

What is New in the United States Trade Representative's Special 301 Report for Arab Countries?

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Abstract

Every year, the United States Trade Representative (USTR) issues a report (known as Special 301) evaluating and assessing the progress of the protection and enforcement of intellectual property rights (IPR) of U.S. trading partners. The USTR is, in particular, required to determine whether the acts, policies, and practices of foreign countries deny adequate and effective protection of IPR, or deny fair and equitable market access for U.S. individuals and companies that rely upon intellectual property protection. This paper critically examines how the USTR in its latest report (announced on May 5, 2011) evaluated the progress of IPR protection and enforcement in Arab Countries.

I. Introduction

On May 5, 2011,¹ the United States Trade Representative (USTR) released the annual review of global intellectual property rights (IPR) protection and enforcement.² Known as the "Special 301"³ report, the USTR is asked to report and comment on the adequacy and effectiveness of IPR protection of U.S. trading partners. In particular, it is required to determine whether the acts, policies, and practices of foreign countries deny adequate and effective protection of IPR, or deny fair and equitable market access for American individuals and companies that rely upon intellectual property protection.

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1. Press Release, U.S. Trade Representative, USTR Releases Annual Special 301 Report on Intellectual Property Rights (May 5, 2011), available at <http://www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-releases-annual-special-301-report-intellectual-p>.

2. U.S. Trade Representative, Special 301 Report (2011), available at http://www.ustr.gov/webfm_send/2841 (last visited Nov. 18, 2011).

3. Trade Act of 1974 § 182, 19 U.S.C. § 2242, amended by Omnibus Trade and Competitiveness Act 1988 and Uruguay Round Agreement Act (1994). See Special 301 Report (2011), *supra* note 2, at 45. This section (i.e., section 182) is commonly referred to as the "Special 301" provisions of the Trade Act.

The USTR identifies these foreign countries through an extensive investigation process. Generally speaking, the USTR may decide to investigate a foreign country's practices on its own initiative, or it may assess a country's practices in response to the filing of a petition by a person, firm, or association that is adversely affected by the practices of the foreign country.⁴

The USTR investigations entail a series of consultations with the foreign government whose policies and practices are under investigation.⁵ After the investigation, it may decide not to take any action against countries that have made satisfactory progress.⁶ Alternatively, the USTR may place any of these countries on a list.⁷ This consists of three categories: a "Priority Foreign Country" list, a "Priority Watch List," or a "Watch List." The Priority Foreign Country list is for countries that possess the most severe acts, policies, or practices in relation to IPR protection. The Priority Watch List is for countries deemed to have less severe IPR protection problems than those assigned to the priority foreign country list.⁸ Finally, the USTR might place a country on a Watch List. Although countries placed on the third list may provide better protection for IPR than those in the other two categories, the USTR decides that it is appropriate to monitor such countries' acts, policies, and practices.

After investigation of the country in question, and once the USTR has established that these policies and practices existed, the USTR is to undergo a "bilateral dialogue" with the country in question to attain agreements by which the country will remove or eradicate the inadequate and ineffective protection of IPR or any other policies and practices that affect the protection of IPR. The "bilateral dialogue" method is described as "the most efficient and preferred manner of resolving [IPR] concerns."⁹ Simultaneously, trade retaliations may take place. Trade retaliations vary in their forms and may include increasing customs duties or establishing import restrictions on goods from the foreign country. At the end of these phases, the USTR may initiate the World Trade Organization (WTO) dispute settlement procedures in the case of non-compliance when deemed necessary.¹⁰

Algeria, Egypt, Kuwait, and Lebanon were among the countries referred to in the USTR's 2011 Special 301 report. With the exception of Algeria, which was designated in the category of Priority Watch List, all the above Arab countries appeared on the Watch List. That meant that the USTR decided to sustain Algeria on the Priority Watch List for the third consecutive year. Algeria was included for the first time in the 2008 Special 301 report.¹¹ Furthermore, the USTR opted to keep Egypt, Kuwait, and Lebanon on the 2011 Watch List, just as they were in the 2010, 2009, and 2008 Special 301 reports. Egypt

4. Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 GEO. WASH. INT'L L. REV. 277, 301 (2001).

5. Special 301 Report (2011), *supra* note 2, at 1.

6. Cheek, *supra* note 4, at 301; *see also* Special 301 Report (2011), *supra* note 2, at 45 (particularly in relation to countries designated as priority foreign countries).

7. Special 301 Report (2011), *supra* note 2, at 45.

8. Extra attention is given by the USTR to countries that are placed on the "Priority Watch List." It aims to solve IP problems through bilateral negotiations. *Id.*

9. *Id.* at 15-16.

10. This process will be initiated particularly where all the above-mentioned efforts have been unsuccessful. *Id.*

11. *See* Mohamed Salem Abou El Farag, *Intellectual Property: United States 'Special 301' and Arab Countries: Which List Are They on This Time?*, 5 MANCHESTER J. INT'L ECON. L. 146, 150 (2008).

and Lebanon were on the Priority Watch List in 2007 and were moved to the Watch List in 2008. As in approximately the previous five years, no Arab country was placed on the Special 301 Priority Foreign Country List.

Although Saudi Arabia was placed on the Watch List of the Special 301 reports for a number of years, namely 2008 and 2009, it was removed from the report in 2010 and did not appear on any of the three lists in 2011. This was because of Saudi Arabia's success in improving its IPR protection and enforcement regime.¹² Issues relating to enforcement, prosecutions, and transparency were successfully addressed by Saudi Arabia.¹³ The significant improvement made resulted from the conclusion of an Out-of-Cycle Review (OCR)¹⁴ and an action plan, which was successfully completed in recent years.¹⁵

On the positive side, and as noticed by the USTR, Morocco, which was not listed on the 2011 Special 301 report, appeared to be in the final stages of agreeing to the Anti-Counterfeiting Trade Agreement with the United States.¹⁶ This agreement seems to be an effective tool in fighting trademarks counterfeiting and copyright piracy.¹⁷

The status of IPR protection and enforcement in some of the Arab countries as envisaged by the United States will be explored in the following sections.

II. Algeria

Algeria was first included within the categories of countries being examined and assessed in relation to the protection and enforcement of IPR by the USTR in the 2008 Special 301 report.¹⁸ As in the previous two years, Algeria was placed on the Priority Watch List in the 2011 Special 301 report.

The main concern revealed by the USTR regarding the protection of IPR in Algeria was a law, which entered into force on January 1, 2009, that bans a number of pharmaceutical products and medical devices from entering into Algeria. The core objective is the protection of local products.¹⁹ There is no doubt that such a ban has (and will have) adverse effects on companies in the United States and other countries that depend on intellectual property. These companies desire to have free market access to the Algerian market.

Moreover, the USTR was still concerned about the insufficient protection against unfair commercial use of undisclosed test data and other data generated to obtain marketing

12. See U.S. Trade Representative, Special 301 Report (2010), at 6, available at http://www.ustr.gov/webfm_send/1906 (last visited Nov. 18, 2011).

13. *Id.*

14. The OCR is "a tool the USTR uses to encourage progress on IPR issues of concern. It provides an opportunity for highlighted engagement with trading partners to address and remedy such issues." See Special 301 Report, *supra* note 2, at 2. OCRs are conducted between Special 301 Reports. A trading partner's status on the Special 301 list may be changed upon the successful resolution of specific IPR issues of concern. *Id.*

15. *Id.* at 5.

16. *Id.*

17. *Id.*

18. Salem Abou El Farag, *supra* note 11, at 150.

19. Special 301 Report (2010), *supra* note 12, at 24.

approval for pharmaceutical products.²⁰ The USTR's concerns also included the unauthorized disclosure of this data. The weak level of patent protection granted according to Algerian Law was also highlighted in the report. Additionally, IPR holders complained about the lack of effective enforcement measures taken against infringers of protected IP rights. There was a noticeably increased level of copyright piracy and trademark counterfeiting that was underlined in the report.

It is strongly advised that these issues, and others raised by other members of the World Trade Organization (WTO) should be taken into consideration by Algeria if it wishes to be accepted as a member of such an important organization.²¹ More specifically, the United States is willing to work together with Algeria to address the IPR issues through bilateral trade and investment framework agreements.

III. Egypt

During the last several years, Egypt²² has made significant progress in strengthening the protection of IPR. The chief development was made in 2002 when Egypt issued the Law on the Protection of Intellectual Property Rights (hereinafter the new IPR law). This new law is regarded as Egypt's most comprehensive independent intellectual property rights law.²³ The law also represents the country's first ever effort to combine all fields of intellectual property (except trade names) into one single code. In addition, Egypt's efforts to improve IP protection, especially in passing the implementing regulations of the IPR law, are—to a degree—acknowledged.²⁴

In the Special 301 reports of 2010 and 2009, the USTR praised Egypt for its efforts in tackling some of the concerns about IPR protection and enforcement raised in previous reports. For example, special acknowledgment regarding the establishment of a new type of courts, i.e., the economic courts,²⁵ was noted. These courts now have jurisdiction over civil and criminal IPR cases. Many factors make them distinct, including simplified procedures and specialized judges. Further, decisions are now reached in a relatively short time and by judges knowledgeable in IPR matters.

20. A similar concern was expressed in the 2008 "Special 301" report. The lack of coordination between health and patent authorities was also pointed out in last year's report but was not mentioned in the Special 301 Report of 2009. See U.S. Trade Representative, Special 301 Report (2008), available at http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf, p. 38 (last visited Nov. 18, 2011).

21. Algeria is one of the countries that enjoy the status of "observer governments." For more details, see *Understanding the WTO: The Organization*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm#observer (last visited May 19, 2012).

22. Egypt has been a member of the WTO since 1995. President of the Republic of Egypt Decree No. 72 of 1995, *Al-Jarida Al-Rasmiyya*, 15 June 1995 (Egypt) (concerning Approval of Egypt Joining the WTO). See also *Egypt and the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/countries_e/egypt_e.htm (last visited May 19, 2012) (showing list of membership of the WTO).

23. Law No. 82 of 2002 (Law on the Protection of Intellectual Property Rights), *Al-Jarida Al-Rasmiyya*, 2 June 2002 (Egypt).

24. See U.S. Trade Representative, Special 301 Report (2004), at 15, available at http://ustraderep.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_5995.pdf; U.S. Trade Representative, Special 301 Report (2007), at 25-26, available at http://www.ustr.gov/sites/default/files/asset_upload_file230_11122.pdf.

25. Economic Courts Establishment Law No. 120/2008, *Al-Jarida Al-Rasmiyya* (May 22, 2008), available at <http://www.sis.gov.eg/En/Story.aspx?sid=1016>.

Effective enforcement measures, particularly the increased number of raids against entertainment and business software piracy, were also identified in the Special 301 report of 2010. Likewise, the new trend in Egypt's IPR cases of criminal convictions with sentences of imprisonment for IPR offenders was highlighted in the same report.

Egypt received a commendation in the Special 301 report of 2011 for establishing the National Observatory for Monitoring Industrial Products.²⁶ Among its many objectives is to ensure that any products that are placed on the Egyptian market, whether manufactured in or imported into the country, comply with Egyptian legislation regarding public interests such as health and safety issues. As far as the interests of IP holders are concerned, it is predicted that such an organization will play an important role in protecting their interests through the removal of infringing goods from, or the prevention of these goods from entering into, the Egyptian market.

During the last year, some governmental authorities and non-governmental organizations undertook public campaigns to raise awareness about counterfeit pharmaceutical products. Egypt's efforts in this regard were also commended in this year's report.²⁷

The Special 301 report of 2010 referred to a number of concerns about IPR protection and enforcement that Egypt should work hard on with a view to generally improving its IPR regime.²⁸ One of these matters was the weak copyright enforcement taken by the competent ministry, Ministry of Culture.²⁹ Piracy of books, music, and films is to some extent a common act among Egyptians for many reasons. One of them is the relatively high prices of these products compared to the prices of the pirated copies.³⁰ With reference to book piracy, Egypt was considered one of the biggest abusers in the Arab region. Illegal copies of books of academics and others were (and still are) often sold in shops instituted near university campuses and in other places. These concerns do not only affect foreign owners of copyrighted materials, but are also of significant interest to domestic copyright owners, such as writers, sound record companies, or others. These categories have suffered significant losses because of piracy.³¹

Although concerns relating to weak copyright protection and enforcement were not mentioned explicitly in the 2011 Special 301 report, Egypt's official authorities should tackle these issues because they influence negatively on the initiative and enthusiasm of creators and innovators.

In the 2007 report,³² the USTR emphasized a number of concerns about the protection and enforcement of IPR in Egypt. These included the lack of protection against unfair commercial use of data submitted to governmental agencies³³ at their request as a condi-

26. Special 301 Report (2011), *supra* note 2, at 34.

27. *Id.*

28. This point was also raised in the Special 301 reports of 2009 and 2008. See U.S. Trade Representative, Special 301 Report (2009), available at http://www.keionline.org/sites/default/files/ustr_special301_2009.pdf; Special 301 Report (2008), *supra* note 20.

29. Special 301 Report (2010), *supra* note 12, at 32.

30. Information based on the author's knowledge as an Egyptian.

31. See Salem Abou El Farag, *supra* note 11, at 149.

32. Special 301 Report (2007), *supra* note 24, at 25.

33. The National Organization for Drug Control and Research (NODCAR) is the government authority responsible for testing, examining, and evaluating the product that contains the undisclosed information or other data. See Council for Trade-Related Aspects of Intellectual Property Rights, *Review of Legislation: Re-*

tion for obtaining their approval for the marketing of pharmaceutical or agricultural chemical products that utilize new chemical entities.³⁴

IV. Kuwait

As in previous years, the USTR placed Kuwait³⁵ on the Watch List.³⁶ The Special 301 report of 2011 explicitly acknowledged the IPR enforcement measures carried out by several of Kuwait's Public Authorities, such as customs authorities, in combating IPR piracy and counterfeit activities. In its Special 301 report of 2004, the USTR indicated that the piracy of copyrighted works was high and, in particular, stated that retail optical piracy rate was considered the worst in the region.³⁷

In its latest report,³⁸ concerns about the delay in issuing key IP laws were evidently expressed by the USTR. Modern legislation concerning patents, copyright, trademarks, geographical indications, among other laws, should, it was suggested, replace the 'outdated' IPR laws. These pieces of legislation have now been pending for many years. They should be enacted in the near future. It was also observed that a number of courts' decisions did not impose deterrent penalties against IPR violators. Tougher sanctions are certainly and essentially needed in order to prevent further infringements of IPRs.

One of Kuwait's commitments resulted from its Trade and Investment Framework Agreement with the United States, which was signed in June 2004. This agreement aimed to join certain IPR conventions, such as the Paris Convention for the Protection of Industrial Property of 1883 and the Patent Cooperation Treaty of 1970.³⁹ But it has not joined any such conventions until now.⁴⁰ The United States has encouraged Kuwait to issue the pending IPR laws and accede to the said IPR conventions, with the intention to develop and improve IPR protection and enforcement in Kuwait.

V. Lebanon

Lebanon was on the Priority Watch List in 2007. Only in the Special 301 report of 2008 did the USTR move it to the Watch List in recognition of its actions pertaining to

sponses from Egypt to the Questions Posed by Japan, Switzerland and the United States, IP/C/W/278 (June 12, 2001), available at http://www.wto.org.tw/SmartKMS/do/www/readDoc?document_id=31982.

34. It should be noted that Article 56 of the new IPR law and Article 65 of the implementing regulations are concerned with the protection of undisclosed test data. In line with Article 56, which implemented Art. 39(3) of the TRIPs Agreement, protection is provided to undisclosed information resulting from considerable efforts and that was presented to the concerned authorities upon their request to permit the marketing of the pharmaceutical or agriculture chemical products utilizing new chemical entities necessary for needed examination for its marketing. The Egyptian authorities that receive the information in question are required to protect it against disclosure and against unfair commercial use.

35. *The State of Kuwait and the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/countries_e/kuwait_e.htm (last visited Nov. 18, 2011).

36. See Special 301 Report (2011), *supra* note 2; Special 301 Report (2010), *supra* note 12; Special 301 Report (2009), *supra* note 28, at 27-28; Special 301 Report (2008), *supra* note 20; Special 301 Report (2007), *supra* note 24; Special 301 Report (2004), *supra* note 24.

37. Special 301 Report (2004), *supra* note 24.

38. As in the reports of the last few years. See Special 301 Report (2011), *supra* note 2, at 34; Special 301 Report (2009), *supra* note 28, at 27-28; Special 301 Report (2008), *supra* note 20, at 42.

39. This concern was raised in Special 301 of 2009. See Special 301 Report (2009), *supra* note 28, at 27-28.

40. See *Kuwait*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/wipolex/en/profile.jsp?code=KW>.

IPR enforcement. For the same reason, it has remained on this list for the last few years, including the 2011 Special 301.

A number of positive matters were noted during the last year. For example, Lebanon started working on amendments relating to its Patent Law of 2000 to provide an effective regime for the protection against unfair commercial use, or unauthorized disclosure, of undisclosed test data and other data generated to obtain marketing approval for pharmaceutical products. Furthermore, IPR courses were included in the training programs of new judges. The main objective of these courses is to increase judicial awareness of the essential importance of effective protection and enforcement of IPR.⁴¹

In its Special 301 report of 2009, the USTR commended Lebanon's successful efforts in combating cable piracy. "These efforts led to cable operators signing licenses with rightsholders, resulting in at least 80 percent of the estimated 600 to 800 illegal cable providers in Lebanon securing licenses."⁴²

On the other hand, the USTR raised a number of important issues regarding IPR protection and enforcement in Lebanon. The first was the lack of *ex officio* authority granted to the Cyber Crime and Intellectual Property Rights Bureau of the Police Department. A complaint must be filed before the Bureau commences its own investigation. Particular references were also made to copyright piracy as well as to inadequate protection and enforcement against counterfeiting activities particularly those relating to medicines. Lebanon was urged to improve its IPR protection and enforcement to succeed in its bid for accession to the WTO.⁴³

VI. Conclusion

The USTR's Special 301 report, which represents the view of the United States on intellectual property protection and enforcement in over seventy countries, often requires U.S. trading partners to provide for and enhance the protection and enforcement of IPR. Most of these countries, especially Arab Countries, are, or are aiming to be, members of the World Trade Organization and are therefore obliged to respect the provisions of the Trade-Related Aspects of Intellectual Property Rights Agreement (known as the TRIPs Agreement).⁴⁴ The TRIPs Agreement establishes minimum standards of protection for the most important forms of IPR, namely copyright and related rights (including those for computer programs, databases, sound recordings, and audio-visual works); trademarks and service marks; geographical indications; industrial designs; patents; layout designs of integrated circuits; and undisclosed information. Plant varieties must also be protected by patents, an effective *sui generis* system, or any combination thereof.

41. Special 301 Report (2011), *supra* note 2, at 37.

42. See Special 301 Report (2009), *supra* note 28, at 28.

43. Lebanon enjoys the status of "observer governments" within the WTO. Its Working Party to such an organization was established on April 14, 1999. See *Lebanese Republic*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/acc_e/a1_liban_e.htm.

44. The TRIPs Agreement, the General Agreement on Trade in Services (GATS), and the General Agreement on Tariffs and Trade (GATT 1994) are the three primary pillars of the WTO. See generally DANIEL GERVAIS, *THE TRIPs AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (Sweet & Maxwell, 2nd ed. 2003); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* (Kluwer Law Int'l 2001) (providing further details on the TRIPs Agreement).

Furthermore, the TRIPs Agreement requires that specified enforcement procedures be available to permit effective action against any IPR infringement covered by the Agreement, including expedited remedies to prevent infringements and remedies that constitute a deterrent to further infringements. The procedures must be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide safeguards against their abuse. The Agreement establishes, among other things, guidelines concerning civil and administrative procedures that must be followed with respect to the enforcement of IPR, including provisions on fair and equitable procedures, evidence, and injunctions.

But the United States and other jurisdictions, such as the European Union, do not regard the TRIPs Agreement as the final word on IPR protection internationally. They are pushing for more extensive commitments from developing countries than those contained in the Agreement itself.⁴⁵ This initiative is widely known as TRIPs-Plus.⁴⁶ In the 2009 report, the USTR, for example, demanded Kuwait to join the Patent Cooperation Treaty 1970,⁴⁷ something that is not required by the TRIPs Agreement.⁴⁸ Similarly, the 2010 Special 301 report praised Egypt for acceding to a number of international IPR treaties, including the Patent Cooperation Treaty, the Madrid Protocol⁴⁹ and the Nice Agreement.⁵⁰ Membership of these treaties is something that is not required by the TRIPs Agreement.

With reference to Arab countries, the USTR, in the recent 2011 report, recognized a relative improvement in some countries, such as Lebanon and Egypt. Nevertheless, the USTR decided to keep Algeria on the Priority Watch List for the unambiguous lack of effective IPR protection and enforcement.

As a general observation, the issue of making available effective enforcement measures to IPR rights holders to allow them to take actions against infringement is still a major concern in most Arab countries. Even if a country provides for such measures, the length of time that any rights holder might take to initiate a legal action against any act of infringement, and to then obtain a court decision and enforce it, is still too long. On this matter, however, a new ray of hope recently shone in Egypt through the establishment of its economic courts. These courts, according to the 2010 Special 301 report, proved to be effective in prosecuting IPR infringements.

45. This normally occurs through the conclusion of bilateral (and sometimes regional) agreements. See Special 301 Report (2011), *supra* note 2, at 6-7.

46. See Mohamed Salem Abou El Farag, *TRIPs, TRIPs-Plus, Developing Countries and Public Health: The Case of Egypt*, 5 J. INT'L BIOTECHNOLOGY L. 1, 1-15 (2008).

47. See Patent Cooperation Treaty, June 19, 1970, available at <http://www.wipo.int/treaties/en/registration/pct/>.

48. Special 301 Report (2009), *supra* note 28, at 27.

49. Formally known as the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, which was adopted at Madrid on June 27, 1989, and last amended on November 12, 2007. See *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/registration/madrid_protocol/ (last visited Nov. 18, 2011).

50. Formally known as the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, which was adopted on June 15, 1957, and was last amended on September 28, 1979. See *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/classification/nice/trtdocs_wo019.html (last visited Nov. 18, 2011).