

THE ALLIANCE BETWEEN ISLAMIC LAW AND TRIPS AGREEMENT: STRUCTURE AND PRACTICE

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Abstract - The Trade Related Aspects of Intellectual Property Rights TRIPs is considered to be one of the most important agreements in the intellectual property protection system. A product of the Uruguay Round that established the World Trade Organization (WTO) and the TRIPS Agreement help to develop the intellectual property from the national level to the international, and from its purely conventional IP perspective that was enacted in the two previous conventions of Paris and Berne to the world trade domain. It therefore set the minimum of protection that should be maintained by the countries adhering to the agreement. Here arises the question core point of this paper: How can the states parties applying sharia law deal with the provision of the TRIPS? Did they adopt or adapt these provisions to sharia? How to strike a balance between Islamic interests and the international obligations dictated by the Marrakesh agreement? Here I have to explain how Sharia rules dealt with the Trips provisions: How they adapted Sharia law to the general principles of TRIPs. It is extremely essential to highlight the relation between the Sharia legislation and the norms of globalization caused by the Marrakesh Agreement of 1994 which established the Uruguay Round.

Keywords - Intellectual Property, TRIPs, Agreement on Trade-Related Aspects of Property Rights, Shari a Law

I. INTRODUCTION

Islamic System and Practice

Although Islamic Law continues to progress, its fundamental principles were developed between the 7th and 10th centuries of the Gregorian calendar. There is no codification of these rules, nor is there a system of judicial precedents. To determine the rules of Islamic Law which govern a given issue, one must refer to texts written by jurists whose writings are regarded as authoritative by those who interpret and apply Islamic Law in a given jurisdiction. There are several schools of Islamic Law, traditionally the schools of Islamic Law have been the Hanbali School, Maliki, Hanvi and Shafi. Shari's law itself derives from four proper sources: The Qur'an, the Sunna, Ijama, and Qiyas. There are five types of conduct under Shari'a: mandatory, recommended, permitted, recommended against, and banned. Engaging in commerce is recommended; however, charging or collecting interest is banned.

The Concept of Intellectual Property

Intellectual property is defined by different systems of laws. It relates to the commercial value of ideas and information incorporated in tangible or physical forms in an unlimited number of copies anywhere in the world. The property is in the expression of ideas and information reflected in those copies. Several researchers define the concept of intellectual property in their own ways. Although there is no a uniform definition of intellectual property, it is a familiar concept and substantially statutory dynamic expression responding to the significant changes in technologies, and it is trying to reconcile the

competing interests of owners and users of protected work. It is designed to reward inventors for their intellectual effort. It is an asset like other types of personal property.

Basically, intellectual property is a statutory right, but it has also developed through common law and equity. Bainbridge (1996) defines intellectual property law as "that area of law concerning legal rights related to creative effort or commercial reputation and good will". The Convention establishing the World Intellectual Property Organization (WIPO) defines intellectual property as "legal rights which result from intellectual activity in the industrial and artistic fields." Cornish (2000) defines intellectual property law as "the branch of law protecting some of finer manifestations of human performance that are of commercial value". Phillips (2001) defines intellectual property as "the legal rights which may be asserted in respect of the product of human intellect or the rights and powers which one may enjoy over another's work". Most importantly, it is clear from different definitions that intellectual property has two aspects. One is colloquial; the other is legal. The colloquial description of intellectual property is that it consists of things resulting from the exercise of human reason; while the legal description of intellectual property relates to the rights of the production of the mind rather than the production itself. Based on the colloquial nature of intellectual property, it would be interesting to study and see how a country like Saudi Arabia, a Muslim country that practices Sharia law (which will be described in detail in the section that follows), deals with the effects and implications of

intellectual property, especially if it affects the international interest.

Of great importance to this research is the connection between the implementation of the Trade Related Aspects of Intellectual Property Rights (TRIPs) requirements and other laws, especially in countries that have strong religious beliefs of their own. This purpose will be achieved by first, looking at both the historical background and the requirements of the TRIPs at the global level and then by looking at Sharia law and its impact and implications on TRIPs. In other words, the researcher will be investigating how the Islamic law dealt with the TRIPs provisions. Thirdly, the study will look at how the Islamic legislators adapted their laws that are based on the Sharia law to the general principles of the TRIPs. It is extremely important at this stage to highlight the relation between the national legislation and the norms of globalization triggered by the Marrakesh agreement of 1994 which concluded the Uruguay round. Finally, the study will compare and contrast between the two kinds of laws and then draw conclusions on whether Islamic Law can achieve both the national and international obligations of TRIPs.

II. RESEARCH METHODOLOGY

The research methodology used in this study is qualitative by nature. This research used mostly documents and publications. Babbie (2004) suggests that one must obtain data from a variety of sources representing different points of view. He recommends that researchers "examine the official documents, charters, policy statements, speeches by leaders and so on..." (p. 335). This study utilized many different sources, including books, journal articles, websites and various convention documents and written laws concerning intellectual property and Islamic law. The scholarly publications were used to explore the emerging legal trends in the international context. Such publications may have revealed things that have taken place before this study started. It was anticipated that the qualitative approach to the study would allow the researcher to do proper analysis of written laws and texts of various countries and conventions to evaluate how they are implemented in different contexts. The following section provides the international and historical background and requirements of TRIPs

III. REQUIREMENTS OF TRIPs WORLDWIDE

A. Historical Background of TRIPs

There are many reasons for the importance of existence of intellectual property law. One reason is to grant statutory expression to rights of creators and to

secure a fair return for them. Another reason is to protect creativity and application. Further, it stimulates fair-trading contribution to economic and social progress and thus advancing public welfare. In the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which resulted from the General Agreement on Tariffs and Trade (GATT)'s Uruguay Round and established the World Trade Organization (WTO) in April, 1994, intellectual property is regarded as referring to the protection of authorship's works, copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits and the protection of undisclosed information. Throughout the 19th century the owners of intellectual property demanded the international protection of intellectual property. This was done by way of bilateral treaties protecting their respective laws in each other's, by national treatment. By the end of the nineteenth century, the Paris Convention for the Protection of Industrial Property 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886 were adopted. In 1947, following the Second World War, the GATT was formed and a multilateral negotiation was launched in 1986, and it was concluded in 1993. Thus it integrated the GATT into the World Trade Organization emanating from the Uruguay Round's conclusion agreement which was signed in Marrakech in April 1994. One of three schedules attached to that agreement dealt with TRIPs which conferred more protection, compared to previous WIPO administered treaties or conventions. First, TRIPs broadens intellectual property rights within a framework making it obvious to the parties to accept stronger intellectual property protection while they considered it to be counter to their interests, yet there might be other unforeseen advantages. Secondly, the GATT negotiations were widely conducted among countries because its treaty process includes non-governmental organizations and other organizations. The TRIPs Agreement covers in detail all areas of intellectual property.

The standard of protection within the Berne and Paris Conventions must be adhered to by all members of the WTO. The Berne Convention was established in 1886 to set minimum standards with respect to author rights, and it also contains a National Treatment most favored nation obligations (Trebilcock & Howse, 1998, p. 315). The Paris Convention, on the other hand, was established in 1883 and dealt with the protection of Industrial property.

The TRIPs Convention, which came after the Paris and Berne conventions, ordained the following rights to be protected in the countries that adhered to the agreement, specifically copyright, including computer

programs, related or neighboring rights, patents, industrial designs, trademarks, semiconductor topographies, trade secrets and bio diversity.

The demand for international protection for intellectual property has increased as the market has internationalized. Intellectual property can be exploited in national and international levels. There are two types of international co-operation treaties and conventions. The first category of treaties and conventions are the ones that set minimum uniform provisions and standards of protection, and thus they harmonize the minimum standards and the basis underneath all intellectual property laws for each member and provide protection for works of foreign inventors. The second category of treaties and conventions are those which require the formality of registration in each country in which protection is sought. Many of them embody a single application and examination procedure or, at least, a certain level of co-operation between the national and international property authorities.

B. International Evolution of Intellectual Property

According to Unesco, by the early nineteenth century, many states issued national copyright laws, amending them from time to time to cope with technological development. Nevertheless, the territorial character of copyright laws remained constant. Moreover, the grant of copyright protection by national laws is ineffective outside the national territories.

Need was felt for multilateral instruments obliging contracting states to give protection to foreign works, on a large scale. The piracy of author's protected works abroad shifted the emphasis in copyright law to an international level. Accordingly, international protection came about at the end of the nineteenth century, through the Berne Convention for Protection of Literary and Artistic Works, 1886. The members' parties to this convention are called "unionist countries," but all members states are not governed by the same text of the convention. Some countries did not ratify some revisions, so there may be no unity between the unionist countries because in each text there is a new law. Only countries that ratified the revisions are bound by it. Sudan, for example, ratified the Berne Convention in 2000, so it is governed by the last revision. USA did not join the Berne Convention until 1988.

Trade Related Aspects of Intellectual Property (TRIPs) is the most important development in international intellectual property law. For the most part it demands members of the WTO to recognize the existing standard of protection within the Berne and other conventions. It requires substantive protection

for rights neighboring copyright. After TRIPs, two new intellectual property treaties were promulgated through WIPO: the 1996 WIPO Copyright Treaty and 1996 WIPO Performers and Phonograms Treaty. "These reincorporated the Berne-plus element of TRIPs into exclusively intellectual property environment, they also added new TRIPs-plus elements". The international protection of national trade marks came about as a result of the ratification of the Madrid Agreement on the International Registration of Trade Marks of 1891. This enables an applicant's whose mark has been registered in their home or business to deposit an international registration with an international office, thus, allowing their work to be registered in other member states determined by applicants, unless those states object within 12 months. According to Madrid Agreement, independent national trademarks are subject to the qualification that if the home registration is invalidated within five years, all international registration is subject to this "central attack". The UK could not ratify the Madrid Agreement because the agreement worked against those who first registered in UK, where examination of all applications is required.

The TRIPs Agreement imposes an obligation on its applicant states to apply the Paris Agreement standards relating to trade marks. TRIPs extend the Paris Convention provision on the protection of well-known marks to service marks and to cases of dilution by use for different goods and services where that use is damaging. The concept of well-known marks has been contested. TRIPs provides in Article 16 (2) that in assessing whether a mark is well-known, members shall take account of the knowledge of the trade mark in the relevant sector of the public, including knowledge in the member concerned, which has been obtained as the result of the promotion of the trade mark. UK has recently recognized a special category of well-known marks.

The TRIPs Agreement provides the most detailed and comprehensive international prescription of protection of substantive rules relating to registered marks. It defines the protectable subject matter comprehensively to include service mark. It also prohibits discrimination against registerability according to the nature of goods and services applicable to trademarks. Trips requires recognition of certain rights, in particular, the use of an identical mark on identical goods or services if such use results in a likelihood of confusion. Moreover, it provides for limited exemptions to the trademarks right and for indefinite registration of marks on basis of renewal terms of each minimum seven years, (art 17 &18). Also it limits the circumstances in case of revocation for non-use in art 19. TRIPs also prohibits the

compulsory license of a mark. Assignments are to be allowed with or without the transfer of related business (art 20 & 21).

Trade mark law has been changed according to further changes in geographical aspects of trade. These changes have two forms. Firstly, growth in international trade led to the establishment of international systems of registration, enabling traders to gain protection quickly and cheaply in all relevant markets. Secondly, changes in international trade encouraged the establishment of international minimum standards of protection. The following section focuses on the Islamic laws in relation to TRIPS.

C. Islamic Evolution

According to Alnajjar (2000), the earlier Islamic principles indicated that Prophet Mohamed's followers attributed all his saying and doing to him; thereafter, they conveyed them to their people and successors. Siden Abu Baker El Seideyg was the first one who laid down this principle of copyright protection. According to Kanan (1987), historians thought that the initial protection of copyright began in the eighteenth century, due to the invention of the printing press. Islamic scholars, however, recognized many concepts of Intellectual property before that time, for example, the intellectual creation, imitation of works, and the economical and moral right of the authors. The best example of intellectual efforts of Islamic scholars is the writing of the Holy Quran's and its reproduction. Also, Islam recognized the idea of duration of copyright protection and the reward to the authors in consideration their creative efforts and exploitations of their works. Concerning the duration of copyright, Islamic philosophers made the maximum period of protection of the inheritor of the deceased owner 60 years from the death of the copyright owners. In relation to moral right of the author, the Islamic scholars mentioned the name of El Hadith's authors. Also, in the earliest centuries, Islamic scholars recognized the notion of the deposit of the works or books in place called 'Eltakhalid'. The major center for the books was called "Dar Elalem" or the "Educational House" in Bagdad. Accordingly, the rule of faith and honesty protects the creation of the mind in the Islamic history. Islam does not concern only the Arabs, but there are different civilizations which converged with Islam and had an input in its evolution.

How to ally Islamic Law with the International Agreements?

The TRIPS agreement contained some of the principles of the GATT, namely the national treatment that the country party to the agreement

should accord to the nationals of countries parties to the agreement; and the most favored nation's concept. The national treatment gives the party to the Marrakesh convention the right to retaliate in another domain of the agreement if the party's intellectual property rights are infringed in a member country if that country hasn't taken any measures against the infringer. Here we are faced with the anomaly of how to ally Islamic law with the international agreements. In this sense, we can mention two types of agreements. The first is the self-executing agreement, which no country should deviate from implementing the entirety of its provision; the second is the non-self-executing agreement, which needs to be enacted in the national laws with a margin of flexibility in adapting the international provisions to the national legislations.

The TRIPS agreement contains elements which reflect both types of international instruments.

Specifically, it contains the imperative part of its provisions, such as the national treatment and the provision of article 14 concerning the protection of performers, producers and broadcasting organizations, and it also includes the other provisions which need to be elaborated and construed in the national laws in a manner more appropriate to them. Of course, the TRIPS agreement excluded article 6 (bis) of the Berne convention from its provisions which concerns the moral rights, and thus it leaves the door open to parties that are not members of the said convention to deal with matters in the manner that suits them.

According to Cullen (2010), many of the traditional arguments against TRIPS have not been voiced adamantly under Shari'a. The issue of patenting living organisms does not seem to conflict with Shari'a, and there has been little--if any--scholarly work on this topic. However, the moral conundrum created by restricting access to patented medicines and various agricultural products creates more problems. Although the argument has not been prominently voiced by legal scholars, restricting such access may violate the principle of Maslaha which requires Muslims to care for and share with those less fortunate and those who are facing hardship. By preventing the sick from using vital medicines or depriving the starving of an efficient and plentiful food source, enforcement of such patent rights directly opposes Maslaha and may be considered a violation of Shari'a. The absence of this argument in contemporary scholarship may indicate that it carries little weight in practice. Islam demands that treaties be respected under Shari'a; thus it binds Islamic states to their treaties with other nations. This suggests that an

Islamic member state of the WTO is under a sacred obligation to uphold the requirements of TRIPS. The obligation under Shari'a to uphold TRIPS has led many Islamic states to enact intellectual property laws meeting the TRIPS minimum standards. Under these laws, intellectual property is placed in a status equivalent to that of tangible personal property, suggesting that these states agree with the predominant belief that intellectual property rights are compatible with Shari'a. Therefore, Shari'a obligates Islamic governments to issue severe punishment for transgressions against intellectual property. Thus, by enacting laws in compliance with TRIPS, an Islamic state effectively verifies that it believes intellectual property rights are compatible with Islamic notions and concepts. Many Islamic countries have completely overhauled and modernized its legislative framework and administrative infrastructure for the protection of intellectual property right to make them in compliance with the Trips Agreement. The patent Office in such countries has taken measures to address the backlog of pending applications, including the significantly increasing number of patent examiners, utilizing search and examination reports, as well as granted patents issued by other offices. It expects to clear its backlog by the end of 2006. In fact, Islamic countries have committed to protect Pharmaceutical and agricultural chemical test data submitted to obtain marketing approval against unfair commercial use for a period of 5 years from the date of approval, and it will not register a generic form of a pharmaceutical when a patent application is on file, unless the invention in the application is not patentable.

Islamic countries excluded from the regulations with regard to Article (23) of the TRIPs Agreement dealing with the additional protection of geographical indications concerning alcohol and alcoholic beverages, which was also deleted from the list of classification of goods and services attached to the trademark system. As a response to Islamic countries' obligation under TRIPS, the Islamic government enacted new intellectual property laws which meet the TRIPS minimum standards. Further, it created a full examination system for patents and an automated patent filing system to improve the efficiency of the application procedure. It also introduced specific provisions on enforcement with an emphasis on conservatory measures, such as the seizure of goods to determine infringement and to preserve evidence.

IV. CONCLUSION

TRIPS is the most significant and comprehensive international agreement on intellectual property rights. Islamic Countries, which adopts sharia law, is automatically bound by the agreement because of its

membership. This paper reveals that a sharia based system is flexible and adoptable, and this flexibility is to be used in order to face economic reality. Trips provisions are fully consistent with sharia law. There appears to be little conflict between Islamic law, intellectual property and TRIPS Agreement. Moral dilemma, created by restricting access to patented medicines and various agricultural products, may violate the principle of Maslaha which requires Muslims to care for and share with those who are less fortunate or those who are facing hardship. Islamic Countries excluded additional protection of geographical indications with regards to alcohol and alcoholic beverages, which was also removed from the list of classification of goods and services involved in the trademark system. While there has been some discussion, the majority of Islamic researchers and government leaders appear to take the view that intellectual property rights have a place under Shari'a. The enactment of intellectual property laws in a number of Islamic states, including Sudan, provides empirical evidence of this conceptual compatibility. Becoming a member of Trips, Islamic Country has dramatically improved its laws and regulations for the protection of intellectual property rights. Based on the results it is highly recommended that all Islamic Countries must train the people on the economic benefits of intellectual property rights and their use as a tool for encouraging the growth of arrangement and industrialization.

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