machinery, he set up plants capable of copying imported hardware so that it would no longer be necessary to buy military apparatus from elsewhere.⁴⁸⁹ There was no Egyptian patent law, nor were there, during the time of Muhammad Ali Pasha, yet any international agreements protecting intellectual property to prevent the free copying of technology, so benefiting from foreign expertise without the need to recompense the inventors was straightforward.

Modernization, therefore, began with bolstering the technical capability and organization of the army to assure Muhammad Ali Pasha of power. The developments that followed derived initially from the need to develop greater military expertise and to promote technological developments in the military field.⁴⁹⁰ The secular education system that dates from the time of Muhammad Ali Pasha was set up in order to feed the military colleges.⁴⁹¹

Once security concerns were accounted for, other areas of expertise were developed as well as manufacturing facilities to enable Egypt to benefit from natural advantages in the large agricultural sector. The high quality of Egyptian cotton meant that cotton textile exports were promoted and Egypt imposed protectionist tariffs to enable the nascent industry to develop. This led to clashes with other nations, where the market philosophy of free trade flourished.

⁴⁸⁷ See analysis of the memoirs of Nubar Pasha in, Robert F 'Self Image and Historical Truth: Nubar Pasha and the Making of Modern Egypt' (July 1987) 23 *Middle Eastern Studies* 363 at 363

⁴⁸⁸ For example the British attempted invasion of 1807, during which, 'under pretext of protecting Egypt against a renewed invasion of Bonaparte, Great Britain sent a fleet to Alexandria, which was repulsed by Mehemet Ali' in Long, Charles Chaillé 'England in Egypt and the Soudan' (May 1899) 168 *The North American Review* 510 at 571

⁴⁸⁹ Al-Sayyid Marsot, Afaf Lutfi *A History of Egypt from the Arab Conquest to the Present* 2nd Ed (Cambridge University Press 2007) at 66

⁴⁹⁰ Al-Sayyid Marsot, Afaf Lutfi *A History of Egypt from the Arab Conquest to the Present* 2nd Ed (Cambridge University Press 2007) at 68

⁴⁹¹ Cochran, Judith *Educational Roots of Political Crisis in Egypt* (Lexington Books 2008) at 38

THE IMPACT OF THE SUEZ CANAL PROJECT

Under Muhammad Ali's grandson Ismail Pasha,⁴⁹² who was also known as Ismail the Magnificent, Egypt boomed, with 'an intellectual renaissance.'⁴⁹³ His most high profile achievement was the Suez Canal project but Ismail also established modern schools, a railway network, encouraged the development of the press, and built theatres in both Cairo and Alexandria. Unfortunately, Ismail seems to have underestimated the effect of the mounting debt that resulted from his modernization program and 'the accumulation of debt and the supposed application of the rule of law' led eventually, to 'everything [being] subordinated to paying the debt.'⁴⁹⁴

Eventually, 'agreements signed with the European powers and enforced by the strong British influence over Egyptian economic affairs after 1880 deprived Egypt of its tariff autonomy.'⁴⁹⁵ By 1880, the pressure to agree to European demands that were not in Egyptian interests was intense. The ensuing legacy of spiralling debt and inflexible commitments resulting in foreign control and occupation has left painful scars.

THE EFFECT OF FREE-TRADE PHILOSOPHY ON DEVELOPMENT IN EGYPT IN THE 19TH CENTURY

The effect of free trade on Egypt, and the Ottoman Empire more generally, has been described as, 'an economic invasion that was aided by the diplomacy of West European consuls and ambassadors, and sanctified by largely unquestioned European arguments in favor of *laissez-faire*.'⁴⁹⁶ Britain was among those countries that clearly benefited from the export of free trade philosophy and was determined to profit from it. Egyptian producers were edged out of both export and local markets as first French, then British and Austrian cotton products displaced Egyptian goods.⁴⁹⁷ Britain dumped its textiles in Egypt, making

⁴⁹² Ruled Egypt and the Sudan as Khedive Ismail from 1863 to 1879

⁴⁹³ Al-Sayyid Marsot, Afaf Lutfi 'The Cartoon in Egypt' (1971) 13 *Comparative Studies in Society and History* 2 at 7

⁴⁹⁴ Al-Sayyid Marsot, Afaf Lutfi 'The Cartoon in Egypt' (1971) 13 *Comparative Studies in Society and History* 2 at 8

⁴⁹⁵ Youssef, Tarik M 'The Political Economy of Interwar Egyptian Cotton Policy' (2000) 37 *Explorations in Economic History* 301–325

⁴⁹⁶ Clark, Edward C 'The Ottoman Industrial Revolution' 5 (1974) *International Journal of Middle East Studies* at 65-76

⁴⁹⁷ Lawson, Fred H 'Rural Revolt and Provincial Society in Egypt, 1820-1824' (1981) 13 *International Journal of Middle East Studies* 131 at 145

similar Egyptian products non-viable.⁴⁹⁸ Ultimately the economy became so dominated by Europeans that they had effective financial control. Eventually, this was extended to political control. Thus, conflict arising out of trading relationships with the West is not new. The arguments over globalization in the late twentieth and early twenty-first centuries are born out of earlier memories of loss of autonomy.

In this way, Egyptian independence was lost even before the British occupation, with foreign supervision of the debt repayment programme justified as protecting the foreign bondholders.

THE DUAL CONTROL AND THE DEBT: FRENCH AND BRITISH COLLABORATION

The British and the French together took control of Egyptian affairs, in 1876, under Dual Control of the Caisse de la Dette Public, an institution established, supposedly, with the intention of putting Egypt back in credit. This system of unusual cooperation between the British and French derived from their recognition of a common interest in the debt repayment. From an Egyptian perspective it was obvious that 'foreign loans and predatory bankers had...wrecked Egyptian finances and were tearing holes in the Egyptian political fabric.' Egyptians were furious that this had provided an excuse for Europeans, especially the British and the French, to interfere in Egyptian internal affairs in order 'to safeguard the foreign bondholders.'⁴⁹⁹ The extremely onerous austerity measures they imposed caused great distress.

THE FOUNDATIONS OF THE URABI REVOLUTION

In fact, the devastating impact of the foreign-imposed measures on the very poorest Egyptians was obvious to all. On his arrival in Egypt, in 1875, Wilfred Scawen Blunt observed that 'the European bondholders were clamouring for their "coupons," and famine was at the doors of the fellahin,' while, 'the tax collectors were in their villages whip in hand.'⁵⁰⁰ No mercy was shown to an Egyptian population that had no say in the public finances.

⁴⁹⁸ Al-Sayyid Marsot, Afaf Lutfi *A History of Egypt from the Arab Conquest to the Present* 2nd Ed (Cambridge University Press 2007) at 73

⁴⁹⁹ Gallagher, John and Ronald Robinson 'The Imperialism of Free Trade' (1953) 6 *The Economic History Review* 1 at 13-14

⁵⁰⁰ Blunt, Wilfred Scawen *Secret History of the English Occupation of Egypt: Being a Personal Narrative of Events* (Alfred A Knopff 1922) at 9

The Dual Control compelled a reluctant Khedive Ismail to become a constitutional monarch, with Nubar Pasha as his Prime Minister and foreigners taking other ministerial positions. Not long afterwards, when Ismail threatened to default on payment of the interest on the debt, he was deposed by 'the Powers'⁵⁰¹ with the agreement of Ottoman Sultan Abdel Hamid. His son Tewfik became Sultan in 1879.

Tewfik attempted to institute the Dual Control's unpopular tax measures. However, Egypt's first constitutional parliament defied him and rejected the tax legislation, which they had not themselves authorized, in accordance with the American revolutionary motto of 'no taxation without representation.'⁵⁰² It was clear that Egyptians were treated and, in particular, taxed, unfairly. When Tewfik responded by disbanding the parliament, mass protests erupted. Egyptian nationalists, rejecting all foreign intervention, adopted the rallying cry of 'Egypt for Egyptians.'⁵⁰³ The protests against injustice lasted from 1879-1882 and were headed by Ahmed Urabi.⁵⁰⁴ In Egyptian history the protests constituted an attempted revolution that unfortunately failed, but the same events were described by the British Consul at Port Said, Donald Andreas Cameron,⁵⁰⁵ as 'a mad revolt of ignorant Arabs.'⁵⁰⁶ Cameron's analysis is typical of the contemporaneous British approach, which reflected a narrow focus on British interests in Egypt and a complete disregard and disdain for Egyptian national sentiment. It did not endear the British to the Egyptians. The British Controller-General of the Dual Control was Evelyn Baring, later Lord Cromer, and widely known in Egyptian circles as 'Lord Over-bearing'. The British occupied Egypt in an attempt to quell the protests.

The reign of Muhammad Ali's heirs continued after the British occupation, which was initially conducted under the ultimate sovereignty of the Ottoman Empire.⁵⁰⁷

⁵⁰¹ These were Russia, Great Britain, France, Austria-Hungary, Italy and Germany

⁵⁰² Cited by Ibrahim, Saad Eddin 'An Open Door' (2004) *Wilson Quarterly* 36 at 38

⁵⁰³ Carman, Harry J 'England and the Egyptian Problem' (March 1921) 36 *Political Science Quarterly* 51

⁵⁰⁴ Led by Ahmed Urabi alternatively transcribed as Arabi

⁵⁰⁵ Judge of the Native Appeal Court 1889-1897

⁵⁰⁶ D. A. Cameron, cited in Harlow, Barbara and Mia Carter Eds *Imperialism and Orientalism: A Documentary Sourcebook* (Blackwell 1999) at 235-247 and 272-276

⁵⁰⁷ Tewfik 1882-1892, Abbas Hilmi 1892-1914, Hussein Kamil 1914-1922, Fouad 1922-1936 and Farouk 1936-1952.

Nationalist fervour, meanwhile, continued to strengthen; occupation 'boosted Egyptianism.'⁵⁰⁸

It was not until the start of the First World War (WWI) on December 7, 1914 that Ottoman rule was formally displaced and a British protectorate was announced. A declaration was published explaining the change in administration.

His Britannic Majesty's Principal Secretary of State for Foreign Affairs gives notice that, in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of his Majesty and will henceforth constitute a British Protectorate. The suzerainty of Turkey over Egypt is thus terminated and his Majesty's Government will adopt all measures necessary for the defence of Egypt and the protection of its inhabitants and interests.⁵⁰⁹

THE NATIONALIST REACTION TO OCCUPATION

According to Osman, the reason the occupation caused such a sharp increase in nationalism was that it had the effect of destroying the impression, begun under Muhammad Ali and continued by his descendants, that Egypt was developing into a modern, independent state. In battling against the occupiers, the poetry of resistance 'urged Egyptians to resist the occupation and the "fall back into decay."⁵¹⁰ Nationalism is, thus, linked with the idea of modernisation. The recent and continuing periods of revolution in Egypt consciously build on the historical precedents set by Urabi's revolution. The theme song of the 1919 revolution, which was the culmination of anti-occupation resistance, was 'Oum ya Masry' (Rise up Egyptians!) by Sayyed Darwish. This song was a core refrain of the January 25, 2011 revolution, with protestors singing it again.⁵¹¹

⁵⁰⁸ Osman, Tarek *Egypt on the Brink: from the Rise of Nasser to the Fall of Mubarak* (Yale University Press 2011) at 32

⁵⁰⁹ 'Egypt a British Protectorate' (January 1915) 9 *The American Journal of International Law* 202

⁵¹⁰ Osman, citing the poems of Abdullah al-Nadeem in Osman, Tarek *Egypt on the Brink: from the Rise of Nasser to the Fall of Mubarak* (Yale University Press 2011) at 32

⁵¹¹ Osman, Ahmed Zaki 'Celebrating Sayyed Darwish: Egypt's revolutionary singer' *Egypt Independent Sun*, 27/03/2011 <<http://www.egyptindependent.com/news/celebrating-sayyed-darwish-egypt's-revolutionary-singer>> accessed 2014

A distinction can be drawn between the modernist nationalist resistance, which sought a modern, independent nation state and other, more religiously orientated, groups whose goals were certainly anti-foreign intervention, but were also anti-Coptic and other Egyptian Christian groups.⁵¹² Professor Robert Tignor attributes the discord between the religious groups to effects of modernization in privileging Muslims over Copts.⁵¹³ Nationalists originally encouraged links with Islamic groups in order to widen the appeal of Egyptian independence but, with the emergence of the Muslim Brotherhood, the paths of nationalists and Islamists began to diverge.

Hasan El Banna, a teacher and Muslim cleric, founded the modern Muslim Brotherhood in 1928. When he moved from the Egyptian countryside, where he was born, to Cairo and encountered the metropolitan elite he was horrified by what he found there. The society seemed to embody

The intellectual, political, and social problems and conflicts which the process of "Westernization" seems to engender: an emphasis upon materialism, the often ostentatious display of wealth, the new standards of prestige and status (which emulated Western criteria), the laxity of adherence to Muslim principles, the moral decay, and the like [...]⁵¹⁴

Based on this evidence, and completely rejecting Western ideas, he desired a return 'to the ideas and practices of the first generation of Islamic rulers for inspiration.'⁵¹⁵ Ideally, this would involve a return to the period before British occupation and a reinvigorated Caliphate,⁵¹⁶ rather than the modern nation state at the heart of nationalists' goals. The particular demand of the Muslim Brotherhood was that Egyptian law should be based

⁵¹² Tignor, Robert *Modernization and British Colonial Rule 1882-1914* (Princeton University Press 1966) at 306

⁵¹³ For further discussion of this point see Tignor, Robert *Modernization and British Colonial Rule 1882-1914* (Princeton University Press 1966) at 307-314

⁵¹⁴ Aly, Abd al-Monein Said and Manfred W Wenner 'Modern Islamic Reform Movements: The Muslim Brotherhood in Contemporary Egypt' *Middle East Journal* 336 at 337

⁵¹⁵ Aly, Abd al-Monein Said and Manfred W Wenner 'Modern Islamic Reform Movements: The Muslim Brotherhood in Contemporary Egypt' *Middle East Journal* 336 at 338

⁵¹⁶ Islamic dynasty such as that exemplified by the Ottoman Empire and its antecedents.

entirely on *Sharia*.⁵¹⁷ This amounted to a total rejection of Westernization and modernization and not merely freedom from Western rule.⁵¹⁸ What both trends, nationalist and Islamist, have in common is the desire to be free of outside control and the wish to shape a future without foreign interference.

CONTINUOUS RESISTANCE TO FOREIGN CONTROL

Continuous resistance to the British occupation eventually led to a unilateral declaration of Egyptian independence in 1922, while formal, *de iure*, independence came later in the Montreux Treaty of 1936.⁵¹⁹ Real independence was only secured by the Free Officer's revolution of 1952 and the subsequent Suez dispute, in 1956, which finally resulted in the departure of all British troops from Egyptian soil.

Egyptian lawyers were at the heart of the process of organizing effective resistance to foreign intervention in Egyptian affairs and key to the evolution of the Egyptian political and the legal systems.⁵²⁰ While they were not completely successful in achieving exactly what they wanted in terms of the legal system and rules that resulted, their efforts in the struggle for independence are nonetheless reflected in the ways in which the law developed.⁵²¹

PRESIDENT GAMAL ABD EL NASSER: RULED 1952-1970

Following independence, the momentum towards modernization continued. President Gamal Abdel Nasser set out an ambitious industrial programme reminiscent of the great projects of Muhammed Ali Pasha and his grandson the Khedive⁵²² Ismail. Although Nasser considered Muhammad Ali and his successors to be part of a non-Egyptian elite that had corruptly ruled the land for their own benefit, he nevertheless saw value in their ambition to modernize. Nasser's development program, therefore, represented Egypt's first 'nation-centered developmental vision' and 'the first time in thousands of years, that a native

⁵¹⁷ Ziadeh, Farhat *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (Stanford University, Hoover Institute on War and Peace 1968) at 136, 143 and 146

⁵¹⁸ Botman, Selma *The Liberal Age 1923-1952* in Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 197

⁵¹⁹ Anglo-Egyptian Treaty, Montreux, August 26 1936.

⁵²⁰ Ziadeh, Farhat. *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (Stanford University, Hoover Institute on War and Peace 1968); Byron Cannon *The Politics of Law and the Courts in Nineteenth Century Egypt* (University of Utah Press 1988)

⁵²¹ See Chapters 4 and 6 for further discussion of this point

⁵²² The term Khedive is an Ottoman honorific title meaning Viceroy

Egyptian had ruled Egypt and articulated a coherent vision of its future.⁵²³ Investment in innovation and industrialization were intended to lead Egypt to a prosperous future.

Abdel Nasser identified the problems that led to the Free Officers revolution as 'a struggle between the nation and its rulers on one hand, and a struggle between the nation and foreign intervention on the other.'⁵²⁴ He explained that 'revolution was the only way out'.⁵²⁵ The post-revolutionary society would ultimately, he promised, 'provide Egypt with a truly democratic and representative government.'⁵²⁶ In this, he eventually failed.

THE SOCIALIST PERIOD

Under Nasser, Egypt embraced Arab socialism. This was an economic model that emphasized the role of the state. Punitive measures that were taken during this time included the sequestration of property belonging to the foreigners and nationals who had previously controlled the majority of resources in the country. As a result, large numbers of foreigners and wealthy Egyptians left the country, either voluntarily or expelled by the regime. International economic relations were strained among the many countries whose citizens had suffered under such policies. Egypt leaned more heavily on its eastern, socialist allies, in particular the Soviet Union. In a 1954 article in *Foreign Affairs* Abdel Nasser made it clear that this preference was pragmatic rather than ideological.

There would not be any Communist infiltration in any part of the Middle East and Africa if the United States could develop a courageous policy—and the only morally correct one—of supporting those who are anxious to get rid of foreign domination and exploitation.⁵²⁷

Egypt would, thus, respond positively to support and negatively to criticism and interference. Nasser was disappointed in contemporary American policy in support of the British. Egyptians were also still deeply disappointed by the earlier failure of the United States to support Egyptian independence following Woodrow Wilson's declaration in

⁵²³ Osman, Tarek *Egypt on the Brink: from the Rise of Nasser to the Fall of Mubarak* (Yale University Press 2011) at 52

⁵²⁴ Abd El Nasser, Gamal 'The Egyptian Revolution' (1954-1955) 33 *Foreign Affairs* 199 at 201

⁵²⁵ Abd El Nasser, Gamal 'The Egyptian Revolution' (1954-1955) 33 *Foreign Affairs* 199 at 203

⁵²⁶ Abd El Nasser, Gamal 'The Egyptian Revolution' (1954-1955) 33 *Foreign Affairs* 199 208

⁵²⁷ Abd El Nasser, Gamal 'The Egyptian Revolution' (1954-1955) 33 *Foreign Affairs* 199 at 211

support of self-determination at the post WWI summit at Versailles. Suspicion of foreign imperialism and the duplicity of foreign powers were very evident.

SOCIAL CHANGE UNDER GAMAL ABD EL NASSER

After decolonization, President Gamal Abd El Nasser's development program, although fashioned after the Western model of industrialization, intended to shake off colonial ties. To do this, 'the engine of development would be an expanding public sector with nationalization and socialism as leitmotifs.'⁵²⁸ Embracing a socialist agenda and rejecting ties with the West, Nasser also expelled many foreigners, who had long resided and traded in Egypt. The sequestration of assets belonging to foreign (as well as some Egyptian) companies meant that all major industries were taken out of private ownership and placed into the hands of the public sector.⁵²⁹ Abu Odeh explains that only small-scale enterprises, escaped. Unsurprisingly this approach led to feelings of suspicion and lack of trust among foreigners wishing to trade in Egypt, which have endured.

'INFITAH' (OPEN DOOR) POLICY UNDER SADAT

Under President Anwar El Sadat, who succeeded Nasser, beginning his presidency on October 15, 1970, some sequestered assets were returned but only for political convenience.⁵³⁰ This illustrated the government's 'new-found respect for private property'⁵³¹ and was intended to encourage foreigners to invest in and trade with Egypt.

After the relative isolation under Gamal Abdel Nasser, Sadat began a policy of *infitah* (opening up) in the 1970s, marking the end of the post-revolution socialist period. This sparked the beginning of renewed struggle to define the newly independent Egypt. The process of *infitah* gradually eroded the closed economy and socialist system and Egypt's active engagement in free trade accelerated rapidly once Sadat 'remov[ed] Nasser's statist

⁵²⁸ Abu Odeh, Lamah 'On Law and the Transition to Market: The Case of Egypt' (2009) 23 *Emory International Law Review* 351 at 351

⁵²⁹ Abu Odeh, Lamah 'On Law and the Transition to Market: The Case of Egypt' (2009) 23 *Emory International Law Review* 351 at 351 n1 Citing John Waterbury, 'The Egypt Of Nasser And Sadat' (Princeton University Press 1983) at 51

⁵³⁰ Abu Odeh, Lamah 'On Law and the Transition to Market: The Case of Egypt' (2009) 23 *Emory International Law Review* 351 at 351 n1 Citing John Waterbury, 'The Egypt Of Nasser And Sadat' (Princeton University Press 1983) at 51

⁵³¹ Owen, Roger and Şevçet Pamuk *A History of Middle East Economies in the Twentieth Century* (I.B. Tauris 1998) at 134

shackles⁵³² and re-opened the Egyptian economy. Egypt became more westward-leaning again.⁵³³

Unfortunately, the 'open door' policy also resulted in the excessive importation of foreign goods, and led once again to a debt crisis. When the Egyptian national debt reached crisis level in the 1970s the international financial institutions, the International Monetary Fund (IMF) and World Bank (WB), as a condition of providing loans, intervened and imposed reforms as part of a structural adjustment program (SAP). Thus, the direction of travel has not been entirely voluntary but in response to considerable external pressure. Among the required measures was the removal of food subsidies. These caused food riots in 1977⁵³⁴ during which many died and more were injured. President Sadat was assassinated by Islamists on October 6, 1981.

Hosni Mubarak acceded to the presidency on October 14, 1981, following Sadat's assassination. His policies hastened movement in the same direction and it was the Mubarak era trade liberalization policy, which eventually led to Egypt's membership of the WTO. On his accession, Mubarak was confronted by a debt crisis 'that resembled Khedive Ismail's situation, in the 1870s, with the role of the *caisse de la dette* now played by the International Monetary Fund.'⁵³⁵ The structural reforms required by the IMF meant that Mubarak had little choice but to further liberalize the economy. In the period preceding the signing of the WTO agreement, the Egyptian government is described as 'dodging and stalling' in the face of implacable IMF 'intransigence'.⁵³⁶

Thus, while the narrative of Egyptian WTO membership and commitment to free market philosophy emphasizes the Egyptian goal of attracting more foreign direct investment, there was a significant degree of external compulsion. It is true that foreign business activity has

⁵³² Bromley, Simon and Ray Bush 'Adjustment in Egypt? The Political Economy of Reform' (1994) 21 *Review of African Political Economy* 201 at 202

⁵³³ Shihata, Ibrahim 'The Attitude of New States Toward the International Court of Justice' (1965) 19 *International Organization* 203

⁵³⁴ Bromley, Simon and Ray Bush 'Adjustment in Egypt? The Political Economy of Reform' (1994) 21 *Review of African Political Economy* 201

⁵³⁵ Roussillon, Alain 'Republican Egypt: Revolution and Beyond' in Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 374

⁵³⁶ Roussillon, Alain 'Republican Egypt: Revolution and Beyond' in Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 375

gradually intensified in Egypt as a result of deregulation.⁵³⁷ However, the benefits have been very unevenly spread, with most of Egypt becoming increasingly 'poor and indebted', while others became US dollar multi-billionaires.⁵³⁸ 'Egyptians did not reap the benefits of Egypt's growth because of Mubarak's cronyism and nepotism.'⁵³⁹ The evident social injustice shows the inadequacy of trade liberalization to address such issues. Egypt's WTO membership has meant accepting free market philosophy, once again, but unsurprisingly, a large number of Egyptians associate liberalization 'with Western colonialism and hegemony, and [...] find these ideas distasteful.'⁵⁴⁰ There has, therefore, been a constant tension within Egypt regarding the management of trading relations with the international community.

However, a great many changes have already been implemented and law has been a major vehicle to secure and promote FDI, enshrining in statute measures from tax incentives to economic courts.⁵⁴¹ Foreign companies operating in Egypt have not necessarily had the same degree of confidence as they did previously in the nineteenth century under the protection of the Mixed Courts. According to a report in 2010 by the Middle East and North Africa regional group of the Organisation for Cooperation and Development (MENA-OECD) Egypt's courts remain slow, and dispute settlements can take several years.⁵⁴² In response to concerns about the court process, a tendency has developed for those companies newly investing in Egypt to specify a dispute settlement procedure outside Egypt in their contracts, generally stipulating either Paris or Geneva for the dispute to be adjudicated. In this way they have been able to avoid the jurisdiction of the Egyptian courts because 'even though Egypt is a signatory to all major international arbitration treaties, domestic courts do not

⁵³⁷ Roussillon, Alain 'Republican Egypt: Revolution and Beyond' in Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 376

⁵³⁸ Roussillon, Alain 'Republican Egypt: Revolution and Beyond' in Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) at 376

⁵³⁹ Salman, Salma 'For Freedom or Security? A Critical Appraisal of Egypt's Unfinished Revolution' (2014) 5 *Situations* at 113

⁵⁴⁰ Dunne, Michele and Tarek Radwan 'Egypt: Why Liberalism Still Matters' (January 2013) 24 *Journal of Democracy* 86

⁵⁴¹ Business Climate Development Strategy Phase 1 Policy Assessment Egypt: Investment Policy and Promotion June 2010 Partner: European Commission This report is issued under the authority of the Steering Groups of the Middle East and North Africa- Organisation for Economic Co-operation and Development MENA-OECD Initiative <<http://www.oecd.org/globalrelations/psd/47017849.pdf>> accessed 2014

⁵⁴² Business Climate Development Strategy Phase 1 Policy Assessment Egypt: Investment Policy and Promotion June 2010 Partner: European Commission This report is issued under the authority of the Steering Groups of the Middle East and North Africa- Organisation for Economic Co-operation and Development MENA-OECD Initiative <<http://www.oecd.org/globalrelations/psd/47017849.pdf>> accessed 2014

always enforce awards granted to foreigners, and the process can be dragged out for years.⁵⁴³ The MENA report made it clear that the anticipated positive impact of the economic courts has yet to be felt.⁵⁴⁴ There is an evident circularity reminiscent, in some respects, of the situation in the nineteenth century.⁵⁴⁵

DESPOTISM AND ITS EFFECTS

The personal, authoritarian style of a president-led autocracy has been the mark of the three major figures that have held the presidency since 1952, Gamal Abd El Nasser, Anwar El Sadat and Hosni Mubarak.⁵⁴⁶ Despite superficial nods towards the development of democracy in Egypt 'the formal branches of government have remained subservient to the overwhelming domination of the executive'⁵⁴⁷ since the Free Officers revolution.⁵⁴⁸ Thus, while regular elections have been held in post-independence Egypt and, until the January 25, 2011 revolution there was a bicameral parliamentary system, with an Upper House (Maglis el Shura) and Lower House (Maglis el Shaab), in place to propose and scrutinize legislation, as well as a fairly robust judiciary, in practice the system has suffered from serious flaws.⁵⁴⁹ Political parties which had prospered, even under British rule, were outlawed and presidential elections reduced to rather farcical 'yes'/'no' referenda in which the president inevitably emerged triumphant with around 99% of the vote in an unambiguously fixed result. In November 2010, Mubarak's National Democratic Party won

⁵⁴³ Business Climate Development Strategy Phase 1 Policy Assessment Egypt: Investment Policy and Promotion June 2010 Partner: European Commission This report is issued under the authority of the Steering Groups of the Middle East and North Africa- Organisation for Economic Co-operation and Development MENA-OECD Initiative <<http://www.oecd.org/globalrelations/psd/47017849.pdf>> accessed 2014

⁵⁴⁴ Business Climate Development Strategy Phase 1 Policy Assessment Egypt: Investment Policy and Promotion June 2010 Partner: European Commission This report is issued under the authority of the Steering Groups of the Middle East and North Africa- Organisation for Economic Co-operation and Development MENA-OECD Initiative <<http://www.oecd.org/globalrelations/psd/47017849.pdf>> accessed 2014

⁵⁴⁵ Shalakany, Amr 'I Heard it All Before: Egyptian Tales of Law and Development' (2008) 27 *Third World Quarterly* 833; Al Attar, Mohsen 'Counter-revolution by Ideology? Law and Development's Vision(s) for Post-Revolutionary Egypt' (2012) 33 *Third World Quarterly* 1611; see also discussion in Chapter 4

⁵⁴⁶ Mohamed Naguib's tenancy as Egyptian president was relatively short-lived. He served only from June 18, 1953 to November 14, 1954.

⁵⁴⁷ Kassem, Maye *Egyptian Politics: the Dynamics of Authoritarian Rule* (Lynne Rienner Publications 2004); Moustafa, Tamir *The Struggle for Constitutional Power* (Cambridge University Press 2007); Rutherford, Bruce *Egypt After Mubarak: Liberalism, Islam and Democracy in the Arab World* (Princeton University Press 2008)

⁵⁴⁸ Egypt's Revolution of 1952 was achieved in a coup organised by a group of army officers that called themselves Free Officers

⁵⁴⁹ See e.g. Kienle, Eberhard 'More than a Response to Islamism: The Political Deliberalization of Egypt in the 1990s' (1998) 52 *Middle East Journal* 219 at 220

more than 93% of all seats, while many Muslim Brotherhood members were either prevented from putting themselves forward or, worse, imprisoned or beaten.⁵⁵⁰

Since January 25, 2011, Egyptian elections have enjoyed much greater participation despite evidence of widespread intimidation and fraud. Ex-President Morsi, however, suffered the same fate as Ex-President Mubarak and was deposed by an impatient population, who accused him of similarly despotic tendencies. On June 30, 2013, on the anniversary of Morsi's election, Egyptians decided to 'express their discontent,'⁵⁵¹ once again, in enormous protests. The military took over, suspended the constitution and, as an interim measure, replaced Morsi with the head of the Supreme Constitutional Court on July 3, 2013.⁵⁵²

In Egypt, there have been many years of paternalistic autocratic government, both during colonial times and since independence, during which important decisions have been taken and international agreements signed with little, if any, democratic participation. The protests since January 25, 2011 have indicated rejection of this approach.

The TRIPS agreement was made under an international system that does not differentiate between democratic and non-democratic states in the conclusion of treaties. Crucially, TRIPS not only mandates rules and systems governing the enforcement of IP, having vertical effect on governmental obligations, but it is also prescriptive as to the enforcement of IPRs within states, with consequent implications for hard won national sovereignty. As Professor Kal Raustiala has noted, TRIPS determines 'the structure of domestic civil and criminal remedies.'⁵⁵³ This is central to 'core domestic policy [and] the organization of the domestic judicial system.'⁵⁵⁴ With an appetite for greater transparency and democratic participation in all aspects of governance it will be interesting to see how controversial aspects TRIPS are managed in the future.

⁵⁵⁰ Osman, Tarek *Egypt on the Brink: from the Rise of Nasser to the Fall of Mubarak* (Yale University Press 2011)

⁵⁵¹ Salman, Salma *For Freedom or Security? A Critical Appraisal of Egypt's Unfinished Revolution* (2014) 5 *Situations* at 130

⁵⁵² Salman, Salma *For Freedom or Security? A Critical Appraisal of Egypt's Unfinished Revolution* (2014) 5 *Situations* at 131

⁵⁵³ Raustiala, Kal 'Sovereignty and Multilateralism' (2000) *Chicago Journal of International Law* 401 at 405

⁵⁵⁴ Raustiala, Kal 'Sovereignty and Multilateralism' (2000) *Chicago Journal of International Law* 401 at 405

CHAPTER 4: NINETEENTH AND TWENTIETH CENTURY LEGAL DEVELOPMENTS IN EGYPT

In order to appreciate the very significant legal reforms that took place in Egypt in the nineteenth century, and their present day repercussions, it is necessary to acknowledge the complexity of the interrelationships that contributed to their development. Egypt's modern juridical history manifests striking patterns, which can still be recognized today. These patterns are evident in Egyptian responses to international pressure in the context of international trade where there are competing strategic interests among and between both international and local actors. They can be seen in the implementation of domestic law resulting from the TRIPS agreement.

FROM CAPITULATIONS TO MIXED COURTS

BASIS FOR JURISDICTION WITHIN THE OTTOMAN EMPIRE

Egypt was part of the Ottoman Empire from the Ottoman conquest in 1517⁵⁵⁵ until 1914, when the British declared Egypt to be a British Protectorate.⁵⁵⁶ A great deal of Egypt's legal development, therefore, occurred in tandem with that of the rest of the Ottoman Empire. However, it also developed to address specifically Egyptian concerns and so demonstrates marked differences. It has been shown that modifications to the law in the Ottoman Empire in the nineteenth century, to address contemporary needs, complemented, rather than supplanted, the Islamic *Sharia* by creating secular law and legal institutions alongside and consistent with the *Sharia*.⁵⁵⁷ Local law reformers, who looked to the Ottoman Empire for inspiration, but translated the law to fit the circumstances of Egypt, spearheaded the process.⁵⁵⁸

An aspect of the Ottoman approach to international relations, however, that did allow for an influx of foreign legal norms, and had a major impact in Egypt, was that of the

⁵⁵⁵ See Daly, M W *The Cambridge History of Egypt: Volume Two, Modern Egypt from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998). The year 1517 marks the Ottoman conquest of Egypt and 1914 marks the end of Ottoman rule with the establishment of a British Protectorate in Egypt

⁵⁵⁶ 'Proclamation by the General Officer Commanding-in-Chief the British Forces in Egypt Announcing the Establishment of a British Protectorate over Egypt' Cairo (December 18, 1914) British and Foreign State Papers [1919] 436 2010

⁵⁵⁷ Peters, Rudolph Ed 'Theme Issue: The Legal History of Ottoman Egypt' (1999) 6 *Islamic Law and Society* 129 at 131

⁵⁵⁸ Peters, Rudolph Ed 'Theme Issue: The Legal History of Ottoman Egypt' (1999) 6 *Islamic Law and Society* 129 at 131

Capitulations. These were treaties in which the Ottoman Empire addressed the concerns of their European trading partners by providing for a system of privileges. They were unilateral dispensations negotiated between the Ottoman Empire and foreign powers to encourage trade by providing a legal framework that provided preferential treatment for foreigners, since ‘infidels [...] could not be expected to abide by Muslim law’.⁵⁵⁹ Differential treatment for Europeans therefore originally derived from a sense of compassionate power whereby the Sublime Porte⁵⁶⁰ gifted concessions to non-believers on the basis of their inability to understand the superior system they were dealing with.⁵⁶¹ The earliest capitulations date from the sixteenth century.⁵⁶²

The privileges enshrined in the capitulations were negotiated between individual states and the Sublime Porte, represented by the Ottoman Sultan. As more states entered into such agreements, a highly complex treaty system evolved.⁵⁶³ Eminent Middle East historian Donald Quataert explains that ‘a capitulation meant that all subjects of a foreign monarch and citizens of republics such as Venice remained under the laws of their own King or republic once the capitulatory favour had been granted.’⁵⁶⁴ As the relative power of Europe increased and Turkish power decreased, the capitulations ‘became a nuisance.’⁵⁶⁵

Known as diplomas, the agreements were divided into chapters according to subject matter. The Latin term meaning chapter, *capitula*, thus became capitulations.⁵⁶⁶ The term capitulation, therefore, is linguistically a ‘false-friend’ in the sense that in English it suggests the surrender of power.⁵⁶⁷ The French understanding of the term, consistent with the Latin, does not carry that meaning. Ultimately, however, abuse of the capitulatory agreements led to the English meaning of the term providing a more accurate description of their effect.

⁵⁵⁹ Fidler, David P ‘A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies and the Standard of Liberal Globalized Civilization’ (2000) 35 *Texas International Law Journal* 387 at 390

⁵⁶⁰ Ottoman government

⁵⁶¹ Fidler, David P ‘A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies and the Standard of Liberal Globalized Civilization’ (2000) 35 *Texas International Law Journal* 387 at 387

⁵⁶² Gong, Gerrit *The Standard of 'Civilization' in International Society* (Oxford University Press 1984) at 65

⁵⁶³ This may be compared to the spread of bilateral agreements post-TRIPS

⁵⁶⁴ Quataert, Donald *The Ottoman Empire, 1700-1922 (New Approaches to European History)* (Cambridge University Press 2005) at 79

⁵⁶⁵ Ahmad, Feroz ‘Ottoman Perceptions of The Capitulations’ 1800-1914 (2000) 11 *Journal of Islamic Studies* 1 at 2

⁵⁶⁶ Longva Anh Nga ‘From the Dhimma to the Capitulations: Memory and Experience of Protection in Lebanon’ in Roald, Ann Sophie and Anh Nga Longva Eds *Religious Minorities in the Middle East* Koninklijke Brill 2012) at 52

⁵⁶⁷ Pierre Crabites *The Courts of Egypt* (1925) 11 *American Bar Association Journal* 485 at 486

With the ascendancy of Europe and the United States, a Western interpretation of international law employed a 'standard of civilization' that assessed non-Western states as lacking civilization unless they mirrored exactly the Western idea of law. In this way, capitulations were used to ensure the adoption of laws acceptable to the West. According to Fidler

Capitulations were required until the standard of civilization could be met by the uncivilized nations. Legal harmonization was, thus, required from non-Western countries by international law through treaty and custom.⁵⁶⁸

The system was similar to that of the multilateral trading system of the WTO⁵⁶⁹ and TRIPS⁵⁷⁰ in that eventually all capitulations were drafted to include a 'Most Favoured Nation Clause,'⁵⁷¹ by which any privilege granted to one state would be extended to all other capitulatory powers. The Capitulations also led to the transplantation of law in that the greater power of Europe and the US meant that the rules chosen derived from US and European law and were 'imposed on the weaker party,' in this case Egypt.⁵⁷² The approach does not seem dissimilar to that employed in the bilateral TRIPS-Plus agreements intended to raise the level of IP protection to one that suits the interests of Europe and the United States. Following Berkowitz and Pistor's argument, rules transplanted in this way were unlikely to find favour among those on whom they are imposed. They found that where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weaker.⁵⁷³ Their study pointed to Egypt as an example of a country unreceptive to transplanted law in the period 1798-1840.⁵⁷⁴

Under Muhammad Ali, the capitulation system endured, and foreign commercial activity increased, in Egypt. Foreigners were encouraged to enjoy the abundant opportunities for generating wealth and foreign states remained unprepared to subject their citizens to the

⁵⁶⁸ Fidler, David P 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies and the Standard of Liberal Globalized Civilization' (2000) 35 *Texas International Law Journal* 387 at 396

⁵⁶⁹ Article 1 GATT 1947

⁵⁷⁰ Article 4 TRIPS

⁵⁷¹ The Egyptian Capitulations and their Reform II (1906-1907) 18 *Juridical Review* 235 at 235

⁵⁷² The Egyptian Capitulations and their Reform I (1906-1907) 18 *Juridical Review* 185 at 185-186

⁵⁷³ Berkowitz, Daniel, Katharina Pistor and Jean-Francois Richard 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163 at 190

⁵⁷⁴ Berkowitz, Daniel, Katharina Pistor and Jean-Francois Richard 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163 at 194

Egyptian system of law.⁵⁷⁵ The capitulations were seen as a necessary quid pro quo for Egypt benefiting from foreign expertise but Egyptians were put at a significant disadvantage by policies that aimed to foster foreign trade and many Egyptians bitterly resented the unfairness. Professor Panayiotis Vatikiotis notes that 'they saw in [the Capitulations] an obstacle to uniform legislation and therefore to any future sovereignty, as well as an affront to their dignity and national sentiment.'⁵⁷⁶ Under the Capitulations, the principle of *actor sequitor forum rei* applied to all disputes.⁵⁷⁷ This meant that the consulate of the defendant would always have jurisdiction, even where the complaining party was Egyptian. Over time, the injustice of this arrangement became ever more apparent.

PRIVILEGES AND PROBLEMS UNDER CAPITULATIONS

Although judicial immunity was not specifically mentioned in the capitulations,⁵⁷⁸ in practice, as a result of applying the principle of the law being personal rather than territorial, all disputes involving a foreigner were removed from Egyptian jurisdiction and tried in consular courts under the relevant foreign national law, which had sole jurisdiction. Many European countries were represented at consular level by the middle of the nineteenth century and 'all the important European States, as well as the United States of America, [were] in possession of Capitulations'.⁵⁷⁹ Eventually, at the end of the nineteenth century, 'there were seventeen separate consulates in Egypt, in each of which the consul was prepared only to apply his national law.'⁵⁸⁰ Some of the disadvantages of the system included the fact that

If there were two defendants of different nationalities there required to be two distinct actions, each brought in a different consulate; if the defendant desired to make a counter claim, he must institute a distinct process before his adversary's

⁵⁷⁵ Brown, Nathan J 'The Precarious Life and Slow Death of the Mixed Courts of Egypt' *International Journal of Middle East Studies* 25 at

⁵⁷⁶ Vatikiotis, Panayiotis J *The History of Modern Egypt: from Muhammad Ali to Mubarak* (Johns Hopkins University Press 1991) at 224

⁵⁷⁷ Debs, Richard *Islamic Law and Civil Code: The Law of Property in Egypt* (Columbia University Press 2010) at 59

⁵⁷⁸ Cannon, Byron D 'A Reassessment of Judicial Reform in Egypt, 1876-1891' (1972) 5 *The International Journal of African Historical Studies* 51 at 52

⁵⁷⁹ 'The Egyptian Capitulations and Their Reform' (1906-1907) 18 *Juridical Review* Parts I and II at 185 and 235; See also Serpell, David 'American Consular Activities in Egypt 1849-1863' (1938) 10 *The Journal of Modern History* 345

⁵⁸⁰ Scott, James Harry 'The Judicial System of Egypt' (1906-1907) 18 *Juridical Review* 386 at 392; See also Debs, Richard *Islamic Law and Civil Code: The Law of Property in Egypt* (Columbia University Press 2010) at 59

consul; and an appeal had to be brought in the final Consular Appeal Court of the appellant, which might be situated at a considerable distance from Egypt.⁵⁸¹

As the Ottoman Empire weakened, the system became ever more open to exploitation.

THE NEED FOR REFORM

The effect of the non-application of local law to foreigners in Egypt was that 'no foreigner could be sued for debt before the local courts or there prosecuted for crime.'⁵⁸² Thus, at first instance, Egyptians were under the double disadvantage of having both to understand foreign law and to be heard under foreign jurisdiction. All these problems were exacerbated and added to where an appeal necessitated undertaking procedures abroad. Appeals of decisions made in the consular courts were also heard under foreign law and cases were then taken outside Egypt altogether to be heard in the appeal court of that nation. This caused real difficulties for Egyptian disputants. The standing of Egyptians in the consular courts was uncertain, the law, language and culture unfamiliar despite being on Egyptian soil, and the costs were potentially prohibitive. This situation was intolerable.

LAW REFORM WITHIN THE OTTOMAN EMPIRE AS A WHOLE

The way in which the capitulations operated differed between Egypt and the rest of the Ottoman Empire. Nevertheless, the modernization that took place within the Ottoman Empire forms part of the context for Egyptian legal reform.

THE *TANZIMAT*

In the nineteenth century, the Ottoman Empire acknowledged a need for radical legal change to encourage trade and developed a mechanism for reform known as the *Tanzimat*,⁵⁸³ which was announced by Sultan Abdulmegid, in 1839, through the *Hatt-i Sherif of Gülhane*.⁵⁸⁴ The *Tanzimat* aimed to enable modernization while also meeting the needs of the diverse peoples represented within the Ottoman Empire. Professor Mark Hoyle explains that the reasoning behind the *Tanzimat*, which also applied in Egypt, was to

⁵⁸¹ Scott, James Harry 'The Judicial System of Egypt' (1906-1907) 18 *Juridical Review* 386 at 392

⁵⁸² Pierre Crabites *The Courts of Egypt* (1925) 11 *American Bar Association Journal* 485

⁵⁸³ Liebsny, Herbert J *The Law of the Near and Middle East State* (University of New York Press 1975) at 46-52

⁵⁸⁴ Liebsny, Herbert J *The Law of the Near and Middle East State* (University of New York Press 1975) at 46

encourage the transfer of 'European culture, science and capital.'⁵⁸⁵ The regulatory regime in place was not adequate for such a project so it was necessary to create a secular code for the modern age that would be applicable to people of all religions, be inclusive and protect all citizens equally.⁵⁸⁶ This represented a type of National Treatment, something that has been included in all IP treaties since the Berne Convention.⁵⁸⁷

THE MAJELLE

The *Majelle*,⁵⁸⁸ the Ottoman civil code that resulted from the *Tanzimat*, was drafted over a period of years to incorporate those principles of *Sharia* that could be universally accepted and embodied in a civil code capable of applying to everyone regardless of religion.⁵⁸⁹ Although some Turkish legal reformers 'argued that the French *Code Civil* should be accepted as the civil code of the Ottoman Empire'⁵⁹⁰ those who argued against doing so and in favour of developing a code based on Islamic principles 'prevailed.'⁵⁹¹ Thus, the *Majelle* has been seen as an example of 'modernizing the indigenous law by putting it into European form and publishing it as a statute.'⁵⁹² Issues of personal status, such as family arrangements, fell outside the reform project and remained within the domain of the relevant religious courts.⁵⁹³

LAW REFORM: THE EGYPTIAN CONTEXT

In Egypt, however, the *Majelle* was not adopted.⁵⁹⁴ Despite attempts to reinstate Ottoman legal control, towards the latter part of Muhammad Ali Pasha's reign a large degree of

⁵⁸⁵ Hoyle, Mark 'The Origins of the Mixed Courts of Egypt' (1985-1986) 1 Arab Law Quarterly 220 at 223

⁵⁸⁶ Liebsny, Herbert J *The Law of the Near and Middle East State* (University of New York Press 1975) at 46

⁵⁸⁷ Article 5 Berne Convention

⁵⁸⁸ Alternative spelling Majalla

⁵⁸⁹ Onar, S. S 'The Majalla' in Majid Khadduri and Herbert J. Liebesny Eds *Law in the Middle East: Origin and Development of Islamic Law* (Middle East Institute 1955) at 295

⁵⁹⁰ Onar, S. S 'The Majalla' in Majid Khadduri and Herbert J. Liebesny Eds *Law in the Middle East: Origin and Development of Islamic Law* (Middle East Institute 1955) at 295

⁵⁹¹ Onar, S. S 'The Majalla' in Majid Khadduri and Herbert J. Liebesny Eds *Law in the Middle East: Origin and Development of Islamic Law* (Middle East Institute 1955) at 295

⁵⁹² Adolf F Schnitzer cited in Liebsny, Herbert J *The Law of the Near and Middle East State* (University of New York Press 1975) at 53

⁵⁹³ Under this system, such disputes among non-Muslim nationals were judged within the jurisdiction of the *millet* courts.

⁵⁹⁴ Debs, Richard *Islamic Law and Civil Code: The Law of Property in Egypt* (Columbia University Press 2010) at 58

Egyptian legal independence had already been established⁵⁹⁵ and so Egyptian law progressed separately from 'the Ottoman metropole' in the early nineteenth century.⁵⁹⁶ However, the enactment of the *Majelle* demonstrated the possibility of codification of key areas of Islamic law, and endorsed codification in principle, paving the way for similar codes to be drafted in Egypt. In contrast to the Ottoman *Majelle*, which left key areas of civil law such as contract and torts predominantly under the remit of Islamic law, the Egyptian codes, prepared by Maitre Manoury, a Frenchman, took a great deal more from the French civil code.⁵⁹⁷

EGYPTIAN AGENCY IN LAW REFORMS

While foreign influence has played a part in the modern legal development of Egypt, Egyptian jurists have been alert to the consequences of legal reform and active in attempting to influence the direction of the reforms. Developments in the law in Egypt did not occur merely through the simplistic imposition of European law on a submissive and uncritical subject. Egyptian legal reformers have always been actively involved in the development of Egypt's law and have been very canny in finding ways to 'preempt imperial penetration.'⁵⁹⁸ As Nathan Brown has observed, 'in Egypt, legal reform was largely the fruit of efforts undertaken by a centralizing elite that sought to circumscribe foreign influence even when it collaborated with it.'

Professor Khaled Fahmy strongly resists the explanation, frequently put forward, that the modernization of the Egyptian legal system was in response to the failure of the Islamic system of law in Egypt. Among Europeans there has been a 'common wisdom' that 'the nineteenth century Egyptian legal system was unpredictable and corrupt'⁵⁹⁹ and required

⁵⁹⁵ Peters, Rudolph 'Islamic and Secular Criminal Law in Nineteenth Century Egypt' (1997) 4 *Islamic Law and Society* 70 at 73

⁵⁹⁶ Peters, Rudolph 'Islamic and Secular Criminal Law in Nineteenth Century Egypt' (1997) 4 *Islamic Law and Society* 70 at 72

⁵⁹⁷ Liebsny, Herbert J 'Stability and Change in Islamic Law' in *The Law of the Near and Middle East: Readings, Cases and Materials* (State of New York Press 1975) at 71

⁵⁹⁸ Brown, Nathan J 'Law and Imperialism: Egypt in Comparative Perspective' (1995) 29 *Law & Society Review* 103

⁵⁹⁹ Peters, Rudolph and Khaled Fahmy Eds 'The Legal History of Ottoman Egypt' (1999) 6 *Islamic Law and Society* 2 at 129

western legal codes to remedy the situation. This is an Orientalists' exaggeration and untrue.⁶⁰⁰

Egyptian leaders, including the Khedive Ismail preferred to look to *Sharia* law for inspiration for legal reform, and resisted foreign-inspired changes although, ultimately, reforms more in keeping with foreign interests prevailed.⁶⁰¹ Resistance to foreign-imposed change has not always been successful, and the reception of foreign law has at times been made under 'strong foreign pressure.'⁶⁰² Significant concessions were indeed made, but resistance continued. Amendments to the law in Egypt began in the commercial law area, where foreign interests were frequently at stake, and derived in part from Muhammad Ali Pasha's policy of looking to Europe for legal inspiration. It is true, therefore, that external interference contributed to the reforms. However, despite the far-reaching changes 'Egyptian law [...] retained many of its traditional Islamic elements.'⁶⁰³

Professor Rudolph Peters and Fahmy are among scholars who have demonstrated that the Islamic system was both more flexible and more accountable than usually acknowledged.⁶⁰⁴ Richard Debs, chair of the American University in Beirut's board of trustees, international banker and policy adviser to bodies such as the IMF and World Bank, feels, like Fahmy, that while it is necessary to examine the undeniable legal developments and modernization that have taken place in Egypt, it should be made clear that this does not detract from the fact that 'Islamic jurisprudence is sophisticated, coherent, rational and effective' and has 'developed over the centuries to serve the needs of its societies [...] that flourished under the rule of law.'⁶⁰⁵ This does not deny that there was a need for reform in the nineteenth century, but it should be emphasized that the reformers' choices were made in a rational response to changing circumstances.

⁶⁰⁰ Fahmy, Khaled 'The Anatomy of Justice: Forensic Medicine and Criminal Law in Nineteenth Century Egypt' (1999) 6 *Islamic Law and Society* 2 at 224

⁶⁰¹ Brown, Nathan J 'The Precarious Life and Slow Death of the Mixed Courts of Egypt' *International Journal of Middle East Studies* 33 at 39

⁶⁰² Peters, Rudolph 'Islamic and Secular Criminal Law in Nineteenth Century Egypt' (1997) 4 *Islamic Law and Society* 70

⁶⁰³ Debs, Richard *Islamic Law and Civil Code: The Law of Property in Egypt* (Columbia University Press 2010)

⁶⁰⁴ Fahmy, Khaled 'The Anatomy of Justice: Forensic Medicine and Criminal Law in Nineteenth Century Egypt' (1999) 6 *Islamic Law and Society* 2 at 225

⁶⁰⁵ Debs, Richards *Islamic Law and Civil Code The Law of Property in Egypt* (Columbia University Press 2010) Preface at xv

The complexity of interactions between Egyptians and foreigners seeking to further different agendas means that it is not possible to consider the law as, either wholly independent of foreign influence, or wholly dictated by it. The methods used by Egyptians, to manage and limit the scope of foreign interests and interference in the country in the nineteenth century, remain significant. They are part of Egypt's shared historical consciousness and are, therefore, available to decision makers and law makers today.

IDEALS OF THE FRENCH REVOLUTION FIND RESONANCE IN EGYPT

Nevertheless, law reform and the need for social transformation had been key issues in France in the eighteenth century, culminating, in 1789, in the French Revolution, which took place less than ten years prior to the invasion of Egypt. The effects of the French Revolution resonated around the world.⁶⁰⁶ Codification of law was certainly on the agenda in France at the time of the occupation of Egypt. A code for the whole of France had been provided for in the French Constitution of 1791,⁶⁰⁷ although it was not until August 13, 1800,⁶⁰⁸ when Napoleon appointed a commission to be responsible for drafting the codes, that it was transformed into a reality. Although the Napoleonic Code has been criticised as being rather unoriginal, 'a purged reproduction in codified form of the existing French law,'⁶⁰⁹ it nevertheless represented 'the earliest practical realization of a dream five centuries old in France.'⁶¹⁰ It was promulgated shortly after the French departure from Egypt, on March 21, 1804.⁶¹¹ The Napoleonic Code not only provided a model for the *Majelle*, but was also heavily relied upon in the drafting of Egyptian codes.

Professor Alain Silvera explains that the French certainly created innovative institutions in Egypt at both local and national level based on an electoral system. Silvera considers that the effect of this radical innovation was chiefly significant for the concepts they introduced, 'for these elective bodies, based on the principle of popular representation and the delegation of authority, contained the germs of legislative assemblies for which there was

⁶⁰⁶ See e.g. Hobsbawm, Eric *The Age of Revolution: Europe 1789-1848* (Abacus 1962)

⁶⁰⁷ Lobingier, Charles Sumner 'Napoleon and His Code' (1918) 32 *Harvard Law Review* 114 at 116

⁶⁰⁸ Lobingier, Charles Sumner 'Napoleon and His Code' (1918) 32 *Harvard Law Review* 114 at 117

⁶⁰⁹ Lobingier, Charles Sumner 'Napoleon and His Code' (1918) 32 *Harvard Law Review* 114 at 119

⁶¹⁰ Lobingier, Charles Sumner 'Napoleon and His Code' (1918) 32 *Harvard Law Review* 114 at 126

⁶¹¹ Lobingier, Charles Sumner 'Napoleon and His Code' (1918) 32 *Harvard Law Review* 114 at 126

absolutely no precedent in Islam.⁶¹² Some credit is surely due to the French for introducing the concept, and means, of limiting the power of autocratic rule.

THE DISPUTED EXTENT OF FRENCH INFLUENCE

The French invasion of Egypt can, therefore, be seen as a vehicle for spreading some of the radical ideas of the time about law reform in Egypt. Indeed, Gamal Abdel Nasser is quoted as saying that ultimately the French invasion meant 'that new ideas began to flow in and new horizons opened before us, of which we had been unaware'⁶¹³

A modern understanding of the concept of the rule of law derives from the work of the Frenchman, Montesquieu, who set out the principles of the importance of the separation of powers as a prerequisite for just government in his hugely significant work *L'Esprit des Loix* published in 1748. Montesquieu's ideas were extremely influential internationally. Notably, they found expression in the Constitution of the United States of America, promulgated on September 17, 1787. However, Professor Gamal Moursi Badr, former deputy director of the codification division of the United Nations, argues that 'Islamic society was a society based on the rule of law, long before this concept became a cornerstone of Western societies.'⁶¹⁴ Therefore, according to his reasoning, Egypt did not need to look to Montesquieu for a theory of the rule of law. However, his view is clearly somewhat idealized. Badr states that 'Islamic law was rhetorically referred to as God's law and as such applied equally to the rulers and to their subjects.'⁶¹⁵ While it is true in theory that Islamic law, being God's law, applied to the sovereign as much as the people, it is equally true that this would only happen in a perfect world and is not something found in reality. Montesquieu, himself, based on his theory of the rule of law, had specifically picked out Ottoman rule as being an example of bad governance. He complained that 'chez les Turcs, où les trois pouvoirs sont

⁶¹² Silvera, Alain 'Egypt and the French Revolution, 1798-1801' (1982) 69 *Revue Française d'Histoire d'Outre-mer* 307 at 318

⁶¹³ Cited in Silvera, Alain 'Egypt and the French Revolution, 1798-1801' (1982) 69 *Revue Française d'Histoire d'Outre-mer* 307 at 315

⁶¹⁴ Badr, Gamal Moursi 'Islamic Law: Its Relation To Other Legal Systems' (1977-1978) *The American Journal of Comparative Law* 187 at 190

⁶¹⁵ Badr, Gamal Moursi 'Islamic Law: Its Relation To Other Legal Systems' (1977-1978) *The American Journal of Comparative Law* 187 at 190

réunis sur la tête du sultan, il règne un affreux despotism.⁶¹⁶ This would also be considered a failure of the rule of law from the Islamic perspective described by Badr.

Peters, Goldberg and Fahmy, are adamant that the process of legal reform in the nineteenth century was not based on a 'Western notion of separation of powers or constitutional government.'⁶¹⁷ Professor Farhat Ziadeh sees very little in the history of Egypt that was conducive to the French idea of the rule of law. In his view, before 1863 when Ismail, the grandson of Muhammad Ali Pasha, acceded to power, 'the conditions for the emergence of an independent legal system with a vigorous body of men capable of establishing and maintaining a rule of law,'⁶¹⁸ simply did not exist.

The push for legal reform took place when Muhammad Ali Pasha, looked to use French expertise to expand his own empire, after the French had departed from Egypt.⁶¹⁹ In achieving more independence for Egypt, Muhammad Ali Pasha was not only in a good position to judge what changes would be beneficial but also to implement any reforms he judged necessary to increase his power.⁶²⁰ He had closely observed the French and it was to France that he chose to send Egyptian lawyers to be trained in European law and legal reasoning. The initial cohort of Egyptian law students left for Paris in 1828, to be followed, later, by others.⁶²¹ These students returned with French textbooks, which they translated into Arabic. They also began the process of translating French codes into Arabic. French became the language of law in Egypt and the institution established for the pursuit of these activities became known as the School of Languages.⁶²² It was initially supervised by *Al Azhar* scholar and cleric, Rifa'a Al Tahtawi.⁶²³

⁶¹⁶ The Turkish system, in which all three powers are concentrated in the Sultan, is appallingly oppressive (my own translation) in 'Montesquieu: L'Esprit des Lois' XVIIIe Siecle Chapitre VI du livre XI Lagarde et Michard Collection at 106

⁶¹⁷ In Peters, Rudolph Ed 'Theme Issue: The Legal History of Ottoman Egypt' (1999) 6 *Islamic Law and Society* 129 at 132

⁶¹⁸ Ziadeh, Farhat *Lawyers the Rule of Law and Liberalism in Modern Egypt* (Stanford: Hoover Institution on War Revolution and Peace 1968) at 3

⁶¹⁹ See the discussion in Chapter 3

⁶²⁰ See Fahmy, Khaled *All the Pasha's Men: Mehmed Ali, his Army and the Making of Modern Egypt* (American University in Cairo Press 2004)

⁶²¹ Ziadeh, Farhat *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (Stanford University, Hoover Institute on War and Peace 1968) at 19

⁶²² This institution after many incarnations is now Cairo University Law School.

⁶²³ Ziadeh, Farhat *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (Stanford University, Hoover Institute on War and Peace 1968) at 19

Fahmy, however, finds the extent to which the French are frequently credited with introducing the concept of the rule of law and initiating legal reform in Egypt galling. While he accepts that the French did make changes to the legal system, he disputes the extent of their influence. Fahmy points out that the French did not have sufficient time to achieve a great deal before they left Egypt, suggesting that there was a domestic drive for modernization of the legal system independent of the French.⁶²⁴ The reforms put in place by the Ottomans under the *Tanzimat* can be viewed as evidence of the possibility that legal development from within the Islamic system was possible.

Fahmy argues, like Badr, that the Islamic legal system in the early nineteenth century, was more sophisticated than generally appreciated. The Quran itself is not a legal code. It contains only 190 verses that can be said to be of a legal nature, which as Badr explains is only three per cent of the whole.⁶²⁵ The *sunna* (practices of the Prophet (PBH) and his disciples) are, equally, sources of law.⁶²⁶ In circumstances where there is no specific provision in the *Sharia* (*Quran* and *sunna*), nor any scope for analogical reasoning (*qiyas*), then it may be possible to use the interpretative method of *ijtihad*, or personal reasoning.

By concentrating all his mental facilities on the penetration of the spirit and precise meaning of the law, and not merely on this or that specific provision, but on the totality of the law, the jurist relies on his conscience [...] to find the solution for the case in question⁶²⁷

In this way, *Sharia* is flexible enough to fit changing circumstances. However, the *Sharia*, as Fahmy explains, also allows for the development of law through the doctrine of *siyasa*. This can be translated as politics, government administration or secular law, and is integral to the *Sharia* Islamic legal system. The doctrine 'allows [...] the ruler wide discretionary powers'⁶²⁸ and enables the state to regulate certain functions, 'such as the protection of an

⁶²⁴ Fahmy, Khaled 'The Anatomy of Justice: Forensic Medicine and Criminal Law in Nineteenth Century Egypt' (1999) 6 *Islamic Law & Society* 224 at 227 Goldberg at 199

⁶²⁵ Badr, Gamal Moursi 'Islamic Law: Its Relation To Other Legal Systems' (1977-1978) *The American Journal of Comparative Law* 187 at 188

⁶²⁶ Goldziher, Ignaz in Herbert J Liebesny Ed. *The Law of the Near and Middle East* (State University of New York Press 1975) 'The Sunna' at 13

⁶²⁷ Santillan, David 'Qiyas and Ijtihad' in Herbert J Liebesny Ed. *The Law of the Near and Middle East* (State University of New York Press 1975) at 18

⁶²⁸ Coulson, Noel 'The State and the Individual in Islamic Law' (1957) 6 *International and Comparative Law Quarterly* 49 at 51

individual's life and property, in as much as *siyasa* allows discretion [...] in the interests of the state.⁶²⁹ Thus, on this interpretation, the *Sharia* system provides internally for legal reforms in certain areas in order to carry out the *Sharia* law and fill in gaps. The regulations formulated to address the areas not covered by the *Sharia* are known as *Qanun*.⁶³⁰ Thus, as Fahmy demonstrates, Islamic law is a complex and highly developed system and Egyptian lawyers have worked, within the constraints of colonial rule, to ensure that legal developments have been in keeping with Islamic norms. Legal developments have evolved more naturally, than was previously understood, out of the dual system of *Sharia* (religious law) and *siyasa*.

THE INNOVATION OF COMMERCIAL COURTS

During the French occupation, the French had introduced separate commercial courts to Egypt, which had the effect of removing commercial matters from the Islamic sphere of jurisdiction. This was as 'a complete innovation'.⁶³¹ It has been suggested that the purpose of these early commercial courts was to limit the jurisdiction of the other European powers under the capitulatory system,⁶³² although this is disputed. The courts were organized with a balanced bench of adjudicators drawn from Muslim and non-Muslim backgrounds applying principles of customary law.⁶³³ The original French commercial courts were unpopular and heavily criticised on the basis that they acted as a tool for extracting money from the local population.⁶³⁴ Nevertheless, commercial courts continued to function into the 1840s.⁶³⁵

It is not clear to what extent the later courts stayed true to the original French design. According to Islamic legal historian Jan Goldberg, 'legal reformers learned from the

⁶²⁹ Nawaz, M K 'The Concept of Human Rights in Islamic Law' (1965) 11 *Howard Law Journal* 325 at 325

⁶³⁰ Taken from the Greek word for regulation see Liebsny, Herbert J *The Law of the Near and Middle East* (State University of New York Press 1975) at 44

⁶³¹ Goldberg, Jan 'On the Origins of Majālis Al Tujjār in Mid-nineteenth Century Egypt' (1999) 6 *Islamic Law and Society* 193 at 198, Ziadeh, Farhat *Lawyers the Rule of Law and Liberalism in Modern Egypt* (Stanford: Hoover Institution on War Revolution and Peace 1968) at 10

⁶³² Richard Debs cited in Goldberg, Jan 'On the Origins of Majālis Al Tujjār in Mid-nineteenth Century Egypt' (1999) 6 *Islamic Law and Society* 193 at 193

⁶³³ Goldberg, Jan 'On the Origins of Majālis Al Tujjār in Mid-nineteenth Century Egypt' (1999) 6 *Islamic Law and Society* 193 at 198

⁶³⁴ Goldberg, Jan 'On the Origins of Majālis Al Tujjār in Mid-nineteenth Century Egypt' (1999) 6 *Islamic Law and Society* 193 at 202

⁶³⁵ Goldberg, Jan 'On the Origins of Majālis Al Tujjār in Mid-nineteenth Century Egypt' (1999) 6 *Islamic Law and Society* 193 at 201

experience of these early courts what needed to be improved or changed altogether.⁶³⁶ There was a gradual process of understanding the ways in which legal developments were necessary in Egypt, and eventually, from these beginnings, the *Majalis al Tujjar* were established in the 1840s.⁶³⁷ These tribunals were presided over by representatives of both the local and foreign commercial community rather than a *Sharia* judge (*qadi*), the code was based on the French *code de commerce*⁶³⁸ and the mixed nature of the fora foreshadowed the later Mixed Courts system. The fact that they were created significantly earlier demonstrates that such a system was capable of deriving from within the Egyptian Islamic system, even if inspired by the French. Where there was merit in foreign ideas, Egyptians, when free to choose, were able to evaluate them and make positive decisions about their adoption or otherwise. The French, therefore, did not simply impose their ideas on Egyptians. Anything they tried to impose on an unwilling population during the period of occupation was likely to be undone once they were no longer in a position to do so.

ADDRESSING THE INJUSTICE OF THE CAPITULATIONS

The system of capitulations could not be ended without the cooperation of the foreign states party to the agreements.⁶³⁹ The system of capitulations drew increasing international condemnation and it became clear that the mischief done to the local population by the capitulations would have to be addressed. Edward Dicey, for example, barrister, foreign affairs commentator, and brother of Albert Venn Dicey, the British constitutional theorist, considered that the capitulations ‘constitute[d] a scandal and an abuse’ and ‘a grave injustice on the Egyptian people.’⁶⁴⁰ It was in this context that the negotiations to establish a Mixed Court system took place.

ESTABLISHING MIXED COURTS

Nubar Pasha, a prominent lawyer, presided over an international commission for judicial reform set up in 1869. His goal was ‘to establish in Egypt the principle of territorial

⁶³⁶ Goldberg, Jan ‘On the Origins of Majālis Al Tujjār in Mid-nineteenth Century Egypt’ (1999) 6 *Islamic Law and Society* 193 at 199

⁶³⁷ Goldberg, Jan ‘On the Origins of Majālis Al Tujjār in Mid-nineteenth Century Egypt’ (1999) 6 *Islamic Law and Society* 193 at 194

⁶³⁸ Debs, Richard *Islamic Law and Civil Code: The Law of Property in Egypt* (Columbia University Press 2010) at 56-72; Debs original DPhil thesis cited by Goldberg *supra* at 75

⁶³⁹ Grigsby, W. E ‘The Mixed Courts of Egypt’ (1896) 12 *Law Quarterly Review* 252 at 253

⁶⁴⁰ Dicey, Edward *The Egypt of the Future* (William Heinemann 1907) at 57

sovereignty, under which justice should be rendered to all the dwellers of Egypt in the name of the Egyptian ruler' even if that meant subjecting Egyptians to a system in which the 'majority of judges should always be European.'⁶⁴¹ He aimed to abolish the capitulations and bring all offenses, both civil and criminal, for Egyptians as well as Europeans, under the jurisdiction of a unified court system. He also saw the courts as a way of 'transforming an unchecked autocracy into one tempered by 'justice''⁶⁴² The Khedive's absolute power was to be restrained through the rule of law and in particular judicial independence.⁶⁴³

The courts were always provisional and the agreement that set them up had to be renewed every five years⁶⁴⁴. They were controversial, but they were independent and found favour with the foreign businesses they were set up to attract. Over time, they were to become institutions loved by foreigners and hated in almost equal measure by Egyptian nationalists, although as Professor Nathan Brown has pointed out many Egyptians went to great lengths to find a foreign element in a dispute in order to access the Mixed Court system. American Mixed Courts Judge, Jasper Yeates Brinton, who was President of the Courts from 1943-1948, stressed in his book *The Mixed Courts of Egypt*,⁶⁴⁵ that the courts were essentially Egyptian courts in that they were financed and administered as part of the Egyptian judicial system. This makes it more difficult to dismiss the courts entirely as tools of foreign intervention. Nathan Brown points out that despite the external influences evident in the formation of Egypt's legal system, it is important to acknowledge the significance of the Egyptian contribution to their formation, as well as the uses to which the Egyptians put the system once in place. Even while the intention may have been to create an advantage for the Europeans and particularly the British, Egyptians found ways to turn the system to their own advantage.

The negotiations were lengthy and involved a great deal of bargaining.⁶⁴⁶ The foreign states would not accept the idea of a single court system so significant concessions had to be made in order to get them to abandon any of their capitulatory privileges. Eventually, the

⁶⁴¹ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 17

⁶⁴² Hunter, Robert F 'Self Image and Historical Truth: Nubar Pasha and the Making of Modern Egypt' (July 1987) 23 *Middle Eastern Studies* 363 at 363

⁶⁴³ Dicey, Edward *The Egypt of the Future* (Heinemann 1907) at 52

⁶⁴⁴ Brown, Nathan 'The Precarious Life and Slow Death of the Mixed Courts of Egypt' (February 1993) 25 *International Journal of Middle East Studies* 33 at 34-36

⁶⁴⁵ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968)

⁶⁴⁶ Crabites, Pierre 'Triumph of a Judicial System' (1930) 4 *Temple Law Quarterly* 105 at 106

solution agreed was to try Mixed Courts on a temporary, renewable basis. It is worth noting that the term Mixed Courts suggests a break with the past, and independence from the capitulatory powers. However, Professor Lama Abu-Odeh calls them the 'Capitulatory Courts',⁶⁴⁷ which may well be a more fitting description of their role as they continued to provide a system of law that privileged foreigners in Egypt.

The courts were to be administered by a bench consisting of both Egyptian judges and European judges together. As an inducement to Europeans it was conceded that European judges would make up the majority on the bench. It was not possible to persuade Europeans to accept the criminal jurisdiction of Egyptian courts. As American judge of the Mixed Courts, Pierre Crabites, explained, the establishment of the Mixed Courts addressed the 'abnormality' of the capitulations in civil cases while leaving, 'conditions unchanged, for all practical purposes, in so far as they affected criminal actions.'⁶⁴⁸ The courts therefore had only civil jurisdiction. Even though this meant that foreigners would, finally, be brought within local jurisdiction, many Egyptians objected and the first Egyptian legislative assembly was 'stridently opposed [to] the mixed courts or any form of foreign intervention in Egypt's internal affairs.'⁶⁴⁹ The courts were seen as tainted by compromise and foreign domination.

COMPARISON WITH BRITISH EXPERIENCE OF MIXED COURTS

Egypt is not the only country to have used Mixed Courts to adjudicate commercial disputes in response to increasing foreign trade. In the thirteenth century, such courts were used in England. When comparing the English experience of Mixed Courts with the Ottoman experience, Klerman noted that the Mixed Courts had a positive influence on the subsequent development of English commercial law.⁶⁵⁰ He put this down to the fact that the English System offered similar treatment to both foreigners and locals within the same court system. The existence of a 'level playing field'⁶⁵¹ encouraged foreigners to trade in England while at the same time giving local judges and other officials the opportunity to learn about

⁶⁴⁷ Abu-Odeh, Lama 'Modernizing Muslim Family Law: The Case of Egypt' (2004) 37 *Vanderbilt Journal of Transnational Law* 1043 at 1084

⁶⁴⁸ Crabites, Pierre 'Courts of Egypt' (1925) 11 *American Bar Association Journal* 485

⁶⁴⁹ Cannon, Byron 'Social Tensions and the Teaching of European Law in Egypt before 1900' *History of Education Society* 299 at 302

⁶⁵⁰ Klerman, Daniel 'The emergence of English commercial law: Analysis inspired by the Ottoman experience' (2009) 71 *Journal of Economic Behavior and Organization* 638

⁶⁵¹ Klerman, Daniel 'The emergence of English commercial law: Analysis inspired by the Ottoman experience' (2009) 71 *Journal of Economic Behavior and Organization* 638 at 645

foreign practices through the disputes. Klerman suggested that participation of both locals and foreigners may have led to greater scrutiny and increased pressure for 'fair' proceedings.⁶⁵²

However, using Klerman's analysis, the Mixed Court system as established in Egypt would be unlikely to increase fairness overall due to the two-tiered system which provided for differential treatment of Egyptian cases under the Native court system. Furthermore, while Egypt was under occupation, any advantages gained through increased trade were less likely to accrue to Egypt. Thus, while the Mixed Court system in Egypt represented some advantages over the system of Capitulations, the experience of occupation nullified its potential to achieve positive effects to a great extent. The Mixed Courts, which have been widely praised by many European commentators, 'became weapons of European intervention.'⁶⁵³

THE IMPACT OF THE 'RULE OF LAW' ON EGYPTIAN SOVEREIGNTY

Nubar Pasha did deprive the European consulates of some of the unreasonable power they wielded in Egypt. However, perhaps even more significantly in terms of its consequences was the fact that under the Mixed Court system a corrupted version of the rule of law was established in Egypt, with different systems for Europeans and Egyptians. It meant that the Khedive himself would be subject to the limits of the rule of law. This had profound implications when the Khedive defaulted on the debts incurred through expenditure on key development projects in Egypt.⁶⁵⁴

It was, thus, the mixed courts that triggered the British occupation. Although it was the Khedive Ismail who agreed to the substantial financial commitment required to undertake reform to the legal system, and he expressed his appreciation on its completion,⁶⁵⁵ he almost immediately fell foul of it. The Mixed Court code stipulated the independence of the judiciary and subjected all who fell under its jurisdiction, including the Khedive and family, to the code and to the rule of law. In illustration of this supposed independence, when

⁶⁵² Klerman, Daniel 'The emergence of English commercial law: Analysis inspired by the Ottoman experience' (2009) 71 *Journal of Economic Behavior and Organization* 638 at 644

⁶⁵³ Hunter, Robert F 'Self Image and Historical Truth: Nubar Pasha and the Making of Modern Egypt' (July 1987) 23 *Middle Eastern Studies* 363 at 367

⁶⁵⁴ See discussion regarding the Dual Control of the *Caisse de la Dette Public* in Chapter 3

⁶⁵⁵ Hoyle, Mark Hoyle, Mark 'The Origins of the Mixed Courts of Egypt' (1985-1986) 1 *Arab Law Quarterly* 220 at 230

Ismail refused to comply with the Mixed Court's decision regarding debt repayment, the Ottomans deposed him. Shortly afterwards, in the face of Egyptian unrest, Britain occupied Egypt, supposedly to restore financial security to the country.

When the Mixed Courts ruled on the Khedive's debts, the judgments were presented as if they were an impartial means of applying the principle of the rule of law to all citizens regardless of rank. In reality they were imposed by Europeans, who had loaned money on terms that were patently unfair and had most likely not been understood at the time of entering into the loan agreements. Thus, 'like a 19th-century version of the IMF, the tribunals consistently ignored the country's actual capacity to pay issuing decisions against the government which required insupportable austerities.'⁶⁵⁶ Therefore, it can be said that it was the Mixed Court's decision against the Khedive and the Egyptian government over debt repayment that precipitated the crisis that led to the British occupation.

Nubar Pasha could not have foreseen the way in which the Mixed Courts would eventually be used to overthrow the Khedive Ismail in the name of the rule of law. Although it was, perhaps a noble goal to attempt to curb the absolute power of the monarch he seems to have been naïve regarding European expansionism across the globe. Professor Robert Hunter has suggested that Nubar Pasha had been so influenced by his European upbringing that he 'may have equated free trade and rule of law with progress and prosperity for everyone, everywhere' and that this may have 'blinded him to the impact that Europe was having upon countries like Egypt.'⁶⁵⁷

THE MIXED COURTS CHARTER AND CODES

The Charter of the Mixed Courts was a treaty that restricted the jurisdiction of foreign consulates.⁶⁵⁸ The Mixed Courts only dealt with civil and commercial matters where cases had a foreign element. Criminal matters where a foreigner was involved remained with the capitulations in the consular courts.

⁶⁵⁶ Reimer, Michael J 'Politics of Law and the Courts in Nineteenth-Century Egypt by Byron Cannon' (May 1991) Rev 23 *International Journal of Middle East Studies* 250

⁶⁵⁷ Hunter, Robert F 'Self Image and Historical Truth: Nubar Pasha and the Making of Modern Egypt' (July 1987) 23 *Middle Eastern Studies* 363 at 371

⁶⁵⁸ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 22

The code for the Mixed Courts, although specially designed for the Egyptian situation, was based on the Napoleonic code and written by a Frenchman: Maitre Manoury. The code had many critics, including some judges of the Mixed Court bench who were not impressed by Manoury's work. Italian Judge, Salvatore Messina was dismayed that the codes drafted to govern the courts were drafted so quickly.⁶⁵⁹ American Judge Pierre Crabites was even more critical, saying that Messina,

[...] copied the codes of France, making a change here and there. Why he made many of these modifications and yet left other articles unaltered, has given rise to many interesting lawsuits, which could readily have been avoided.⁶⁶⁰

Others considered the codes an improvement, in some respects, on the French code.⁶⁶¹ Whatever its merits or demerits, the code created a foundation for subsequent Egyptian codes and so was highly significant in that respect.

EXTENDING MIXED COURT JURISDICTION

The key feature of the Mixed Courts was their judicial independence but the judges went further in their activism and in interpreting the law they took a very broad approach. According to Ziadeh, the judges of the mixed courts 'arrogated to themselves the right of judicial review with regard to any law affecting foreigners in Egypt.' He further points out that, 'In view of the size, occupational diversity, and territorial distribution of the foreign colony by the 1870s, this right of review could be (and was) stretched to cover virtually any piece of legislation.'⁶⁶² The audacity of the Mixed Court judges, in extending their reach, went beyond their mandate.

Unlike in India, which adopted patent legislation in 1856 and copyright together with other British territories in 1911,⁶⁶³ Egypt did not have early IP legislation imposed in this area. Egypt was not subject to British law despite being occupied by Britain due to the specific

⁶⁵⁹ Wilner, Gabriel M 'The Mixed Courts of Egypt: A Study of The Use of Natural Law and Equity' (1975) Georgia Law Scholarly Works Paper 210 at 414 <http://digitalcommons.law.uga.edu/fac_artchop/210p411> accessed 2014

⁶⁶⁰ Crabites, Pierre 'The Courts of Egypt' (1925) 11 *American Bar Association Journal* 485 at 491

⁶⁶¹ Crabites, Pierre 'The Courts of Egypt' (1925) 11 *American Bar Association Journal* 485 at 491

⁶⁶² Reimer, Michael J 'Politics of Law and the Courts in Nineteenth-Century Egypt by Byron Cannon' (May 1991) Rev 23 *International Journal of Middle East Studies* 250

⁶⁶³ Deere, Carolyn *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2008) at 35

conditions prevailing and the involvement of the many other international actors. As a result, most of Britain's attempts to introduce aspects of British law were resisted.

One reason why codification of IP laws would not take place in Egypt until the complete abolition of the capitulations in 1949⁶⁶⁴ was that with capitulations still in place, leaving criminal matters under the jurisdiction of the consulates, it was not possible to provide for criminal sanctions. Therefore, the judges of the Mixed Courts filled the lacuna and ensured the protection of intellectual property rights by recourse to the principles expressed in Article 34 of the Charter of the Mixed Courts which stipulated that 'in case of silence, insufficiency, and obscurity of the law, the judge shall follow the principles of natural law and equity.'⁶⁶⁵ The same was true in the Native Courts. According to Badrawi, 'unable to decide criminal sanctions, indigenous and mixed courts, alike, turned to civil remedies in order to provide adequate protection for industrial property on the basis of principles of natural law and justice.'⁶⁶⁶ Despite the lack of clear direction, therefore, IP disputes were dealt with regularly in the courts.

THE LANGUAGE OF THE MIXED COURTS

Language was a key issue of the Mixed Courts. At the outset the languages of the court were Arabic, French and Italian, while French became the 'language of universal use.'⁶⁶⁷ It was not until 1905 that the British obtained a decree 'elevating English also to the status of a judicial "language".'⁶⁶⁸ The entrenchment of French as the main language of the courts acted as a bulwark against the British gaining full control of Egypt and proved an irritant to the British occupiers. This took on even more significance after the establishment of a British protectorate in Egypt, in 1914. While the British eventually managed to get English adopted as a language of the Mixed Courts, French remained the legal language. This is noteworthy

⁶⁶⁴ See Article 9 Convention Regarding Abolition of Capitulations in Egypt (1940) 34 *The American Journal of International Law* Supplement: Official Documents 201, which stated 'No Consular Court shall be maintained after October 14, 1949. On that date all proceedings pending before the said Consular Courts shall be remitted to the national tribunals at the stage they have then reached.'

⁶⁶⁵ Article 34

⁶⁶⁶ El Badrawi, Hassan 'Role of the Judiciary in the Enforcement of Intellectual Property Rights' WIPO Advisory Committee on Enforcement Second Session Geneva (June 28 to 30 2004) 1 at 3

⁶⁶⁷ Article 16 of the Charter of the Mixed Courts, 1875. The other languages were Arabic and Italian, with English added in 1905 see Appendix F Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 232-241; Brinton, Jasper 'The Closing of the Mixed Courts of Egypt' (1950) 44 *American Journal of International Law* 303 at 308

⁶⁶⁸ Dupont, Jerry *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Fred B Rothman and Co 200) at 827 FN

because, as an American, Consul General to Egypt Frederic Penfield pointed out, 'so long as the European language of the Egyptian official remains French, his mode of thought and action will be French also'.⁶⁶⁹ The significance of the choice of language extends to the choice of legal principles. This can be seen in the Egyptian approach to copyright, which follows the French focus on authorship and consequently moral rights as fundamental to the protection accorded for creative works, while the British and common law approach is more focused on the economic value of the work and thus the right to prevent copying.⁶⁷⁰

BALANCE ON THE BENCH

The balance of judges who sat in the Mixed Courts was highly political. To try to prevent the occupation becoming more deep-seated, large numbers of judges were picked from countries like Belgium and the Netherlands that were perceived as being relatively more neutral.

While British judges actively participated in the Mixed Courts from the start, 'Great Britain never achieved a dominant position on the bench, which jealously guarded its independence from the "paramount power."⁶⁷¹ The Egyptians realized that by keeping the British out of their courts they could prevent them taking greater control of the country, so even while they were unhappy at the fact that the Mixed Courts had a mandatory foreign majority of judges and that the language of the courts was also foreign, there were still many advantages to be gained from Mixed Courts' with a judiciary independent of the British. Although Britain was represented by a large number of judges at both district court and appeal court level, second only in number to the French judges, Britain never 'dominated'. Thus, the courts protected their independence from the 'paramount power'⁶⁷² and, 'after forty years of the British Occupation, British officials were administering French law in Arabic, teaching French law in English, and arguing French law in French'⁶⁷³. It was not

⁶⁶⁹ Penfield, Hon. Frederic C 'England's Absorption of Egypt' (1897) 165 *North American Review* 682 at 690

⁶⁷⁰ Makeen, F. Makeen 'Moral Rights Protection under Egyptian Author's Rights Law' (2007) 38 *International Review of Intellectual Property and Competition Law*

⁶⁷¹ Dupont, Jerry *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Fred B Rothman and Co 200) FN at 827

⁶⁷² Dupont, Jerry *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Fred B Rothman and Co 200) FN at 827

⁶⁷³ Jasper Brinton at 231

until 1905 that a khedival decree designated English a 'judicial language.'⁶⁷⁴ Today, the language of the Egyptian courts is Arabic, but there is a demand for laws to be available in English in order to be accessible to foreign businesses investing in Egypt. The translations of the law are not authoritative and translations of the IP law differ quite substantially to an extent that can affect the meaning. The lack of an officially approved translation means that language and access to legal information is still an issue Egypt.

ENFORCEMENT OF IP IN THE MIXED AND NATIVE (LATER NATIONAL) COURTS

Intellectual property issues were not addressed by the Mixed or Native Courts codes, but cases that dealt with IP subject matter were enforced in both the Mixed and National Courts by reference to natural law and equity.⁶⁷⁵ Brinton points to the uniqueness of a reference to equity at a time when positivism reigned and natural law theory was in disfavour. He also explains that in its origins the provision lay 'entirely outside the traditional realm of French code law.'⁶⁷⁶ It owes more, in his opinion, to Aristotle. Others have pointed to the Roman concept of equity providing the model. Professor and Judge William Grigsby emphasizes that the equity referred to in the Mixed Courts Charter and codes derived from Roman, and not English, law.⁶⁷⁷ Whatever the origin, Industrial Property,⁶⁷⁸ Trademark,⁶⁷⁹ and Literary Property⁶⁸⁰ were all dealt with by applying equitable principles. Brinton applauds the 'ingenuity of the jurist[s],'⁶⁸¹ who managed to incrementally develop the law through case law.

Thus, as Vice President of Egypt's Court of Cassation and former Vice President of the Supreme Constitutional Court of Egypt, Hassan Badrawi explains, despite there being no legislation directed at the protection of either industrial or literary property, judicial activism enabled both 'indigenous and mixed courts [to] invoke principles of natural law and justice to protect those rights.' Furthermore, the creativity of the judiciary extended not only to applying civil remedies in such cases but they also 'established an administrative system for

⁶⁷⁴ Dupont, Jerry *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Fred B Rothman and Co 200) FN at 827

⁶⁷⁵ Article 34 Mixed Court Charter, Article 11 Mixed Court Code

⁶⁷⁶ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 95

⁶⁷⁷ Grigsby, William E 'The Mixed Courts of Egypt' (1896) 12 *Law Quarterly Review* 252 at 256

⁶⁷⁸ Pauillac v Chikaoui 26 Bulletin de Législation et de Jurisprudence Égyptiennes 63 (Cour d'Appel 1913)

⁶⁷⁹ Karkour v Venieri 20 Bulletin de Législation et de Jurisprudence Égyptiennes 14 (Cour d'Appel 1907)

⁶⁸⁰ Horn v Vayssie 35 Bulletin de Législation et de Jurisprudence Égyptiennes 477 (Cour d'Appel 1923)

⁶⁸¹ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 95

the registration of trademarks and commercial names, in order to facilitate evidence of ownership and determine priority on the basis of such registration.’⁶⁸² Brinton also mentions the registration of patents.⁶⁸³ While registration was not required for protection to apply Brinton points to the important role it provided in determining priority by ‘proving the date and publicity of usage, and preventing the invention from becoming public property by abandonment.’⁶⁸⁴ The courts respected the territoriality of patent law and based their decisions as to the appropriate duration of patents, trademarks and tradenames by reference, in the first instance, to the inventor’s country of origin unless they offered no protection at all, in which case they applied equitable principles.⁶⁸⁵

However the Mixed and Native Courts, while both having recourse to natural justice and equity took different approaches to the sanctions applicable in IP cases.

Technically, while there was provision in the penal code that dealt with the imposition of criminal penalties for trademark infringement, a lack of implementing regulations meant that the penalties were unusable. Where literary property was concerned the Mixed Court judges found a way to make criminal penalties available using techniques to extend their jurisdiction beyond that of the codes ‘by shrewd use of the concept of "la jurisdiction mixte."’⁶⁸⁶ However, in the case of industrial property only civil remedies were available.

The Native Courts, in contrast, were not prepared to apply criminal sanctions to disputes over literary property because of the lack of criminal provision in the code. Therefore, for Egyptians, in cases where there was no foreign interest, only civil remedies were available for all IP disputes.

THE NATIVE (LATER NATIONAL COURTS)

The ‘Native’, (later National or *ahliyya*) courts, were the result of Nubar Pasha’s failure to achieve equal standing in the Mixed Courts for Egyptians. They were established seven years later than the Mixed Courts, in 1883, after the British had taken effective control of Egypt.

⁶⁸² El Badrawi, Hassan ‘Role of the Judiciary in the Enforcement of Intellectual Property Rights’ WIPO Advisory Committee on Enforcement Second Session Geneva (June 28 to 30 2004)

⁶⁸³ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 96

⁶⁸⁴ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 96

⁶⁸⁵ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 96

⁶⁸⁶ Edge, Ian ‘Comparative Commercial Law of Egypt and the Arabian Gulf’ (1985-1986) 34 *Cleveland State Law Review* 129 at 131

The term 'native', used in English to describe the courts is itself indicative of their origins under the colonial period. As Professor Takami Kuwayama rightly explains, the term was used in a 'pejorative sense' and 'the unequal relationship between the colonizer/civilized and the colonized/primitive is [...] inscribed in the word *native*.'⁶⁸⁷ The term National was not applied to the courts until after the conclusion of the Treaty of Montreux,⁶⁸⁸ under which Egypt achieved independence.

In defining the application of the terms native and foreign in order to determine which disputes could be adjudicated under the Mixed Courts, former Mixed Court Judge Jasper Brinton explained that even those foreigners who came from countries that had not entered into capitulatory arrangements benefited from 'the fiction that the capitulatory powers had contracted with Egypt for the benefit of all foreign powers, and [...] that the courts were open to subjects and citizens of all foreign nations'.⁶⁸⁹ The Mixed Courts continuously extended their jurisdiction beyond that originally envisaged including even Egyptian companies, where the existence of any 'mixed interest', such as a foreign shareholder could be used to bring all the key institutions and interests of the country, including aspects of government, where there were any dealings with foreigners, under their purview.⁶⁹⁰ Professor Gabriel Wilner explains that a means used to extend the jurisdiction of the Mixed Courts was the 'straw man' strategy; naming a foreigner with no genuine connection to a case 'solely to confer jurisdiction on the Mixed Courts.'⁶⁹¹

The jurisdiction of the Native Courts was, therefore, fairly limited. They dealt with situations where all parties were Egyptian and had jurisdiction over both criminal and civil matters. Family and inheritance matters, however, remained with the *Sharia*, or millet courts.⁶⁹² The Native Courts were supposed, eventually, to supersede the Mixed Courts. However,

⁶⁸⁷ Kuwayama, Takami "'Natives" as dialogic partners: Some thoughts on native anthropology' (2003) 19 *Anthropology Today*

⁶⁸⁸ The Treaty of Alliance Between His Majesty, in Respect of the United Kingdom, and His Majesty, the King of Egypt, Montreux, August 26 1936

⁶⁸⁹ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 61

⁶⁹⁰ Briton, Jasper Yeates *The Mixed Courts of Egypt* at 65

⁶⁹¹ Wilner, Gabriel M 'The Mixed Courts of Egypt: A Study of The Use of Natural Law and Equity' (1975) Georgia Law Scholarly Works Paper 210 at 414 <http://digitalcommons.law.uga.edu/fac_artchop/210p411> accessed 2014

⁶⁹² Millet courts applied the law of other, non-Muslim, religions

Unfortunately, because these courts were envisioned as a first step toward replacing the mixed tribunals and unifying the judicial system, and because the Egyptian government hoped to forestall European intransigence toward such a move, many foreign jurists were hired to staff the courts, and the codes adopted for the national courts were practically the same as the Code Napoleon. Presumably, these codes served the interests of moneylenders and big landowners just as well in the fledgling ahliyya courts as in the mixed tribunals.⁶⁹³

The Native Courts were, therefore, set up to be a tool of colonial control but, in an attempt to reduce Egyptian dissent, there was an expectation that the codes written for the Native courts, while similar to those of the Mixed Courts, would be drafted to be closer to Islamic norms. However, Nathan Brown points out that the resulting codes were, 'far closer to the French than the to the Ottoman majalla.'⁶⁹⁴ Judge Crabites, who criticized the Mixed Court code, was even more damning of the code for the Native Courts. He noted that,

The compilers of the Egyptian Statutes took the French codes and transposed them from tenor to bass, forgetting occasionally, however, that the tenor is usually a hero and the bass generally a villain and that to transpose is sometimes more difficult than to create.⁶⁹⁵

The lesser status of the Native Courts and the failure to unify the judicial system in Egypt was condemned by at least one foreign judge as a 'backward step'⁶⁹⁶ although Brown has also pointed out that for working class Egyptians, 'the tools available to litigants matter far more to them than abstract debates about the cultural or religious appropriateness of the law.'⁶⁹⁷

Despite their temporary nature, the Mixed Courts began operating in 1876 and lasted until 1949. Nevertheless, as the mood for independence grew it became abhorrent to have foreigners treated differently from Egyptians and, indeed, to have a majority foreign bench.

⁶⁹³ Reimer, Michael J 'Politics of Law and the Courts in Nineteenth-Century Egypt by Byron Cannon' (May 1991) *Rev 23 International Journal of Middle East Studies* 250

⁶⁹⁴ Brown, Nathan J *The Rule of Law in the Arab World* (Cambridge University Press 1997) at 3

⁶⁹⁵ Pierre Crabites 'The Courts of Egypt' 11 *ABAJ* 1925 at 487

⁶⁹⁶ Jasper Yeates Brinton (citing an article by Judge Herreros 'Un Haute Cour de Justice en Egypte' (1928) *Livre D'Or*) in *The Mixed Courts of Egypt* (Yale University Press 1968) at 158-159

⁶⁹⁷ Brown, Nathan J *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press 1997) at 208

There was an, 'immense' literature of opposition to the Mixed Courts coming even from among Egyptians who served in them.⁶⁹⁸ Farhat Ziadeh cites the two main criticisms of the Mixed Courts as being the disproportionate efforts given to protecting foreign interests as well as the infringement of Egyptian sovereignty through the extension of jurisdiction claimed by the courts covering areas not strictly within their remit. The situation was not sustainable.

THE DEMISE OF THE MIXED COURTS

On independence it was clear that the Mixed and Native Court system would have to be dismantled. Samir Rifaat expresses Egyptian feelings of great pride on October 15 1949, the date of the courts' demise. On that day, the inscription on the Palace of Justice designating it 'al-Mahkama al-Mokhtalata' or Mixed Courts was replaced with one saying 'Dar al-Kada'a al-Aali' (High Court of Justice). In Samir Rifaat's words this was 'another logical step towards genuine independence.'⁶⁹⁹ It was a matter of immense national satisfaction that 'from that day all residents in Egypt, irrespective of nationality would appear in front of National Courts where the proceedings would be conducted in Arabic before Egyptian judges'.⁷⁰⁰

The Montreux Convention Concerning the Abolition of the Capitulations, agreed on May 8th 1937, came into effect on October 15th of the same year stipulating that the Mixed Courts should close by 1949. Significantly, the demise of the Mixed Courts also marked the end of *Sharia* courts in Egypt in a move that aimed 'to remove all traces of exceptional judicial systems,'⁷⁰¹ and unify the legal system under one authority. Thus, the jurisdiction of the Islamic tribunals over personal status ended, bringing all people, regardless of religious persuasion, within the National Court system on January 1, 1956 when law 462 of 1955 came into force. This was a nationalist, secular vision of modernisation rather than a religious one.

⁶⁹⁸ Ziadeh, Farhat. *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (Stanford University, Hoover Institute on War and Peace 1968) FN 3 at 100-101

⁶⁹⁹ Rifaat, Samir 'The Palace Of Justice' *Cairo Times* (unedited version)' (April 2, 1998) <<http://www.egy.com/landmarks/98-04-02.php>> accessed 2014

⁷⁰⁰ Rifaat, Samir 'The Palace Of Justice' *Cairo Times* (unedited version)' (April 2, 1998) <<http://www.egy.com/landmarks/98-04-02.php>> accessed 2014

⁷⁰¹ Brown, Nathan J *The Rule of Law in the Arab World* (Cambridge University Press 1997) at 63

THE NEW CIVIL CODE OF 1949

Independence required the writing of a new civil code. After a lengthy process, in which a number of commissions were established and dissolved in favour of a narrower approach to drafting, presumably in order to achieve consensus more easily, the original drafters were restricted to prominent Egyptian legal scholar Abd El Razzaq el Sanhuri, and a Frenchman, Edouard Lambert.⁷⁰² Subsequently, the draft was opened up for consultation and revision before being passed into law in 1949, superseding the codes of the Mixed and Native courts, now institutions of the bygone colonial era. Among Sanhuri's concerns, like those of other Egyptian jurists, was to address the way in which modernization had caused the dominance of a European legal approach to the detriment of the position of *Sharia* law in the Egyptian legal system. Even so, he asserted that the code drew from

Twenty civil codes representing countries in Europe, Asia, Africa and the Americas; from the jurisprudence of the Egyptian courts and from the *Shari'ah*⁷⁰³

Sanhuri was determined to ensure that the new code should be consistent with *Sharia*. The new civil code should represent the resurgence of pride in the legal traditions that predated European colonialism. Nevertheless, the principle of codified, secular legislation was retained. Significantly, Sanhuri claimed that the new code aimed to achieve 'a balance between the freedom of the individual and the interest of the group, with emphasis on the "social function of property"'⁷⁰⁴ Extending this goal to IP would be consistent with the need to protect the public interest where IP rights might impinge.

Using his reputation for Islamic scholarship Sanhuri developed a model that enabled a modern approach which, 'opened a door for experimenting with democracy and government that was accountable.'⁷⁰⁵ His reasoning helped to make it possible, significantly, to bring family and inheritance matters, which had remained with the *Sharia* courts during

⁷⁰² Hill, Enid 'Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzag Ahmad al-Sanhuri Egyptian Jurist and Scholar 1895-1971' (1988) 3 *Arab Law Quarterly* 182 at 182

⁷⁰³ Alternative transliteration of Sharia; Sanhuri cited by Ziadeh, Farhat. *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (Stanford University, Hoover Institute on War and Peace 1968) at 142

⁷⁰⁴ Cited by Ziadeh, Farhat. *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (Stanford University, Hoover Institute on War and Peace 1968) at 142

⁷⁰⁵ Moosa, Ebrahim 'The Debts and Burdens of Critical Islam' in Ed. Omid Safi *Progressive Muslims: On Justice, Gender and Pluralism*, (Oneworld Publications 2003) at 120

the colonial period, within the Egyptian legal system, thus providing for a unified structure of legal governance no longer dependent on religious or national affiliation.

Notwithstanding Sanhuri's best efforts, although some considered it to be a 'masterpiece of legal phrasing',⁷⁰⁶ the code was criticised for drawing upon multiple legal texts as sources, becoming thereby a mixture of sources.⁷⁰⁷ It has also been described as, 'a hodgepodge of socialist doctrine and sociological jurisprudence'.⁷⁰⁸ In discarding the French language, which had been used for more than a century, and translating the code into Arabic, it has been said that inaccuracies were introduced.⁷⁰⁹ At the same time even though Sanhuri attempted to modify the code for the Egyptian context it was criticised for remaining too closely tied to French law. The continuing influence of French law is illustrated by the fact that, in drafting the civil code, El Sanhuri was assisted by a Frenchman, as well as a number of Egyptian legal scholars.⁷¹⁰ In spite of all the criticisms, however, the extensive influence of Al Sanhuri's work can be seen in the fact that it has been widely copied in many other jurisdictions in the region, and even beyond.⁷¹¹

Despite Sanhuri's religious devotion, he was a proponent of secularism in law and politics. According to Professor Enid Hill, Sanhuri later conceded, twenty years after the code came into effect, that the code 'continue[d] to be representative of Western civil culture, not Islamic legal culture.'⁷¹² He is quoted as saying, that 'in truth, the new Egyptian civil code is a faithful representative of Western civilian culture.'⁷¹³ However, he justified this as being necessary because 'Western-based civil law had become part of the country's legal

⁷⁰⁶ Bechor, Guy *The Sanhuri Code and the Emergence of Modern Arab Civil Law (1932-1948)* (Brill Academic Publishers 2007) at 37

⁷⁰⁷ Bechor, Guy *The Sanhuri Code and the Emergence of Modern Arab Civil Law (1932-1948)* (Brill Academic Publishers 2007)

⁷⁰⁸ Shalakany, Amr 'Between Identity and Redistribution: Genealogy and the Will to Islamise' (2001) 8 *Islamic Law and Society* 201 at 201

⁷⁰⁹ Wilner, Gabriel M 'The Mixed Courts of Egypt: A Study of The Use of Natural Law and Equity' (1975) Georgia Law Scholarly Works Paper 210 at 415 <http://digitalcommons.law.uga.edu/fac_artchop/210p411> accessed 2014

⁷¹⁰ Hoyle, Mark 'The Mixed Courts of Egypt: an Anniversary Assessment' (1985-1986) 60 *Arab Law Quarterly* at 61

⁷¹¹ Bechor, Guy *The Sanhuri Code and the Emergence of Modern Arab Civil Law (1932-1948)* (Brill Academic Publishers 2007) at 37

⁷¹² Cited in Hill, Enid 'Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzag Ahmad al-Sanhuri Egyptian Jurist and Scholar 1895-1971' (1988) 3 *Arab Law Quarterly* 182 at 186

⁷¹³ Shalakany, Amr 'Between Identity and Redistribution: Genealogy and the Will to Islamise' (2001) 8 *Islamic Law and Society* 201 at 201

culture.’⁷¹⁴ Sanhuri made a conscious choice to stick with the Western principles as he considered that ‘a sudden return (to Islamic law) would have been difficult and would have caused disturbances and confusion.’⁷¹⁵ Nevertheless, he also saw the code as a ‘great victory for Islamic law.’⁷¹⁶

Much of the controversy over the code illustrates the postcolonial dilemma in which a desire to be cleansed of colonial influence is expressed in the rejection of everything modern. Shalakany cites Egyptian historian Tarik Al-Bishri as an example of those who considered the code to be merely ‘a corrosive agent for alienation.’⁷¹⁷ Bishri, demonstrates how the trauma of colonialism has led to a view that modernist aspirations must irreconcilably conflict with the wish to rediscover an authentic pre-colonial past, but Shalakany convincingly argues that the return to ‘an untainted pre-colonial home’ is both pointless and impossible.⁷¹⁸

In Shalakany’s opinion, asking about the extent to which the code is or isn’t Islamic is not particularly helpful as in retrospect it is not easy to appreciate the nuanced thinking of the time in which Sanhuri undertook his project or reconstruct the conditions of the pre-colonial period. Instead, Shalakany explains that it is important to understand that Sanhuri had dual aims of both modernising Islamic law and addressing concerns about social justice. His project aimed ‘to reconstruct identity [and] redistribute wealth and power.’⁷¹⁹ It is,

⁷¹⁴ Cited in Hill, Enid ‘Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzag Ahmad al-Sanhuri Egyptian Jurist and Scholar 1895-1971’ (1988) 3 *Arab Law Quarterly* 182 at 186

⁷¹⁵ Cited in Hill, Enid ‘Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzag Ahmad al-Sanhuri Egyptian Jurist and Scholar 1895-1971’ (1988) 3 *Arab Law Quarterly* 182 at 186

⁷¹⁶ Cited in Shalakany, Amr ‘Between Identity and Redistribution: Genealogy and the Will to Islamise’ (2001) 8 *Islamic Law and Society* 201 at 201

⁷¹⁷ Paraphrasing Al Bishri in Shalakany, Amr ‘Sanhuri and the Historical Origins of Comparative Law in the Modern Arab World (or How Sometimes Losing your *Asalah* can be Good for You’ in Annelise Riles Ed. *Rethinking The Masters Of Comparative Law* (Hart Publishing: 2001) at 153

⁷¹⁸ Shalakany, Amr ‘Sanhuri and the Historical Origins of Comparative law in the Arab World (or How Sometimes Losing your *Asalah* can be Good for You’ in Annelise Riles Ed. *Re-thinking the Masters of Comparative Law* (Hart Publishing 2001

⁷¹⁹ Shalakany, Amr ‘Between Identity and Redistribution: Genealogy and the Will to Islamise’ (2001) 8 *Islamic Law and Society* 201 at 244

therefore, more useful to examine ‘who wins and who loses’⁷²⁰ out in the articles of the code.

This is an example of a legal realist approach to understanding the law⁷²¹ and can usefully be applied to attempts at codification today as part of a postcolonial re-evaluation of internationally derived legislation, such as that required by TRIPS and exemplified in Law 82, 2002 on Intellectual Property. Where benefits seem to be excessively weighted in favour of foreign interests it would seem wise to reconsider the appropriateness of the relevant legal provisions. Islamic principles may be able to provide helpful balance where IP rights impinge on other rights, if a non-formalist approach is taken. In this way, the combination of Islamic law together with the weight of natural law and equity found in the civil code can be brought to bear in the public interest.⁷²² However, it is neither possible nor reasonable to try to recreate an authentic original Islamic position on IP subject matter by going back to a time that pre-dated such modern developments as the printing press.

EGYPTIAN LAW SINCE THE 1952 REVOLUTION

In one of Gamal Abd El Nasser’s first acts after the 1952 revolution, the Administrative Court (Maglis el Dowla) was dismantled and the Constitution suspended. El Sanhuri was badly beaten and imprisoned for trying to insist on a return to constitutional government. However, some twenty years later Egypt’s Constitution was revived and a Supreme Constitutional Court (SCC), capable of reviewing and challenging government legislation was established.⁷²³ Indeed Tamir Moustafa has identified the fact that for a significant period of time the SCC was utilized as a political tool to challenge the government and pursued a progressive agenda to promote both economic liberalization and human rights.⁷²⁴ Judicial independence, challenged by Abdel Nasser in the infamous ‘massacre of the judiciary’⁷²⁵ in which he dismissed a hundred judges, has been a feature of Egyptian constitutions since 1971 and remains an important brake on executive power. However, it is not untrammelled.

⁷²⁰ Shalakany, Amr ‘Between Identity and Redistribution: Genealogy and the Will to Islamise’ (2001) 8 *Islamic Law and Society* 201 at 244

⁷²¹ See discussion of legal realism in Chapter 2

⁷²² Article 1 Egyptian Civil Code 1949

⁷²³ Moustafa, Tamir *The Struggle for Constitutional Power* (Cambridge University Press 2007) at 4

⁷²⁴ Moustafa, Tamir *The Struggle for Constitutional Power* (Cambridge University Press 2007) at 4

⁷²⁵ Nasr, Hesham and Nathan J Brown ‘Egypt’s Judges Step Forward The Judicial Election Boycott and Egyptian Reform’ (2005) Carnegie Endowment for Peace Policy Outlook: Democracy and the Rule of Law at 2 <<http://carnegieendowment.org/files/PO17.borwn.FINAL.pdf>> accessed 2014

As recently as February 2014, a report by the International Bar Association Human Rights Institute (IBAHRI) found that

Although independence is constitutionally protected and the highest courts frequently rule against the government, the Ministry of Justice is given wide powers over judges which provide scope for abuse. [...] The legal framework also gives a role to the executive branch in the appointments system, particularly at the higher judicial level, allowing scope for politicised decision-making. A lack of transparency and the absence of public examinations for appointments also leads to a perception—if not a reality—of nepotism.⁷²⁶

The assessment seems reasonably balanced and consistent with that of other commentators.⁷²⁷ Certainly the judiciary manifests a degree of independence, but the constraints mentioned in the IBAHRI report are considerable.

In the late 1990s the Mubarak regime tried with some success to neutralize the role of the court in criticizing the government. However, the judiciary has retained sufficient independence to continue to represent a significant restraint against unconstitutional behaviour. The SCC has even used international treaties, ‘to help interpret, adjudicate and strike down repressive legislation’,⁷²⁸ something that the regime certainly did not anticipate. Moustafa suggests that the Mubarak regime ‘signed and ratified international conventions as [mere] window dressing.’⁷²⁹ They did not anticipate that they would ever be used. This attitude may have been present in the context of signing up to the WTO TRIPS agreement.

MODERN IP LAW IN EGYPT

The pace of legislative change in Egypt has certainly increased markedly since Egypt joined the WTO. In order to achieve trade liberalization legal reforms were necessary and a judicial commission was set up in 2004, funded to the tune of L.E.11.8 million by the United States Agency for International Development (USAID), to examine the problem of legislative

⁷²⁶ ‘Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt’ (Report of the International Bar Association Human Rights Institute (IBAHRI) Supported by the Open Society Foundations Arab Regional Office February 2014) at 6

⁷²⁷ Moustafa, Tamir *The Struggle for Constitutional Power* (Cambridge University Press 2007); Bernard-Maugiron, Nathalie Ed. *Judges and Political Reform in Egypt* (American University in Cairo Press 2008)

⁷²⁸ Moustafa, Tamir *The Struggle for Constitutional Power* (Cambridge University Press 2007) at 7-8

⁷²⁹ Moustafa, Tamir *The Struggle for Constitutional Power* (Cambridge University Press 2007) at 7-8

barriers to foreigners trading in Egypt. Chief Justice Hesham Ragab, is quoted as saying that reforms were planned that would, 'quite literally change the rules of the game.'⁷³⁰

Among recent legal reforms, since the promulgation of Law 82/2002, perhaps the most notable in the context of the management of IP is the establishment of an Economic Court system set up by Law 120 of 2008. The subject matter dealt with by the courts established under this law includes IP law.⁷³¹ While they are not exceptional courts in that they do not discriminate between litigants according to nationality as the Mixed Courts and National Courts did, they do prioritize commercial cases and so there is a sense in which they can be seen as favouring the commercial sector. They have been operating now for some time and have been criticized by the Egyptian Organization for Human Rights (EOHR)⁷³² but welcomed by the Office of the US Trade Representative (USTR) among others.

The US has taken a close interest in Egyptian legal reform. In assessing two United States Agency for International Development (USAID) projects it is acknowledged that IP is 'a particularly sensitive issue in Egypt. The projects, Strengthening Intellectual Property Rights in Egypt (SIPRE, 1996-2001) and Technical Assistance for Intellectual Property Rights in Egypt (TIPRE, 2001-03)

[...] assisted GOE [Egyptian Government] counterparts to build the capacity of the Patent, Trademark, and Industrial Designs Offices and to improve the intellectual property legal framework to comply with World Trade Organization (WTO) agreements. The projects also helped the GOE promote public awareness of IPR

⁷³⁰ Cited in Bossone, Andrew 'A Commercial Break: Special Economic Courts Forming' (September 2006) *Business Today*

⁷³¹ Article 4(9) Law No. 120 of 2008 Establishing Economic Courts WIPO <<http://www.wipo.int/wipolex/en/details.jsp?id=13567>> accessed 2014 The other subjects covered by the Economic Courts Law are: The law of Companies Operating in the Field of Receipt of Assets for Investment; The Money Market Law; The Guarantees and Incentives of Investment Law; The Lease Financing Law; The Law concerning the Protection of the National Economy from the Effects of Harmful Actions in International Trade; The Commercial Law in relation to transfer of Technology, Commercial Agency, Banking Transactions, Bankruptcy and Settlements for Its Avoidance; The Real Estate Financing Law; The Organization of Communications Law; The Regulation of Electronic Signature Law and the Establishment of the Authority for the Development of the Information Technology Industry; The Protection of Competition and Prevention of Monopolistic Practices Law; The Joint Stock Companies, Partnerships limited by shares and Limited Liability Companies Law; The Central Banks, Banking institution and Money Law. WIPO <http://www.wipo.int/wipolex/en/details.jsp?id=13567> accessed 2014

⁷³² 'The Law of Economic Courts Violates the Guarantees of Judiciary Independence in Egypt' Editorial (June 25, 2008) Editorial (June 25, 2008) *Egyptian Organization for Human Rights* <<http://en.eohr.org/2008/06/25/the-law-of-economic-courts-violates-the-guarantees-of-judiciary-independence-in-egypt/>> accessed 2014

rationales and objectives, and they facilitated private public collaboration throughout the process.

In 2007 a further USAID initiative aimed to 'modernise' economic legislation in Egypt. According to a European Commission report commenting on the USAID initiative, a Prime Ministerial decree authorised the USAID project but it

Produced no documents, the commission is no longer operative, and the committee reportedly does not exist anymore. The reasons for the failure of the initiative are not clear and there are no available documents and/or reports that may shed light on its work.⁷³³

The same European Commission report suggests that the problems the Americans faced in influencing Egyptian legal developments lay in the Egyptian legislative process. While it is hard to interpret the opaque process, Egyptian jurists were clearly reluctant to allow foreigners to alter Egyptian law to the benefit of foreigners. The Americans are, however, still very closely involved in legal developments in Egypt. Egyptian economic court judges have visited the US since the 2011 Egyptian 'revolution' as part of the US Commercial Law Development Program of the US Department of Commerce suggesting that a legal dialogue with the US is continuing.⁷³⁴

This shows that, far from showing a fear of comparative law, some among the higher echelons of the Egyptian judiciary have looked to US law as a model for reform, in some respects. This is not a new development. The radical and outward-looking Chief Justice of the SCC from 1991-1998 Awad Al-Morr, has welcomed judicial reference to the law of other countries and sees no reason for shunning the wealth of experience found in other jurisdictions. In his view,

⁷³³ Business Climate Development Strategy Phase 1 Policy Assessment EGYPT DIMENSION II-3 Business Law and Commercial Conflict Resolution April 2010 Partner: European Commission report issued under the authority of the Steering Groups of the MENA-OECD Initiative <<http://www.oecd.org/dataoecd/49/36/46341549.pdf>> accessed 2014

⁷³⁴ 'Egyptian Economic Court Judges meet with US Federal, State and International Courts' *US Program for Egyptian Economic Court Judges* Commercial Law Program, Office of General Counsel, US Department of Commerce May 2, 2011 - May 13, 2011 <<http://cldp.doc.gov/programs/cldp-in-action/details/211>> accessed 2014

Science evolves as a result of a cumulative effort, of each benefiting from the work of others, adding to it and developing it further. The work of the court in this context is no more than a form of participation in values (rights and freedoms) shared by all countries no matter what the unique culture of each might be.⁷³⁵

Nathan Brown questions whether the approach of the court in Al Morr's heyday, when the court referred to the 'practices of other countries, jurisprudence of other courts, and international human rights instruments [which] they used [...] to construct a broad reading of the country's vague constitutional guarantees,'⁷³⁶ will survive. In 2013, Brown has identified a more narrowly textual and cautious approach among the judiciary.

In the context of IP law, Egyptian courts have demonstrated independence from international pressure.⁷³⁷ However, it remains to be seen what impact the political turmoil and constitutional changes of the last few years may have, particularly in cases where there is a foreign interest, which must be balanced against Egyptian public interest.

⁷³⁵ Abu Odeh, Lamah 'On Law and the Transition to Market: The Case of Egypt' (2009) 23 *Emory International Law Review* 351 at 19, FN 109

⁷³⁶ Brown, Nathan J 'The Supreme Constitutional Court in Post-Revolution Egypt' (Jan 25, 2013) *Tahrir Squared* <<http://tahrirsquared.com/node/110>> accessed 2014

⁷³⁷ See discussion of the Mailbox Cases in Chapter 6

CHAPTER 5: INTERNATIONAL LEGAL CONTEXT

Placing the development of IP law in Egypt within the evolving international legal framework of self-determination in the twentieth century helps to explain aspects of the Egyptian approach to joining and implementing IP treaties. International law has not always addressed the interests of many of the countries now considered to be developing, and Egypt has experienced many disappointments. This may partially explain Egypt's, at times ambivalent, approach to international law following independence. It also goes some way to explaining some implications for Egypt's engagement with the treaty-making process relating to IP.

RECOGNITION OF THE PRINCIPLE OF SELF-DETERMINATION

When America recognized the British Protectorate over Egypt, on April 21, 1919,⁷³⁸ they crushed the dream of an end to colonialism at that time. The Americans had, themselves, inspired hope that the principle of self-determination of nations would prevail following WWI. President Woodrow Wilson made it clear that he believed that 'no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were his property.'⁷³⁹ His rhetoric resonated particularly strongly in Egypt, convincing Egyptians that the United States was 'not an imperialist country' and would therefore 'enforce the right to self-determination'⁷⁴⁰ and rid Egypt of the British Occupation. Woodrow Wilson's 'Fourteen Points', originally articulated in front of the US Congress⁷⁴¹ and subsequently relied upon at

⁷³⁸ 'Egypt: Recognition by the United States of the British Protectorate' Exchange of Diplomatic Communications in (1919) 2 *Foreign Relations* <<http://images.library.wisc.edu/FRUS/EFacs/1919v02/reference/frus.frus1919v02.i0010.pdf>> page 203 accessed 2014. See, in particular, telegram from the Lansing Commission to Negotiate Peace to the Acting Secretary of State Paris (April 21, 1919) document 883.00/119 in which Lansing wrote to Mr Balfour, British Prime Minister, 'the President has authorized me to inform you that he recognizes the British protectorate over Egypt.'

⁷³⁹ 'Address of President Woodrow Wilson to the U.S. Senate 22 January 1917' <<http://www.firstworldwar.com/source/peacewithoutvictory.htm>> accessed 2014

⁷⁴⁰ Haykal, Muhammad Husayn *Mudhakkirat fi al-Siyasah al-Misriyyah* [Memoirs of Egyptian Politics] 1 (1977) at 67 cited in Erez Manela 'The Wilsonian Moment and the Rise of Anticolonial Nationalism: The Case of Egypt' 12 (2001) *Diplomacy and Statecraft* 99 at 104

⁷⁴¹ 'President Woodrow Wilson's Fourteen Points' (8 January 1918) *Documents in Law, History and Diplomacy: The Avalon Project*, Yale Law School Lillian Goodman Library <http://avalon.law.yale.edu/20th_century/wilson14.asp> accessed 2014

the Versailles Peace Conference after the war, were so much in tune with Egyptian sentiment that they reached Egyptians even in 'the remotest villages.'⁷⁴²

A delegation (*Wafd*) was formed to go to the peace conference at Versailles and present the Egyptian case for independence in front of the leading world powers.⁷⁴³ It was headed by eminent lawyer Sa'ad Zaghlul, who sent a telegram to President Wilson in which he appealed for a new approach to international relations, '[un]troubled by the ambitions of hypocrisy or the old-fashioned policy of hegemony and furthering selfish national interests.'⁷⁴⁴

The British attempted to defuse the *Wafdist* demands by exiling Zaghlul and three other delegates to Malta. However, in the face of growing rebellion, from among all classes of Egyptian society, who together demonstrated their desire for independence, the British eventually allowed the delegation to proceed on to Paris, although without Zaghlul and the other detainees. Fearing the loss of Egypt, the British, who blamed Wilson's speech on self-determination for the rise in nationalism, leaned on the Americans to recognize the British protectorate.

An American, Missouri lawyer Joseph W. Folk represented the Egyptian case before the US Senate, in the period immediately following Versailles,⁷⁴⁵ in an attempt to persuade the Americans to support Egyptian national self-determination. He pointed out that the Egyptian people wanted the League of Nations to protect their independence, not to destroy their independence. In his defence of Egypt he stated that 'if the principles of the Covenant of the League of Nations are to be made impartially effective, the status of Egypt should be declared to be a matter of adjustment by the League of Nations.'⁷⁴⁶ However, the decision to recognise the British protectorate had already been made. Americans regretted the effects of Wilson's powerful oratory. The US Secretary of State, Robert Lansing,

⁷⁴² Manela, Erez 'The Wilsonian Moment and the Rise of Anticolonial Nationalism: The Case of Egypt' 12 (2001) *Diplomacy and Statecraft* 99 at 105

⁷⁴³ Anand, R. P 'Rôle of the "New" Asian-African Countries in their Present International Legal Order' (1962) 56 *American Journal of International Law* 383

⁷⁴⁴ Cited in Manela, Erez *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford University Press 2007) at 71

⁷⁴⁵ Folk, Joseph Wingate *The Case of Egypt* (Submitted by Counsel for the Egyptian Delegation, Selected by the Legislative Assembly of Egypt and other Representative Egyptian Institutions 1919)

⁷⁴⁶ Folk, Joseph Wingate *The Case of Egypt* ((Submitted by Counsel for the Egyptian Delegation, Selected by the Legislative Assembly of Egypt and other Representative Egyptian Institutions 1919) at 23

explained that he feared the effect of the rhetoric of self-determination on 'certain races,' including Egyptians.⁷⁴⁷ The fact that Egyptians, following the 'Wilsonian Moment', were prepared to take a proactive approach to asserting self-determination, panicked the Western powers.⁷⁴⁸ This illustrates the self-delusion of Orientalism. In imagining that Egypt would be slow on the uptake, or await independence patiently until it was bestowed as a gift, they completely misunderstood the nature of self-determination.

The trust of Egyptians who had believed in the good faith of the Americans was shattered by the American approval of the Protectorate. Influential Egyptian politician and commentator Muhammad Husayn Haykal said, in his memoirs, that 'when news of the armistice in Europe arrived, a friend exclaimed: 'This is it! We have the right to self-determination, and therefore the English will leave Egypt.'⁷⁴⁹ The disappointment could not, therefore, have been greater when the US endorsed the occupation; it was 'like a bolt of lightning' according to Haykal.⁷⁵⁰ Egyptians simultaneously lost faith in both the Americans and in the new international legal order with good reason. The hypocrisy of a system that protected only the interests of the West had been exposed. The bitterness of that memory remains. Should the TRIPS agreement be found to have serious negative effects in Egypt, benefiting the West to the detriment of Egyptian interests the memory would be revived.

Lansing's fears of 'discontent, disorder and rebellion' were realized as large numbers of Egyptians responded to the betrayal with a popular uprising that became increasingly confrontational and pushed the occupying British to the brink. This led, eventually, to the unilateral declaration, in which the Protectorate was 'terminated' and Egypt recognised by the British as an independent state, in 1922.⁷⁵¹ This was only a stage in what became known as "the unfinished revolution,"⁷⁵² as full independence, with the removal of foreign troops

⁷⁴⁷ Cited in Manela, Erez 'The Wilsonian Moment and the Rise of Anticolonial Nationalism: The Case of Egypt' 12 (2001) *Diplomacy and Statecraft* 99 at 99

⁷⁴⁸ Cited in Manela, Erez *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford University Press 2007) at 99

⁷⁴⁹ Cited in Manela, Erez *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford University Press 2007) at 104

⁷⁵⁰ Cited in Manela, Erez *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford University Press 2007) at 112

⁷⁵¹ Declaration to Egypt by His Britannic Majesty's Government (February 28, 1922)

⁷⁵² Di Capua, Yoav 'Embodiment of the Revolutionary Spirit: The Mustafa Kamil Mausoleum in Cairo' (2001) 13 *History and Memory* 85 at 92; Kazziha, Walid 'The Jarida-Umma Group and Egyptian Politics' (1977) 13 *MiddleEastern Studies* 373 at 378

on the ground, was not achieved until after the 1952 revolution. The last British troops left Egypt during the Suez crisis, in 1956.⁷⁵³ In limping towards independence, with the British retaining control for as long as possible it was clear that the rhetoric of self-determination was subject to the more powerful reality of power politics.

EGYPTIAN INDEPENDENCE AND MEMBERSHIP OF LEAGUE OF NATIONS

Formal independence came in 1936 when Egypt and the United Kingdom ratified the Anglo-Egyptian Treaty,⁷⁵⁴ which officially brought the British occupation to an end. Then the mechanisms were put in place for Egypt to join the League of Nations⁷⁵⁵ and thereby symbolically (re)enter the international community with a greater degree of autonomy, although subject to conditions. Egypt's membership of the League of Nations was unanimously approved at an 'extraordinary session' convened by the Secretary General at the invitation of thirty three governments.⁷⁵⁶ Egypt was the last country to be welcomed into the League of Nations before the organization was disbanded.⁷⁵⁷ However, although Egypt had been drawn to the concept and ideals of the League of Nations from its inception, by the time Egypt eventually joined it was with somewhat jaded expectations. Shortly after Egypt joined the League of Nations, the organization demonstrably failed as the world disintegrated into World War II. It was officially disbanded and transformed into the United Nations (UN) following the war, on 24th October 1945, with Egypt becoming a founder member of that organization.

Membership of the United Nations brings with it a commitment to protect IP rights. Under Article 15(1)(3) of the Covenant on Economic, Social and Cultural Rights (CESCR),⁷⁵⁸ States are required to ensure that everyone is able 'to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he

⁷⁵³ The Guardian correspondent Michael Butler reported the withdrawal of the last British troops from Egypt. Butler, Michael 'Last British Troops Withdraw from Egypt: an Orderly Operation Completed' *The Guardian* (24 December 1956) <<http://www.guardian.co.uk/theguardian/1956/dec/24/fromthearchive>> accessed 2014

⁷⁵⁴ The Treaty of Alliance Between His Majesty, in Respect of the United Kingdom, and His Majesty, the King of Egypt Ratified at Montreux (December 22, 1936 31) *American Journal of International Law Supplement: Official Documents (April, 1937)*

⁷⁵⁵ Covenant of the League of Nations, Versailles Treaty June 28, 1919

⁷⁵⁶ Egypt became the 56th member of the League of Nations on the 26th May 1937

⁷⁵⁷ Rizk, Yunan Labib 'Egypt and the League of Nations' *Al Ahram Weekly* (25-31 August 2005) Issue 757 <<http://weekly.ahram.org/2005/757/chrncls.htm>> accessed 2014

⁷⁵⁸ International Covenant on Economic, Social and Cultural Rights (ICESR) (1966) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> accessed 2014

is the author.’ However, this is to be balanced against the rights expressed in Article 15(1)(1) CESCR, under which States must ensure that everyone can ‘take part in cultural life, and Article 15(1)(2) CESCR, the requirement to enable everyone ‘To enjoy the benefits of scientific progress and its applications.’ There is no indication, however, in the UN treaty how the balance is to be achieved.

INDEPENDENCE, ORIENTALISM, AND IP

Britain’s welcome of Egypt into the League of Nations revealed a lingering Orientalist attitude. By focusing entirely on the wondrous achievements of the Ancient Egyptians and avoiding all reference to her present statehood, British Foreign Secretary, Anthony Eden, while apparently being complimentary, implicitly compared the modern state negatively to its mythical achievements. His speech, redolent with Orientalist implication, included the following:

Long before some of the nations we represent emerged from their primordial darkness, Egypt had bestowed upon the human race precious gifts of science and literature, not to mention the matchless treasures of its arts, which remain until the present day a source of admiration and wonder.’⁷⁵⁹

Although his assertion is entirely true, the emphasis on the past is marked. An effect of such a comparison, by avoiding all reference to modern Egypt, is to undermine and disempower the ‘young’ state by making it appear inadequate when compared with past glory. In contrast, UN Secretary General, Señor Quevedo acknowledged modern Egypt as well as its ancient roots, saying that Egypt ‘represents the world in all its antiquity and youth.’⁷⁶⁰ Significantly, he also acknowledged the debt the world owes Egypt as ‘the country in which many civilizations have their roots.’ It could be argued that this is a debt that is yet to be repaid.

The idea that past knowledge is still relevant and that its contribution should be given recognition is something that has been resisted by developed countries but is of growing

⁷⁵⁹ Cited in Rizk, Yunan Labib ‘Egypt and the League of Nations’ *Al Ahrām Weekly* (25-31 August 2005) Issue 757 <<http://weekly.ahram.org.eg/2005/757/chrncls.htm>> accessed 2014

⁷⁶⁰ Cited in Rizk, Yunan Labib ‘Egypt and the League of Nations’ *Al Ahrām Weekly* (25-31 August 2005) Issue 757 <<http://weekly.ahram.org.eg/2005/757/chrncls.htm>> accessed 2014

interest to developing countries that wish to benefit from acknowledgment of their contribution to knowledge. An interpretation of Anthony Eden's emphasis on a clear separation between the ancient and modern worlds could be to imply that the knowledge of ancient Egypt can be viewed as part of the common heritage of all mankind,⁷⁶¹ free for all to use at no cost.

THE COMMON HERITAGE OF MANKIND AND TRADITIONAL KNOWLEDGE

Prospecting in developing countries for profitable ideas that can be re-invented for a modern audience has been commonplace. Multinational companies, for example, have gained access to knowledge without consent and patented 'inventions' that build on the practices of farmers and practitioners of agricultural and healing methods, among others, whose practices remained unwritten or only known by a few.⁷⁶² The effect is to prevent commercialization of the product by the knowledge holders and resentment that the profits are not shared with those who provided the original idea for the invention. Patents granted have proved susceptible to revocation based on the lack of novelty and obviousness⁷⁶³ of such products. However, the legal process of challenging a patent internationally is costly and requires very specialised expertise. A US patent was awarded to two Indian expatriates for the use of Turmeric to treat wounds, although the patent application itself stated that 'turmeric has long been used in India as a traditional medicine for the treatment of various sprains and inflammatory conditions.'⁷⁶⁴ Even though the patent opposition was eventually successful, and the patent rescinded, the obstacles faced in opposing it were enormous.⁷⁶⁵ The results of litigation are uncertain and, in addition to the financial burden, require a great deal of time commitment and expertise. In the case of various patents granted for uses of properties of the Neem Tree, known for its fungicidal and pesticidal properties, while one patent was successfully opposed in the European Patent Office, others granted in the US

⁷⁶¹ See e.g. Dutfield, Graham Intellectual Property, Biogenetic Resources and Traditional Knowledge (Earthscan 2004) at 10

⁷⁶² See e.g. the discussion of the cases of Turmeric, Neem and Kava in Philippe Cullet et al in Susette Biber-Klemm and Thomas Cottier Eds *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (CABI 2006) at 135-7

⁷⁶³ Article 27(2) TRIPS

⁷⁶⁴ Philippe Cullet et al in Susette Biber-Klemm and Thomas Cottier Eds *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (CABI 2006) at 135

⁷⁶⁵ Philippe Cullet et al in Susette Biber-Klemm and Thomas Cottier Eds *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (CABI 2006) at 135

have remained.⁷⁶⁶ Interestingly, Indian inventors have also filed patent applications for Neem-related inventions, in India, demonstrating the complexity of the issue.⁷⁶⁷

An attempt to formulate a system to protect this form of knowledge, designated traditional knowledge (TK) or indigenous knowledge, has proved problematic both in terms of defensive protection against appropriation and in developing a system to provide a positive framework for protection.⁷⁶⁸ Posited as a means of crediting the knowledge of the past, the term traditional can also be criticized as a rhetorical device that differentiates and stigmatizes the knowledge deriving from developing countries as ‘traditional’, to be contrasted with ‘modern’ knowledge. It is significant that reference to TK or indigenous knowledge is absent from TRIPS. However, a *sui generis* legal framework for TK that includes a requirement to obtain prior-informed-consent and a requirement to share the benefits of inventions has been drafted by WIPO.⁷⁶⁹ Where genetic material is concerned a draft treaty was completed and put out for consultation in February 2013.⁷⁷⁰ However, the question of how to compensate communities for use of long-guarded secrets has not been resolved.

In the UK, Andrew Gowers’ independent Review of Intellectual Property, commissioned by the government in December 2005, acknowledged that ‘every creator “stands on the shoulders of giants.”’⁷⁷¹ There is, however, still no agreement over what the appropriate type or amount of protection, if any, should be given to the descendents of such giants. It is also not easy to determine precisely who should benefit. While arguments have been made regarding the importance of crediting developing countries for their vast input to the sum of knowledge, there are many difficulties in assessing the contribution in economic terms. In reality, it is incalculable.

⁷⁶⁶ Philippe Cullet et al in Susette Biber-Klemm and Thomas Cottier Eds *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (CABI 2006) at 136

⁷⁶⁷ Philippe Cullet et al in Susette Biber-Klemm and Thomas Cottier Eds *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (CABI 2006) at 136

⁷⁶⁸ Maina, Charles Kamau ‘Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums (2011) 18 International Journal of Cultural Property 143 at 166

⁷⁶⁹ See ‘Traditional Knowledge’ WIPO <<http://www.wipo.int/tk/en/>> accessed 2014

⁷⁷⁰ ‘Draft Intellectual Property Guidelines for Access to Genetic Resources and Equitable Sharing of the Benefits arising from their Utilization’ CONSULTATION DRAFT (February 4, 2013) WIPO <http://www.wipo.int/export/sites/www/tk/en/resources/pdf/redrafted_guidelines.pdf> accessed 2014

⁷⁷¹ Gowers, Andrew ‘Gowers Review of Intellectual Property’ (2006) <<http://www.official-documents.gov.uk/document/other/0118404830/0118404830.asp>> accessed 2014

It is also important not to restrict the public domain so much that creativity is excessively constrained. Gowers recognized that ‘much of the value from the inventions and creativity protected by IP can only be realized if that knowledge is widely accessible to others.’⁷⁷² However, while the accumulated knowledge of developing countries is often in the public domain, IP restricts access to new knowledge for developing countries. With the majority of IP protected products accumulated in a small number of countries notably the US, the EU, and Japan the financial gain, as well as the knowledge, is secured by the now industrialized West.

Egyptian legislators have looked for innovative legal mechanisms to try to address the issue of protecting indigenous knowledge. In 2007, legislation was drafted designed to provide copyright protection for Egyptian antiquities, including the pyramids. It came into effect in 2010, making it clear that the right to make exact replicas of Egyptian antiquities vests entirely with the State. The authority to pursue infringements is administered through the Supreme Council of Antiquities.⁷⁷³ It is still possible to reproduce the items, but not to the precise scale of the original item. In addition, the legislation addresses commercial filmmakers and photographers,⁷⁷⁴ who would incur royalties if they use archaeological sites or objects in their works. Reproduction for educational purposes is exempt, in accordance with Law 82/2002.⁷⁷⁵ The penalty for infringement is imprisonment for a term of up to one year and/or a fine of between LE 5,000 and LE 20,000.⁷⁷⁶ The money accrued is paid to the Council of Antiquities and ring-fenced for antiquities and museum projects.⁷⁷⁷

In reality, these provisions are more political than they are legal. The aim has been made explicit. Nada Alnajafi cites Professor Loutfi as saying that the law was aimed at controlling international use of Egypt’s antiquities.⁷⁷⁸ She quotes Loutfi as saying that Egypt has the

⁷⁷² Gowers, Andrew ‘Gowers Review of Intellectual Property’ (2006) <<http://www.official-documents.gov.uk/document/other/0118404830/0118404830.asp>> accessed 2014 at 12

⁷⁷³ Hawass, Zahi introduction to Law No. 117 of 1983 as Amended by Law No. 3 of 2010 Promulgating the Antiquities’ Protection Law (Egypt) (Published in the Official Gazette on February 14, 2010) (2010) 17 *International Journal of Cultural Property* 613

⁷⁷⁴ Article 36 Law 117/1983 as Amended by Law 3/2010 Promulgating the Antiquities’ Protection Law (Egypt) (Published in the Official Gazette on February 14, 2010)

⁷⁷⁵ Article 171(7) Law 82/2002

⁷⁷⁶ Article 44(bis) Law 117/1983 as Amended by Law 3/2010

⁷⁷⁷ Article 49 Law 117/1983 as Amended by Law 3/2010

⁷⁷⁸ cited in Alnajafi, Nada ‘Protecting the Past in the Future: How Copyright is Wrong for Egypt and Why Other Sui Generis Laws may Help Protect the Pyramids and Other Cultural Antiquities’ (2008-2009) 56 *Journal of the Copyright Society of the USA* 244 at 244

support of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in working to develop the principle that 'a nation has the right to defend how its folklore and intangible heritage is used internationally' as part of the 'integrity of the nation.'⁷⁷⁹ As a higher level of protection than that provided for in TRIPS, it is potentially TRIPS compatible.⁷⁸⁰ However, it would not only be difficult to implement, given Egypt's commitment to national treatment in the Berne Convention and TRIPS agreement,⁷⁸¹ but it is unlikely to find any international support despite the backing of UNESCO. Alnajafi rather charmingly suggests that 'once the U.S. shows its true support and understanding of Egyptian culture by cooperating with the new proposal, Egypt will be more anxious to collaborate with the U.S.'s IPR system.' This is nicely put, but unfortunately naïve. It seems unlikely that the provisions will have any real impact.

Certainly a major reason for drafting the amendment to the Antiquities law in this way was to counter developed country pressure to comply with IP norms, and the law cleverly uses western Orientalism to advertise the issue of excessive copyright protection. However, as a potential tool of leverage to obtain concessions to benefit Egypt, it is doubtful that it will be successful.

THE INTERNATIONAL LEGAL REGIME AND EMERGENT INDEPENDENT STATES

Egypt like the other newly emerging or re-emerging independent states of the twentieth century joined a system made to fit other countries. At the outset of the twenty first century, as Egyptian judge and WTO Appellate Body member from 2000-2008, Georges Abi-Saab has noted, 'international law already covered the whole world.'⁷⁸² Customary international law can be said to have evolved out of widespread customary practices familiar from earlier, non-Western, approaches to international law.⁷⁸³ Indeed, the earlier international law experience of non-western states has been well documented.⁷⁸⁴ However, the impact of colonialism deprived its objects of the opportunity to contribute to

⁷⁷⁹ Alnajafi at 244

⁷⁸⁰ Article 1(1) TRIPS

⁷⁸¹ Article 5 Berne Convention; Article 3 TRIPS

⁷⁸² Abi-Saab, Georges 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 *Howard Law Journal* 95 at 97

⁷⁸³ Earlier international legal practice prior to the colonial period is discussed in Alexandrowicz, Charles Henry *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon Press 1967)

⁷⁸⁴ Georges Abi Saab refers to 'the systems of international law in ancient China, India, Greece and the Moslem Empire among others' citing Nussbaum, Arthur *Concise History of the Law of Nations* (Macmillan 1958)

developments in modern international law. While the exact nature and experience of foreign control under colonization may have differed among colonized nations, in all cases they were largely excluded from contributing to the development and structure of general rules of international law. In the process of decolonization, newly independent states status changed 'from objects to subjects of international law'.⁷⁸⁵ However, they had not participated in 'building it up'⁷⁸⁶ so they were inevitably, suspicious of a system that felt 'alien'⁷⁸⁷ and imposed obligations on them.⁷⁸⁸ It is understandable, therefore, that the newly joining states would wish to 'claim the right to choose from among its rules only those which suit their interests'.⁷⁸⁹

THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS

The sources of International Law must, themselves, be subject to scrutiny. Algerian ambassador and judge at the ICJ, Mohammed Bejaoui, has described them as the focus of a 'religion'⁷⁹⁰ that perpetuates the 'colonial civilized/barbarian distinction' by setting in stone the international legal methodology of the colonizing states.⁷⁹¹ Certainly, from the perspective of an ex-colonized country, it is important to be alert to the possibility that international law may embody a postcolonial approach.

Article 38 of the Statute Establishing the International Court of Justice (ICJ) in 1945 by the UN Charter is generally accepted to list the sources of modern international law.⁷⁹² These are treaties,⁷⁹³ which include international conventions, 'whether general or particular', and establish expressly recognized rules. International custom, 'as evidence of a general practice

⁷⁸⁵ Georges Abi-Saab 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 95 at 97

⁷⁸⁶ Brierly J. L *The Law of Nations* 5th Ed. (Clarendon Press 1955) cited in Abi-Saab at 99

⁷⁸⁷ Brierly cited in Abi Saab at 99

⁷⁸⁸ The principles established by Drahoš to assess the fairness of treaties are relevant here. See discussion in Chapter 1 and Drahoš, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) at 15

⁷⁸⁹ Brierly cited in Abi Saab at 99

⁷⁹⁰ Bejaoui, Judge Mohammed (1979) *Towards a New Economic Order* at 100 Cited by Chimni, B. S 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melbourne International Law Journal* 499 at 502.

⁷⁹¹ Chimni, B. S 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melbourne International Law Journal* 499 at 501; Anghie, Anthony *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) at 37

⁷⁹² Statute of the International Court of Justice <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> accessed 2014

⁷⁹³ Article 38.1(a) Statute of the International Court of Justice

accepted as law,⁷⁹⁴ is also a recognised source of international law. However, this generally takes a long time and widespread practice to evolve. New members joining on emerging from decolonisation have not had the opportunity to contribute to its development while subject to colonial control or, more significantly, the priorities encoded in and conveyed through the medium of concepts and methodology.

Judicial decisions and the works of authoritative legal academics are also accepted sources of international law. Article 38.1(d) states that 'judicial decisions and the teachings of the most highly qualified publicists of the various nations are subsidiary means for the determination of rules of law.'⁷⁹⁵ This provision potentially accommodates all legal systems without discrimination and is capable of including the Islamic legal system. It was, however, envisaged mainly to accommodate the different methodologies of the common law and the civil law, particularly in relation to the emphasis placed on judicial decisions and doctrinal materials. It is made clear in the ICJ statute that its decisions are not bound by the doctrine of precedent as in the common law system. Article 59 ICJ states that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'.

Notably, Article 38.1(c) ICJ refers to 'the general principles of law recognized by *civilized nations*.'⁷⁹⁶ The loaded meaning of this term may be interpreted as apparently entrenching an orientalist view of the international legal system in international law, and imposing norms deemed civilized, and accepted in Europe and the West, on 'other' states. Lack of civilization was used to justify many of the abuses of colonialism.⁷⁹⁷ John Stuart Mill said that it would be a mistake to think that 'barbarians', the uncivilized subjects of colonial rule, were capable of respecting 'the same rules of international morality' as those followed by 'civilized nations'.⁷⁹⁸ In this way, it was possible to rationalize the use of despotic power in colonies while professing liberal beliefs at home. As a result, reference to the term civilized has become 'increasingly considered anachronistic and insulting by the growing number of

⁷⁹⁴ Article 38.1(b) Statute of the International Court of Justice

⁷⁹⁵ Article 38.1(d) Statute of the International Court of Justice

⁷⁹⁶ Article 38.1(c) Statute of the International Court of Justice. Emphasis mine.

⁷⁹⁷ Bull, Hedley foreword to Gerrit Gong *The Standard of Civilization in International Society* (Clarendon Press 1984) at vii-viii

⁷⁹⁸ Prakash, Gyan 'Who's Afraid of Postcoloniality?' (1996) *Social Text* 187 at 191

non-European countries which were becoming [...] full International persons.⁷⁹⁹ The word itself, it can be argued, has become so deeply imbued with negative meaning, retaining its residual connotations with the colonial era, that many view it with suspicion.

However, Egyptian international law professor Cherif Bassiouni pragmatically dismisses any such controversy by accepting the current, 'presumption... that all Member-States of the United Nations are "civilized"'.⁸⁰⁰ On this view, the provision refers to the principles of the countries of the United Nations as established through the conventions. As a founding member of the United Nations it can, therefore, be said that Egyptian values are accommodated within the principles of civilized nations and form part of the ethos of the institution. This may be true but there are still grounds for caution. Professor Bassiouni may have wanted to avoid engaging in a postcolonial critique of the sources of international law, however, implications arising from the inclusion of the term in the ICJ statute do still carry the weight of the colonial understanding of the word. It is, therefore, important to acknowledge the heavy burden of meaning inherent in the term while at the same time accepting that the modern understanding of the term is inclusive.

The question arises, what are the 'general principles of law recognized by civilized nations' referred to in Article 38.1(c)? There is still no international agreement as to which principles are generally accepted but Professor Schlesinger points to the fact that they could be found in concrete form in the domestic legal systems of both common law and civil law countries. He identifies Egypt as an example of a country that positively encourages judges to use general principles.⁸⁰¹ For example, the Egyptian Civil Code of 1949, states in Article I, paragraph 2, that

In default of statutory provisions the Judge shall decide according to custom, in the absence of custom, according to the principles of Islamic law, and in default of such, according to the principles of natural law and equity.

⁷⁹⁹ Gong, Gerrit *The Standard of Civilization in International Society* (Clarendon Press 1984) at 84

⁸⁰⁰ Bassiouni, Cherif M 'A Functional Approach to General Principles of International Law' (1986-1990) 11 *Michigan Journal of International Law* 768 at 768

⁸⁰¹ Schlesinger, Rudolf B 'Research on the General Principles of Law Recognized by Civilized Nations' (October 1957) 51 *The American Journal of International Law* 734 at 742

Schlesinger points out that the reference to the principles of Islamic law means that Egyptian judges are permitted to look beyond Egypt's national borders to include the entire Islamic world in their search for those principles. In reality, the internal reasoning of Islamic law is more closely related to a particular jurisdiction. However, where Egypt is concerned, its reputation as a centre of Islamic learning and jurisprudence have meant that developments in the law of Egypt have had much wider implications in the region and more widely in the Islamic world.

Further, reference to the principles of natural law and equity potentially allows judges unrestricted global scope to look for solutions. This duty to look to natural law and equity has been part of Egyptian law since it was included in the Mixed Courts' Charter and affirmed through Mixed Courts' case law.⁸⁰² Although Wilner confirms that the Mixed Courts were not Common Law courts, he also notes that the 'notion of settled case law [...] was well established.'⁸⁰³ His authority for the assertion is Judge Brinton, who explained that 'previous interpretations of the law were followed not because they made the law but because of the assumption that they had been made *according* to the law.'⁸⁰⁴ The sources drawn upon in order to decide such cases included 'French statutes and case law [and] Moslem institutions.'⁸⁰⁵ However, despite the wide scope for discretion offered by Article 34 Mixed Court Charter and Article 11 Mixed Court Code they were, in fact, interpreted narrowly and used only to fill genuine gaps in the law.

In the realm of IP the use of natural law and equity was necessary because the law was silent on the matters. The application of equitable principles therefore became well established where literary and artistic property, or copyright are concerned. It was decided in the case of Puthod, who bought the score of an Opera and staged a number of performances, without paying any royalties, that buying the score of an Opera did not entitle an Impresario to produce performances of that Opera without further payment for

⁸⁰² Article 34 Mixed Courts Charter; Article 11 Mixed Courts Civil Code

⁸⁰³ Wilner, Gabriel M 'The Mixed Courts of Egypt: A Study of The Use of Natural Law and Equity' (1975) Georgia Law Scholarly Works Paper 210 at 418 <http://digitalcommons.law.uga.edu/fac_artchop/210p411> accessed 2014

⁸⁰⁴ Brinton, Jasper Yeates *The Mixed Courts of Egypt* (Yale University Press 1968) at 94

⁸⁰⁵ Wilner, Gabriel M 'The Mixed Courts of Egypt: A Study of The Use of Natural Law and Equity' (1975) Georgia Law Scholarly Works Paper 210 at 423 <http://digitalcommons.law.uga.edu/fac_artchop/210p411> accessed 2014

the right to perform it.⁸⁰⁶ Despite the lack of a specific rule to the effect that this was an infringement of his exclusive right it was found that, as the assignee of the author's right, Tito di Giovanni was, indeed, entitled to royalties. The court decided that the case could be decided by reference to the 'droit commun' or custom and established case law of the Mixed Courts, finding that

[...] à défaut de toute convention ou loi spécial, la propriété littéraire et artistique est protégée en Egypte par les règles ordinaire du droit commun. Par suite, le préjudice qui résulte d'une atteinte portée à ce droit de propriété donne lieu contre celui qui en est l'auteur, à une action en réparation.⁸⁰⁷

The decision was justified on the basis of Article 34 of the Mixed Court Charter, and Article 11 of the Mixed Court Civil Code which allowed, 'in the case of silence, insufficiency, and obscurity of the law, the judge [to] follow the principles of natural law and equity.'

Cette solution découle de l'esprit général de la législation mixte en Egypt et de la disposition contenue en l'art 34 due Règlement d'Organisation Judiciare.⁸⁰⁸

The ideal of finding common principles that are shared globally remains a utopian vision. Equitable solutions may be found by applying general principles locally but at an international level it is still likely to be the case that one person's equity is another's injustice. It is important to note, however, that Egypt is a particularly important jurisdiction in this respect as other jurisdictions in the Islamic world and, particularly in the Middle East region, have long looked to Egyptian law and judicial decisions as a model.

TENSION IN THE GLOBAL LEGAL SYSTEM

At least in theory, weaker states benefit by participating in and abiding by the decisions of a rule-based system, not by undermining it. This is a reason for the extremely wide

⁸⁰⁶ P. Puthod contre Tito di Giovanni Ricordi Cour d'Appel d'Alexandrie, le 27 Mars 1889 in *Jurisprudence des Tribunaux de la Reforme en Egypte: Recueil Officiel Arrets de la Cour d'Appel D'Alexandrie Tome 14, Annee Judiciare 1888-1889* Alexandrie: Typo-Lithographie V. Penasson 1889 at 164

⁸⁰⁷ Where there is no specific law, literary and artistic property are protected in Egypt by the rules of custom and practice. It, therefore, follows that any loss that results from an infringement of this property right will give a right of damages against the infringing party. My translation of the citation from the case summary of P. Puthod contre Tito di Giovanni Ricordi at 164

⁸⁰⁸ This solution derives from the provision in Article 34 of the Mixed Courts Charter and is in the spirit of the Mixed legislation. My translation of the citation from the case summary of P. Puthod contre Tito di Giovanni Ricordi at 164

participation of developing countries in the WTO system. Nevertheless, there is a tension between international law as understood on the basis of sovereign nation states and international rules that leave little room for individual states to make their own decisions.

There is a difference between the general rules of international law in which newly independent states had not had any say, and those of treaties in which developing countries played an active role in negotiating and setting the rules. Abi Saab expected 'newly independent states' to meet such freely undertaken obligations 'undertaken since independence for purposes of economic development which benefit the country.'⁸⁰⁹

In its request for admission to join the League of Nations the Egyptian Government stated its 'sincere intention to observe its international obligations'.⁸¹⁰ This was required, since in order to join the club of autonomous sovereign states it was necessary to accept the already existing rules. Similarly, when Egypt joined the GATT⁸¹¹ in 1970, Egypt had to agree to the system, which had been negotiated by the original 23 contracting parties. In contrast, by participating in the WTO negotiations from the outset, Egypt had the opportunity to shape the treaty that was eventually concluded at Marrakesh in the Uruguay round. The move from a power-based system to one rooted in rules was perceived to be in Egypt's favour. As a developing country, it was considered to represent a means of providing a more even playing field by constraining the ability of the more powerful states to impose their will in international trade. The potential opening up of greater access to export markets was also seen to be of benefit to developing countries.⁸¹²

However, while Egypt was, ostensibly an equal player in the WTO negotiations, there were constraints on Egypt's input to the agreement, and capacity to negotiate. A South Centre report aimed at strengthening the negotiating capacity of developing countries helps to explain the problem that remains insoluble, which is that the 'balance of power among WTO Members is always a major factor in WTO decision-making.' The report cites a number of

⁸⁰⁹ Abi-Saab at 115-116

⁸¹⁰ Hudson, Manley O 'Admission of Egypt to the League of Nations' (1937) 31 *The American Journal of International Law* 681

⁸¹¹ General Agreement on Tariffs and Trade (GATT 1947)

⁸¹² Carlos Correa 'The WTO Dispute Settlement TRIPS Rulings and the Developing Countries' (2005) 4 *Journal of World Intellectual Property* 251

issues common to developing countries that exacerbate the limitations on developing country influence. The factors they identified include:

Incoherence in national policies and in national policymaking coordination, [...] limitations with respect to the availability and depth of national, human, financial, and technical resources that adversely affect their ability to adequately prepare for trade negotiations.⁸¹³

EGYPT'S POST-INDEPENDENCE ATTITUDE TO INTERNATIONAL LAW

Following independence, Egypt feared a continuation of the status quo ante through indirect methods and sought to ensure that the new states would be able to shape the direction of international law in the future. Egypt endorsed the promotion of relations between states on a basis of equality and viewed the UN Charter as signifying a new system of international law. Advantages of a rule-based system include the fact that such a system is supposed to have the effect of de-politicizing disputes and conferring equal status on the disputants, something that politics alone would not achieve.

In any case, in order to gain the advantages of participating in the international legal system it is necessary to profess a belief in it. States wishing to secure foreign direct investment and/or attract the transfer of technology need to have a reputation for respecting their international obligations and to have a reliable approach to dispute settlement. Other states are less likely to enter into trading agreements unless they have confidence that their rights will be protected. This explains why at times apparently incompatible views have been expressed by Egyptian officials. Kathryn Doherty, writing in the late 1960s, documented expressions of suspicion of international law expressed by Egyptian officials that demonstrate both a lack of trust in the system as well as a desire to benefit from it.⁸¹⁴ At that time, Egypt endorsed the idea that countries that had previously benefited from occupation and exploitation had an obligation to foster the welfare of newly liberated and

⁸¹³'Strengthening Developing Countries' Capacity for Trade Negotiations: Matching Technical Assistance To Negotiating Capacity Constraints' (2004) South Centre http://www.g77.org/doha/Doha-BP04%20-Strengthening_Southern_trade-related_negotiating_capacity.pdf

⁸¹⁴ Doherty, Kathryn B 'Rhetoric and Reality: A Study of Contemporary Official Egyptian Attitudes towards the International Legal Order' (1968) 26 *American Journal of International Law* 335

still developing countries. Doherty uses the term 'tax'⁸¹⁵ to describe this obligation, pointing out that Egypt sought to establish a welfare obligation to be imposed upon previously colonizing states as part of International Law.

Treaty based international legal obligations are enforceable as contracts according to the principle of *pacta sunt servanda*. This is a fundamental obligation of Islamic law.⁸¹⁶ However, Egyptian officials have also argued that the principle of *pacta sunt servanda* did not entitle more developed and more powerful states, including ex colonial powers to maintain unfair positions 'secured...to the detriment of weak entities, peoples, or small States.'⁸¹⁷ The Egyptian delegate to the 1966 UN Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States made it clear that Egypt's position was that 'only obligations undertaken "freely and on the basis of equality" need be fulfilled in good faith.' Where developed countries used their power to extract 'unreasonable' concessions from developing country counterparts this would justify departing from the otherwise sacrosanct principle.⁸¹⁸

Egypt, together with nine other states, proposed an amendment to the drafting committee of the Friendly Relations agreement in an attempt to develop 'a sound theory regarding the vitiation of consent [that] could greatly contribute to the solution of the problem of unequal treaties'.⁸¹⁹ The proposal addressed all 'obligation[s] undertaken in circumstances vitiating

⁸¹⁵ Doherty, Kathryn B 'Rhetoric and Reality: A Study of Contemporary Official Egyptian Attitudes towards the International Legal Order' (1968) 26 *American Journal of International Law* 335 at 337

⁸¹⁶ 'It is righteousness... to fulfil the contracts which ye have made' *The Holy Quran: English Translations of the Meanings and Commentary* (The Custodian of the Two Holy Mosques King Fahd Complex For the Printing of The Holy Quran, Al-Madinah Al-Munawarah Under the Auspices of the Ministry of Hajj and Endowments, The Kingdom of Saudi Arabia 1413H) Sura 2:177 at 71. In the commentary provided for Sura 2:177 it states that this aya 'warns against deadening formalism' and goes on to explain that while the 'God-fearing man [...] should obey salutary regulations [...] he should fix his gaze on the love of Allah and the love of his fellow citizens' this is explained as meaning that 'we must be good citizens, supporting social organisation'; Also, 'O ye who believe! Fulfill (all) obligations' Sura 5:1 at 276. The commentary for this aya emphasizes its 'comprehensiveness' and goes on to state that when the 'State enters into a treaty [...] every individual in that [...] State is bound to see that as far as lies in his power, such obligations are faithfully discharged.'

⁸¹⁷ Doherty, Kathryn B 'Rhetoric and Reality: A Study of Contemporary Official Egyptian Attitudes towards the International Legal Order' (1968) 26 *American Journal of International Law* 335

⁸¹⁸ Doherty, Kathryn B 'Rhetoric and Reality: A Study of Contemporary Official Egyptian Attitudes towards the International Legal Order' (1968) 26 *American Journal of International Law* 335 at 338 fn 15 See Chapter 7 for further discussion of this point.

⁸¹⁹ Doherty, Kathryn B 'Rhetoric and Reality: A Study of Contemporary Official Egyptian Attitudes towards the International Legal Order' (1968) 26 *American Journal of International Law* 335 at 338 FN 15

full and free consent,⁸²⁰ not only those treaty obligations undertaken during the colonial period.⁸²¹ The framework for assessing treaties for fairness put forward by Drahos and Braithwaite provides a possible means by which agreements could be analysed to address power imbalances in international standard setting.⁸²² However, no such mechanism has emerged.

Professor Ibrahim Shihata Former Senior Vice President and General Counsel of the World Bank, and Secretary General of the International Center for the Settlement of Investment Disputes rejected, with good reason, any suggestion that new states were any more mistrustful of international law than the traditional states. He explained that it was entirely unsurprising that both old and new states should continue to try to interpret rules to serve their own interests or question the character of a rule as an established rule of law where it was not in their favour. The discussion, he believed, could take place within the limits of the international legal system.⁸²³

EGYPT AND THE GATT

The General Agreement on Tariffs and Trade (GATT) was agreed in 1947 by a group of forty-four nations at the Bretton Woods Conference, which had begun in 1944, in anticipation of the end of World War II, to regulate the financial and commercial aspects of international relations. The agreement also established the International Monetary Fund (IMF) and the World Bank (WB). The original parties to the agreements were the forty four Allied states, which together had successfully opposed the Axis powers.⁸²⁴ After the war other states joined. When Egypt joined the GATT, in 1970, it was one of the few newly decolonized

⁸²⁰ Doherty, Kathryn B 'Rhetoric and Reality: A Study of Contemporary Official Egyptian Attitudes towards the International Legal Order' (1968) 26 *American Journal of International Law* 335 at 338

⁸²¹ It may be noteworthy that despite acceding to the Vienna Convention on the Law of Treaties on February 11, 1982, Egypt has never ratified it. Although the treaty merely restates customary international law, the lack of ratification may leave more room for interpretation regarding, for example, Article 26 and 27 VCLT.

⁸²² Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) at 15

⁸²³ Shihata, Ibrahim F I 'The Attitude of New States toward the International Court of Justice' (1965), 19 *International Organization*: 203

⁸²⁴ Bretton Woods Monetary Conference, July 1-22, 1944 World Bank <<http://web.worldbank.org>> accessed 2014

states to do so.⁸²⁵ By that time, however, the GATT had already been in existence for 23 years, and this meant accepting the system as set up by the founding members.

EGYPT AND THE WTO

In contrast, by participating in the Uruguay Round negotiations that led to the formation of the WTO, Egypt contributed to the final shape of the treaty. Minister of Economy and Foreign Trade in 1994, Mahmoud Mohamed Mahmoud talked of his, 'pride in playing an active rôle in [the] Round', not only by participating in shaping the results of these negotiations but also by taking various wide steps in pursuing ambitious economic reform and trade liberalization'.⁸²⁶ In his view it 'symbolize[d] the true and global participation of developing countries as equal partners.' The agreement came into force in Egypt on 30 June, 1995, and Egypt is, therefore, also one of the earliest adherents.

Among the benefits accruing from WTO membership is the reputational value of participating as an equal among other nation states at the WTO. Non-participation was not, however, a real option. Developing countries feared marginalization if they did not join the organisation, and Egypt did not want to be side lined. Many studies point to the fact that there remains a lack of real equality in the partnership.⁸²⁷

Moreover, although the promise of increased trade opportunities is greatly alluring there is no guarantee that benefits will be shared. It is likely that they will remain 'unevenly distributed',⁸²⁸ as before, among a small elite. Fears that the benefits of globalization will not reach the needy, and that foreign interests will be protected at the expense of Egyptian interests, as in the nineteenth and early twentieth centuries have, therefore, persisted with some justification.

⁸²⁵ 'The 128 Countries that had Signed GATT by 1994' WTO <http://www.wto.org/english/thewto_e/gattmem_e.htm> accessed 2014

⁸²⁶ Statement by H.E. Mr. Mahmoud Mohamed Mahmoud in Negotiations: Meeting at Ministerial Level, Uruguay Round Marrakesh (Morocco), 12-15 April 1994 WTO Documents Online <UR-94-0120 http://www.wto.org/gatt_docs/English/SULPDF/92150215.pdf> accessed 2014

⁸²⁷ See e.g. Chilton, Adam S and Ryan W Davis 'Equality, Procedural Justice, and The World Trade Organization' (2012) 7 *Intercultural Human Rights Law Review* 101; Gowa, Joanne and Soo Yeon Kim 'An Exclusive Country Club: The Effects of the GATT on Trade, 1950-1994' (2005) 57 *World Politics* 453; Lewis, Meredith Kolsky 'WTO Winners and Losers: The Trade and Development Disconnect' (2007) 39 *Georgetown Journal of International Law* 165; Moon, Gillian 'Trade and Equality: A Relationship to Discover' (2009) 12 *Journal of International Economic Law* 617

⁸²⁸ Adly, Amr Ismail 'Politically-Embedded Cronyism: The Case of Post-Liberalization Egypt' (2009) 11 *Business and Politics* 1 at 1

THE TRIPS AGREEMENT

The interests of developed countries prevailed in the final shape of the WTO agreement, especially over the TRIPS negotiations. The idea that the treaty was the result of an understanding reached between, 'sovereign and equal states' as supporters of TRIPS claim,⁸²⁹ is demonstrably untrue. Drahos questions the democratic foundations of TRIPS because 'international standard setting in intellectual property has proceeded under conditions that do not correspond to the ideal of bargaining amongst equally well-informed and resourced international actors.'⁸³⁰ Developing countries were under-represented in the consultation process. In addition, the developing country negotiators who were present were not sufficiently well-informed, and may not have appreciated the implications of the decisions they were asked to take. The developed country representatives were firmly in charge of the bargaining process, and the pressure of multinational companies was ever-present behind the scenes. Developing countries, including Egypt, did not want to tie IP monopoly rights in with the WTO treaty, which was mainly about reducing tariffs and extending free trade.⁸³¹ In the end, however, they compromised, in exchange for the promise of greater access to developed country markets.⁸³² Thus, with only '20 of the 106 developing countries that are now bound [by the treaty] involved in the negotiations'⁸³³ the TRIPS agreement was appended to the WTO agreement.

THE BASIS FOR INTERNATIONAL PROTECTION OF IPRS

Traditionally, just like property rights, intellectual property rights have been jealously guarded territorial matters. Intellectual property treaties were concluded between states

⁸²⁹ Drahos, Peter and Ruth Mayne Eds. *Negotiating Intellectual Property Rights: Between Coercion and Dialogue: Global Intellectual Property Rights: Knowledge Access and Development* (Palgrave Macmillan 2002) at 166

⁸³⁰ Drahos, Peter and Ruth Mayne Eds. *Negotiating Intellectual Property Rights: Between Coercion and Dialogue: Global Intellectual Property Rights: Knowledge Access and Development* (Palgrave Macmillan 2002) at 161; See also discussion of Fairness in Treaty Making in Chapter 1

⁸³¹ Gervais, Daniel *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell 1998); Yu, Peter K 'The Objectives and Principles of the TRIPS Agreement' (2009) 46 *Houston Law Review* 979; Liang, Margaret 'The Realpolitik of Multilateral Trade Negotiations from Uruguay to the Doha Round' (2004) *Singapore Yearbook of International Law* at 150 <<http://law.nus.edu.sg/sybil/downloads/articles/SYBIL-2004/SYBIL-2004-149.pdf>> accessed 2014;

'Official Country Positions and Proposals on TRIPS Article 27.3(b)' *GRAIN* <http://www.grain.org/trade_env/docs/upov.pdf> accessed 2014

⁸³² Gervais, Daniel *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell 1998);

⁸³³ Drahos, Peter and Ruth Mayne Eds. *Negotiating Intellectual Property Rights: Between Coercion and Dialogue: Global Intellectual Property Rights: Knowledge Access and Development* (Palgrave Macmillan 2002)

when mutual assurances of protection for inventive and artistic works were necessary to ensure not only that creators would obtain benefits for their work, but that the state, and thereby the public too, would reap maximum economic rewards from inventiveness. The motivation to provide protection for the products of other nations was a belief in native talent and its ability to compete internationally. For this reason, states in an early stage of development were less likely to enter into international intellectual property protection agreements, thus leaving themselves free to copy and benefit from the efforts of others without having to pay for the work that went into the original creative process.

However, the 'one-size-fits-all or [...] one-standard-fits-all'⁸³⁴ model of TRIPS has impinged on the ability of states to take an individual approach designed to suit local conditions. TRIPS incorporates provisions of earlier multilateral IP treaties, notably the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both have a large number of members⁸³⁵ and have been revised and updated a number of times.⁸³⁶

TRIPS, with its aim of harmonizing standards globally, is therefore, unlike the earlier IP treaties. Accession to this major all-encompassing global intellectual property agreement, is widely considered to have far-reaching implications. Not only does it aim to address all aspects of intellectual property subject matter together in one agreement but, crucially, it can be enforced between member states by the WTO dispute settlement body (DSB).⁸³⁷ It also extends IP protection to new areas for many jurisdictions, which for Egypt include: trade secrets, plant varieties and patent protection not only for inventive processes that lead to the creation of new medicines but also for new medicinal products. Egypt's pre-TRIPS patent legislation, Law 132 of 1949, ensured that medicinal products could not be protected. The law excluded 'pharmaceutical chemical products and agricultural chemical

⁸³⁴ Khor, Martin 'Rethinking Intellectual Property Rights and TRIPS' in Drahos and Mayne Eds *Negotiating Intellectual Property Rights: Between Coercion and Dialogue: Global Intellectual Property Rights: Knowledge Access and Development* (Palgrave Macmillan 2002) at 205

⁸³⁵ The Paris Convention currently has 173 members and the Berne Convention has 164 as of May 2011 World Intellectual Property Organization (WIPO) <http://www.wipo.int/treaties/en/SearchForm.jsp?search_what=C> accessed 2014

⁸³⁶ The Trips Agreement clarifies that where it refers to the Paris Convention (1967) it means the Stockholm Act of 14 July 1967 and reference to the Berne Convention refers to the Paris Act of 24 July 1971

⁸³⁷ Article 2(1) Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the WTO Agreement

products related to foodstuff,⁸³⁸ although it was possible to obtain a process patent for a new 'chemical' process. This meant that producers were able to develop different processes for developing a similar medicinal product to the one for which the process patent had been granted. Consumers could therefore have access to new medicines although they had to be made differently from the in-patent version. Furthermore, under Article 12(4) of Law 132 of 1949 new processes could only be protected by patent for ten years, a period which could not be renewed.⁸³⁹ In contrast, implementing TRIPS required products as well as processes in all fields of technology to be protected for a twenty-year period. This measure alone is predicted to have an enormous impact. Balat and Loutfi refer to 'adverse effects' that pose a 'real risk for all Egyptians.'⁸⁴⁰

Thus, Egypt and other developing countries have needed to make enormous changes to their IP regimes in order to comply with TRIPS standards, while the required level of protection, perceived as 'exceptionally high' by developing countries largely reflected the status quo in developed countries.⁸⁴¹ It remains a major concern that 'such standards [may] significantly reduce the scope of countries in the South to devise systems of IPRs protection suited to their own conditions and development needs.' For the developed countries, which have had to make very little adjustment, if any, to their IP regimes in response to TRIPS there is nothing to lose but a great deal of potential gain as they anticipate being the beneficiaries of the predicted 'asymmetric trade flows.'⁸⁴² For developing countries like Egypt, however, in addition to the financial consequences of paying more for imported IP

⁸³⁸ Balat, Mohamed Abou El Farag and Mohamed Hossam Loutfi 'The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt' (2004) 2 *Web Journal of Current Legal Issues Ltd* http://www.peacepalacelibrary.nl/ebooks/files/WEBJCLI_BALAT_TRIPs-Agreement-and%20Developing-Countries.pdf accessed 2014

⁸³⁹ Balat, Mohamed Abou El Farag and Mohamed Hossam Loutfi 'The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt' (2004) 2 *Web Journal of Current Legal Issues Ltd* http://www.peacepalacelibrary.nl/ebooks/files/WEBJCLI_BALAT_TRIPs-Agreement-and%20Developing-Countries.pdf accessed 2014

⁸⁴⁰ Balat, Mohamed Abou El Farag and Mohamed Hossam Loutfi 'The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt' (2004) 2 *Web Journal of Current Legal Issues Ltd* http://www.peacepalacelibrary.nl/ebooks/files/WEBJCLI_BALAT_TRIPs-Agreement-and%20Developing-Countries.pdf accessed 2014

⁸⁴¹ Gervais, Daniel J 'Intellectual Property, Trade & Development: The State of Play' (2005) 74 *Fordham Law Review* 507

⁸⁴² *TRIPS Agreement: A Guide for the South The Uruguay Round Agreement on Trade-Related Intellectual Property Rights* (South Centre 1997) at 36

protected material, they must also pay the costs of the enormous structural and administrative changes necessary to implement the new regime. According to an UNCTAD report produced in 1996, the implementation costs were anticipated at \$800,000 and thereafter approximately £1 million per year.⁸⁴³ It is not surprising, therefore, that many critics have expressed concerns about the manner in which IP issues have been addressed in the international trading system with respect to developing countries and are concerned about possibly significant detrimental effects that may result.⁸⁴⁴

Most significant is the fact that because of its status as an instrument of the WTO, infringements of TRIPS are subject to the compulsory jurisdiction of the WTO DSB. The fact that this is a compulsory forum for adjudicating disputes that can compel states to comply with its rulings and take enforcement measures⁸⁴⁵ makes it unique in the international legal regime. Its goal with respect to IP is to ensure that TRIPS is successfully embedded among WTO members as the basis for minimum standards of protection for all types of IP. The Paris and Berne conventions still remain relevant within the WTO TRIPS system⁸⁴⁶ as they provide detailed substantive rules for patent and copyright protection, and all WTO members are required to join them.

NATIONAL TREATMENT

International IP treaties have long provided for National Treatment.⁸⁴⁷ This means, as reiterated in Article 3 of the TRIPS agreement, that '[e]ach Member shall accord to the

⁸⁴³ UNCTAD (1996) *"The TRIPS Agreement and the Developing Countries"*, UNCTAD, Geneva cited in Commission on Intellectual Property Rights Integrating Intellectual Property Rights and Development Policy (2002) <http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf> accessed 2014 at 145

⁸⁴⁴ See e.g. Gervais, Daniel J 'Intellectual Property, Trade & Development: The State of Play' (2005) 74 *Fordham Law Review* 507; AbdelGafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006); Correa, Carlos María *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press 2007) as well as organizations such as Third World Network <<http://www.twinside.org.sg>> ;and GRAIN <<http://www.grain.org>> both accessed 2014

⁸⁴⁵ Article 22(1) WTO Dispute Settlement Understanding (DSU) explains that 'Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.'

⁸⁴⁶ articles 2.1 and 9.1 respectively

⁸⁴⁷ 'National treatment is the simple and ingenious solution to solve the problem of worldwide protection for creative inventors and authors. According to the principle of territoriality, countries can grant protection only within the boundaries of their own territory. [...] National treatment, under which a treaty member accords

nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property'.⁸⁴⁸ All WTO nationals can, therefore, expect to be treated in the same way as any other national citizen, if not better. The concept of 'no less favourable treatment'⁸⁴⁹ does not rule out the possibility of a state choosing to grant privileges to foreigners over nationals. In Egypt, the experience of the capitulations granted under the Ottoman regime has already provided a historical precedent for some of the problems associated with such an approach and so one would not expect to see a re-emergence of such measures.

EFFECT OF THE MOST FAVOURED NATION PROVISION

Article 4 TRIPS provides for the extension of, 'any advantage, favour, privilege or immunity granted by a WTO member to the nationals of any other country.' This must be done, 'immediately and unconditionally.' Subject to some very limited exceptions this means that no agreements entered into after joining TRIPS can favour one country without being extended to all others. All member states, therefore, benefit from any increase in IP protection included in any Free Trade Agreement (FTA) concluded between WTO member states.

This has led to the raising of IP standards beyond TRIPS level as IP continues to be included as an aspect of FTAs, leading inexorably to an increase—never a decrease—in IP protection. FTA negotiations are dominated primarily by the US and the EU, which see their future prosperity as being tied up in increasing the value of intellectual property. They, therefore, aim to continue raising standards of protection to TRIPS Plus levels internationally and work towards effective enforcement of such protection.⁸⁵⁰

nationals of other member states the same treatment it accords its own nationals, allows that member and its courts to apply their own law — the law they are familiar with.' Loewenheim, Ulrich 'The Principle of National Treatment in the International Conventions Protecting Intellectual Property' (2009) in *Patents and Technological Progress in a Globalized World* Ed Wolrad Prinz zu Waldeck und Pyrmont Volume 6 MPI Studies on Intellectual Property, Competition and Tax Law (Springer 2009)

⁸⁴⁸ TRIPS Article 3(1), see also Paris Convention Article 2 and Berne Convention Articles 5(1) and 5(2)

⁸⁴⁹ Article 3(1) TRIPS

⁸⁵⁰ See e.g. Drahos, Peter 'BITS and BIPS: Bilateralism In Intellectual Property' (2001) 4 *The Journal of World Intellectual Property* 791

THE DSU AND DEVELOPING COUNTRIES

A key feature of the WTO is the DSB's ability to adjudicate disputes without needing the consent of the parties. This enhancement of the rule-based nature of international trade law has generally been thought to be in developing countries' favour,⁸⁵¹ although how this works in reality has been questioned. An obvious detriment for developing countries is the prohibitive cost of either prosecuting or defending a case for non-compliance with the TRIPS agreement, under the WTO's Dispute Settlement Understanding (DSU).⁸⁵² The prospect of legally sanctioned trade retaliation⁸⁵³ suggests a potential return to a power-based system.

PARTICIPATION IN WTO DISPUTE RESOLUTION

Low participation of African countries in the WTO dispute settlement regime remains a concern in terms both of its efficacy and potential benefits for developing countries in the region⁸⁵⁴. This is in contrast to other developing countries such as Brazil and India. Egypt is one of the more active African countries in terms of using the dispute settlement mechanism and indeed in terms of representations on panels. A number of Egyptians have sat on panels and two have sat on the Appellate Body bench.⁸⁵⁵ This means that Egypt has gained valuable experience in using the system. Egypt has participated in several disputes as a respondent, although none as complainant. However, Egypt has requested consultations on a number of occasions, on one occasion requesting a panel. Participation in these processes is necessary to build capacity in managing WTO commitments and in order to contribute to the development of a balanced organization. The WTO needs to attract fuller participation if it is to work in the long run, and the validity of WTO decision-making is dependent on this

⁸⁵¹ 'The 10 Benefits of the WTO Trading System: A system based on rules rather than power makes life easier for all' WTO <http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b03_e.htm> accessed 2014; Brewster, Rachel 'Rule-Based Dispute Resolution In International Trade Law' (2006) 92 *Virginia Law Review* 251

⁸⁵² Understanding on rules and procedures governing the settlement of disputes. Annex 2 of the WTO Agreement <http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 2014

⁸⁵³ Article 22 DSU Compensation and the Suspension of Concessions

⁸⁵⁴ Mosoti, Victor 'Africa in the First Decade of World Trade Organisation Dispute Settlement' (2006) 9 (*Journal of International Economic Law*) 427

⁸⁵⁵ These are George Michel Abi-Saab (2000-2008) and Said El-Naggar (1995-2000) see Appellate Body Members <http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm> accessed 2014

THE ROLE OF DEVELOPING COUNTRIES IN THE WTO

In 2002, European Commissioner for Trade, Pascal Lamy anticipating the increasing weight of developing country authority in negotiations, stated that 'The Uruguay Round was perhaps the last time when we could write a new set of trade rules the way we, the Northern countries, wanted them, and then granting developing countries "special and differential treatment" to relieve them of the burden of the rules.' Developing countries must now 'be at the table, north and south negotiating on the future of rules together.'⁸⁵⁶ Lamy went on to become WTO Director General, and held the post from 2005-2013.⁸⁵⁷ Lamy states elsewhere, as an aside, that he 'welcomes' the lack of 'shy[ness] among developing country delegates about promoting their interests'⁸⁵⁸ He also expresses a need for the latest round of negotiations begun at Doha, in 2001,⁸⁵⁹ to be 'development friendly,'⁸⁶⁰ if it is to be successful. However, his view, expressed in 2002, seems to acknowledge the fact that the Uruguay Round entrenched rules that were not in developing countries' best interests.⁸⁶¹ While Lamy does make the case for taking the Doha Development Agenda⁸⁶² seriously,⁸⁶³ he does not attack the status quo. A generally positivist view of WTO rules prevails. Developing countries must negotiate based on the rules as they are. Any amendment to the rules must be agreed multi-laterally among all the members of the WTO. It has proved very difficult to achieve any amendment to the rules. However, it is not impossible. Article X(6) WTO

⁸⁵⁶ Lamy, Pascal 'Steeling the EU-US Relationship for the Challenges Ahead' (January 25, 2002) Speech given at the Woodrow Wilson International Center for Scholars, European Commission Trade Documents Archive <http://trade.ec.europa.eu/doclib/docs/2004/september/tradoc_118778.pdf> accessed 2014

Also cited in Lichtenbaum, Peter 'Reflections on the WTO/Doha Ministeria: "Special Treatment" vs "Equal Treatment" Striking a Balance in the Doha Negotiations' (2002) 17 *American University International Law Review*

⁸⁵⁷ Biodata: Former Director-General Pascal Lamy, WTO Director-General, 2005-2013 WTO <http://www.wto.org/english/thewto_e/dg_e/pl_e.htm> accessed 2014

⁸⁵⁸ Lamy, Pascal 'The Current State of EU-US Trade Relations' Congressional Economic Leadership Institute Washington DC (March 4, 2003) <http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_118247.pdf> accessed 2014

⁸⁵⁹ 'The Doha Round' WTO <http://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed 2014

⁸⁶⁰ Lamy, Pascal 'The Current State of EU-US Trade Relations' Congressional Economic Leadership Institute Washington DC (March 4, 2003) <http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_118247.pdf> accessed 2014

⁸⁶¹ Lamy, Pascal 'Steeling the EU-US Relationship for the Challenges Ahead' Speech given at the Woodrow Wilson International Center for Scholars, European Commission Trade Documents Archive (January 25, 2002) <http://trade.ec.europa.eu/doclib/docs/2004/september/tradoc_118778.pdf> accessed 2014

⁸⁶² 'The Doha Round: Doha Development Agenda' <http://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed 2014

⁸⁶³ Lamy, Pascal 'The Current State of EU-US Trade Relations' Congressional Economic Leadership Institute Washington DC (March 4, 2003) <http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_118247.pdf> accessed 2014

Agreement allows for a simplified process to apply to amendments that ratchet up IP protection beyond that provided for in TRIPS,

[...] amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

For other amendments under Article 71, 'in the light of any relevant new developments which might warrant modification or amendment of this Agreement,' there is provision for two-yearly review.

The fact that amendment is possible is demonstrated by Doha Declaration on TRIPS and Public Health, adopted on 14 November 2001⁸⁶⁴ and subsequent Decision⁸⁶⁵ to address the, acknowledged, extreme social injustice caused by IP rules that was largely responsible for South Africa's tragic inability to effectively deal with HIV-AIDS infection because of the high price of new, in-patent, drugs.⁸⁶⁶

FORCED CONCESSION

The injustice of strictly implementing TRIPS was demonstrated in the dispute between the US, South Africa and Brazil, which involved providing drugs to HIV/AIDS sufferers in South Africa, where the disease was epidemic.⁸⁶⁷ Both South African and international drug companies, which owned patents to HIV/AIDS medicines complained about the provision in Section 15(c) of the Medicines and Related Substances Control Act 101 of 1965, which addressed 'Measures to ensure supply of more affordable medicines.' It stated that 'the Minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public,' and allowed for compulsory licensing and importing of generic equivalent medicines. At the same time, the US began a complaint in the WTO over the compulsory licensing provisions in Brazil's IP law that

⁸⁶⁴ Doha WTO Ministerial Declaration on the TRIPS Agreement and Public Health 2001: TRIPS WT/MIN(01)/DEC/2 20 November 2001, Ministerial Conference Fourth Session Doha, 9-14 November 2001, adopted on 14 November 2001 <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed 2014

⁸⁶⁵ Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health: Decision of the General Council of 30 August 2003 WT/L/540 and Corr.1 September 1, 2003 <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> accessed 2014

⁸⁶⁶ Discussed below in this Chapter

⁸⁶⁷ Barnard, David 'In the High Court of South Africa, Case No. 4138/98: Politics of Access to Low-Cost AIDS Drugs in Poor Countries' (June 2002) 12 *Kennedy Institute of Ethics Journal* 159

enabled Brazil to produce generic copies of in-patent drugs and sell them to South Africa at a much lower price than the patent holder(s).⁸⁶⁸ South Africa did not have the capacity to produce the drugs, nor the financial resources to buy the patented drugs.

US Ambassador Robert Zoellick claimed, in notifying the DSB of the mutually agreed solution to the dispute, that 'the United States' concerns were never directed at [the Brazilian] government's bold and effective program to combat HIV/AIDS.'⁸⁶⁹ Nevertheless, the link was made. The enforcement of IPRs in medicinal products had been identified as a major impediment to efforts to combat serious disease. The utilitarian argument for providing pharmaceutical companies with monopolistic patent rights no longer seemed so convincing. The patent system had publicly failed. Both cases were dropped in the face of the resulting 'public relations nightmare.'⁸⁷⁰

Eventually, in the face of outraged public opinion as well as developing country pressure the WTO as an organization had to concede that the appropriate interpretation of TRIPS in this respect had to be clarified. The resulting Doha Public Health Declaration of 2001⁸⁷¹ states that the TRIPS agreement should be interpreted so that IP rights cannot be used to prevent the poor in developing countries from accessing essential medicines. The Protocol drafted to implement the Decision is yet to become fully operational, as it must be accepted by two thirds of members. The deadline for acceptance has been extended several times. It is currently extended until December 31, 2015.⁸⁷²

INFLUENCE OF DEVELOPING COUNTRIES SINCE THE DOHA DECLARATION

Developing countries have demonstrably, therefore, been at least partially successful in making the WTO more responsive in the Doha Round.⁸⁷³ As a group developing countries

⁸⁶⁸ Brazil—Measures Affecting Patent Protection DS199 <http://www.wto.org> accessed 2014

⁸⁶⁹ Cited in Brazil—Measures Affecting Patent Protection: Notification of Mutually Agreed Solution WT/DS199/4 G/L/454 IP/D/23/Add.1 19 July 2001 <<http://www.wto.org>> accessed 2014

⁸⁷⁰ Fisher III, William W and Cyril P. Rigamonti 'The South Africa AIDS Controversy 'A Case Study in Patent Law and Policy' (February 10, 2005) Harvard Law School, The Law and Business of Patents <<http://cyber.law.harvard.edu/people/ffisher/South%20Africa.pdf>> accessed 2014

⁸⁷¹ Declaration on the TRIPS Agreement and Public Health, Ministerial Conference Fourth Session Doha, 9-14 November 2001, adopted on 14 November 2001 <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed 2014

⁸⁷² Members accepting amendment of the TRIPS Agreement <http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm> accessed 2014

⁸⁷³ Correa, Carlos María *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options for Developing Countries* (Zed Books 2000)

now form the majority of the membership of the WTO and, while they have a diversity of interests, they have a strong negotiating position and are potentially powerful when acting together. This is important as the polarization between developed and developing countries remains and some of the attitudes of earlier times clearly still exist. However, to mount effective challenges to inappropriate application of TRIPS requires informed participation and organization. Eminent Scholar Frederick Abbott praised the achievements of the Doha Declaration while at the same time noting that, faced with the prospect of ‘a new world order characterized by a vast schism between a prosperous and stable post-industrialized North, and a desperately poor and chaotic South,⁸⁷⁴ it is still ‘far from [...] an adequate adjustment.’⁸⁷⁵ The imbalance remains a stark reminder that it is still necessary to be alert to potentially damaging effects of IPRs. There are still other issues relating to poverty and development that are likely to be affected by TRIPS, and which the WTO has not yet addressed.

DEVELOPING COUNTRY STATUS

Within the WTO, there are no set criteria to determine which countries are designated as ‘developing’. As the WTO website affirms,

There are no WTO definitions of “developed” and “developing” countries. Members announce for themselves whether they are “developed” or “developing” countries. However, other members can challenge the decision of a member to make use of provisions available to developing countries.⁸⁷⁶

This method of self-designation means that countries with widely differing economic circumstances can avail themselves of the benefits of such status. Thus, the large developing countries such as Brazil, Russia, China, and India (the BRIC countries)⁸⁷⁷ that have been predicted to significantly outperform previous growth expectations fall within the same category as Egypt.

⁸⁷⁴ Abbott, Frederick M ‘The Enduring Enigma of TRIPS: A Challenge for the World Economic System’ (1998) 1 *Journal of International Economic Law* 497

⁸⁷⁵ Abbott Frederick M ‘The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO (2002) 5 *Journal of International Economic Law* 469

⁸⁷⁶ ‘Who are the developing countries in the WTO?’ WTO Website <http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 2014

⁸⁷⁷ Wilson, Dominic & Roopa Purushothaman, ‘Dreaming with BRICs: The Path to 2050’ (2003) Goldman Sachs, Global Economics Paper No. 99, <<http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-dream.pdf>> accessed 2014

The advantages of developing country status may be questioned. However, transition periods for the implementation of certain TRIPS provisions which were available only to developing countries were necessary, although insufficient, to allow developing countries time to adjust to the new requirements of the law.

THE WELFARE OF DEVELOPING COUNTRIES

It is questionable whether an obligation to promote the development of countries designated as developing, such as Egypt, has indeed materialized. It has proved difficult to reconcile such an entitlement with equal treatment in the context of the international legal system. It is particularly hard when developing countries have signed up to obligations that may not be suitable for their particular stage of development. Both the WTO and TRIPS agreements express concerns about development and seem to endorse consideration for the needs of developing countries as a goal in their preambular aims and objectives. The TRIPS agreement also provides for substantive measures such as transitional periods for implementation, and flexibilities, which should, in theory, lead to a softer attitude towards the IP obligations of less developed and least developed countries. In reality, they are worded carefully so that, interpreted narrowly, there is very little scope for leniency should developing countries fail to live up to their IP commitments. It is unlikely, although possible, for a broad interpretation to develop that would better accommodate development needs. The barrier to such an approach comes from the IP agendas of the US and the EU.

TRIPS AIMS AND OBJECTIVES

Articles 7 and 8 of the TRIPS agreement, in establishing the objectives and principles at the heart of TRIPS, appear to provide a balanced approach to rights and obligations. Peter Yu and Alison Slade argue that the provisions can be helpful for developing countries,⁸⁷⁸ and indeed, such countries have looked to these articles believing that they would be useful in protecting their interests should a dispute be raised in the WTO DSB, however, they are written in such soft, and qualified language as to be not particularly helpful.

⁸⁷⁸ Yu, Peter K 'The Objectives and Principles of the TRIPs Agreement' (2009) 46 *Houston Law Review* 797; Slade, Alison 'Articles 7 and 8 of the TRIPS Agreement: A Force for Convergence within the International IP System' (2011) 14 *The Journal of World Intellectual Property* 413

Article 7, in setting out the objectives of TRIPS, states that ‘the protection and enforcement of intellectual property rights *should*⁸⁷⁹ contribute to the promotion of technological innovation and to the transfer and dissemination of technology.’ This utilitarian justification of IPRs has worked well at national level, and has typified the rationale for the grant of intangible property rights from the beginning. In the UK, the first IP statute, the Statute of Anne, in 1710, was ‘An Act for the Encouragement of Learning,’ which aimed to, ‘encourage learned men to compose and write useful books.’ The monopoly right granted in the copying of such work was determined to be, not a natural right, but one granted by statute for the stated purpose.⁸⁸⁰ It is less clear how this approach will work in practice at the international level.

Use of the word ‘should’ in Article 7 suggests that under the TRIPS regime the goals referred to are merely aspirations. Further, the emphasis on ‘mutual advantage’ for both producers and users is potentially unhelpful from a developing country perspective. It suggests maintenance of the status quo in which the advantages will remain forever balanced in the developed countries’ favour, perhaps further entrenching the already established pattern of producers and users, despite the expressed aspiration to transfer knowledge.

The principles expressed in Article 8 of TRIPS refer to ‘measures consistent with the provisions’ that can be used, ‘to protect the public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.’ Measures, ‘consistent with the provisions’ of TRIPS may also be adopted to deal with abuses of IP monopolies, restraint of trade and impediments to technology transfer. Whatever measures are taken, therefore, are bound to comply with the TRIPS agreement in all circumstances.

TRANSITIONAL ARRANGEMENTS

The inability of these articles to provide for developing country needs, resulted in the dispute between Brazil and South Africa, and the US, which led to the need for the special Ministerial Declaration at the WTO Ministerial Conference in Doha. The *Doha Declaration on the TRIPS Agreement and Public Health* aimed to, ‘clarify ambiguities between the need for

⁸⁷⁹ My italics

⁸⁸⁰ *Donaldson v Beckett* 1 E.R. 837 (1774)

governments to apply the principles of public health and the terms of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁸⁸¹ Although the declaration was seen at the time as a victory for developing countries the power imbalance quickly reasserted itself in favour of developed countries and a very restrictive interpretation of the declaration has followed, leading critics to describe it as ‘arthritic.’⁸⁸²

Concessions to developing country members meant that transitional periods were allowed in order to give time for capacity building and other necessary adjustments to ease the implementation of some of the more difficult aspects of TRIPS,⁸⁸³ but these transitional periods were not based on any serious assessment of potentially damaging outcomes.⁸⁸⁴

TRIPS Article 65.4 relates to transitional arrangements that were put in place to allow developing and least developed countries time to fully implement the agreement. The transitional provisions that allowed developing countries time to adjust to the new regime quickly ran out. Transitional agreements as far as Egypt is concerned expired in January 2005. Egypt has made substantial changes to its IP regime, and committed a significant amount of resources⁸⁸⁵ to completely re-drafting and re-organising the law, introducing new Economic Courts,⁸⁸⁶ and training judges and other stakeholders in intellectual property.⁸⁸⁷ However, there are still questions about the potential for the increased IP standards of TRIPS and, subsequently even higher TRIPS-Plus standards, to operate to Egypt’s detriment rather than benefit.

⁸⁸¹ Doha WTO Ministerial 2001: TRIPS WT/MIN(01)/DEC/2 20 November 2001 Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed 2014

⁸⁸² Baker, Brook K ‘Arthritic Flexibilities For Accessing Medicines: Analysis Of WTO Action Regarding Paragraph 6 Of The Doha Declaration On The Trips Agreement And Public Health’ (2003-2004) 14 *Indiana International and Comparative Law Review* 613

⁸⁸³ Article 65, TRIPS Agreement

⁸⁸⁴ See discussion of lack of impact assessment in Chapter 1

⁸⁸⁵ In 2000 Professor Keith Maskus cites an Egyptian expert who estimated the initial administrative and enforcement costs ‘at around \$800,000 [and] annual training costs of around \$1 million.’ This is almost certainly an underestimate. Maskus also notes that in 2000 Egypt had an extreme scarcity of ‘trained professional administrators and judges. Maskus, Keith E Intellectual Property Rights and Economic Development (2000) 32 *Case Western Reserve Journal of International Law* 471 at 494

⁸⁸⁶ See discussion in Chapters 1 and 6

⁸⁸⁷ See e.g. the following USAID projects ‘Egypt, Strengthening Intellectual Property Rights (SIPRE)’ (1996-2001) Nathan Associates Inc. <<http://www.nathaninc.com/projects-and-cases/egypt-strengthening-intellectual-property-rights-1996-2001>> accessed 2014; ‘Egypt, Technical Assistance for Intellectual Property Rights (TIPRE)’ (2001-2003) Nathan Associates Inc. <<http://www.nathaninc.com/projects-and-cases/egypt-technical-assistance-intellectual-property-rights-2001-2003>> accessed 2014

The controversy over IP matters has not subsided in the years after TRIPS and it is not clear what form it will take in the future. The fact that Egypt took on its IP commitments reluctantly, as part of a bargain for access to the markets of developed countries, may explain why in some quarters there has been less than whole-hearted support for the idea of raising standards so far and there may be resistance to revising IP protection ever upwards. Egyptian Ambassador to the UN Mounir Zahran, who coordinated the African group of nations during the Uruguay Round negotiations leading to the establishment of the WTO spoke of the 'extraordinary burden' placed on developing countries. He was concerned that the 'imbalance weighted heavily against African countries' because of the TRIPS obligations.⁸⁸⁸ In the end, despite continual and strong objections made regarding the appending of TRIPS to the WTO agreement,⁸⁸⁹ Egypt had no choice but to accept TRIPS as part of the bargain made in exchange for a rule-based trading system.⁸⁹⁰ The concerns expressed by Ambassador Zahran over the implementation of TRIPS, were sublimated in order to seal the deal, but there had been very little real examination of the impact on developing countries of raising IP standards to the level required by TRIPS. In order for the system to function properly a high level of adherence to the rules is necessary, but a necessary corollary is that the rules should be appropriate. In order for the new states to enthuse about the international IP system the benefits need to be more evenly shared.

Developed countries' success in pressurizing developing countries to bow to their demands in the TRIPS agreement is strongly reminiscent of coercive methods of the past and can be

⁸⁸⁸ Zahran, H.E. Ambassador Mr. Mounir Egypt Permanent Representative to the UN Statement (19 January 1994) WTO Documents Online MTN.TNC/40/ST/6
<http://www.wto.org/gatt_docs/English/SULPDF/92150131.pdf> accessed 2014

⁸⁸⁹ Peter Drahos, among others, has documented the strong opposition of Egypt to intellectual property being bundled with trade negotiations, citing the Report of Committee on Trade and Development (LJ5913) (1984-1985), Basic Instruments and Selected Documents, General Agreement on Tariffs and Trade, 32nd Supplement, 21,26 in Drahos, Peter 'Developing Countries and International Intellectual Property Standard-Setting' (2002) 5 *The Journal of World Intellectual Property* (2002) 765 at 773 and citing the work of Adrian Otten of the World Trade Organization in identifying 'developing country members of the "hardliners" opposing intellectual property in the GATT or active in the "10 + 10" TRIPS Negotiating Group, or both' at 775

⁸⁹⁰ See e.g. Drahos, Peter and Ruth Mayne Eds. *Negotiating Intellectual Property Rights: Between Coercion and Dialogue: Global Intellectual Property Rights: Knowledge Access and Development* (Palgrave Macmillan 2002) at 3; Deere, Carolyn *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) at 8-9

described as ‘more a result of colonization and coercion than democratic bargaining.’⁸⁹¹ The WTO was meant to represent a move away from such practices but the bargain made by developing states in the WTO agreement negotiations was an unequal bargain.

Knowledge and inventiveness are at the core of economic development so the ability to regulate access to useful inventions and the knowledge necessary to produce them has led nations, at times, to use IP regulation as a means of engaging in, ‘beggar thy neighbour trade games.’⁸⁹² While developed countries had to do virtually nothing to implement the TRIPS Agreement, developing countries had to make a massive commitment with long-term and wide-ranging costs and implications. Developing country signatories did not necessarily appreciate the significance of the bargain, and their expectations of the trading side of the agreement were, perhaps overblown. In 1996, shortly after the TRIPS agreement came into force, Ruth Gana suggested that ‘without the specific conditions of strong property systems, stable government, free market capitalism, and zealous protection of corporate interests, it is unlikely that modern intellectual property in and of itself has the potential to transform developing countries into the technology producers they aspire to become.’⁸⁹³ The conditions in Egypt are still not suitable for the country to benefit sufficiently from the strong IP norms it is bound by. As a developing country and net-importer of IP, Egypt needs the opportunity to benefit more freely from the achievements of developed countries in order to achieve development.⁸⁹⁴ However, those developed countries remain determined to optimize their returns through strengthening the IP rights and enforcing them.⁸⁹⁵

While Egypt does participate actively in developing country discussions relating to IP through both governmental and non-governmental means and at national, regional and international levels there needs to be broader engagement, more public debate and more

⁸⁹¹ Drahos, Peter and Ruth Mayne Eds. *Negotiating Intellectual Property Rights: Between Coercion and Dialogue: Global Intellectual Property Rights: Knowledge Access and Development* (Palgrave Macmillan 2002) at 180

⁸⁹² Citing Penrose 1951 in Drahos and Mayne at 115-117

⁸⁹³ Gana, Ruth L ‘Prospects For Developing Countries Under the TRIPs Agreement’ (1996) 29 *Vanderbilt Journal of Transnational Law* 735

⁸⁹⁴ Story, Alan ‘Balanced’ Copyright: Not A Magic Solving Word (February 27, 2012) *Intellectual Property Watch* <<http://www.ip-watch.org/2012/02/27/‘balanced’-copyright-not-a-magic-solving-word/>> accessed 2014 IMF statistics reveal that only two countries in the world, the US and the UK, are IP net exporters. Every other country is a net IP importer.

⁸⁹⁵ Drahos, Peter and Ruth Mayne at 163

transparency. Under the authoritarian regime of ex-President Hosni Mubarak⁸⁹⁶ critical domestic debate was severely restricted and the threshold for the level of criticism that would be tolerated by the Mubarak regime was set very low. The high cost for those attempting to criticize controversial aspects of the law in Egypt, can be seen in the 1998 report of the special rapporteur on human rights.⁸⁹⁷

Discussion of the impact of some of the more controversial issues related to the TRIPS agreement may also have been repressed. Ominously, in the context of the biotechnology debate and the regulation of plant varieties, a prominent scientist welcomed suppression of criticism. He had complained of 'highly negative articles' in the Egyptian press, which he described as 'inflammatory' saying they 'duplicated the more radical arguments seen and heard in Europe, India, and elsewhere.' Subsequently he reported his pleasure that the 'negative comments and articles no longer appear.'⁸⁹⁸ The inference that can reasonably be drawn is that pressure was brought to bear to prevent critical articles appearing. It is doubtful whether, in such an atmosphere of suppressed debate, the public can have confidence that legislation in sensitive and controversial areas has been sufficiently scrutinized.

Professor Duncan Matthews has found that Non Governmental Organizations (NGOs) are particularly important in coordinating and engaging civil society to respond to injustice and are an increasingly important factor in determining the WTO agenda.⁸⁹⁹ The effectiveness of NGO activity in influencing IP policy in Egypt will depend upon the further development of civil society and increased democratic participation.

⁸⁹⁶ Mubarak ruled from 1981-2011. Before his downfall, his regime was described as "one of the oldest authoritarian regimes in the developing world" Brownlee, Jason *Authoritarianism in an Age of Democratization* (Cambridge University Press 2007) at 3

⁸⁹⁷ Report on 'The Question Of The Human Rights Of All Persons Subjected To Any Form Of Detention Or Imprisonment' 1998 <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/90059ee4a93ae8efc1256613004417b6?Opendocument>> This highlights the detention of two lawyers arrested for 'Possession of printed material critical of Law 96', and 'with inciting farmers to oppose the Law, although by peaceful means'. The lawyers were 'tortured in Tora penitentiary by security officers.' In the same year, another lawyer, Sayyed Ahmad al-Tokhi, from the EOHR, was arrested and detained at Cairo airport before being sent to a remote prison in the Sinai, for 'peaceful activities in opposition to Law 96'. His offence was, 'verbally promoting ideas which contradict the fundamental principles of the ruling regime'.

⁸⁹⁸ Bahieldin, Ahmed 'Biotechnology and the Production of Plants resistant to Drought and Plagues: Egyptian Prospects' AGERI <http://www2.mre.gov.br/aspa/semiario/data/ahmed_bahieldin.htm> accessed 2010

⁸⁹⁹ Matthews, Duncan *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Edward Elgar 2011)

Democratic participation depends on the ability of people to openly debate important issues. Under ex-President Morsi opportunities for free expression did not improve. Journalists who participated in a Chatham house workshop in Cairo In 2011 said that 'red lines' had already been redrawn although there was more uncertainty over which topics were taboo.⁹⁰⁰ The interim government under President Adly Mansour has been assessed as no better.⁹⁰¹

Human Rights Watch, an organization that actively works to investigate and expose human rights abuses globally, has been very critical of the Morsi regime. Notably, ex-President Morsi convicted and imprisoned NGO workers merely for being members of their organizations. This led Heba Morayef, Egyptian Director of Human Rights Watch, to implore him to draft a less repressive NGO law so that such convictions would not happen again. Morayef explained that 'A liberal NGO law is [...] key to empowering development organizations of the sort that Egypt desperately needs, as the economic crisis continues to inflict grave harm on the country's poor.'⁹⁰² The economic situation has not yet shown signs of improvement, with the World Bank reporting that 'economic growth remains weak,'⁹⁰³ Morayef's assessment is consistent with Duncan Matthews' findings.⁹⁰⁴ Greater democratic engagement in decision-making allowing for genuine critical debate would help inform the discussion of IP regulation both nationally and internationally and may also provide for increased legitimacy and reception of IP rules.

⁹⁰⁰ 'Egypt in Transition: The Media's Role in Politics' (June 2011) Chatham House Middle East and North Africa Programme: Workshop Summary
<http://www.chathamhouse.org/sites/default/files/0611egypt_summary.pdf> accessed 2014

⁹⁰¹ See McRobie, Heather 'From Morsi to Sisi: the evolution of targeting journalists in Egypt' (August 2013) 18 *Open Democracy* <<http://www.opendemocracy.net/author/heather-mcrobie>> accessed 2014; also McRobie, Heather 'Academia in Egypt: Security forces and self-censorship: The Corrosion of Academic Freedom of Expression in Post-Revolutionary Egypt Continues' (April 15, 2014) *Index on Censorship* <<http://www.indexoncensorship.org/2014/04/academia-egypt-security-self-censorship/>> accessed 2014

⁹⁰² Morayef, Heba 'Why Egypt's New Law Regulating NGOs is Still Criminal' (June 11, 2013) *Foreign Policy* <<http://www.hrw.org/news/2013/06/11/why-egypts-new-law-regulating-ngos-still-criminal>> accessed 2014

⁹⁰³ Egypt Overview (updated March 17, 2014) World Bank <<http://www.worldbank.org/en/country/egypt/overview>> accessed 2014

⁹⁰⁴ Matthews Duncan 'The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities of Multilateral Institutions' (2007) 82 *Chicago-Kent Law Review* 356; Matthews, Duncan *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Edward Elgar 2011)

THE UNITED STATES AND IP IN EGYPT

From the perspective of the United States the extent to which IP is protected is highly significant in determining future trading relations. Currently the US is Egypt's biggest trading partner, although China is vying for that position.⁹⁰⁵ The US has been very critical of the system of IP protection in Egypt.

SPECIAL 301

The United States has established a system of monitoring and assessing the IP protection offered by its trading partners worldwide. The US trade representative (USTR) uses a watch list system, known as Special 301 measures, authorized under the US Trade Act 1974,⁹⁰⁶ as an analytical tool to determine trading policies towards individual countries. While this measure has itself been challenged as being potentially non-compliant with WTO rules⁹⁰⁷ it remains significant, particularly for developing countries wanting to trade with the United States.

The Special 301 reports assign countries to the watch lists according to the degree to which they measure up to US expectations in terms of IP compliance. As a measure, the Special 301 approach has been described as a 'twentieth century variant of gunboat trade diplomacy.'⁹⁰⁸ The priority watch list is reserved for countries whose IP protection is deemed to threaten US interests while the watch list contains countries where IP protection has been strengthened or is closer to the US ideal.

According to the Office of the United States Trade Representative (USTR),

USTR's Office of Intellectual Property and Innovation (IPN) uses a wide range of bilateral and multilateral trade tools to promote strong intellectual property laws

⁹⁰⁵ 'Egypt looks to China as largest trading partner in 2010' (2009) *China Daily*, 16, March 2009, <http://www.chinadaily.com.cn/china/2009-04/16/content_7685563.htm> accessed 2014

⁹⁰⁶ Office of the United States Trade Representative (USTR) 2013 Trade Policy Agenda and Annual Report Chapter V Trade Enforcement Activities: Enforcing US Trade Agreements <<http://www.ustr.gov/sites/default/files/Chapter%20V%20-%20Trade%20Enforcement%20Activities.pdf>> at 181

⁹⁰⁷ United States — Sections 301–310 of the Trade Act 1974 WTO DS152 The Panel Report was adopted in 2000. Although the panel found that the measures were not inconsistent with the Dispute Settlement Understanding (DSU), they also said that this was based on certain undertakings sanctioned by Congress made by the US during the Uruguay Round, which were repeated to the panel during this case. The panel ruling only holds as long as those undertakings remain in place.

⁹⁰⁸ Watkins, Kevin 'GATT and the Third World: Fixing the Rules' (1992) 34 *Race and Class* 23 at 36

and effective enforcement worldwide, reflecting the importance of intellectual property and innovation to the future growth of the U.S. economy.⁹⁰⁹

The US openly acknowledges that its trade policy involves deliberately putting pressure on countries to increase IP protection out of US self-interest.

The US has taken a critical view of the Egyptian IP law and does not accept Egypt's claim to TRIPS compliance. Egypt has been moved on and off the priority watch list several times in recent years. Shortly after passing the new IP law, in 2003, Egypt was briefly rewarded with a move off the priority watch list, to the watch list, suggesting that the US perceived Egypt as posing a lesser threat to its economic interests. The reward was short-lived as Egypt was reinstated on the priority watch list almost immediately, in 2004, reflecting US displeasure. More recently, in 2008, the USTR moved Egypt once more off its priority watch list of non-compliant countries to the watch list, where Egypt remained in 2009 and again in 2010, in recognition of Egyptian efforts that accord with US goals for increased IP protection.

In 2009, the International Intellectual Property Alliance (IIPA) said in their recommendations to the USTR, that, 'despite a few positive developments and some enforcement cooperation in 2009, the piracy situation remained of great concern in Egypt and requested that Egypt, 'amend the copyright law and implementing decree to cure TRIPS deficiencies and resolve ambiguities.'⁹¹⁰ As a result, the International Intellectual Property Alliance (IIPA) thought that Egypt should be placed once more on the Priority Watch List and was very unhappy about Egypt remaining merely on the watch list. The group was extremely critical of the IP protection offered in Egypt. Their report stated that,

⁹⁰⁹ Office of the United States Trade Representative, (USTR) *Intellectual Property*, (2009) <<http://www.ustr.gov/trade-topics/intellectual-property>> accessed 2014 For all USTR reports from 1989-2013 see <http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/2013-special-301-report> or <<http://www.keionline.org/ustr/special301>> both accessed 2014

⁹¹⁰ Special 301 Report on Copyright Protection and Enforcement: Egypt (2010) International Intellectual Property Alliance (IIPA) <<http://www.iipa.com/rbc/2010/2010SPEC301EGYPT.pdf>> accessed 2014. For all IIPA reports from 2001-2013 see <<http://www.iipa.com/special301.html>> accessed 2014

In Egypt, what should be a shining economic success story of ingenuity and creativity in Egypt's rich creative industries, instead is a nightmare for right holders, stunted by piracy, difficult bureaucracy, and almost unparalleled market hurdles⁹¹¹

The IIPA is an influential US private body that analyses country performance with respect to copyright protection in particular, and which makes recommendations to the USTR. The group represents a powerful coalition of seven trade associations including the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).⁹¹²

While the IIPA focuses on copyright law, however, the USTR considers the entire range of IP issues. Thus, there is some variation in the views expressed by US interested parties on Egypt's performance when it comes to the protection of different aspects of intellectual property.

Interestingly, the IIPA Special 301 recommendation, in 2010, while still scathing about IP protection in Egypt, takes a less bullish, less one-sided approach by stressing the impact of copyright infringements on Egyptian IP owners as well as their impact on US interests.⁹¹³ It notes that, 'local Egyptian and U.S. right holders are equally hampered by piracy and other barriers, as authors such as Alaa al Aswany, and the local Egyptian film market duopoly of the Arabic Company for Production and Distribution Group and El Mottahida (which suffer from piracy, cultural burdens, narrow theatrical windows, and a dearth of screens in the country) can attest.'⁹¹⁴ It is worth noting in this respect that the report merely states that the individual and institution have reason to complain about piracy. It does not say that they have actually done so.

⁹¹¹ Special 301 Report on Copyright Protection and Enforcement: Egypt (2009) International Intellectual Property Alliance (IIPA) <<http://www.iipa.com/rbc/2009/2009SPEC301EGYPT.pdf>> accessed 2014

⁹¹² International Intellectual Property Alliance (IIPA) <<http://www.iipa.com>>

⁹¹³ Special 301 Report on Copyright Protection and Enforcement (2010) (IIPA) <<http://www.iipa.com/rbc/2010/2010SPEC301EGYPT.pdf>> accessed 2014.

⁹¹⁴ Special 301 Report on Copyright Protection and Enforcement: Egypt (2010) (IIPA) <<http://www.iipa.com/rbc/2010/2010SPEC301EGYPT.pdf>> accessed 2014.

In an interview with Alaa al Aswany he attributes weak copyright protection in Egypt and the Arab World to political despotism, under which dictators leave loopholes in copyright law to ensure that writers do not become completely independent. The decreased revenues from the lack of copyright protection mean he must continue to practice as a dentist. However, instead of complaining about the weak copyright protection, he stated that this was positive because he found that it helped him to maintain his connections with the people who inspire his creativity.⁹¹⁵ The USTR use of al Aswany to bolster the case for stronger copyright protection in Egypt may not, therefore, be entirely representative of his true feelings. It is also illustrative of the fact that creators are not all motivated by the same impulse for wealth and control.

In 2011, while remaining critical of IP protection in Egypt, identifying ‘several obstacles to effective IPR protection and enforcement,’ the USTR Special 301 report⁹¹⁶ acknowledges that following the January ‘revolution’, IP is not the most important priority for Egypt, stating that, ‘the United States looks forward to engaging with Egyptian officials at the appropriate time.’ However, in May 2011, before the trial of ex-President Hosni Mubarak had begun, and before elections or even amendments to the Egyptian constitution were agreed, the US Commercial Law Development Program held workshops on IP with Egyptian Economic Court Judges.⁹¹⁷

The United States has been using a carrot and stick approach to seek changes to Law 82/2002.⁹¹⁸ American investors have at times been discouraged from investing in Egypt until IP protection is guaranteed, something underlined in the 2004 Special 301 report warning that, ‘efforts by Egypt to...improve its IPR regime will continue to play an important role in the expansion of trade and investment ties with the United States.’⁹¹⁹ Concurrently,

⁹¹⁵ Aswany, Alaa al Interview with Steve Paulson (04/03/2011) <http://ttbook.org/book/alaa-al-aswany-chicago>

⁹¹⁶ Special 301 Report (USTR) (2011) The USTR Special 301 Reports, 1989 to 2013, Office of the United States Trade Representative (USTR) <http://www.keionline.org/ustr/special301> accessed 2014 http://ustraderep.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_5995.pdf

⁹¹⁷ U.S. Program for Egyptian Economic Court Judges (May 2, 2011-May 13, 2011) Commercial Law Development Program Office of General Counsel United States Department of Commerce <http://cldp.doc.gov/programs/cldp-in-action/details/211> accessed 2014

⁹¹⁸ Chart of Countries' Special 301 Placement (1989-2004) http://keionline.org/sites/default/files/1989-2004_special301placement.pdf accessed 2014

⁹¹⁹ Special 301 Report of the United States Trade Representative (USTR) (2004) The USTR Special 301 Reports, 1989 to 2013, Office of the USTR <http://www.keionline.org/ustr/special301> accessed 2014

however, discussions concerning an FTA giving Egypt greater access to the US market, contingent, in part, on increased IP protection, were underway.⁹²⁰ Negotiations began in 2005 but in March 2010 the possibility of a US/Egypt FTA was shelved partly because of intellectual property concerns.⁹²¹

The change in administration in the US, following the election of Barack Obama in 2008, gave hope of a better trading relationship between the two countries, and the prospects of greatly increased trade in the future with a Strategic Partnership deal agreed in May 2009⁹²². Where IP is concerned, however, there is unlikely to be any decrease in pressure concerning IP issues notwithstanding a slightly different emphasis. The aggressive approach of the previous US administration under President George W. Bush towards IP issues may have given way to more 'subtle tactics'⁹²³ but the goals regarding increased IP protection remain essentially the same. The Strategic Partnership deal cites the 'protection and enforcement of intellectual property rights' as a, 'priority area for discussion and cooperation.'⁹²⁴ Pressure on Egypt to meet at least the minimum standards of TRIPS is very high and the consequences in trade terms of non-compliance could be significant.

THE EU-EGYPT ASSOCIATION AND IP

The EU-Egypt Association Agreement, which came into force in Egypt on June 1, 2004 contains IP provisions. Article 37(1) of the agreement states that the parties

Shall grant and ensure adequate and effective protection of intellectual property rights in accordance with the prevailing international standards, including effective means of enforcing such rights.

http://ustraderep.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_5995.pdf

⁹²⁰ Lawrence, Robert Z and Ahmed Galal 'Anchoring Reform with a US-Egypt Free Trade Agreement' (May 2005) 74 *Policy Analyses in International Economics*

⁹²¹ 'Egypt-US Economic Relations' American Chamber of Commerce Egypt <http://www.amcham.org.eg>; Sheline, Annelle 'US-Egypt Aim to Double Bilateral Trade' *The Daily News Egypt* March 22, 2010 <<http://www.masress.com/en/dailynews/105148>> accessed 2014; Sharp, Jeremy M Specialist in Middle Eastern Affairs (February 11, 2011) 'Egypt: The January 25 Uprising and Implications for U.S. Foreign Policy' Congressional Research Service <http://fpc.state.gov/documents/organization/157112.pdf> at 31 accessed 2014; Wahish, Niveen 'Subtle Tactics' *Economics Al Ahram Weekly* 25-31 March 2010

⁹²² Sheline, Annelle 'US-Egypt Aim to Double Bilateral Trade' *The Daily News Egypt* March 22, 2010 <<http://www.masress.com/en/dailynews/105148>> accessed 2014

⁹²³ Wahish, Niveen 'Subtle Tactics' *Economics Al Ahram Weekly* 25-31 March 2010

⁹²⁴ Cited in the Special 301 Report on Copyright Protection and Enforcement (IIPA) (2010) <http://www.iipa.com/rbc/2010/2010SPEC301EGYPT.pdf>

It is not clear what is intended by the term ‘prevailing international standards.’ Ahmed Abdel Latif has interpreted it to be a less onerous formulation of words than that included in other EU FTAs, which contain reference to ‘the highest international standards of IP protection.’⁹²⁵ However, with the proliferation of US bilateral agreements, the higher standards enshrined in those agreements could be considered to be prevailing.

Some reassurance can be found in Article 37(2), which states that

The implementation of this Article and of Annex VI shall be regularly reviewed by the Parties. If problems in the area of intellectual property affecting trading conditions were to occur, urgent consultations shall be undertaken, at the request of either Party, with a view to reaching mutually satisfactory solutions.

Reference to mutually satisfactory solutions provides for meaningful dialogue and suggests a more flexible position on IP than that usually attributed to the US. While the EU, like the US, has been critical of Egyptian IP law, it has been somewhat more muted and diplomatic in its approach.

Consistent with the obligation in Article 67 of TRIPS, to ‘provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members’ the EU has committed, in Article 72 of the EU-Egypt agreement, to provide financial help to Egypt in order to promote, among other goals, ‘reforms designed to modernize the economy’ as well as Egypt’s capacity and capabilities in the field of the protection of intellectual property rights.’ Nevertheless, in a 2009 Progress Report on Egypt from the European Commission to the Council and the European Parliament, monitoring implementation of the European Neighbourhood Policy, it noted that, ‘limited progress’ had been made in Egypt with respect to intellectual property rights.⁹²⁶

⁹²⁵ Abdel Latif, Ahmed Egypt’s Role in the A2K Movement: An Analysis of Positions and Policies’ in Rizk, Nagla and Lea Shaver *Access to Knowledge in Egypt* (Bloomsbury 2010) at 41

⁹²⁶ Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council. Implementation of the European Neighbourhood Policy in 2008 *Progress Report Egypt* Brussels, 23/04/2009 SEC (2009) 23/2 http://ec.europa.eu/world/enp/pdf/progress2009/sec09_523_en.pdf

Annex VI of the EU-Egypt agreement requires Egypt to join a number of international treaties within four years of the conclusion of the agreement. Among these is the UPOV 1991 treaty,⁹²⁷ concerning the international protection of plant varieties, which Egypt has yet to do ten years later. I have argued elsewhere that UPOV 1991 is unsuitable for the Egyptian farming and seed development community⁹²⁸ and that the 1978 version of the treaty, closed to new members would have been more suitable. It may be that concerns about UPOV 1991 'were based on a misunderstanding of the UPOV Convention.'⁹²⁹

However, those concerns are widely held,⁹³⁰ and deserving of further study. Dutfield points out that the final draft of the TRIPS agreement deliberately withholds reference to UPOV in Article 27(3)(b),⁹³¹ instead allowing for choices to be made according to tailor the protection to local needs. It is worded thus,

Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.

As Dutfield points out, UPOV started out as very much a Western European club,⁹³² and he challenges the assumption that it is suitable for all countries.⁹³³ The consensus building that appears to suggest that it is the only possible framework for seed protection also continues to be criticised for non-transparency. Indeed, Dutfield states that 'its institutional set-up appear[s] to inhibit debate.'⁹³⁴ The combination of apparent opacity in the discussion,

⁹²⁷ International Convention for Protection of New Varieties of Plants (UPOV) (Geneva Act 1991) <http://www.wipo.int/wipolex/en/other_treaties/details.jsp?group_id=22&treaty_id=27> accessed 2014

⁹²⁸ Jones, Bronwen 'Plant Variety Protection in Egypt' (2005-2006) 8 *BioScience Law Review* 25

⁹²⁹ Pires de Carvalho, Nuno *The TRIPS Regime of Patent Rights* (Kluwer Law International 2010) at 309

⁹³⁰ See e.g. Saez Catherine (October 30, 2013) Farmers' Groups Warn ARIPO About Implementing UPOV 91 In Africa <<http://www.ip-watch.org/2013/10/30/farmers-groups-warn-aripo-about-implementing-upov-91-in-africa/>> accessed 2014

⁹³¹ Dutfield, Graham 'Plant Intellectual Property, Food Security and Human Development: Institutional and Legal Considerations and the Need for Reform' in McMahon, Joseph and Melaku Geboye Desta Research Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law (Edward Elgar 2012) at 134

⁹³² Dutfield, Graham 'Plant Intellectual Property, Food Security and Human Development: Institutional and Legal Considerations and the Need for Reform' in McMahon, Joseph and Melaku Geboye Desta Research Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law (Edward Elgar 2012) at 133

⁹³³ Dutfield, Graham 'Plant Intellectual Property, Food Security and Human Development: Institutional and Legal Considerations and the Need for Reform' in McMahon, Joseph and Melaku Geboye Desta Research Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law (Edward Elgar 2012) at 136

⁹³⁴ Dutfield, Graham 'Plant Intellectual Property, Food Security and Human Development: Institutional and Legal Considerations and the Need for Reform' in McMahon, Joseph and Melaku Geboye Desta Research

benefits that largely seem to accrue to Europe and the US, and its inclusion in FTAs as a TRIPS Plus measure are all indicative of a degree of postcoloniality.

Egypt chose to implement *sui generis* legislation for plant varieties in Book 4 of Law 82/2002. The choice to do so was made to create legislation suitable for Egyptian farmers and seed-producers based on a belief that the flexibilities provided for in TRIPS were genuine. That legislation was drafted to be compatible with the UPOV 1978 treaty and so would require revising in order to join the 1991 version. It has, so far, proved impossible to reopen the IP law to address the issues, and it is highly questionable whether it would be desirable.

Ahmed Abdel Latif also points to an additional problem that makes Egypt's accession to UPOV 1991 currently impossible. Egypt has included a provision, in Article 200, Law 82/2002 requiring prior informed disclosure of the origin of plant genetic source material, which must also be acquired legally, having been given approval.⁹³⁵ However, according to Latif, this is a barrier to UPOV entry. The measure is consistent with Article 15 of the CBD, which emphasises state sovereignty over genetic resources and mandates legislation to regulate access. The CBD anticipates that States should provide for a system of Prior Informed Consent⁹³⁶ and for rules to ensure the 'sharing in a fair and equitable way [of] the results of research and development and the benefits arising from the commercial and other utilization of genetic resources [...] on mutually agreed terms.'⁹³⁷ Egypt's implementation of CBD compliant provisions is intended to prevent patents from being obtained over Egyptian-derived plant materials without acknowledgment or without compensation.⁹³⁸ It explicitly aims to protect Egyptian traditional knowledge.

Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law (Edward Elgar 2012) at 136

⁹³⁵ Abdel Latif, Ahmed 'Implementation of the IPR Provisions of the EU-Egypt Association Agreement' WBI/UNCTAD/ICTSD Dialogue Implementation of IPRs provisions in FTAs Geneva (April 16, 2009) <http://www.iprsonline.org/ictsd/Dialogues/2009-04-16/the-egypt-euomed-association-agreement_ahmed-abdel-latif1.pdf> accessed 2014

⁹³⁶ Article 15(5) CBD

⁹³⁷ Article 15(7) CBD

⁹³⁸ See discussion earlier in this Chapter of cases where traditional (indigenous) knowledge has been the subject of patent protection

Abdel Latif makes an obscure reference to ‘reasons beyond plant variety protection’ in explanation for the delay in amending Egyptian legislation in order to join UPOV.⁹³⁹ It seems to me that this is a matter of such importance that open debate should be encouraged on the matter before any amendments are made or supervening legislation passed.

⁹³⁹ Abdel Latif, Ahmed ‘Implementation of the IPR Provisions of the EU-Egypt Association Agreement’ WBI/UNCTAD/ICTSD Dialogue Implementation of IPRs provisions in FTAs Geneva (April 16, 2009) <http://www.iprsonline.org/ictsd/Dialogues/2009-04-16/the-egypt-euromed-association-agreement_ahmed-abdel-latif1.pdf> accessed 2014

CHAPTER 6: EGYPTIAN IP LAW INTO THE 21ST CENTURY

In enacting IP law since freedom from colonial rule, Egyptian legislators have tried to tread a difficult path between meeting international commitments and maintaining a degree of independence and flexibility consistent with Egypt's needs. This chapter aims to identify key provisions in Law 82/2002 that seem to indicate that Egypt's implementation has fallen short of the standards expected in TRIPS. These are most notable in the specific areas of translation of copyright works and the compulsory licensing of patents. Legislation that increases the standard of IP protection above that required by TRIPS is also identified. The establishment of new Economic Courts is an example of such a measure. The analysis suggests that in implementing TRIPS legislation the drafters, torn between internal and external pressure, have produced a law that shows signs of the stress.

Both the strength and length of protection for IP owners were increased while there are also measures intended to mitigate the effects of the raised standards. The legislation is implemented according to the relevant executive regulations. Published in Arabic, the new law and its regulations were also, almost immediately, made available in English translation.⁹⁴⁰

REPEAL OF EARLIER IP LAWS

In implementing TRIPS all pre-existing Egyptian laws covering IP rights were expressly repealed by the new law, which, in fundamentally restructuring Egyptian IP law, brought all IP subject matter within the umbrella of Law 82/2002.⁹⁴¹

TRADEMARKS LAW 57/1939: REPEALED

Egypt's original Trade Mark legislation,⁹⁴² which was also the first domestic IP law, dates back to 1939, coming into force three years after the 1936 Anglo-Egyptian treaty⁹⁴³ that required the British to withdraw most, but not all, occupying forces. Trademark legislation was therefore in place, domestically, very soon after formal independence. Ten years later,

⁹⁴⁰ The law is available in Arabic and English on the WIPO website in Egypt: Laws and Treaties <<http://www.wipo.int/wipolex/en/profile.jsp?code=EG>> accessed 2014. The Arabic version is authoritative

⁹⁴¹ Article 2 Preamble promulgating Law 82/2002

⁹⁴² Law 57/1939 on Trade Marks and Information

⁹⁴³ The Treaty of Alliance Between His Majesty, in Respect of the United Kingdom, and His Majesty, the King of Egypt, Montreux, August 26 1936

Egypt acceded to the Madrid Agreement Concerning the International Registration of Marks.⁹⁴⁴ That agreement came into force in Egypt on July 1 1952, just three weeks before the Free Officers' revolution of July 23, 1952 that deposed King Farouk. Post-independence Egypt, therefore, participated in the international regulation of trademarks from an early stage.

PATENTS LAW 132/1949: REPEALED

Patent legislation was first passed in 1949, with Law 132 of 1949. Egypt joined the international agreement, the Paris Convention for the Protection of Industrial Property,⁹⁴⁵ just three years later. The Convention came into force, in Egypt, on July 1, 1951, almost exactly a year before the Egyptian Free Officers' revolution.⁹⁴⁶

COPYRIGHT LAW 354/1954: REPEALED

Egypt's first Copyright legislation took effect two years after the Free Officers' revolution, in Law 354 of 1954 and, although it was some twenty years later, Egypt joined the Berne Convention for the Protection of Literary and Artistic Works,⁹⁴⁷ which came into force, in Egypt, on June 7 1977.

There was no rolling back from commitments to protect IP after independence. Where both copyright and patent protection are concerned Egypt joined the main international treaties ahead of the US (today the most insistent critic of Egypt's IP law). In contrast to Egypt, the US, despite now being the most determined proponent of raising standards of intellectual property protection internationally, only ratified the Berne Convention in 1989⁹⁴⁸ twelve

⁹⁴⁴ For information about members of the Madrid Union see Madrid System for the International Registration of Marks <http://www.wipo.int/madrid/en/> accessed 2014

⁹⁴⁵ For information about members of the Paris Convention see Contracting Parties Paris Convention for the Protection of Industrial Property <http://www.wipo.int/treaties/en/ip/paris/index.html> accessed 2014

⁹⁴⁶ For further information on the Free Officers revolution see Gordon, Joel *Nasser's blessed movement: Egypt's Free Officers and the July revolution* (Oxford University Press 1992)

⁹⁴⁷ For information about members of the Berne Convention see Contracting Parties Berne Convention for the Protection of Literary and Artistic Works <<http://www.wipo.int/treaties/en/ip/berne/index.html>> accessed 2014

⁹⁴⁸ Contracting Parties Berne Convention for the Protection of Literary and Artistic Works <<http://www.wipo.int/treaties/en/ip/berne/index.html>> accessed 2014

years after Egypt. The US ratified the Paris Convention in 1967, some 26 years later than Egypt.⁹⁴⁹

CONFLICTING LEGISLATION: REPEALED

In addition to the specific laws mentioned above as being 'superseded' the Official Gazette expressly states that any other applicable rules that might contradict Law 82/2002 are also repealed.⁹⁵⁰

TRIPS COMPLIANCE

The Egyptian Patent Office states on its website that 'the law was harmonized according to the TRIPS agreement,'⁹⁵¹ and the law is described as conforming to the requirements of TRIPS by the Egyptian Association for Protection of Intellectual Property (AEPPI).⁹⁵²

USTR CRITICISM

Almost as soon as Egypt's new IP legislation was passed the US Trade Representative (USTR) criticised Law 82/2002 as a failure to implement TRIPS correctly and placed Egypt on its IP Priority Watch List. The 2003 USTR Special 301 Report even stated that 'Egypt has acknowledged that its IPR law is not fully TRIPS-consistent,'⁹⁵³ although this claim is unattributed and it has not been possible to find such official public acknowledgement elsewhere. The USTR report went on to demand that Egypt bring the law into compliance, declaring that it was 'essential that Egypt address the TRIPS-inconsistencies in its IPR law, particularly in the areas of copyrights, trademarks, and patents, as well as take steps to further strengthen protection of confidential test data.' The US criticisms were, therefore, directed at all areas of Egypt's IP law. Subsequent USTR reports have alternated soft and harsh language and targeted different aspects of the law, in an attempt to herd Egypt into complying with the US understanding of what TRIPS compliance means.

⁹⁴⁹ Contracting Parties Berne Convention for the Protection of Literary and Artistic Works <<http://www.wipo.int/treaties/en/ip/berne/index.html>> accessed 2014

⁹⁵⁰ Article 2 Preamble promulgating Law 82/2002

⁹⁵¹ Egyptian Patent Office <<http://www.egypo.gov.eg>> accessed 2011; See also e.g. Egyptian General Authority for Investment *Business Laws: Intellectual Property* June 1, 2009 <<http://www.gafinet.org>> accessed 2014

⁹⁵² Hamza, Samir and Heba El Toukhy (March 16, 2010) 'Protection of Trade Secrets through IPR and Unfair Competition Law' Egyptian National Group (AEPPI) <<https://www.aippi.org/download/committees/215/GR215egypt.pdf>> accessed 2014

⁹⁵³ USTR Special 301 Egypt 2003 <http://www.ustr.gov/archive/Document_Library/Reports_Publications/2003/2003_Special_301_Report/Special_301_Watch_List.html> accessed 2014

DELAYED IMPLEMENTATION

The provisions of Law 132/1949 on Patents and Industrial Designs that related to pharmaceutical and food-related patents remained in effect until 1 January 2005. However, other than the above-mentioned provisions Law 132/1949 was immediately repealed.⁹⁵⁴

The delayed implementation of the increased protection for pharmaceuticals and agricultural patents was due to the transitional period allowed in the TRIPS agreement to give developing countries time to make necessary adjustments. Egypt utilized this permitted hiatus.⁹⁵⁵

THE TOPICS COVERED IN THE FOUR BOOKS OF LAW 82/2002

The topics addressed by law 82/2002 are as follows.⁹⁵⁶

- PATENTS: Book One covers patents for inventions and utility designs, **schematic designs of integrated circuits**⁹⁵⁷ and **undisclosed data and information**;⁹⁵⁸
- TRADEMARKS: Book Two covers trademarks and data, **geographical indications**⁹⁵⁹ and industrial drawings and designs;
- COPYRIGHT: Book Three is concerned with copyright, covering authors' rights and **neighbouring rights**;⁹⁶⁰ and

⁹⁵⁴ Article 2 Preamble promulgating Law 82/2002

⁹⁵⁵ TRIPS Article 65

⁹⁵⁶ The topics listed in bold print are entirely new IP subject matter, which were not previously addressed by legislation in Egypt but have been mandated by adherence to the TRIPS agreement.

⁹⁵⁷ TRIPS Section 6: Layout-Designs (Topographies) of Integrated Circuits, Articles 35-37

⁹⁵⁸ TRIPS Section 7: Protection of Undisclosed Information. Now protected as an intellectual property right under Article 39 Law 82/2002, previously 'the concept of trade secrets per se as defined by TRIPS was not recognized by Egyptian legislation.' Owners of trade secrets could, however, 'seek damages for any injury resulting from the infringement of their trade secrets on the basis of tort liability as per Article (163) of the Egyptian Civil Code.'

Additionally, under the Article 66 of the Commercial Code revealing, or improper use, of trade secrets is considered unfair competition; the Civil Code Article 685(d) stops employees from revealing trade secrets even after the end of their employment and also prevents them from competing with their ex-employer on departure from employment Article 686 (I); Article 56 of Law 12 of 2003 (known as the Labor Law) further protects employers' confidential information against employees; and Law 47 of 1978 (known as the Civil Service Law) prevents civil servants from 'making any statement or divulging information relating to their position'. Hamza, Samir and Heba El Toukhy March 16, 2010 'Protection of Trade Secrets through IPR and Unfair Competition Law' Question Q 215 addressed to the Egyptian National Group by the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI) <https://www.aippi.org/download/committees/215/GR215egypt.pdf> accessed 2014

⁹⁵⁹ TRIPS Section 3: Geographical Indications, Articles 22-23

- PLANT VARIETY RIGHTS: Book Four introduces **plant variety rights**,⁹⁶¹ making them a subject of protection for the first time.

THE VIEWS OF KEY IP PROFESSIONALS IN EGYPT ON CHANGES TO IP LAW: INTERVIEWS

In order to get a sense of how the TRIPS agreement and its subsequent implementing legislation are viewed in Egypt a number of key individuals involved in determining IP policy in Egypt were contacted and interviewed. The individuals were chosen for their expertise covering a range of aspects of IP. While the aims behind the interviews were limited,⁹⁶² the results are nevertheless interesting. The reasons for choosing to interview leading experts among the IP community in Egypt were: to seek corroboration, to identify issues worth pursuing, and to obtain information or advice on finding material in relation to IP law in Egypt.

The three interview subjects who agreed that their views could be made public were: Dr Maha Bekhiet Director of the IP Unit at the League of Arab States (the Arab League), an expert on regional and international IP affairs.; Mrs Hoda Serageldine President of the Egyptian Association for the Protection of Industrial Property (AEPPI), Cairo, an expert in the IP protection of industrial property; and Professor Dr. Mohamed Hossam Loutfi, Professor of Civil Law, Faculty of Law of Bani-Suef, University of Cairo, Egypt (BSCU) and Member of the Official Drafting Committee of the Egyptian Law on Intellectual Property Rights (Law 82/2002), an expert in the areas of Copyright and related rights.

CONSENSUS ON THE REQUIREMENT TO IMPLEMENT TRIPS

The most notable point of agreement among all three interviewees was that they were adamant that Egypt should honour obligations undertaken in international agreements. They all felt strongly that Egypt's status as a founder member of the WTO made it particularly important that the WTO agreements, including the TRIPS agreement, should be complied with. Serageldine stated explicitly that 'Egypt is a signatory of the WTO from the

⁹⁶⁰ TRIPS Article 14 Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

⁹⁶¹ TRIPS Article 27(3)(b)

⁹⁶² See Chapter 2 for a more detailed discussion of interview methodology.

start so it was a commitment to do something about the law.’ She also stressed that the new law is ‘TRIPS compliant’.

USE OF FLEXIBILITY WITHIN TRIPS

All three interviewees agreed that Egypt should aim to make best use of the flexibilities within the TRIPS agreement. The official Arab League line promoted by Maha Bekhiet is that while members of TRIPS should be fully compliant, they should concentrate on using the exceptions in the agreement to their benefit. Consistent with this approach, Egypt has interpreted these flexibilities in such a way as to ‘appease’ the opponents of the draft law, according to Serageldine.

Professor Hossam El Saghir, Egyptian IP expert of high standing who participated in the drafting of Law 82/2002,⁹⁶³ affirms that Egypt has attempted to use the flexibilities available in implementing TRIPS to the maximum extent possible.⁹⁶⁴

The policy underlying the Egyptian IP Law concerning patents was to stick to the minimum standard of protection provided under the TRIPs, and to make use of all the exceptions and limitations provided for in the TRIPs Agreement as well as interpreting it in accordance with the objectives and principles cited in Articles 7 and 8 of the Agreement to achieve the best interest of the country.⁹⁶⁵

Flexibilities include provision for allowed exclusions, exceptions, and the possibility of compulsory licensing in certain circumstances. The use of TRIPS flexibility is particularly noticeable in the rules relating to the compulsory licensing of patents.

Despite this goal, there are some provisions in the law that go beyond what is required by TRIPS. TRIPS does not mandate an upper level of IP protection; it therefore allows for TRIPS Plus standards. Participation in Free Trade Agreements such as the EU Association Agreements has led to a rise in IP standards above that of TRIPS. This is true of many

⁹⁶³ El Saghir, Hossam A *Biography* Center for Special Studies and Programs (CSSP) Bibliotheca Alexandrina <<http://www.bibalex.org/cssp/Speakers/SpeakersDetails.aspx?ID=180>> accessed 2014

⁹⁶⁴ Abou El Farag, Mohamed Salem (2008) TRIPs, TRIPs-PLUS, Developing Countries and Public Health: The Case of Egypt 5 *Journal of International Biotechnology Law* 1 at 14

⁹⁶⁵ El Saghir, Hossam ‘Egypt’ *WIPO Study on Patents and the Public Domain: Annex* WIPO Committee on Development and Intellectual Property (CDIP) Eighth Session Geneva, (November 14 to 18, 2011) CDIP8/INF/3 <http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_inf_3_rev.pdf> accessed 2014 at 8

developing countries and is notable among Arab countries.⁹⁶⁶ Egypt's EU Association Agreement containing TRIPS-Plus commitments,⁹⁶⁷ thus, undermines the goal of the legislators as described by Saghir.

THE MARGIN OF APPRECIATION

TRIPS makes it clear, in Part 1 of the agreement in setting out the 'general provisions and basic principles' and determining the 'nature and scope of obligations' entered into, that 'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.⁹⁶⁸ Thus, there is a margin of appreciation to allow legislators to address local concerns in choosing the precise way in which IP standards under TRIPS are implemented in domestic legislation, and enforced.

In addition, the TRIPS agreement contains a number of provisions that aim to safeguard developing countries' interests or which enable some leeway in their interpretation.⁹⁶⁹ These are known as the TRIPS flexibilities. It was thought that by utilising these flexibilities, developing countries would be able to maintain a modicum of defence against uneven benefit sharing between WTO members. The flexibilities include the power to exclude certain subject matter from protection, to provide for exceptions that allow for defenses against the infringement of IPRs in certain circumstances, and the possibility of compulsory licensing protected IP subject matter under prescribed conditions.

QUESTIONING LAW 82/2002 COMPLIANCE WITH TRIPS

Despite the repeated assertions of TRIPS compliance both Egyptian respondents, Serageldine and Loutfi, acknowledged that there are still problems with the law and agreed

⁹⁶⁶ El Said, Mohamed K 'The European Trips-Plus Model and The Arab World: From Co-operation To Association—A New Era In The Global IPRs Regime?' (2007) 28 *Liverpool Law Review* 143;

El Said, Mohammed (2012) 'The Morning After: TRIPS-Plus, FTAs and Wikileaks - Fresh Insights on the Implementation and Enforcement of IP Protection in Developing Countries' Program on Information Justice and Intellectual Property (PIJIP) American University, Washington College of Law <<http://digitalcommons.wcl.american.edu/research/25/>> accessed 2014

⁹⁶⁷ See the summary set out by the Delegation of the European Union to Egypt of the Association Agreement *Europa* <http://eeas.europa.eu/delegations/egypt/eu_egypt/political_relations/agreements/index_en.htm> accessed 2014

⁹⁶⁸ TRIPS Article 1(1)

⁹⁶⁹ Article 7 Objectives, Article 8 Principles, Article 6 Exhaustion, Article 30 Exceptions and Article 31 Other Use without Authorization of the Right Holder, and Article 65.4 Transitional Arrangements

that no one was completely satisfied with the outcome. Loutfi referred to ‘a lot of weak points’ in the law. Serageldine and Loutfi identified specific deficiencies in the areas of Patents, Trademark, Copyright, and Plant Varieties and expressed concerns that some articles in the law may discourage investment in Egypt. Overall, Loutfi may be exaggerating the defects in the law. With only a few exceptions, Law 82/2002 fairly accurately reflects the TRIPS requirements while, clearly, stretching TRIPS flexibility as far as possible.

COPYRIGHT

It seems to be fairly common ground that a major problem with the Copyright provisions of Egypt Law 82/2002 is the translation provision set out in Article 148. The issues concern whether or not the provision is either useful or justifiable and whether it complies with international commitments, specifically the Berne Convention and the TRIPS agreement. Eva Hemmungs Wirtén rightly considers that ‘international copyright relations have always been inscribed in a colonial grid.’⁹⁷⁰ The Berne Convention specifically provided for colonies to become members by virtue of a clause, which ‘grandfathered’ the colonies of member states into the convention. Article 31 of the 1971 Paris Text, which is the version still in force states that

⁹⁷¹Any country may declare in its instrument of ratification or accession, or may inform the Director General by written notification at any time thereafter, that this Convention shall be applicable to all or part of those territories, designated in the declaration or notification, for the external relations of which it is responsible.

On decolonization, those states had to decide whether to accept the Berne convention or to leave it. In the case of Egypt, there was a substantial gap in time between decolonization in 1936 and re-joining in 1977 suggesting that there was some deliberation.

TRANSLATION

Egypt’s controversial translation provision derives from the original version of the Berne Convention in which an author’s right to translate or approve the translation of their work was a limited right. It had to be exercised within ten years of publication of the work or it

⁹⁷⁰ Wirtén, Eva Hemmungs ‘Colonial Copyright, Postcolonial Publics: The Berne Convention And The 1967 Stockholm Diplomatic Conference Revisited’ (2010) 7 *SCRIPTed* 533 at 534

⁹⁷¹ Berne Convention (Paris Text 1971) Article 31(1)

would lapse. The limitation could be justified on the basis that copyright has historically been considered to be a grant of a monopoly given to authors, who profit from the right to copy or assign their work because of the public benefit derived from appreciating and learning from creative work. If a work is not available in an accessible form, there is no public benefit. This limitation seems to be in line with the very earliest enactment of copyright law in the UK, the Statute of Anne 1710, which was

An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.

The public benefit part of the copyright monopoly bargain has, therefore, a long history but there is no test to ascertain which works attract copyright. Copyright attaches to work of any quality, whether published or unpublished,⁹⁷² and there is no requirement of registration or other formality.⁹⁷³ It, therefore, seems quite reasonable to assess the value of a work to an extent against the fact that it is considered to be worth copying or, indeed, translating. Translation is both an economic right and a moral right, which should normally accrue to the author.

In TRIPS there is no limitation period in which authors must either translate or authorise translation of their work or lose the right of translation. The right of translation vests solely in the author or the author's assignees for the duration of the copyright period. This seems to be more in line with a French authorial rights attitude that strongly emphasizes the moral rights of the author and therefore views the right to approve any translation as existing alongside other moral rights, such as attribution.

However, the Berne Convention was amended to allow developing countries to utilise the translation limitation period on joining the Berne Convention by making a reservation to allow translation into the host country language if the author had not exercised the right within three years of publishing the work.⁹⁷⁴ Egypt was among the countries that did so. On joining in 1977

⁹⁷² Berne Convention Article 3(1)(a)

⁹⁷³ Berne Convention Article 5(2)

⁹⁷⁴ Berne Convention Appendix II Article II(2)

Pursuant to Article I of the Appendix of the Paris Act,⁹⁷⁵ a notification was deposited on March 12, 1990, in which the Government of the Arab Republic of Egypt declared that it availed itself of the faculties provided for in Article II and III of the said Appendix.⁹⁷⁶

The Berne exception tied the ability to produce translations quickly, where the author had failed to do so, to the goal of benefiting the public. Thus, licences granted for such translations had to be limited to ‘the purpose of teaching, scholarship or research.’⁹⁷⁷ The aim of allowing compulsory licences for translation into the target language was to ‘ensure a wide dissemination of works.’⁹⁷⁸ The hope was that this would boost development.

The possibility of including a provision allowing for the Arabic translation right to expire, so that a third party can exercise the right instead of the author, thus derives from the Appendix to the Berne Convention Special Provisions Regarding Developing Countries, which states that

[...] if, after the expiration of a period of three years, or of any longer period determined by the national legislation of the said country, commencing on the date of the first publication of the work, a translation of such work has not been published in a language in general use in that country by the owner of the right of translation, or with his authorization, any national of such country may obtain a license to make a translation of the work in the said language and publish the translation in printed or analogous forms of reproduction.⁹⁷⁹

This derogates from the Article 8 right of translation provided for in the Berne Convention, which assures authors that they ‘[...] shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works’

⁹⁷⁵ Berne Convention Appendix II Article I(1)

⁹⁷⁶ Berne Convention, Treaties and Contracting Parties, Declarations and Reservations WIPO <http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=946C> accessed 2014

⁹⁷⁷ Berne Convention (Paris Text) 1971 Appendix II Article II(5)

⁹⁷⁸ Silva, Alberto J. Cerda ‘Beyond The Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright’ (2012) Program on Information Justice and Intellectual Property Research Paper Series <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1032&context=research>> accessed 2014

⁹⁷⁹ Berne Convention Appendix I, Article II(2)(a)

The Egyptian declaration lapsed on October 10, 1994. It is for this reason that the reappearance of the provision in Law 82/2002 is strange. Not only is it in breach of the Berne Convention, but it also clearly demonstrates failure to comply with the TRIPS agreement. Its inclusion is inflammatory and either an error as Loutfi suggests, or intended as a deliberate snub to the treaty.

Article 148 Law 82/2002, purportedly implementing Articles II and III of the Berne Convention Appendix in Egypt, states that

The protection of an author's copyright and the translation rights of his work into another language shall lapse with regards to the translation of that work into the Arabic language, unless the author or the translator himself exercises this right directly or through a third party within three years of the date of first publication of the original or translated work.⁹⁸⁰

This is hard to read in terms of an 'access to knowledge' agenda. It is very broad with no limitation as to the type of work to be translated, which could relate to any copyright work. The right is automatic, free and merely triggered by the lack of an available translation after three years have elapsed without the author exercising the right to translate the work. If the translated work is to be commercialized then there may, however, be a license fee paid to the government. Because of the position on exhaustion of rights under Article 147⁹⁸¹ under which 'the right to prevent third parties from importing, using, selling or distributing his protected work, shall lapse where the copyright owner undertakes to exploit or market his work in any state or authorize a third party to do so,' the translation provision presumably applies to any copyright works published anywhere in the world.

Under Article 148 there is no need to demonstrate any particular motivation for translating the work. It is, in any case, unnecessary to use Article 148 for educational purposes. There is another exception for the compulsory licensing of copyright works for educational purposes. Article 170 Law 82/2002 allows for the copying or translation of works 'for the purpose of meeting teaching requirements of all kinds and levels.' This makes the Article 148 provision seem superfluous for the purposes of accessing specifically educational information. Article

⁹⁸⁰ Egypt Law 82/2002 Article 148

⁹⁸¹ Egypt Law 82/2002 Article 147

170 also includes the kinds of controls a copyright holder would expect over the unauthorized use of their work. There is a degree of assessment of the need for copying or translation in that it requires application to the ‘competent ministry,’ and the application must include an explanation of both the reason for the request as well as its parameters, and payment of a license fee.

The principle of National Treatment enshrined in the Convention means that ‘when the author is not a national of the country of origin of the work for which he is protected [...] [the author] shall enjoy in that country the same rights as national authors’ and that ‘the extent of protection, as well as the means of redress afforded to the author to protect [the author’s] rights, shall be governed exclusively by the laws of the country where protection is claimed.’⁹⁸² Therefore, works of foreign authors are protected under the Berne Convention in exactly the same way as those of Egyptian authors, while the TRIPS agreement, by insisting on ‘no less favourable treatment’ provides for the possibility of foreigners receiving better, but not worse, treatment than Egyptian nationals. In this case, it seems likely that foreign works, or at least works composed in languages other than Arabic, will receive a lower level of protection.

Loutfi describes the article as ‘this bad article’ and expects it to be among the first to be deleted when the law is revised. He attributes its inclusion to the fact that he was in the United Arab Emirates (UAE) at the time the draft IP law was finalised and explains that the parliamentarians who agreed to keep the provision, which existed in the previous law, in his absence, were ‘shocked’ to properly understand the implications. Loutfi calls it a ‘catastrophe’. The message the provision sends out is that ‘there is a foreclosure of copyright after three years.’ Loutfi may be right to suggest that it was merely a mistake to keep the provision in the law. It may also have been retained as a basis for future negotiation although it is hard to see what benefit Egypt obtains from its presence in the law. It is a disincentive for authors to publish their non-Arabic works in Egypt and therefore could be a barrier to knowledge acquisition—the very thing, presumably that the provision

⁹⁸² Berne Convention Article 5(2)

is intended to encourage. The right to use this provision was affirmed in 2005 by the Court of Cassation.⁹⁸³

An alternative explanation for the translation provision may be found in the expressed wish to benefit from Western knowledge at no or little cost. At a meeting of decolonized states over copyright issues, in the 1960s, the concerns of the participants were spelled out by the Tunisian delegate in the following way.

There are two kinds of intellectual foodstuffs: those drawn from the African cultural heritage that should be encouraged, and those that stem from abroad and should be acquired exempt of all rights. It is essential that Africa does not pay too much for the fruits of imported knowledge.⁹⁸⁴

Wirtén points out that the statement exposes certain paradoxes basic to the dilemmas confronting decolonizing countries. Focusing firmly on foreign 'knowledge' suggests that colonization has dealt a blow to local confidence in finding solutions to problems. The desire not to pay 'too much' for foreign knowledge is understandable. It falls into a narrative that seeks reparation for the harm done by colonialism, as well as acknowledging that much foreign knowledge was obtained from the colonies without payment or attribution. Nevertheless, the 'fruits' of foreign knowledge seem to be exalted. Wirtén correctly notes a tendency to dichotomize knowledge into old and new. She points out that by connecting the 'up-to-date'⁹⁸⁵ with the West rather than the East further entrenches this harmful binary; it is an illustration of the power of Orientalist discourse.

ATTITUDE TOWARDS THE POSITION OF DEVELOPING COUNTRIES IN THE WTO

The interviewees differed regarding their attitude towards the treatment of developing countries within the WTO and the measures needed to deal with problems arising from unequal resources. Bekhiet was greatly irritated by debates that cast doubt upon the

⁹⁸³ Translation Right Decision of 2005 [22 March 2005, n°791 and 832/72] cited in Awad, Bassem and Moatasem El-Gheriani and Perihan Abou Zeid 'Egypt' in C Armstrong, et al Eds *Access to Knowledge in Africa* (University of Cape Town Press 2010) at 40

⁹⁸⁴ Wirtén, Eva Hemmungs 'Colonial Copyright, Postcolonial Publics: The Berne Convention and the 1967 Stockholm Diplomatic Conference Revisited' (December 2010) 7 *Scripted* 533 at 538 citing the opening speech by the Tunisian delegate at the African Study Meeting on Copyright in Brazzaville in August 1963, organised jointly by BIRPI and UNESCO

⁹⁸⁵ Wirtén, Eva Hemmungs 'Colonial Copyright, Postcolonial Publics: The Berne Convention And The 1967 Stockholm Diplomatic Conference Revisited' (December 2010) 7 *Scripted* 533 at 538

appropriateness of international IP standards for developing countries. She viewed the developed/developing country debate as a distraction and she did not wish to consider the possibility that international conventions on IP may need to be amended to account for the needs of developing countries. In her view it is pointless now questioning the TRIPS agreement's history on a moral basis. She was frustrated by the discussion around issues such as 'so-called' bio-piracy in which developed countries are accused of plundering the biological resources of the developing world. In her opinion it was, 'better [...] not to engage in this debate about whether it is good or bad or the developed countries try to take all the resources away from the developing countries,' adding, 'I hate this debate, really'. Instead, she made it clear that she feels that energy can be more usefully spent in concentrating on making better use of the exceptions already available within the system. In this last point all three interviewees' opinions converged. However, Serageldine and Loutfi expressed reservations regarding the effectiveness of provisions intended to accommodate the needs of developing countries.

Bekhiet's view is that Arab States should be more integrated in the international community, and more involved in discussions about IP at the global level. She explained that she promotes this point of view at Arab League meetings and pushes for more engagement in IP across the Arab League by encouraging accession to IP conventions. She would like to see a greater focus on the positive aspects of the IP system, although she is also keen to defend Arab interests. Her intention is clearly fuelled by a strong desire to promote development by increasing IP compliance in the Arab World. However, she revealed evident hostility to the contrary viewpoint and, coming from a person in a position of such high authority, this might suggest potential difficulties in raising dissenting arguments.

INCREASING LEVEL OF IP PROTECTION: TRIPS-PLUS

At the Arab League level it was made clear that the regional policy is to promote increased levels of IP protection. According to Bekhiet, 'at every chance we try to [...] urge the Arab countries to accede to conventions which will make progress or develop in the field of IP in their countries.' Bekhiet is clearly strongly 'pro-IP' and her perspective as a policy leader at the regional level means that she is in a position to compare the different IP regimes around the region. She noted 'progress' in some areas, but felt that there was a great deal of

inconsistency both within states and between states. Her view was that there should be a more consistent approach both in terms of legislation and enforcement measures among all Arab countries and she was concerned that Arab countries should develop clear policies regarding IP. Serageldine and Loutfi are both against raising the level of IP protection yet higher, expressing concerns about the impact of TRIPS-Plus standards on Egypt and Egyptians. Serageldine is strongly against TRIPS-Plus measures, stating that ‘imposing too many higher standards [...] is not in the interests of developing countries: it’s a fact.’ There is a clear divergence of views over this matter.

REGIONAL IP POLICY

The Arab League does not seem to be as deeply engaged in the critical appraisal of IP law as some other bodies. One function of the Arab League IP Unit is to promote appreciation of the importance of IP protection among NGOs. Bekhiet explained that the Unit has organised many such awareness raising activities in Egypt. The enthusiasm of the Arab League in promoting IP suggests an alternative narrative to the one that views Egypt and other Arab countries as being unwillingly subjected to a western IP agenda. Regional and local activities aimed at promoting IP concepts are inspired from within the region and not only from Western sources such as USAID or the EU. However, while the region and the state may be willing, the same is not necessarily true of the people. Robust discussion clearly took place in the Egyptian parliament over the IP law but it is not known exactly who was or was not entitled to speak or present arguments nor is it known precisely how decisions as to its final shape were made. The extent to which dissenters were able to present their arguments is also unclear.

POPULAR DISSENT REGARDING THE IP LAW IN EGYPT

There is some evidence that dissent over the TRIPS agreement was suppressed or contained. During the drafting process, Loutfi said efforts were made to ‘eliminate unpleasant intervention from different stakeholders’. Serageldine confirmed that the IP law was not popular. Dislike of the law among the general public and the consequent extensive discussions in parliament were at least partly responsible for the two-year delay needed to

complete the necessary administrative parliamentary process.⁹⁸⁶ It is not clear what Loutfi meant by the term ‘unpleasant’ but, particularly after the WTO deal was finalised and TRIPS became law Egyptian IP advocates have seemed at times uncomfortable with the arguments of those with fundamentally different views. This can be seen in Bekhiet’s strong denunciation of those who argue in favour of altering the global IP regime to address the needs of developing countries.

Although largely supportive of the IP regime, Serageldine expressed reservations regarding the likelihood of the IP system to enable development in Egypt. She voiced her worries about access to IP protection for young Egyptian inventors and the consequent impact on Egyptian competitiveness. In particular, she complained that the very limited resources available to most Egyptians meant that Egyptian inventors were not able to usefully engage with the IP system. Her experience in practice demonstrated to her the ‘horrendous’ costs of patent protection, which are prohibitive for all but the very rich in Egypt, even with reduced fees at the international level for inventors from developing countries. And, as she pointed out, inventors are not always rich.

Serageldine acknowledged that the Patent Cooperation Treaty (PCT) administered by WIPO, which facilitates international patent applications among member states, had made some improvements in enabling Egyptians to file abroad. She pointed out, however, that it merely enables an inventor to take the first step. After filing a patent with the PCT an applicant must move to the national phase in the countries in which a patent is sought. The expenses then escalate rapidly and include, among others, examination fees and, possible responses to opposition, requiring costly legal advice. When, in addition, the high exchange rate is taken into account the expense is ‘exorbitant’ and unaffordable for most Egyptians. Furthermore, even if they can afford a one-off payment, most Egyptian inventors are unable to afford the annuities to maintain their patent.

Even filing a patent application in Egypt is extremely expensive for many Egyptians. Thus, the apparent equality offered to foreigners under the principle of National Treatment

⁹⁸⁶ Under the 1971 constitution new laws had to be sent for approval to parliament by the Prime Minister, who provided a national umbrella where more than one ministry was involved in writing the law. The law was, therefore, sent first to the consultative assembly (Maglis el Shura) before being sent for further scrutiny and approval by the People’s Assembly (Maglis el Shaab), and finally the Ministry of Justice.

creates unfairness. Serageldine's experience with Egyptian inventors' struggle to patent their inventions graphically illustrates the point that formal equality is not the same as fairness where the 'playing field is not equal'.

DELAY IN IMPLEMENTATION OF TRIPS

The complexity of fully exploiting the TRIPS flexibilities to accommodate the specific conditions of Egypt was time consuming and expensive.⁹⁸⁷ According to both Serageldine and Loutfi the technicality of the IP law was challenging for those unfamiliar with the precise details of IP legislation to understand. Because of its complexity a report had to be presented alongside the draft legislation to explain the law to the parliamentarians. Consequently, it took eight years from ratification to implementation before the TRIPS Agreement was embodied in Egyptian IP legislation. The delay was also partly because Egypt took a radical approach and completely revised all the intellectual property laws as well as gathering them together into one document. As Balat explains, the new IP law represented 'the country's first ever effort to combine all fields of intellectual property (except trade names) in one single Code' supported by executive regulations relating to each area.⁹⁸⁸ Balat and Loutfi suggest that there was also foot-dragging, explaining that 'Egypt was reluctant to swiftly implement the TRIPS levels of protection, despite the intensive pressures received from a number of developed countries, in particular the US and European Union (EU) countries.'⁹⁸⁹ Law 82/2002 was passed on June 2, 2002, two years later than the official deadline for bringing domestic law in line with TRIPS. The reluctance to quickly implement TRIPS is understandable; it also seems very reasonable to take time in enacting such radical legislation to ensure that the law would successfully balance competing demands.

⁹⁸⁷ Concessions to developing country members meant that transitional periods were allowed in order to give time for capacity building and other necessary adjustments to ease the implementation of some of the more difficult aspects of TRIPS,⁹⁸⁷ but these transitional periods were not based on any serious assessment of potentially damaging outcomes.

⁹⁸⁸ Balat, Mohamed Salem Abou El Farag 'Intellectual Property: United States 'Special 301' and Arab Countries: Which List Are They on This Time?' (2008) 5 *Manchester Journal of International Economic Law* 146 at 148

⁹⁸⁹ Balat, Mohamed Abou El Farag and Mohamed Hossam Loutfi 'The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt' (2004) 2 *Web Journal of Current Legal Issues Ltd* http://www.peacepalacelibrary.nl/ebooks/files/WEBJCLI_BALAT_TRIPs-Agreement-and%20Developing-Countries.pdf accessed 2014

END OF TRANSITION: CONSEQUENCES

The time limits set for developing countries to revise laws and bring IP systems up to the WTO required level were clearly not feasible for Egypt as evidenced by the late promulgation of the domestic IP law, and further changes required in its implementation are likely to be difficult and disruptive. As Dr Elangi Botoy Ituku convincingly argues, the transitional periods for developing countries have proved 'short and insufficient'.⁹⁹⁰ She calculates the time that the now-developed countries have had to adjust to changes in IP protection as beginning from the time they first signed the Paris Agreement on March 20 1883. In the intervening time those countries were able to manage the process incrementally at a pace that suited their economies and local needs. Indeed, she points out that 'countries nowadays called "industrialized" [...] profited from the lack of robust and full protection at the international level in order to copy British technology from one another and disseminate it throughout their local industries.'⁹⁹¹ She, therefore, considers the one hundred and twelve year period between the Paris Agreement and the TRIPS Agreement to have been a very great advantage to those countries that developed without the burden of colonization. In contrast, Egypt has been, and continues to be (along with other countries emerging from the colonial experience) expected to raise the IP bar very rapidly, in what may prove to be an inappropriate and damaging time-scale.

The widespread feeling that the transitional period was much too short has been most keenly felt within the pharmaceutical industry.⁹⁹²

TRANSITIONAL PERIOD FOR PRODUCT PATENTS

Egypt took advantage of the additional five-year transitional period allowed for in Article 65 TRIPS to give developing countries time to adjust before giving full effect to certain provisions. This included the provision in Article 65.4 to delay the implementation of rules

⁹⁹⁰ Ituku, Elangi Botoy 'From the Paris Convention to the TRIPS Agreement: A One-Hundred-and-Twelve-Year Transitional Period for the Industrialized Countries' (2004) 7 *The Journal of World Intellectual Property* 115 at 30

⁹⁹¹ Ituku, Elangi Botoy 'From the Paris Convention to the TRIPS Agreement: A One-Hundred-and-Twelve-Year Transitional Period for the Industrialized Countries' (2004) 7 *The Journal of World Intellectual Property* 115 at 115

⁹⁹² Iskander, Dina 'TRIPS and Access to Medicines in Egypt' in *The New Political Economy of Pharmaceuticals: Production, Innovation and TRIPS in the Global South* Lofgren, Hans and Owain David Williams Eds (Palgrave 2013) Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006)

relating to protection of product patents for pharmaceuticals, which meant that they did not have to be protected until 2005. Claims of a positive correlation between research and development and stronger IP protection in Egypt have been viewed with suspicion.⁹⁹³ The 'large risk represented in providing patent protection for pharmaceutical products'⁹⁹⁴ as well as processes, which were covered under the previous law, required special consideration in Egypt.

Despite the large size of the Egyptian generic drug industry, and notwithstanding Egyptian objections at the WTO, the industry was ultimately unable to press its case against joining the WTO with the Egyptian government at the time.⁹⁹⁵ Amr Ismail Adly, Director of the Social and Economic Justice Unit at the EIPR, puts the Mubarak regime's approach to negotiating the WTO agreement down to 'cronyism'.⁹⁹⁶ He considers the decision to join the WTO arbitrary, and laments the fact that the regime was impervious to reasoned arguments put forward by well established and experienced professionals who opposed exposing Egypt's 'uncompetitive domestic sectors to foreign competition'.⁹⁹⁷ Adly's analysis rings true. However, Egypt is now bound by the agreement and, accordingly, compliance is necessary. In that context, the flexibilities provided for within the TRIPS agreement are the sole means of protecting against the potentially negative effects of implementation.

THE MAILBOX RULE AND EXCLUSIVE MARKETING RIGHTS

The measure known as the 'mailbox' rule meant that, under TRIPS, during the transitional period allowed for pharmaceutical products in developing countries, those countries taking

⁹⁹³ Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006)

⁹⁹⁴ Balat, Mohamed Abou El Farag and Mohamed Hossam Loutfi 'The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt' (2004) 2 *Web Journal of Current Legal Issues Ltd* http://www.peacepalacelibrary.nl/ebooks/files/WEBJCLI_BALAT_TRIPs-Agreement-and%20Developing-Countries.pdf accessed 2014; Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) at 27-28

⁹⁹⁵ Balat, Mohamed Abou El Farag and Mohamed Hossam Loutfi 'The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt' (2004) 2 *Web Journal of Current Legal Issues Ltd* http://www.peacepalacelibrary.nl/ebooks/files/WEBJCLI_BALAT_TRIPs-Agreement-and%20Developing-Countries.pdf accessed 2014; Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006)

⁹⁹⁶ Adly, Amr Ismail 'Politically-Embedded Cronyism: The Case of Post-Liberalization Egypt' (2010) 11 *Business and Politics* at 15

⁹⁹⁷ Adly, Amr Ismail 'Politically-Embedded Cronyism: The Case of Post-Liberalization Egypt' (2010) 11 *Business and Politics* at 15

advantage of the time for adjustment provided for in the agreement, were required to make it possible for drug patents to be registered pending patent approval at the end of the transitional period.⁹⁹⁸ This has become known as the mailbox rule. Additionally, during the time after filing under the mailbox rule and being granted a patent, the patent owner is entitled to exclusive marketing rights (EMRs) for the drug, for five years once the drug has been given marketing approval, as long as a patent and marketing approval have been granted elsewhere.⁹⁹⁹

THE PROBLEM OF NEW RULES CONCERNING PHARMACEUTICALS

Pharmaceutical advances embody the most recent developments in medical science and, as such, are generally subject to patent protection. Inventive medicines have the potential to improve the survival and quality of life for individuals suffering from diseases. However, pharmaceuticals have been at the centre of controversy over implementation of the TRIPS agreement; poverty excludes those who cannot afford the medical benefits of highly priced in-patent products.¹⁰⁰⁰

Patent protection under TRIPS provides for a twenty-year monopoly¹⁰⁰¹ in which the patentee can recoup research and development costs. This represents an extension of the term of patent protection in many states. In addition, whereas many jurisdictions previously protected only pharmaceutical products, it is now a requirement under Article 27(1) of TRIPS that WTO member countries provide patent protection for pharmaceutical products themselves as well as the processes to make them. Egypt, like many other jurisdictions, previously did not protect medicinal products but only the processes used to create them. This allowed generic companies to copy new drugs by using different processes. However, Article 27(1) of TRIPS put an end to this practice by ensuring that 'patents shall be available for any inventions, whether products or processes.' This requirement has been in effect since the beginning of 2005 for those developing countries that utilised the transitional

⁹⁹⁸ TRIPS Article 70(8)(a)

⁹⁹⁹ TRIPS Article 70(9) 'Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.'

¹⁰⁰⁰ Harrison, James *The Human Rights Impact of the World Trade Organisation* (Hart Publishing 2007) at 149

¹⁰⁰¹ Article 33 TRIPS

period.¹⁰⁰² However, product patents could be filed under the mailbox rule prior to the expiration of the transitional period.

Article 1, Law 82/2002 implements Article 27(1)TRIPS, stating that

A patent shall be granted in accordance with the provisions of this Law to any industrially applicable invention which is new, involves an inventive step, whether connected with new industrial products, new industrial processes or a new application of known industrial processes.

While TRIPS consistent IP protection is certainly not the sole reason behind Egypt's health care woes, this increase in IP protection has prevented the many Egyptian companies previously producing generic copies of new drugs from manufacturing cheap copies of patented drugs causing the price of new medicines to rise to levels beyond most Egyptians' pockets.

Foreign pharmaceutical companies have benefited from the rule change since prices for new medicines are no longer constrained by competition from the generic drug industry. This is likely to mean a significant increase in the amount Egyptians have to pay for the latest medicines. Egyptian consumers who cannot afford the expensive original brand will, therefore, certainly lose out with prices for new medicines put further beyond their reach. Older, out of patent medicines can still be copied by the generic companies but, as a result of implementing TRIPS, only original versions of new drugs are now available.

THE MONIST/DUALIST CONTROVERSY AND TRIPS

Even before the domestic IP law was promulgated some foreign pharmaceutical companies have aggressively pursued their rights to press their cause for IP protection. They initially tried to rely on the fact that Egypt takes a theoretically monist approach to international agreements.¹⁰⁰³ Under this approach, it was argued, TRIPS became directly applicable once ratified. Thus, despite the transitional rules allowing time to adjust to the rules of TRIPS

¹⁰⁰² The transitional arrangements have been extended again for least developed countries until July 2021 See 'The Least Developed get Eight Years more Leeway on Protecting Intellectual Property' (11 and 12 June 2013) Intellectual Property: Formal Council Meeting WTO 2013: News Items http://www.wto.org/english/news_e/news13_e/trip_11jun13_e.htm

¹⁰⁰³ El Zeidy, Mohamed 'Egypt and Current Efforts to Criminalize International Crimes' (2005) 5 *International Criminal Law Review* 247 at 248

relating to pharmaceuticals, Egypt came under pressure to implement all TRIPS provisions immediately 'on the ground that the provision of strong patent protection would enhance technological development by encouraging highly risky investment'.¹⁰⁰⁴ By quickly raising IP standards, on this view, Egypt would attract Foreign Direct Investment (FDI). The suggestion was that foreign investors feared investing in Egypt due to the lack of IP protection for their products.

The terms monist and its antonym dualist are not easy to define.¹⁰⁰⁵ They describe different states' approaches to the status of treaties within a jurisdiction once agreed. The terms have been criticized as being excessively 'dichotomous in flavour'¹⁰⁰⁶ and not reflective of the complexity found in reality. It is relatively easier to define dualist states, in which 'no treaties have the status of law in the domestic legal system.' In such a system there is always a need for a law to incorporate treaty rules. Without it, the treaty rules cannot be relied upon with any certainty until such a law is passed. This has traditionally been assumed to be the case in the UK, for example.¹⁰⁰⁷ The difficulty of precise definition, however, is captured in Professor David Sloss's¹⁰⁰⁸ definition of a monist state, which is one in which '*some treaties* have the status of law in a domestic legal system, even in the absence of implementing legislation.'¹⁰⁰⁹ Discovering which treaties will be self-executing is not an easy task. States that provide for a degree of direct applicability of treaties, and can therefore be described as monist to an extent, include the Netherlands and France, among others, with the US 'somewhere in between.'¹⁰¹⁰

The UK has remained determinedly dualist in its approach to international law.¹⁰¹¹ However, membership of the EU means that when the EU makes international commitments, the UK

¹⁰⁰⁴ Abdelgafar, Basma I *The Illusive Trade-Off: Intellectual Property Rights, Innovation Systems, and Egypt's Pharmaceutical Industry* (University of Toronto Press 2006) at 28; see also the Mail Box cases discussed below in this Chapter

¹⁰⁰⁵ Brownlie, Ian David *Principles of International Law* (Oxford University Press 2008) at 31-33

¹⁰⁰⁶ Jackson, John H 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 *American Journal of International Law* 310 at 314

¹⁰⁰⁷ Jackson, John H 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 *American Journal of International Law* 310 at 319

¹⁰⁰⁸ Professor of Law and Director of the Center for Global Law and Policy at Santa Clara Law School

¹⁰⁰⁹ Sloss, David 'Domestic Application of Treaties' (2011) Santa Clara Law Digital Commons <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs> at 3

¹⁰¹⁰ Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 *American Journal of International Law* 310 at 320

¹⁰¹¹ See eg the approach to the ECHR prior to the promulgation of the Human Rights Act 1998. Professor

is bound to consider those agreements to be directly applicable. In the case of *Società Consortile Fonografici (SCF) v Marco Del Corso*, which required a preliminary ruling on the question of the direct applicability of TRIPS, the European Court of Justice (ECJ) stated that such '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'.¹⁰¹² The court explained that international agreements have direct applicability by virtue of Article 216(2) of the Treaty on the Functioning of the European Union (TFEU).¹⁰¹³ The court noted that 'the TRIPS Agreement [was] signed by the European Union and approved by Decision [...] 94/800. Consequently, [the] agreement and treaty bind the institutions of the European Union and the Member States.'¹⁰¹⁴ Thus, international agreements entered into by the EU are directly applicable in the UK by virtue of the UK's membership of the EU.

In both monist and dualist states the courts are instrumental in deciding whether a particular agreement is directly applicable and Sloss suggests that there are strong policy reasons behind their decisions. He has found that

Judicial doctrine invariably grants judges some discretion to determine which treaties are self-executing. Transnationalist judges exercise their discretion in a manner that pushes more treaties into the self-executing category. Nationalist judges exercise their discretion in a manner that pushes more treaties into the non-self-executing category.¹⁰¹⁵

Jackson outlines some of the policy reasons for choosing one approach over another. Arguments in favour of direct applicability of treaties include the idealistic notion of increasing the effectiveness of international law generally and, pragmatically, increasing the likelihood that parties to the treaty will meet their obligations. The EU is generally

Gordon Anthony, of Queen's University Belfast, says that 'the doctrine of parliamentary sovereignty has [...] given rise to a rigid form of constitutional dualism in the UK' in Anthony, Gordon UK Public Law and European Law: the Dynamics of Legal Integration (Hart Publishing 2002) at 77

¹⁰¹² Case C-135/10, REFERENCE for a preliminary ruling under Article 267 TFEU, from the Corte d'appello di Torino (Italy), made by decision of 10 February 2010, received at the Court on 15 March 2010, in the proceedings *Società Consortile Fonografici (SCF) v Marco Del Corso* <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-135/10> accessed 2014 at para 37 (Subsequently, the *Corso* case)

¹⁰¹³ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)

¹⁰¹⁴ The *Corso* case at paras 38-40

¹⁰¹⁵ Sloss, David 'Domestic Application of Treaties' (2011) Santa Clara Law Digital Commons <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs>

transnationalist, at least within its sphere of influence, and so has championed the direct applicability of treaties, particularly its own treaties. In addition, certain treaty provisions can have direct effect. In the pivotal case of *Van Gend en Loos* the ECJ found that where a treaty provision is clear, precise and unconditional and requires no further implementing legislation, within the EU that provision will have direct effect and can be relied upon by an individual.¹⁰¹⁶ The same conditions were applied in the *Corso* case in relation to the TRIPS Agreement.

Treaties have proved capable of being oppressive in Egypt in the past. The Capitulations were only finally dispensed with in 1949, so it would be surprising if the judiciary were not alert to the historical resonance. National sovereignty concerns are an important factor in arguments against direct applicability, and sensitivity over sovereignty is likely to be particularly raw in countries that have experienced colonialism. Thus, 'urging the direct application of treaties [can be seen as] tantamount to "interference in the internal affairs" of a sovereign state.'¹⁰¹⁷

THE PRINCIPLE OF PACTA SUNT SERVANDA: ISLAMIC LAW AND TREATIES

The basis for Egypt assuming a monist approach to the implementation of treaties has been explained with reference to Islamic law. The explanation is based on analogy with the principles of Islamic contract law. The duty to comply with the principle of *pacta sunt servanda*, under *Sharia*, where contracts between individuals are concerned, is clear.¹⁰¹⁸ This duty has been interpreted to extend to treaties. Compliance with treaties as contracts is further supported by the fact that the Prophet Mohamed (PBUH) entered into international agreements and stressed the importance of fulfilling them as long as there is 'genuine consent among parties entering into a treaty arrangement and its provisions [are]

¹⁰¹⁶ NV *Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* Reference for a preliminary ruling: *Tariefcommissie* Judgment of the European Court of Justice of 5 February 1963 *Pays-Bas* Case 26-62

¹⁰¹⁷ Jackson, John H 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 *American Journal of International Law* 310 at 323

¹⁰¹⁸ Qur'an 16:91; Qur'an 8:72; see also Schacht, Joseph 'Islamic Law in Contemporary States' (1959) 8 *American Journal of Comparative Law* 133 at 139 and Rehman, Javid *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart Publishing 2005) at 45

not coercive, unjust or oppressive towards one party.¹⁰¹⁹ With the proviso that treaties are entered into willingly and that they are not harmful, or excessively one-sided, there is, therefore, a high level of commitment to abide by the terms of agreements.

This approach is affirmed in Article 151 of the 1971 Egyptian Constitution, which states that

The President of [the] Republic shall conclude treaties and communicate them to the People's Assembly, accompanied with a suitable clarification. They shall have the force of law after their conclusion, ratification and publication according to the established procedure.

Article 151 lists some exceptions in relation to treaties dealing with particularly sensitive subject matter, which require the additional measure of requiring parliamentary approval before entering into law. These include:

[...] all the treaties involving modifications [...] having connection with the rights of sovereignty, or which lay upon the Treasury of the State certain charges not provided for in the budget.¹⁰²⁰

Such treaties need the approval of the People's Assembly. IP treaties are likely to fall into this category both because there may be issues relating to national sovereignty and because of the necessary expenditure required to make adjustments to meet increased IP standards. Resources need to be provided, among other things, to set up new institutional arrangements, to train staff at all levels including judges, lawyers, the legislature and customs officials, as well as to educate the population at large. Used in this way, the resources allocated are, therefore, not available to meet other demands.

Even if a treaty falls into the above category, once the People's Assembly has ratified an international treaty, Article 151 affirms that there is no need for further legislative action for it to be used before national courts.¹⁰²¹ In practice, however, further legislation or some

¹⁰¹⁹ Rehman, *Javaid Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart Publishing 2005) at 46

¹⁰²⁰ Article 151, Egyptian Constitution (1971). The short-lived Constitution of 2012 contained almost identical wording in Article 145 with the additional proviso that there must be a two-thirds majority in both houses when approving treaties concerning sensitive subject matter.

¹⁰²¹ The 2013 draft constitution approved by a referendum in January 2014 takes a radically different approach to treaty implementation, with potentially far-reaching effects. In particular, it states that treaties 'shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution.' The

level of amendment or revision of existing legislation is usually needed to ensure that national law is consistent with international commitments. A strictly monist application of the law, as seems to be indicated under the constitution, would mean that treaties that have been ratified can be relied upon directly in the absence of such legislation. Under a monist interpretation, since TRIPS was ratified by the People's Assembly it was, arguably, self-executing at that point and its provisions could be directly relied upon before the national courts. The choice could be reasonably described as political decision-making dressed up as law.¹⁰²² This is consistent with the explanation of the nature of law put forward by both American and Scandinavian realists, who refuse to accept attempts to explain law as positively rule-based or the elaboration of moral principles. Following a realist approach, the analysis should focus on the nature of the power relationship represented by the choice made.¹⁰²³

TRIPS: HORIZONTAL EFFECT BETWEEN INDIVIDUALS

Whether a state is dualist or monist, compliance with the TRIPS Agreement requires that its provisions must be effectively enforced within member states, not merely by member states.¹⁰²⁴ This means that individuals are able to rely on TRIPS provisions once conforming legislation is implemented.

Members shall ensure that enforcement procedures [...] are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.¹⁰²⁵

provisions of the Constitution require that 'with regards to any treaty of peace and alliance, and treaties related to the rights of sovereignty, voters must be called for a referendum, and they are not to be ratified before the announcement of their approval in the referendum.' And, for the avoidance of doubt, it states that 'in all cases, no treaty may be concluded which is contrary to the provisions of the Constitution [...]' While this provision cannot be described as departing from the monist approach, it could be interpreted as being a great deal more nationalist/protectionist and could have implications in the context of new IP treaties. See 'New Constitutional Document After Amending the Suspended 2012 Constitution Prepared pursuant to Article 29 of the Constitutional Declaration *The Arab Republic of Egypt Draft Constitution* (8 July 2013) Unofficial translation prepared by International IDEA <http://www.constitutionnet.org/egypt-draft-constitution-dec-2013> accessed 2014

¹⁰²² Koh, Harold Hongju 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599 http://digitalcommons.law.yale.edu/fss_papers/2101 <accessed 2014>

¹⁰²³ See discussion of Legal Realism in Chapter 2

¹⁰²⁴ Part III TRIPS Agreement: Enforcement of Intellectual Property Rights Articles 41-61

¹⁰²⁵ TRIPS Article 41(1)

The civil remedies that must be made available include the availability of damages,¹⁰²⁶ injunctive relief¹⁰²⁷ until a decision regarding the status of any infringement, and the seizure and destruction of infringing goods is made.¹⁰²⁸ Criminal remedies must be available for serious cases of 'wilful trademark counterfeiting or copyright piracy on a commercial scale.'¹⁰²⁹ Such remedies include monetary penalties and/or imprisonment. Law 82/2002 not only provides for fines for infringing activities, but more severe cases involving commercial gain may also be punished by imprisonment, consistent with TRIPS. Article 32 Law 82/2002 provides for imprisonment for repeat offences of patent infringement, Article 113 for Trade Mark infringement, and Article 181 for serious copyright infringement.

The availability of imprisonment in Egypt as a punishment for infringement of intellectual property should be of great concern. Compliance with the TRIPS agreement may contravene human rights instruments whenever the remedy of imprisonment is applied. It is well known that prisons in Egypt are extremely exacting. The US government's own report on Egypt's Human Rights practices stated, in 2012, that 'conditions in the country's prisons and detention centers remained harsh'¹⁰³⁰ and that 'according to international NGO observers, prison cells were overcrowded, with a lack of medical care, proper sanitation, food, clean water, and proper ventilation. Tuberculosis remained widespread. Abuse was common, especially of juveniles in adult facilities, and guards brutalized prisoners.' It is outside the scope of this work to discuss the human rights implications of the enforcement provisions of TRIPS, however, this is certainly worth examining.

NATIONAL TREATMENT AND THE EGYPTIAN PHARMACEUTICAL INDUSTRY

The National Treatment principle means that foreign IP owners, including foreign companies in Egypt, can access Egyptian IP law just as Egyptians can. In this way, litigation solely between Egyptian parties as well as between foreigners and Egyptians is likely to ensure the raising of IP standards to the TRIPS level.

¹⁰²⁶ TRIPS Article 45

¹⁰²⁷ TRIPS Article 44

¹⁰²⁸ TRIPS Article 46

¹⁰²⁹ TRIPS Article 61

¹⁰³⁰ Egypt: Country Reports on Human Rights Practices for 2012, United States Department of State, Bureau of Democracy, Human Rights and Labor at 5 <<http://www.state.gov/documents/organization/204569.pdf>> accessed 2014

This system of non-discrimination is certainly preferable to that of the Mixed Courts where foreigners and Egyptians had differential access to legal services. However, it also means that foreigners with access to greater resources may still be able to access the law more easily than Egyptians. Thus, even before implementation of Law 82/2002 it was possible to identify the local Egyptian pharmaceutical industry and its customers in Egypt as potential losers from the increased level of IP protection required by TRIPS.

Until full implementation of TRIPS, Egypt's manufacturers of generic medicines thrived on making copies of in-patent drugs by using processes that differed from the patented process in order to create a similar product. The rule changes imposed by TRIPS meant that Egyptian pharmaceutical industry was bound to suffer, as this practice would no longer be within the law. The only pharmaceutical products that can be copied, since January 1, 2005, are those whose patents have expired. The prospect was devastating for the generics industry in Egypt and for those who had come to rely on their copies of new drugs.

Dina Iskander, researcher on the Egyptian Initiative for Personal Rights (EIPR)'s Right to Health Program, stated that 'an adverse impact of TRIPS compliance on the generics drug industry in Egypt was anticipated but no careful analysis [...] undertaken of the effects of changes in intellectual property rights legislation.'¹⁰³¹ Some action to mitigate the effects was taken, however it is questionable how effective this attempt has been. In the drafting process, the legislators attempted to lessen the effects by using permitted flexibilities. Mohamed Abou El Farag Balat and Loutfi expressed the view that the new law 'present[ed] a significant development in the search for an appropriate balance between the interests of IPR owners and pharmaceutical users'.¹⁰³² This may be true, but it assumes that it is possible to determine what an appropriate balance would be, which is something that is difficult to ascertain.

¹⁰³¹ Iskander, Dina 'TRIPS and Access to Medicines in Egypt' (2013) in *The New Political Economy of Pharmaceuticals: Innovation and TRIPS* Ed Hans Lofgren and Owain David Williams (Palgrave Connect 2013) at 91

¹⁰³² Balat, Mohamed Abou El Farag and Mohamed Hossam Loutfi 'The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt' (2004) 2 *Web Journal of Current Legal Issues Ltd* http://www.peacepalacelibrary.nl/ebooks/files/WEBJCLI_BALAT_TRIPs-Agreement-and%20Developing-Countries.pdf accessed 2014

THE MAILBOX CASES¹⁰³³

Unsurprisingly, the earliest cases brought in relation to the TRIPS agreement concerned pharmaceuticals and the operation of the Mailbox rule.¹⁰³⁴ A key question raised was whether Egypt's monist approach to treaties would mean that the TRIPS agreement was self-executing and could be relied on to guarantee EMRs to pharmaceutical products,¹⁰³⁵ filed under the mailbox provision,¹⁰³⁶ prior to the expiry of the transitional rules.

Although a bit tardy, considering TRIPS was ratified in 1995, an Egyptian Prime Ministerial decree No. 547/2000 was passed in 2000,¹⁰³⁷ (two years before Law 82/2002 came into force) granting EMRs to pharmaceutical patent owners who sought patent approval in Egypt and went on to register their products under the mailbox rule pending the expiration of the TRIPS transitional period.¹⁰³⁸ In the case of *Apex Pharma v Minister of Health and Population and others* (subsequently *Apex v Eli Lilly (I)*), the complainant, Eli Lilly, sought to rely on the decree.

APEX V ELI LILLY (I) IN THE COURT OF APPEAL¹⁰³⁹

In the case of *Apex v Eli Lilly (I)* Apex was an Egyptian generic pharmaceutical company that had manufactured copies of Eli Lilly's antipsychotic drug Zyprexa, which had been registered in Egypt under the mailbox rule. Eli Lilly is an American Multinational pharmaceutical company. Under TRIPS Article 70(9) Eli Lilly should have been entitled to the EMRs for Zyprexa. Eli Lilly had filed a patent application and the drug had a patent and marketing approval in the US. However, as the case to enforce Eli Lilly's EMRs was brought before Law 82/2002 was passed, the foreign company, Eli Lilly needed to establish that the TRIPS Agreement was self-executing in Egypt. The court, therefore addressed the question of whether Prime Ministerial decree No. 547/2000, implementing the TRIPS provisions ahead

¹⁰³³ Since the decisions were not made in the Court of Cassation they are of limited precedential value. In addition, the transitional period to which they relate is now over.

¹⁰³⁴ See discussion of the Mailbox rule above in this Chapter

¹⁰³⁵ TRIPS Article 70(9)

¹⁰³⁶ TRIPS Article 70(8)(a)

¹⁰³⁷ Prime Ministerial Decree No. 547/2000

¹⁰³⁸ Prime Ministerial Decree No. 547/2000

¹⁰³⁹ *Apex Pharma v President of Academy of Science and Technology, Minister of Health and Population, the Prime Minister and the Legal Representative of the Company Eli Lilly* (subsequently *Apex v Eli Lilly (I)*) Decision of the Supreme Administrative Court (SAC) First Circuit 25 December 2004 Appeal number 6965/49

of the end of the transitional phase was effective. In order for such a decree to be legitimate, in a case where the decree would affect the rights of third parties, the court had to consider whether the decree alone was sufficient to implement the rules or whether, in order to be constitutional, it should be brought before Parliament for approval.

The Court of Appeal found in Eli Lilly's favour. TRIPS was self-executing and the Prime Ministerial decree was consistent with treaty obligations implementing the agreement. Apex, therefore, did not have the right to market their generic copies as Eli Lilly's drug had been registered, pending patent approval, with the Egyptian Patent Office (EPO), under the mailbox rule. This ruling seems consistent with a strict interpretation of the law and demonstrates the courts applying TRIPS horizontally between individuals in Egypt, consistent with a monist view of international obligations.

APEX V ELI LILLY (I) IN THE SUPREME ADMINISTRATIVE COURT

However, on appeal, the Egyptian Supreme Administrative Court reversed the decision, and found TRIPS not to be self-executing on the basis the provision was the type of rule that required implementing legislation and that the Prime Ministerial decree implementing EMRs was unlawful. It was not considered sufficient authority on which to limit the rights of the Egyptian pharmaceutical company as against its foreign competitor. Indeed the decree was described in the judgment as constituting 'a grave violation of the Constitution and the law.'¹⁰⁴⁰ It was, therefore, found that TRIPS was not self-executing as might have been expected; the TRIPS agreement itself could not be directly relied upon. The decision is consistent with Sloss's explanation¹⁰⁴¹ wherein judges tend to determine whether or not to apply a monist approach to international law depending on factors that include their nationalist or transnationalist inclinations. Egypt's experiences with occupation and with the international legal arrangements of the nineteenth and twentieth centuries are likely to lead judges, as in this instance, to be wary of provisions in international law that benefit developed country parties to the detriment of Egyptians. Apex subsequently received marketing approval for their generic copy of Eli Lilly's drug, and began selling it some months before a patent was granted for Zyprexa in Egypt.

¹⁰⁴⁰ Bahgat, Hossam and Rebecca Wright Rizk, Nagla and Lea Shaver (2010) *Access to Knowledge in Egypt New Research on Intellectual Property, Innovation and Development* Bloomsbury Academic at 67

¹⁰⁴¹ Sloss, David 'Domestic Application of Treaties' (2011) Santa Clara Law Digital Commons <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs>

A factor that, although not raised as a legal issue, seems to have been influential in the decision is the fact that Apex were proposing to sell the drug for a fraction of the cost of the original patented version. This question of access to medicines is one of great importance, and as Bahgat and Wright have rightly said in their analysis of the case, the decision would have been more significant had it directly addressed the public health implications arising from raising the level of patent protection, which it did not.¹⁰⁴² Nevertheless, it provides an insight into the initial reception of TRIPS by the Egyptian courts.

ELI LILLY V MINISTER OF HEALTH AND OTHERS (II) (COURT OF ADMINISTRATIVE JUSTICE (CAJ))

When Eli Lilly itself was eventually granted a patent for Zyprexa in October 2005 the company immediately sued both the Ministry of Health and Apex Pharma¹⁰⁴³ to prevent Apex manufacturing or marketing further generic copies and to withdraw any which were already available on the market. They also sought compensation for the period of several months during which Apex marketed their generic copy pending patent approval of Eli Lilly's drug. However, this application, too, was unsuccessful. The two decisions were based on a rational interpretation of the Egyptian constitution and the way in which treaties are implemented in Egyptian law. The interpretation, however, reveals a restrictive judicial approach to TRIPS implementation consistent with the desire among the legislature to protect Egyptian interests as expressed by Professor Saghir.

PFIZER V EGYPTIAN INTERNATIONAL PHARMACEUTICAL INDUSTRIES COMPANY (EIPICO) ZAGAZIG CIVIL COURT

Also in the transitional period, but immediately after Law 82/2002 came into effect, another pharmaceutical company, Pfizer, tried a different approach in an attempt to establish a decision that would favour producers of original pharmaceutical products against their Egyptian generic competitors. Eschewing the Administrative court, Pfizer brought their action only against the generic competitor EIPICO, a private company, and not the Ministry

¹⁰⁴² Bahgat, Hossam and Rebecca Wright (2010) Access to Medicine in Egypt in Nagla Rizk and Lea Shaver Access to Knowledge in Egypt Bloomsbury Academic Publishers

¹⁰⁴³ Eli Lilly v Minister of Health & others (II) (Court of Administrative Justice ruling of 20 December 2008)

of Health.¹⁰⁴⁴ Accordingly, the case was heard in civil court, in Zagazig, a town in the Nile delta about 50 miles away from Cairo.

Pfizer's drug (Lipitor) had been approved for marketing in 1998 and was awaiting the formality of a patent under the mailbox rules and acquired marketing approval in 2000. EIPICO, a generic competitor company, obtained marketing approval for a generic copy of Lipitor, called Ator, very shortly after Pfizer. Having spent years of research and development to produce the drug, Pfizer believed it would have been impossible for EIPICO to produce their copy of the drug without access to confidential information. Thus, in the absence of the grant of a patent, Pfizer based their case on Article 39(3) of the TRIPS Agreement,¹⁰⁴⁵ which requires Member States to protect confidential information against misuse. Articles 56-57 of Law 82/2002 implemented the TRIPS rules aiming to protect confidential information, which must be revealed as part of the patent application process, from disclosure and unfair practices. The only exception allowed in the provision is 'except to protect the public'.

Because the court lacked the necessary IP expertise, a report was commissioned from a body of experts, which concluded that Article 39(3) of TRIPS was not directly applicable. Neither, they concluded, did articles 56-57 protect the relevant information. Article 56, like Article 39(3), states that 'disclosure of information by the competent authorities, where necessary to protect the public shall not be deemed to constitute an infringement of the information owner's rights.' The reasoning again seems to have been a public interest defense and it may be that provision of cheap copies of Lipitor was deemed to be a necessary public health measure.

Without access to the report, however, it is difficult to ascertain the reasoning of the commission of experts in order to understand why they came to their decision. The court subsequently followed their conclusion and Pfizer's case, therefore, failed.

¹⁰⁴⁴ Pfizer v Egyptian International Pharmaceutical Industries Company (EIPICO) (ruling by Zagazig civil court of 30 April 2005) (subsequently Pfizer v EIPICO)

¹⁰⁴⁵ TRIPS Article 39(3) Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

PFIZER V MEMPHIS AND DELTA (DECISION BY COURT OF PROVISIONAL MATTERS OF 19 MAY 2004)

Subsequently, when an Egyptian private-public partnership combined to produce yet another copy of Lipitor,¹⁰⁴⁶ Pfizer sought an injunction to immediately prevent its sale and manufacture as provided for in Law 82/2002 Article 33, which states that

The holder of a patent [...] may request the president of the competent court, [...] to order conservatory measures against products or goods that are claimed to imitate a patented product [...]. The aforementioned order may be issued before instituting the proceedings [...]

Here again the application was rejected and, in this case, no appeal was allowed.¹⁰⁴⁷

THE VIAGRA CASE

Pfizer's internationally renowned drug for male erectile dysfunction, Viagra (Sildenafil), has been the subject of disputes against generic manufacturers in many jurisdictions. Egypt is not exceptional in this respect. However, in analyzing the decision made in Egypt, to some extent academic commentary on the case in Egypt seems to have missed the point.

Robert Bird and Daniel Cahoy have criticized the decision in Egypt to allow generic companies to market copies of Viagra on the grounds that the decision 'did not comply with TRIPS.'¹⁰⁴⁸ However, they accept that Egypt had until 2005 to implement provisions relating to pharmaceutical patents. They also concede that the case took place in 2002, well before those provisions entered into effect.¹⁰⁴⁹ The decision is consistent with the other similar cases discussed above. It is therefore, inaccurate to suggest, as they do, that in this respect Egypt's practice was not in line with its TRIPS obligations.

¹⁰⁴⁶ Pfizer v Memphis and Delta (Decision by Court of Provisional Matters of 19 May 2004)

¹⁰⁴⁷ *Domestic Legislation and Court Decisions on Intellectual Property Rights and Public Health in Egypt* <http://www.local-pharma-production.net/fileadmin/dateien/Country_studies/Country_analysis_-_Egypt.pdf> accessed 2014

¹⁰⁴⁸ Bird, Robert and Daniel R. Cahoy (2008) The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach *American Business Law Journal* at 25

¹⁰⁴⁹ Allam, Abeer 'Seeking Investment, Egypt Tries Patent Laws' *New York Times* (October 4 2002) <<http://www.nytimes.com/2002/10/04/business/seeking-investment-egypt-tries-patent-laws.html>> accessed 2014

Bird and Cahoy's paper has received tremendous accolades.¹⁰⁵⁰ However, its reasoning is incoherent. Having stated wrongly that the decision was not TRIPS compliant, they complain that

Even though Egypt had until 2005 to comply with TRIPS, its refusal to attempt *early compliance*¹⁰⁵¹ with the treaty when it had the opportunity to do so signals that its interest in compliance is at best lukewarm and that it might do only the minimum necessary to protect intellectual property rights under the agreement.¹⁰⁵²

There is a very significant difference between not complying with TRIPS and doing 'only the minimum necessary'. The policy space created to deliberately allow developing countries to enjoy flexibility in applying IP protection has been under constant challenge. The rhetoric and attitude of developed countries, in particular the US, is Orientalist in nature, creating myths about the inadequacy of non-US practices while aiming to promote US interests. Their incorrect assertions have been repeated by other academics, thus perpetuating an Orientalist myth that now has its own momentum.¹⁰⁵³

The consequences of appropriating Pfizer's valuable patent in this way are far-reaching. As Bird and Cahoy note, citing a leading pharmaceutical figure, it may only be possible to issue a compulsory license 'once'.¹⁰⁵⁴ Use of such an extreme measure leads to a loss of confidence in IP protection. Both the company directly affected and others who may be in the future are likely to be wary of future investment. Indeed, Bird and Cahoy provide evidence that immediately after the compulsory licensing of Viagra in Egypt, in 2002, Pfizer began to rethink its exposure to the Egyptian marketplace. However, in 2004, the president of Pfizer Middle East and Africa is cited saying that Pfizer decided to 'go ahead' and invest in Egypt anyway, after certain reassurances. The report states that despite considering other

¹⁰⁵⁰ Bird and Cahoy's article received the Holmes-Cardozo Award for Outstanding Submitted Conference Paper as well as the Ralph J. Bunche Best Paper Award at the Academy of Legal Studies in Business (ALSB) Annual Meeting, Indianapolis Indiana, August 2007.

¹⁰⁵¹ Emphasis mine

¹⁰⁵² Bird, Robert and Daniel R. Cahoy (2008) The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach *American Business Law Journal* 1 at 25

¹⁰⁵³ Feldman, Jamie 'Compulsory Licenses: The Dangers Behind the Current Practice' (2009) 8 *Journal of International Business and Law* 131 at 161

¹⁰⁵⁴ Bird, Robert and Daniel R. Cahoy (2008) The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach *American Business Law Journal* 1 at 24

options in the region, the company went on to make a 'long term commitment' to Egypt.¹⁰⁵⁵ The same source is, however, not sanguine about the Egyptian pharmaceutical market's future, pointing to its overall decline. This is borne out by other sources.

Objections to Bird and Cahoy's criticism of Egypt's IP law are, in the end, therefore, difficult to sustain. The compulsory licensing provisions are so long and convoluted as to be a cause of significant uncertainty.¹⁰⁵⁶ They are much broader and far more extensive than Article 31 TRIPS would suggest possible. In addition, the choice of drug over which Egypt's first compulsory license was granted is quite outrageous. Viagra does indeed have a real therapeutic effect and addresses a genuine problem. However, no one could take seriously the suggestion that the market authorization allowing generic companies to manufacture Viagra was granted in the interests of 'poor people'. Of all the very serious health needs in Egypt, erectile dysfunction is probably the least deserving of a compulsory license. The decision is derisory and brings into disrepute the very concept of the compulsory licensing system. In taking such a decision, the Minister seems to be deliberately snubbing the US pharmaceutical company as an act of resistance. Such a decision would be easier to explain were Egypt under occupation and lacking autonomous decision-making power.

The courts, however, have consistently made the point that until the transitional period for pharmaceutical patents expired they were not prepared to consider the possibility of the treaty being capable of being directly applicable. Measures that did not meet the highest standards of procedural compliance with constitutional legitimacy would be struck down. Provisions providing for exceptions that benefit Egyptian companies were widely interpreted particularly where there may be an impact on public health.

COMPULSORY/NON VOLUNTARY LICENSES

The possibility of compulsory, or non-voluntary, licensing of patents is not directly provided for by TRIPS but can be inferred through TRIPS Article 31: Other Use Without Authorization of the Right Holder. Its use is only contemplated in very restricted circumstances as it represents a serious derogation from a protected IP right.

¹⁰⁵⁵ Thompson, Richard 'Fight for Your (Intellectual Property) Rights' (2004) 48 *Middle East Economic Digest* at 4-5

¹⁰⁵⁶ Egypt Law 82/2002 Articles 23 and 24

There are a number of conditions for its use, which are often described as a three-step test. This test derives from Article 9(2) of the Berne convention, in the context of copyright law, but is applied generally wherever compulsory licensing of IP is contemplated. The article provides that,

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.¹⁰⁵⁷

This means that any decisions regarding non-voluntary licenses must be reached on a case-by-case basis, taking into account, ‘the individual merits’ of each.¹⁰⁵⁸ Egypt Law 82/2002 Article 24 (1) addresses this point and, thus, complies with TRIPS in this respect.

Further requirements that apply when issuing a compulsory license are found in TRIPS Article 31 which, in paragraphs (a) to (l), sets the conditions for authorizing use ‘by the government or third parties authorized by the government’.

Efforts must have been made, ‘to obtain authorization from the right holder on reasonable commercial terms and conditions’.¹⁰⁵⁹ Only if, ‘such efforts have not been successful within a reasonable period of time’ should a license be issued, unless the situation is one of a ‘national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.’¹⁰⁶⁰ Where the situation is an emergency or extremely urgent it is only necessary to inform the right holder as soon as reasonably practicable. Where public non-commercial use is contemplated, ‘the right holder shall be informed promptly.’¹⁰⁶¹ The language of Law 82/2002, in these respects, too, reflects that of TRIPS Article 31 in all respects.¹⁰⁶²

Public non-commercial interest is defined in Article 23(1)(i) as being not limited to, but including, ‘the preservation of national security, health, environment and food safety.’

¹⁰⁵⁷ Article 9(2) Berne Convention for the Protection of Literary And Artistic Works (Paris Text 1971)
Underlining mine

¹⁰⁵⁸ TRIPS Article 31(a)

¹⁰⁵⁹ TRIPS Article 31 (b)

¹⁰⁶⁰ TRIPS Article 31(b)

¹⁰⁶¹ TRIPS Article 31(b)

¹⁰⁶² Law 82/2002 Article 23(1)

Article 23(1)(ii) allows for the immediate issuance of a compulsory license by the relevant minister in ‘emergency cases or conditions of utmost necessity’. Neither of these provisions is unreasonable, however, in Article 23(1)(iii) another category of public interest is contemplated that includes the ‘support of national efforts in vital sectors for economic, social and technological development.’ While the provision is qualified, stating that such a license should not cause ‘unreasonable prejudice to the patent owner’s rights’ and it should be ‘subject to the legitimate interests of third parties,’ it is not absolutely clear whether the exploitation envisaged would be commercial or non-commercial. Nor is it clear exactly when a compulsory license would be justified in such circumstances. The owner of the patent, however, ‘shall have the right of obtaining a fair consideration in return for exploiting his invention,’ and ‘the economic value of the invention shall be taken into account in estimating that consideration.’ This should be determined by ‘the committee.’¹⁰⁶³

Even if the exploitation envisaged is non-commercial, Article 23(1)(iii) seems to go beyond what was envisioned by Article 31 TRIPS in that public interest is interpreted so widely, taking into account the support of ‘vital sectors for economic, social and technological development’ although strictly speaking the language of TRIPS seems potentially to support such an interpretation. If commercial, then the provision would clearly be in breach of TRIPS unless in the context of an emergency. As noted above, where public non-commercial use is considered there seems to be no requirement in Law 82/2002 for, ‘efforts to [be made to] obtain authorization from the right holder on reasonable commercial terms and conditions.’¹⁰⁶⁴ In accordance with the exception provided for in Article 31, which states ‘this requirement may be waived by a Member in the case of national emergency or other circumstances of emergency or in cases of public non-commercial use,’ Egypt’s drafters have chosen to make the need for ‘prior negotiations’ with the patent owner optional although, ‘the owner of the patent shall be notified promptly of the decision,’¹⁰⁶⁵ consistent with Article 31.

Article 23(2) lists circumstances in which medicines that are under patent can be compulsorily licensed. These include where medicines are considered to be excessively

¹⁰⁶³ Law 82/2002 Article 23

¹⁰⁶⁴ TRIPS Article 31(b)

¹⁰⁶⁵ Law 82/2002 Article 23(1)(i)

expensive, inferior in quality or not available in sufficient amounts, as well as where the patent relates to 'critical cases, incurable or endemic diseases.' Both processes and the products themselves of an invention that addresses any stage of treatment or disease prevention can be subject to such licensing. The Article requires prompt notification but makes no mention of remuneration or compensation and makes no mention of limits on the license. Instead, the provisions of Article 24 address the issues relating to the scope and duration of a compulsory license. Where drugs are concerned, it is the Minister of Health who requests a compulsory license. To a certain extent this may be reassuring to a patent owner in that the decision-making must take place at the highest level of government. However, it also politicizes the process.

Correa has been critical of the limited amount of manoeuvrability left for developing countries. After assessing the policy options available to developing country members of the WTO wanting to implement TRIPS without accepting standards at a level higher than strictly necessary he has concluded that even when the flexibilities are used to their fullest extent, the agreement means that developing countries are forced to entrench one-sided benefits 'whereunder Northern countries generate innovation and Southern countries constitute the market for the resulting products and services.'¹⁰⁶⁶ This evident imbalance is a constant running sore. On the face of it, however, Egypt's compulsory licensing provisions, as they stand, seem to provide considerable flexibility, at least in theory.

COMPULSORY LICENSING PROVISIONS

Both Serageldine and Loutfi criticized the length and breadth of the compulsory licensing provisions while wishing to retain the right to use them in principle. In Serageldine's opinion, the way in which they have been interpreted is excessive. Referring to the drafting process of Law 82/2002, she said of the law

It was badly accepted, it was very badly accepted; so the compulsory licensing is in the law. It is there to appease public opinion. OK, but you have articles 17, 18, and 19 just to appease public opinion. You don't need all of this.

¹⁰⁶⁶ Correa, Carlos María *Intellectual Property Rights, the WTO and Developing Countries: the TRIPS Agreement and Policy Options* (Zed Books 2000) at 5

Serageldine cited the specific circumstances of Egypt to be a legitimate reason for retaining the 'sovereign right' of the Ministry of Health to issue compulsory licences in the face of epidemics. She explained that the high population density in the ten per cent of habitable land of Egypt, 'a small strip' surrounded by desert, causes a problem with epidemics. In addition, as a developing country with large numbers of people suffering from curable diseases, and an inadequate budget to provide for them, it is important to retain the power to compulsorily licence medication.

However, both Serageldine and Loutfi complained that the provisions are too long. Loutfi, complained that it was contrary to good practice to have 'more than one hundred lines for one article'. Loutfi also criticised the compulsory licensing rules for being 'excessively broad', and 'containing legal errors'. He remained in favour of keeping compulsory licensing provisions in the law but considered the inclusion of compulsory licensing to be useful merely 'as a bargaining tool' not as something to be used. To that end he favoured their reform and rephrasing in more conciliatory language.

We are interested in having this system but not in using it [...] just as a walking stick. Just to warn... If you are not cooperative enough, we will take a decision. But for the time being we did not issue one single compulsory licence since 1949 till now. For more than 61 years we did not have [...] one single compulsory license, then why should we adopt this hostile wording regarding compulsory licenses?

IP AND FOREIGN DIRECT INVESTMENT (FDI)

A problem with aggressively asserting the right to issue compulsory licenses is that it may discourage foreign investment. There is some evidence that this has, indeed been the case.¹⁰⁶⁷ Dr Amany Asfour, President of the Egyptian Business Women's Association and the African Association for Women's Empowerment, cites figures for FDI in Egypt that seem to fluctuate wildly.

¹⁰⁶⁷ Bird, Robert and Daniel R Cahoy (2008) 'The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach' *American Business Law Journal* at 19; Asfour, Amany 'FDI in Egypt during 5 years' Mediterranean Congress of Business and Professional Women United Nations Economic Commission for Africa
<[https://www.google.co.uk/#q=Asfour%2C+Amany+'FDI'+in+Egypt+during+5+years'+Mediterranean+Congress+of+Business+and+Professional+Women+](https://www.google.co.uk/#q=Asfour%2C+Amany+'FDI'+in+Egypt+during+5+years'+Mediterranean+Congress+of+Business+and+Professional+Women+>)> accessed 2014

VOLUME OF FDI TO EGYPT¹⁰⁶⁸

Direct Investment in Egypt (net)

	In Millions of US Dollars					
	1997/98	1998/99	1999/00	2000/01	2001/2002	2002/2003
Direct Investment in Egypt (net)	1104	711	1656	509	428	701

According to these figures, there is certainly a massive drop in FDI in the period preceding and up to the passing of IP law 82/2002 and a marked increase following the passing of the law. Whether or not this can be attributed to the level of IP protection, however, is less certain. Bird and Cahoy certainly make the link in their 2008 journal article,¹⁰⁶⁹ but Cynthia Ho interrogates their assumptions, pointing out that ‘the actual empirical data is equivocal on whether compulsory licenses dampen innovation.’¹⁰⁷⁰ It is certainly important to base any pronouncements on the effect of such measures on sound data, given the potential consequences for individuals relying on cheaper generic versions of drugs.

BOLAR EXCEPTION

Egypt has also included a provision similar to the Canadian measure that became known as the Bolar Exception. Even before Egypt’s law was implemented, in 2002, however, it had been decided in the WTO DSU that this type of provision was not TRIPS compatible.

The Law 82/2002 Article 10.5 exception allows a generic producer to begin stockpiling copies of an in-patent drug before its expiry date in order to begin profiting from its copies as soon as the drug falls out of patent. The provision permits the local pharmaceutical producer to proceed

¹⁰⁶⁸ Asfour, Amany ‘FDI in Egypt during 5 years’ Mediterranean Congress of Business and Professional Women United Nations Economic Commission for Africa <<https://www.google.co.uk/#q=Asfour%2C+Amany+FDI+in+Egypt+during+5+years'+Mediterranean+Congress+of+Business+and+Professional+Women+> > accessed 2014 citing Monthly Economic Digest (table 21) at 30

¹⁰⁶⁹ Bird, Robert and Daniel R Cahoy (2008) ‘The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach’ *American Business Law Journal* at 19-27

¹⁰⁷⁰ Ho, Cynthia M ‘Patent Breaking Or Balancing?: Separating Strands Of Fact From Fiction Under Trips’ (2008-2009) 34 *North Carolina Journal of International Law and Commercial Regulation* 371 at 452

during the protection period of a product, with its manufacturing, assembly, use or sale, with a view to obtain a marketing license, provided that the marketing starts after the expiry of such a protection period.

In Canada's dispute with the EU¹⁰⁷¹ the panel found that although using the patented invention in order to obtain marketing approval was acceptable, the stockpiling of copies of in-patent products prior to expiry of the patent was not. Generic companies tried to argue that in order to quickly obtain an advantage in getting generic products quickly to market on expiry of the patent they needed to start manufacturing early. However, the argument was not accepted. The Egyptian legislation seems to allow stockpiling in that manufacturing, assembly, use or sale are allowed activities as long as they are connected to obtaining a marketing license. This is strange, given that the Canadian panel decision was adopted on April 7, 2000 and Canada reported compliance with the decision by October of that year. The Egyptian IP law was not passed until June 2002. The legislators must have been aware of the Canadian dispute so the decision to include an exception that is clearly not consistent with the ruling suggests a deliberate intention not to comply. This seems to fall outside the leeway allowed by TRIPS.

TRIPS-PLUS: THE ECONOMIC COURTS

Egypt's new Economic Courts have found favour with the international community. The court process in Egypt has long been described as complicated, slow and non-transparent, and enforcement of IP protection in Egypt has been labeled weak.¹⁰⁷² The criticisms come from both foreign investor and domestic perspectives,¹⁰⁷³ which is important to note as it demonstrates that the need for reform cannot be linked entirely to foreign interests. In April 2010, a report from the Organization for Economic Cooperation and Development, Middle East and North Africa (OECD-MENA) region stated, that 'Egypt is notorious for the inefficiency and complexity of its commercial court system – the single biggest grievance of foreign and local investors alike'.¹⁰⁷⁴ Al-Ali and Mihail, echoed the concern that the biggest

¹⁰⁷¹ Panel Report, Canada – Patent Protection of Pharmaceutical Products, WT/DS114/R, adopted 7 April 2000, DSR 2000:V, 2289

¹⁰⁷² *Ibid*

¹⁰⁷³ Egypt: International Intellectual Property Alliance (IIPA) 2010 Special 301 Report on Copyright Protection and Enforcement <<http://www.iipa.com/rbc/2010/2010SPEC301EGYPT.pdf>> accessed 2014

¹⁰⁷⁴ Business Climate Development Strategy Phase 1 Policy Assessment EGYPT DIMENSION II-3 Business Law and Commercial Conflict Resolution April 2010 Partner: European Commission report issued under the

barrier to IP protection in Egypt was the court system, pointing out that in addition to the delays, the process was not transparent; 'only decisions issued by the Cassation Court are published [and] no record is kept of decisions issued by the appeal and first instance courts.'¹⁰⁷⁵

The problem of transparency in decision-making is a frustration expressed by Richard Castellano, who points out that foreign investors may be less likely to take flight, following decisions contrary to their interests, if they are able to read the decisions and understand the legislative process even if a court decision does not favour them. Castellano points to the UK and US as instructive in this respect and to China as a developing country jurisdiction where, for example, a decision made against the Viagra patent was easier to accept because the process was more open than similar decision-making processes in Egypt and Argentina.¹⁰⁷⁶ A desire for more openness and transparency in the court system has been frequently expressed.¹⁰⁷⁷ Bekhiet told me, in 2008, that the Arab League was working to make the IP case law from all countries in the region available on a publicly accessible website in English as well as Arabic. However, this has yet to materialise in reality.

Moreover, the length of time it takes to reach the highest level of litigation is considerable, with the Cassation Court taking 'up to eight years to rule on an appeal.'¹⁰⁷⁸ Very few parties have the time, inclination or the money to take a case all the way through the system.

There was, therefore, a real need for reform of the court system. This was addressed in 2008 when Economic Courts were created under Law 120/2008 to address certain types of commercial disputes. The IP law is just one of the seventeen laws that are adjudicated under the Economic Courts,¹⁰⁷⁹ which also have specialized Appeal Courts. For civil cases, in

authority of the Steering Groups of the MENA-OECD Initiative
<<http://www.oecd.org/dataoecd/49/36/46341549.pdf>> accessed 2014

¹⁰⁷⁵ Al Ali, Nermien and Robert Mihail 'Egypt: Renewed Enthusiasm for IP Protection' (2007) *Building and Enforcing Intellectual Property Value* 245 at 246

¹⁰⁷⁶ Castellano Richard 'Patent Law for New Medical Uses of Known Compounds and Pfizer's Viagra Patent' (2006) 46 *IDEA-the Intellectual Property Review* 283 at 310

¹⁰⁷⁷ 'Transparency International Concerned About Egyptian Court Ruling Against Civil Society' Transparency International Secretariat (June 4, 2013) http://www.transparency.org/news/pressrelease/transparency_international_concerned_about_egyptian_court_ruling_against Abdelrahman, Maha *Egypt's Long Revolution Protest Movements and Uprisings* (Routledge 2015) forthcoming

¹⁰⁷⁸ Al Ali, Nermien and Robert Mihail 'Egypt: Renewed Enthusiasm for IP Protection' (2007) *Building and Enforcing Intellectual Property Value* 245 at 246

¹⁰⁷⁹ Article 4 Egypt Economic Courts Law 120/2008

order to expedite the speed with which cases are concluded, appeals fall under the Economic Courts' appeal system; there is no right to appeal at the level of Cassation.

A requirement of TRIPS is that the agreement should be effectively enforced.¹⁰⁸⁰ It is also a TRIPS requirement that enforcement be speedy, fair and not excessively difficult.¹⁰⁸¹ However, Article 41(5) makes it clear that there is no need for IP to be given special status in the court system.

[TRIPS] does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.¹⁰⁸²

Egypt has chosen to privilege IP together with other business-related subject matter by taking the matters out of the much-criticised general court system. This is clearly a TRIPS-Plus measure.

Serageldine stressed that the demand for the courts dealing with economic matters came from Egyptians and pre-dated Egypt's membership of the WTO. She had criticized the way in which IP cases were previously handled as inadequate so was pleased that IP issues had been brought within the economic court system. All three interviewees praised the establishment of the courts for greatly increasing the speed with which IP cases proceed through the system.

There is an improvement in the specialized knowledge among judges of the Economic Courts. This is particularly important when dealing with IP. The complicated web of treaties dealing with IP make it a highly specialized subject and the general commercial and administrative courts were not sufficiently well informed to manage IP disputes adequately. Bekhiet, however, contrasted the Egyptian system of Economic Courts unfavourably, in this

¹⁰⁸⁰ TRIPS Agreement Part III: Enforcement of Intellectual Property Rights Articles 41-61

¹⁰⁸¹ TRIPS Article 41(2) 'Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.'

¹⁰⁸² TRIPS Article 41(5)

respect, with the Sudanese approach, unique in the Arab area, where dedicated IP Courts were established in 2002. As a result of focusing only on IP cases, the Sudanese IP judges, who have been trained by WIPO, have a very high degree of expertise. In Egypt, with IP only one of 17 topics that fall under the Economic Courts' jurisdiction, the judges are not as specialized. Bekhiet sees the lack of specialized knowledge among judges, lawyers and the legislature as a challenge to be overcome. Both Loutfi and Serageldine agree that they would like to see greater specialization in the courts.

It is, however, problematic that the right of appeal from the economic courts is limited. Professor Loutfi, among others, has criticised them for being unconstitutional in this respect. In order to be able to take a case to appeal there is an arbitrarily set minimum value, below which there is no right to appeal. It seems likely that the exclusion of some cases from the possibility of appeal is a problem that will need to be addressed.

Another problem with economic courts stems from the fact that they have been created to address the needs of the trading community, rather like the Mixed Courts of the nineteenth century. However, while there may be parallels in this regard and indeed, on their formation, they were attacked on this basis, the fact that the courts do not discriminate between foreigners and Egyptians means that they are likely to continue to be accepted and welcomed as part of the Egyptian court system today.

CONCLUSIONS

The endorsement by both chambers of parliament, and publication in the Official Gazette on June 2, 2002, of Egypt Law 82/2002 ended the debate over whether TRIPS could be self-executing, and whether or not it should be implemented, in Egypt.

Not everyone has taken a gloomy view of compliance with the TRIPS agreement. In a message on the Egyptian Patent Office (EgyPO) website in 2007, Professor, Dr Maged Mostafa Elshrbeni, President of the Academy of Scientific Research and Technology at the EgyPO under the Mubarak administration, expressed high expectations that complying with TRIPS would bring substantial benefits and hoped that the protection of IP would help Egypt 'achieve...prosperity, welfare and progress.'¹⁰⁸³ The goals are laudable. However, since the president of the EgyPO posted his hopeful sentiment, poverty has continued to worsen. According to the World Bank, in Egypt 'the poverty rate increased from 21.6 percent in 2008/09 to 25.2 percent in 2010/11'.¹⁰⁸⁴ The situation has further degenerated since the January 2011 'revolution', with the United Nations documenting a 'significant' rise in poverty and food insecurity.¹⁰⁸⁵ Another UN publication, in May 2013, has published figures showing that 'between 2009 and 2011, some 15% of the population moved into poverty, twice the number who moved out of poverty.'¹⁰⁸⁶ Furthermore, inequality persists. Privileged groups became much wealthier under the Mubarak regime and the consequent inequality is perceived by many to have been a cause of the January 25th, 'revolution'.¹⁰⁸⁷ While a small element among the rich may still be able to afford to pay high prices for IP protected imported technology, the poor certainly cannot. What's more, the money that

¹⁰⁸³ Elshrbeni, Professor, Dr Maged Mostafa President of the Academy of Scientific Research & Technology http://www.egypo.gov.eg/inner/english/News_Info_1.html This message has now been removed from the EPO website, however, it provides insight to a pro-IP trend in Egypt and an impression that stronger IP will aid growth and development.

¹⁰⁸⁴ 'Egypt Overview' (2013) The World Bank <http://www.worldbank.org/en/country/egypt/overview>

¹⁰⁸⁵ 'Hunger, poverty rates in Egypt up sharply over past three years' UN Report UN News Centre (21 May 2013) <<http://www.un.org/apps/news/story.asp?NewsID=44961#.UI56ShaBXdk>> accessed 2014

¹⁰⁸⁶ UNited in Egypt: the Status of Poverty and Food Security in Egypt (May 2013) 35 Newsletter from the United Nations in Egypt <http://www.un.org.eg/pdf/39_United%20in%20Egypt%20issue%20May%202013.pdf> accessed 2014

¹⁰⁸⁷ Abdel Meguid, Nivin S. et al 'The Economic Causes of the Egyptian Revolution "January 25, 2011"' in Egyptian and Arab Revolution Scholarly Works The American University in Cairo Digital Archive and Research Repository <http://dar.aucegypt.edu/bitstream/handle/10526/2710/Economic_Causes_of_the_Egyptian_Revolution.pdf?sequence=2> accessed 2014

flows out of the country in IP rents adversely affects the country's ability to invest in the measures necessary to improve conditions.

The severe socio-economic problems of poverty and inequality pose an unrelenting challenge, which any government in Egypt must address. It is questionable, however, whether strengthening IP law is helpful in this respect or indeed whether the international IP system is capable of fostering innovation and development in countries such as Egypt. On the contrary, it may make matters worse.

The text of Law 82/2002 represents and embodies the difficult decisions that Egyptian legislators had to make in order to balance the demands of international obligations against the anticipated negative effects of suddenly raising IP standards domestically to a level dictated by the requirements of already developed countries. Astonishingly, for such far-reaching changes, the potential impact of increasing levels of IP protection so rapidly has never been properly assessed.¹⁰⁸⁸ The fact that it has not proved possible to assess exactly how to apply IP law to best harness creativity and spread useful knowledge means that the subject is very susceptible to pressure from those who would benefit. Egypt's history means that there is a particular sensitivity to the possibility that TRIPS measures may advantage foreign interests to the detriment of Egyptian interests, thus postcolonial analysis remains relevant. TRIPS has narrowed the policy space and ability to develop laws more in keeping with Egyptian legal traditions to manage IP, although some of the provisions in Egypt's IP law have been included to try to offset concerns that prioritizing foreign interests will cause Egyptian interests to suffer.

TRANSPLANTING TRIPS

The language of TRIPS has travelled, the 'baggage'¹⁰⁸⁹ has landed, and it has been transposed, translated into Arabic and implemented consistently with the agreement. Legrand is correct when he points to the impossibility of direct transplantation.¹⁰⁹⁰ In

¹⁰⁸⁸ Iskander, Dina 'TRIPS and Access to Medicines in Egypt' in *The New Political Economy of Pharmaceuticals: Production, Innovation and TRIPS* Ed Hans Löfgren and Owain David Williams (2013 Palgrave Connect) at 91

¹⁰⁸⁹ Legrand, Pierre The Impossibility of Legal Transplants (1997) 4 Maastricht Journal of European and Comparative Law 111 at 114

¹⁰⁹⁰ Legrand, Pierre The Impossibility of Legal Transplants (1997) 4 Maastricht Journal of European and Comparative Law 111

translating the treaty into Arabic subtle changes of emphasis inevitably occur. In addition, in order to adapt to the specific circumstances of Egypt, adjustments have had to be made. Just as Manouri (in the nineteenth century) and Sanhuri (in the mid-twentieth century), when adapting the French Civil Code for use in Egypt, found it necessary to shape the law to meet Egyptian needs, in implementing the TRIPS agreement the drafters of Law 82/2002 had to consider the specific, cultural, linguistic and religious context of Egypt. The legislation nevertheless maintains a high level of consistency of harmonization with the multilaterally agreed international norms.

Although interpretation of its provisions may require clarification, having implemented the treaty obligations, the new IP law can be relied upon. However, the TRIPS agreement could not be relied upon in the absence of domestic legislation. The Mail Box cases¹⁰⁹¹ show judges using the law defensively to prevent foreign patent owners from asserting an interpretation of Egypt's approach to international law that would give them early access to IP protection despite the flexibilities allowed in the TRIPS agreement. In ruling against the pharmaceutical companies the courts have avoided this outcome and ensured that, just as in the United States, private individuals have to await the domestic implementation of treaty rules. Although case law in Egypt is not precedential, as in the common law system, this decision could have wider implications beyond the area of IP. It will now be harder to argue that Egypt's approach to international law is monist.

ORIENTALISM

Disapproval of Egypt's IP implementation and enforcement comes most notably from the United States through the US Trade Representative's Special 301 reports, and from US academics. However, the strength of some US criticism does not seem entirely warranted. In assessing Egypt's compulsory licencing system under law 82/2002, Bird and Cahoy, two US academics, criticize the language of the provisions allowing for compensation where a product is subject to such licensing. In analysing the terminology of the statute and complaining that the language deviates from TRIPS,¹⁰⁹² they seem to ignore the fact that translation into Arabic is already a departure from English but they do not suggest an

¹⁰⁹¹ See discussion in Chapter 6

¹⁰⁹² Bird, Robert and Daniel R. Cahoy (2008) 'The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach' 45 *American Business Law Journal* 283 at 305

alternative, preferred Arabic term. They focus on the difference between 'adequate' and 'fair' in Article 24(8) Egypt Law 82/2002. The translation of the Arabic term 'عدل' is 'just,' 'fair,' 'equitable' as they say. Their complaint is that in choosing to translate the term in this way the Judges will have greater discretion in applying the law. In fact, their analysis is Orientalist in its intention to tie Egypt to a more strictly positivist translation and interpretation of TRIPS. The writers concede that 'the interpretation may be unnecessarily nuanced,' however, the damage is done. Their audience has already received the impression that Egypt's implementation of TRIPS is somehow faulty. In fact, the reference to equity is consistent with the way in which IP law has been implemented in Egypt since, at least, the late nineteenth century, as the records of the Mixed Courts show. It is also consistent with an approach that aims to ensure that IP law does not operate to the detriment of the public interest.

The Viagra case¹⁰⁹³ was, perhaps, not the best battleground to try out compulsory licensing in defence of the public interest. It is difficult to see how the compulsory licensing of a product to treat male erectile dysfunction could possibly be a public health priority of the highest order, sufficient to justify aggressive state intervention to undermine the private rights of a patent holder. However, rhetorically, the case has been used to make a point regarding strength of feeling in Egypt about attempts to corner Egypt into conceding further than the TRIPS agreement requires. It is a response which is confrontational and probably not at all helpful. Bird and Cahoy describe the use of compulsory licensing in this situation as 'reckless.'¹⁰⁹⁴ It is hard to argue with their assessment in this instance, but they may have exaggerated the potential flight of FDI following the use of a compulsory licence. However, where compulsory licensing is used without clear, careful reasoning and comprehensible justification, and where there is very limited transparency, it is likely to affect the reputation of the licensor and may give investors pause for thought.

¹⁰⁹³ See discussion in Chapter 6

¹⁰⁹⁴ Bird, Robert and Daniel R. Cahoy (2008) 'The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach' 45 *American Business Law Journal* 283 at 305

UNJUSTIFIABLE DEPARTURE FROM TRIPS

While, on the whole the legislation complies in a literal sense with TRIPS, it is true that it is extremely defensive in some respects, which makes, in certain limited cases, conformity with TRIPS seem illusory.

Article 148 Law 82/2002,¹⁰⁹⁵ which allows for translation of copyright works into Arabic where the creator has not done so within three years, does not seem to be justified by any reasonable interpretation. It is no longer a valid exception to the Berne Convention rules, it contravenes the TRIPS agreement and there is another provision that adequately addresses copying for educational purposes.¹⁰⁹⁶ This provision allows for 'fair' compensation to be paid to the author, as in the case of compulsory licensing discussed above. This is a means of ensuring that copies of useful works are available in Arabic, which addresses the important issue of access to knowledge. In doing so, it also makes it possible to prevent excessively high prices putting knowledge beyond the means of Egyptians. Article 148 is unhelpful and only serves to attract negative attention to the IP law.

POSTCOLONIALISM AND HISTORICAL RESONANCE

In Egypt, modernization and innovation have become associated with foreigners and foreign methods. The link was made during the rule of Muhammad Ali, and has continued, with both positive and negative connotations. Advantages from modernization, however, are perceived as accruing mainly to foreigners and to a small Egyptian elite. No easily discernible benefits or improvements in living conditions have accrued to the majority of the population, although industrialisation led them to have hopes of a better life. Since 'urbanization is an indispensable part of modernization,' millions have moved to Egyptian cities away from rural Egypt in this quest and experienced only disappointment.¹⁰⁹⁷ Additionally, the identity of many Egyptians, which had become associated with Islam and being practising Muslims, has been eroded by increasing secularism attributed to, in part, foreign legal transplants. The legal reasoning that allows for foreign codes to be used to fill the gaps in Islamic law is complex, sophisticated and unconvincing to Egyptians whose

¹⁰⁹⁵ See discussion in Chapter 6

¹⁰⁹⁶ Article 170 Egypt Law 82/2002

¹⁰⁹⁷ Zinkina, Julia and Andrey Korotayev Urbanization Dynamics in Egypt: Factors, Trends, Perspectives (2013) 35 *Arab Studies Quarterly* 20

educational background means that they do not have access to that type of sophistry because of the poverty of the educational system. They also do not benefit from it. From the capitulations to the Mixed Courts, independence, socialism and globalization this is the pattern that is repeated. The relative power of Egypt and the West remains unequal and treaties continue to be agreed without representation or full information and where the parties representing Western interests clearly have a dominant position.¹⁰⁹⁸

PENDING AMENDMENTS

Further revisions of the IP law are proposed. Prior to the January 2011 ‘revolution’, amendments were poised for parliamentary consideration,¹⁰⁹⁹ but they are still to be agreed three years later. There are some informal indications regarding the likely nature of some of the amendments but as yet there is no clarification as to their exact form. Due to the continuing political situation they have not been passed and there is still opportunity for alteration. However, eventually, IP issues will have to be addressed. IP is now inextricably linked to international trade, which will be vital to Egypt’s post-revolution recovery. In a carefully worded Special 301¹¹⁰⁰ report, in 2012, the US welcomed ‘the [Egyptian] Government’s recognition that IPR is important both to Egypt’s economic development and to enhanced trade relations.’¹¹⁰¹ The USTR has acknowledged that Egypt has continued to ‘improve IPR protection and enforcement’ since the revolution. It is important, however, that the IP law should genuinely promote meaningful development in Egypt and that the IP law should not cause the negative effects predicted by many.¹¹⁰²

Serageldine and Loutfi expected that planned major revisions to Egypt’s IP law, long on the legislative agenda, would have been passed in late 2010. Loutfi qualified his prediction with,

¹⁰⁹⁸ Drahos, Peter and John Braithwaite *Information Feudalism* (Earthscan 2002) at 15

¹⁰⁹⁹ ‘Legislative Agenda’ Egypt News: Politics (November 4 2009) Masrawy Portal <<http://www.masrawy.com>> accessed 2010

¹¹⁰⁰ Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100-418, §§ 1301, 1303, 102 Stat. 1107 (codified in 19 U.S.C. § 2242 (1988)). The US Special 301 procedures will be discussed in more detail later.

¹¹⁰¹ Special 301 Report: Egypt (2012) Office of the United States Trade Representative <<http://www.ustr.gov>> accessed 2014

¹¹⁰² The EIPR among others: see the press release and report by the Egyptian Initiative for Personal Rights (EIPR) ‘New Study Urges Egyptian Government to Use TRIPS Flexibilities to Protect People’s Right to Health’ (Tuesday 11 January 2005) <<http://eipr.org/en/pressrelease/2005/01/11/247>> and Egyptian Initiative for Personal Rights (EIPR) Policy Paper on Intellectual Property Rights ‘The TRIPS Agreement and Egypt’s Responsibility to Protect the Right to Health’ <<http://eipr.org/en/report/2005/01/01/848>> accessed 2014

'if everything's OK'.¹¹⁰³ Perhaps Loutfi's caveat came from a premonition of the upheaval of revolution, which meant that the amendments were delayed. Since then IP has not been a top priority. It was noted in the months after the 'revolution' that Egypt's economy shrank, 'the government [...] haemorrhage[d] foreign exchange, and investment in Egypt [...] dropped precipitously.'¹¹⁰⁴ The government needs urgently to address many urgent concerns. New IP legislation will only be possible once the political situation has been resolved. With the amendments to the IP law still awaiting attention, the choices for the legislature are challenging. It is attractive to imagine that the expressed intention of Egyptian legislators to utilise the flexibilities of TRIPS to the maximum extent in implementing TRIPS, echoed by the people I interviewed, would be realised. However, this is unlikely. The pressure to provide incentives for FDI by providing more IP protection is likely to be more compelling than other considerations. Nevertheless, it is hoped that the forthcoming amendments to the IP law will support, rather than hinder, Egypt's economic recovery.

¹¹⁰³ Hossam Loutfi Interview

¹¹⁰⁴ Sharp, Jeremy M 'Egypt in Transition' Congressional Research Service for Congress August 23, 2011 <<http://www.unhcr.org/refworld/pdfid/4e5c81712.pdf>> accessed 2014

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APPENDIX

RESEARCH PROPOSAL, CONSENT FORM, QUESTIONNAIRE

Research Proposal and Goals

In 1996, a World Bank report¹¹⁰⁵ predicted that the effect of increased intellectual property (IP) legislation on Egypt would be the most significant result for Egypt of World Trade Organization (WTO) membership. This is because the Trade Related Aspects of Intellectual Property (TRIPS) agreement establishing minimum IP standards was attached to the WTO agreement and is binding on all members. The following questions are, therefore, raised:

1. How will Egypt manage its IP commitments in the face of both external pressure and internal concerns? and
2. How much leeway can Egypt reasonably expect within the WTO framework?

Egypt's law 82/2002 collects all aspects of IP law and claims compliance with international agreements, including TRIPS. It has, nevertheless, been criticized for inconsistency,¹¹⁰⁶ while the court process has been described as complicated, slow and non-transparent¹¹⁰⁷. This is uncomfortable from both foreign investor and domestic perspectives. It seems likely that changes to both legislation and enforcement procedures may be necessary in order to effectively accommodate all interests. Further clarification of the international legal position may also be desirable.

The unique legislative history of Egypt is pertinent with occupation and colonisation contributing to the development of Egyptian law through Islamic *Sharia* Law, the French civil code, and aspects of British common law. This historical context will be used to provide a broader context through which modern conditions can be understood. In particular, the evolution of the Egyptian approach to IP will be considered. It may be possible to explain and even justify some limited divergence from TRIPS.

Research into this area is vital to all stakeholders, including Egyptians, foreign investors and other developing countries. Research findings could potentially inform policy and practitioners, and contribute to existing international IP knowledge within the context of continued appraisal and interpretation of TRIPS. This research may also further enhance understanding of the position of developing countries within international laws that frequently seem to promote a Western agenda.

In order to undertake this study the following methods will be applied:

1. The relevant Egyptian legal texts will be examined as well as the applicable international treaties.
2. Interested parties in Egypt will be sought to provide documentation or anecdotal evidence to further inform the texts.
3. Evidence from other jurisdictions will be considered, in particular case law at international and national levels. This will be used to predict potential outcomes of Egypt's approach where there is a lack of available evidence from local disputes.

¹¹⁰⁵ Hoekman, Bernard and Arvind Subramanian. 'Egypt and the Uruguay Round'. *Policy Research Working Paper 1597*. The World Bank Europe and Central Asia and Middle East and North Africa Technical Department, Private Sector and Finance Team. May 1996. <http://econ.worldbank.org/view.php?id=901>

¹¹⁰⁶ International Intellectual Property Alliance (2005) Special 301 Report. Egypt <http://www.iipa.com/rbc/2005/2005SPEC301EGYPT301.pdf>

¹¹⁰⁷ *Ibid*

Consent Form: Project title: Egypt's New IP law (82/2002) in Context

Information and/or materials not in the public domain gathered during this research will be treated as confidential or used according to the authorisation given under this agreement. Data collected will be securely stored. Please answer each statement below, concerning the collection and use of the research data.

I have read and understood the sheet outlining the research proposal and goals.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I have been given the opportunity to ask questions about the study.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I have had my questions answered satisfactorily	Yes <input type="checkbox"/> No <input type="checkbox"/>
I understand that I can withdraw from the study at any time without having to give an explanation.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I agree to the interview being audio-taped and its contents being used for the specific purposes outlines here.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I agree to being identified in this interview and in any subsequent publications or use.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I agree to my comments and the information I provide being used but without attribution.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I agree to the transcripts (in line with conditions outlined above) being archived and used by other bona fide researchers.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I agree to my audiotapes (in line with conditions outlined above) being archived and used by other bona fide researchers.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I would like to see a copy of my transcript.	Yes <input type="checkbox"/> No <input type="checkbox"/>
I would like my name acknowledged in the report (without linking it to content or quotation).	Yes <input type="checkbox"/> No <input type="checkbox"/>

Name (printed) _____

Signature _____ Date _____

Interviewee information:

Name: _____

Institution: _____

Position: _____

Other relevant information: _____

Prompt Questions

1. How much time do you spend managing intellectual property matters? 75-100% <input type="checkbox"/> 50-75% <input type="checkbox"/> 25-50% <input type="checkbox"/> less than 25% <input type="checkbox"/>
2. Have you been involved in intellectual property disputes in Egypt?
3. What is (are)/ was (were) your role(s)?
4. Have you been involved in intellectual property disputes in other countries?
5. What is (are) was (were) your role(s)?
6. Which types of intellectual property were involved?
7. Can you describe the situation(s) involving intellectual property in Egypt in which you have been involved?
8. Can you describe the procedures followed?
9. Has/have the dispute(s) been settled?
10. How long did the different stages of the dispute take?
11. What was the outcome, if settled?

12. Is there any related material that would be available to my research: e.g. reported judicial decision, court statistics, newspaper reports etc...?
13. What problems (if any) did you confront?
14. What improvements (if any) would you like to see?
15. Do you think that the remedies (both civil and criminal) available for infringement are adequate/inadequate/too harsh?
16. Do you think any changes need to be made to the remedies? If so what changes would you recommend?
17. To what extent do you think the TRIPS agreement has had an impact on intellectual property in Egypt?
18. In your view, has the TRIPS agreement been good for Egypt? Why? Why Not?
19. Are you in favour of increasing standards for intellectual property in Egypt? Why? Why not?
20. Do you think Egypt should accept standards of intellectual property protection, in bilateral or multilateral agreements, higher than the minimum standards set out in TRIPS? Why? Why Not?
21. How does managing intellectual property disputes in Egypt compare with your experience elsewhere (if applicable)?
22. What changes would you (ideally) like to see to the international intellectual property regime?
23. Is there anything else, not covered here, that you would like to add?