

**An examination of the intellectual property regimes in the Gulf Co-operation Council (GCC) states and a series of recommendations to develop an integrated approach to intellectual property rights**

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A thesis submitted in fulfilment of the requirements for the degree of  
Doctor of Philosophy

University of Bradford  
School of Law

2015

## **ABSTRACT**

This thesis aims to examine the intellectual property regimes in the Gulf Co-operation Council (GCC) states and assess the relationships between legislation, enforcement mechanisms and sharia law. The GCC states, currently Bahrain, Oman, Kuwait, Saudi Arabia, UAE and Qatar, all have varied mechanisms in place for both the implementation and enforcement of intellectual property rights. The thesis pays close attention to the evolution of intellectual property laws and regulations in the GCC states with particular interest directed towards the development of national intellectual property laws within the GCC states from the 1970's onwards<sup>1</sup>.

Intellectual property protection in the GCC states is considered from two perspectives. The first perspective addresses the international demand for higher standards of intellectual property protection in the GCC states. The second perspective defines intellectual property within the laws of Islam and explores the relationship between Islam and intellectual property. The latter part analyses religious influence, societal and cultural norms, economic reality and the developmental stage of each GCC state. It is an important area of study as developing Muslim countries are struggling with meeting international standards and a successful integrated framework will impact not only on GCC states but other Islamic states and as a result could potentially lead to more informed negotiation in trade agreements with developed states. The research argues there are systematic flaws in the GCC states adopting intellectual property laws which are in essence a procrustean modification of foreign laws which have developed from colonial occupation or laws taken from donor countries. The GCC legal systems of the states have evolved utilising different sets of legal principles and therefore it could be argued the foreign laws that have been adopted are somewhat unsuitable for the GCC states.

The research has focused on the implications of the national and international legislative regimes on the protection of intellectual property rights on the GCC states. Consideration is given to compliance, mainly how compliant the GCC is to its World Trade Organisation (WTO) membership and Trade Related Intellectual Property Rights (TRIP's) Agreement and to what extent the European Union (EU) and the United States (US) influence the intellectual property protection regimes in the GCC. The research has examined the development of the GCC in three distinct stages; pre-TRIPS, TRIPS compliance stage and TRIPS plus.

Furthermore, the thesis argues that the somewhat simplistic formula of the GCC states passing a large number of intellectual property laws to appease the EU and US does not have the significant economic impact on the GCC economy as the international agreements would suggest. Not all trade is intellectual property related and not all foreign direct investment is contingent upon intellectual property protection. However, as the GCC states are largely oil dependent, they do need to diversify their trade and as such an intellectual property protection model that accounts for international intellectual property law and the bespoke cultural and religious views amongst GCC citizens can produce tangible results for both the GCC and its trading partners. What sets the research apart from previous research is two-fold. Firstly, the research is qualitative and has scratched beneath the surface of intellectual property law in the GCC and examined in detail the Islamic law principles that have been used to justify sharia compliance, the western perspective on international intellectual property and the impact of multilateral trade agreements. Secondly, the analysis of Islamic finance and the application of successful sharia compliant models in Islamic finance to intellectual property is innovative as it acts as a springboard to creating a modified sharia compliant intellectual property protection model. Finally, the thesis will conclude by making a series of recommendations to develop an integrated approach to intellectual property rights which takes into account; the structure of the GCC states, international agreements and pressures, the international institutions, Islamic finance and both societal and religious views.

**KEYWORDS:** INTERNATIONAL INTELLECTUAL PROPERTY, GULF CO-OPERATION COUNCIL (GCC), ISLAMIC LAW, ISLAMIC FINANCE, INTELLECTUAL PROPERTY RIGHTS PROTECTION RECOMMENDATIONS, TRADE RELATED INTELLECTUAL PROPERTY RIGHTS (TRIPS), INTERNATIONAL TRADE AGREEMENTS

## **Table of Contents**

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<sup>1</sup> See Chapter 1 from 1.4 to 1.9.

## 1. CHAPTER 1: Introduction

### Abstract

- 1.1 Introduction
- 1.2 Purpose of thesis
- 1.3 Research questions
- 1.4 Research objectives
- 1.5 Research process
- 1.6 Proposed methodology
- 1.7 Grounded theory methodology
- 1.8 Islamic law sources
  - 1.8.1 The Quran
  - 1.8.2 Sahih International
  - 1.8.3 Muhsin Khan
  - 1.8.4 Pickthall
  - 1.8.5 Yusuf Ali
  - 1.8.6 Shakir
  - 1.8.7 Dr Ghali
- 1.9 The Sunnah
- 1.10 Western methodology considerations
  - 1.10.1 Social constructionism
- 1.11 Disclosure analysis
- 1.12 Data collection
- 1.13 Legislation
- 1.14 GCC case law
- 1.15 Intellectual property resources
- 1.16 Islamic fiancé methodology
- 1,17 Islamic finance resources
- 1.18 Conclusion

## 2. CHAPTER 2: Background to the GCC states

- 2.1 Introduction
- 2.2 The GCC Charter
- 2.3 Background to the GCC and international relations
- 2.4 The GCC as a collection of rentier states
- 2.5 Development of intellectual property laws
- 2.6 Saudi Arabia
- 2.7 Oman
- 2.8 Bahrain
- 2.9 Qatar
- 2.10 The United Arab Emirates
- 2.11 Kuwait
- 2.12 Conclusion

3. CHAPTER 3: The development of intellectual property under sharia law principles in the GCC

- 3.1 Introduction
- 3.2 Overview of sharia law principles
- 3.3 Primary sources of sharia law
- 3.4 Overview of secondary sources of sharia law
  - 3.4.1 Ijma as a secondary source of sharia law
  - 3.4.2 Qiyas as a secondary source of sharia law
- 3.5 Criticisms of secondary sources of sharia law
- 3.6 Conduct under sharia law
- 3.7 Classifying intellectual property law
  - 3.7.1 No Quranic reference to intellectual property law
  - 3.7.2 Inferential reasoning for intellectual property law
- 3.8 The use of proprietary rights to justify intellectual property law
  - 3.8.1 John Locke as property as a natural right
  - 3.8.2 The Sunnah on property as a natural right
  - 3.8.3 Quranic proprietary rights to justify intellectual property law
  - 3.8.4 Quranic reform on property law

- 3.8.5 Linking theft of property to intellectual property infringement
      - 3.8.6 Sharia principles on mutual consent
      - 3.8.7 Defining intellectual property infringement
    - 3.9 Sharia sources on contract law
    - 3.10 Sharia sources on international transactions
    - 3.11 Sharia sources on public interest
    - 3.12 Sharia sources on economic gain
    - 3.13 Previous work on sharia and intellectual property law
    - 3.14 Sharia and intellectual property
    - 3.15 The religion loyalty index
    - 3.16 Conclusion
- 4. CHAPTER 4: A foundation of mutual understanding – the United States and the European Union’s stance on intellectual property protection
  - 4.1 Introduction
  - 4.2 Background to the US intellectual property law
  - 4.3 The US and international intellectual property law
    - 4.3.1 International agreements
  - 4.4 The US approach to intellectual property
  - 4.5 The US and international agreements
    - 4.5.1 The US and TRIPS standards
    - 4.5.2 The US and bilateral agreements
  - 4.6 The US and the GCC
  - 4.7 The EU on intellectual property law
  - 4.8 The EU’s intellectual property systems
  - 4.9 The EU and the GCC
  - 4.10 The EU, the US and the GCC
  - 4.11 Conclusion
- 5. CHAPTER 5: Sharia and TRIPS, the rocky road from pre TRIPS to TRIPS plus in the GCC

- 5.1 Introduction
- 5.2 The Berne and Paris Convention
- 5.3 The GCC at the pre TRIPS stage
- 5.4 Impact of the internet age and globalisation
- 5.5 The GCC at the TRIPS compliance stage
- 5.6 Saudi Arabia's intellectual property development
  - 5.6.1 Saudi Arabia's copyright law
  - 5.6.2 Saudi Arabia's patent law
  - 5.6.3 Border measures in line with TRIPS
  - 5.6.4 Saudi Arabia headed back to US special 301 watch list
- 5.7 UAE intellectual property development
- 5.8 Qatar's intellectual property development
- 5.9 Economic view on international intellectual property law
- 5.10 What does TRIPS plus really mean?
- 5.11 TRIPS plus and the GCC
- 5.12 Not a level playing field – developing countries v the GCC
- 5.13 Customs law in the GCC
- 5.14 The role of sharia law in intellectual property development
- 5.15 Conclusion

6. CHAPTER 6: The international Trojan horse – TRIPS plus, TTIP and investor to state dispute settlements – spill over effects on the GCC

- 6.1 Introduction
- 6.2 Research objectives
- 6.3 Justification of intellectual property rights
  - 6.3.1 Justification for copyright protection
  - 6.3.2 Justification for design rights
  - 6.3.3 Justification for patent protection
  - 6.3.4 Justification for trademark law
  - 6.3.5 Justification for confidential law

- 6.4 TRIPS to TRIPS plus – a higher level of compliance
- 6.5 The TRIPS plus enforcement criteria
- 6.6 Transatlantic Trade and Investment Partnership on intellectual property and international trade
- 6.7 The benefits and pitfalls of the TTIP on intellectual property and international trade
- 6.8 Criticisms of the TTIP
- 6.9 The intellectual property chapter in the TTIP
- 6.10 The TTIP has a sister – the Trans-Pacific Partnership Agreement (TTP)
- 6.11 Intellectual property and the GCC
- 6.12 Impact of ISDS on intellectual property rights in the GCC
- 6.13 Lessons to be learnt from Eli Lilly v Canada
- 6.14 Is ISDS sharia compliant?
- 6.15 The Trojan horse – corporate sovereignty impact on the GCC
- 6.16 The GCC states and the need for better intellectual property protection
- 6.17 Conclusion

7. CHAPTER 7: Islamic finance as a vehicle to promote improved intellectual property rights in the GCC

- 7.1 Introduction
- 7.2 The research objectives
- 7.3 Background to Islamic finance
- 7.4 Founding principles of Islamic finance
- 7.5 Islamic finance products
  - 7.5.1 Musharaka – profit loss sharing capital
  - 7.5.2 Mudaraba – profit loss sharing of trade and capital
  - 7.5.3 Murabaha – contract of sale
  - 7.5.4 Sukuk – Islamic bond
  - 7.5.5 Takaful – Islamic insurance
  - 7.5.6 Other types of Islamic finance products

- 7.6 Islamic finance scholars and sharia boards
- 7.7 Main criticisms of sharia boards
- 7.8 Sharia board governance in Bahrain
- 7.9 Sharia board governance in Saudi Arabia
- 7.10 Sharia board governance in the UAE
- 7.11 Sharia board governance in Kuwait
- 7.12 Sharia board governance in Oman
- 7.13 Sharia board governance in Qatar
- 7.14 International standard setting in Islamic finance
- 7.15 The role of Islamic finance in intellectual property
- 7.16 Islamic finance as a vehicle to drive intellectual property
- 7.17 Intellectual property based sharia boards
- 7.18 Strengthen the intellectual property market structure
- 7.19 Improve compliance in terms of systems and controls
- 7.20 Address issues around the efficiency of supervisory procedures
- 7.21 Greater public confidence in the intellectual property sector
- 7.22 Conclusion

8. CHAPTER 8: Recommendations to develop an integrated approach to intellectual property

- 8.1 Introduction
- 8.2 The research questions
- 8.3 First area of recommendations: embedding sharia principles to intellectual property law
  - 8.3.1 Embedding sharia principles of property law
  - 8.3.2 Embedding sharia principles of contract law
  - 8.3.3 Embedding sharia principles of ijaza
  - 8.3.4 Embedding sharia principles of public interest
- 8.4 Second area of recommendations: proposals for the GCC and each individual GCC state



- 8.4.1 Assessing the capacity of the GCC states to increase intellectual property rights protection
- 8.4.2 The current intellectual property structures in the GCC
- 8.5 Improving intellectual property rights development in Saudi Arabia
- 8.6 Third area of recommendations: assess the impact of Islamic law, the US and the EU, TRIPS standards, international trade and Islamic finance
  - 8.6.1 Improved intellectual property protection in the GCC through Islamic law
- 8.7 Intellectual property and Islamic law
- 8.8 The Islamic law based approach to an integrated intellectual property model
- 8.9 The US and the EU on international intellectual property rights protection
- 8.10 Impact of international trade on the GCC
- 8.11 Impact of TRIPS plus on the GCC
- 8.12 Islamic finance as a catalyst for a modified intellectual property rights approach
- 8.13 Further research

## **Chapter One: Introduction to the examination of the intellectual property regimes in the Gulf Co-operation Council (GCC) states**

### **1.1 Introduction**

The Co-operation Council for the Arab States of the Gulf (GCC), namely UAE, Saudi Arabia, Qatar, Oman, Kuwait and Bahrain, are a six nation union dealing with a range of political and economic matters. The GCC was formed in response to three main issues; the perceivable security threats to the different Gulf Arab regimes from the Iran – Iraq conflict around the time of formation, the Soviet communist threat from Afghanistan and to be better protected against security threats<sup>1</sup>.

The GCC states are geographically placed in close proximity to each other and the entire GCC member states fall under the Arabian Peninsula. Yemen shares borders with the GCC states and falls under the same region, however it is not, as of yet, a GCC member state<sup>2</sup>.

### **1.2 Purpose of Thesis**

The research focuses on the intellectual property developments made by the member states of the GCC and how intellectual property development and subsequent deployment, can act as a catalyst for financial prosperity. The main purpose of the thesis is to analyse and examine the intellectual property provisions currently in existence within the six states of the GCC and agreements entered into by the six states collectively under the GCC Union. The aim is to provide recommendations to improve the current level of intellectual property protection at both a national level and at a state level in the GCC through an integrated intellectual property protection model.

There have been three main stages in the development of intellectual property in the Gulf states; a pre Trade Related Aspects of Intellectual Property Rights (TRIPS) stage, the current level of TRIPS compliance and a push towards TRIPS Plus. To date, each individual Gulf state has developed its intellectual property laws at varying rates. Post 2000, the Gulf states all display a set of intellectual property laws that are largely compliant with TRIPS. Therefore a question arises as to how much scope there is in the current laws to accede to more stringent intellectual property provisions. The thesis will

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<sup>1</sup> Hussain, A. (2012), *So History Doesn't Forget: Alliances Behaviour in Foreign Policy of the Kingdom of Saudi Arabia, 1979-1990*, AuthorHouse and Patrick, N. (2011), *The GCC: Gulf state integration or leadership cooperation? Kuwait Programme on Development, Governance and Globalisation in the Gulf States*.

<sup>2</sup> Reasons include the facts that Yemen is no longer an autocratic monarchy and not as wealthy. For a detailed analysis see Caton, S. (2013), *Yemen, Middle East in Focus*, page 20.

show this is a key question for the GCC, its international partners and the wider trading communities of the WTO.

There is a widening gap between the level of intellectual property standards that are demanded by developed countries and the capability of the GCC states to enforce these standards as discussed in chapter 5<sup>3</sup>. Through intellectual property the region is opening itself up to further foreign direct investment which can lead to a positive impact on the economy<sup>4</sup>. The underlying theme behind the legislative changes that have taken place in the GCC, is the influence of sharia law<sup>5</sup>. The research will assess the impact of sharia law on the decisions taken by the GCC in intellectual property law development. It is an important area of study as developing Muslim countries are struggling with meeting international standards and a successful integrated approach to intellectual property rights could impact on a number of countries and trade agreements with developed states<sup>6</sup>.

Where the study of intellectual property developments and Islamic law becomes multi-faceted is when consideration is given to the dichotomy that has arisen between the levels of intellectual property legislation in the Gulf states against the pressures from international states to increase intellectual property enforcement mechanisms. There are international pressures on the GCC states to adopt enhanced intellectual property laws for which they lack the necessary expertise, infrastructures and judicial experience to implement<sup>7</sup>.

### **1.3 Research questions**

- How can the GCC states satisfy international demands for better intellectual property protection without compromising their Islamic values and traditions?

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<sup>3</sup> See chapter 5 from 5.5 to 5.13. See also Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States Infidels at the Gates*, chapter 1, Wiley & Sons Limited.

<sup>4</sup> See chapter 2 from 2.7 to 2.10, chapter 4 at 4.6, chapter 5 from 5.9 to 5.11, chapter 6 at 6.10 and 6.15. See also Ulrichsen, K. (2011), *Knowledge Economies in the GCC States, The Political Economy of the Gulf*, Summary Report, Center for International and Regional Studies Georgetown University School of Foreign Service in Qatar, Thirwall, A. (2000), *Trade, Trade Liberalisation and Economic Growth: Theory and Evidence*. Economic Research Papers, The African Development Bank, Number 63 and Berg, H. (2007), *International trade and economic growth*, M.E. Sharpe Incorporated.

<sup>5</sup> Price, D. (2007), *The Dynamics Of Intellectual Property Protection In The Arab Gulf States*, International Review of Business Research Papers, Volume 3, pages 147-161. Available at <http://www.bizresearchpapers.com/Paper%2011.pdf>. Accessed on 28.03.2014.

<sup>6</sup> El-Bialy, N. (2011), *Can Shari'a be a Deterrent for Intellectual Property Piracy in Islamic Countries?* The Journal of World Intellectual Property, Volume 14, pages 441-466.

<sup>7</sup> Khoury, A. (2007), *Trademark Policy: The case of Arab Countries*, pages 299-333, Oxford University Press and Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States Infidels at the Gates*, chapter 1, page 6, Wiley & Sons Limited.

- Do the GCC states have the necessary capacity both in their legal structure and internal institutions to increase their levels of intellectual property protection?
- What recommendations can be made to develop an integrated approach to intellectual property rights in the GCC taking into account; the structure of the GCC states, international agreements and pressures, the relevant international institutions, Islamic finance and both societal and religious views.

#### **1.4 Research objectives**

The research objectives addressed are split across the remaining chapters:

- **Chapter 3**
  - To identify the sources of Islamic law that justify intellectual property protection and analyse the influence of sharia law on intellectual property protection in the GCC states.
  - To find differences/similarities between sharia law principles and intellectual property law to make recommendations on intellectual property development in the GCC.
- **Chapter 4**
  - Provide a background to the western development of intellectual property rights to gain a holistic view of the international intellectual property industry.
  - To review the role of US international institutions such as the Office of the United States Trade Representative (USTR) and its influence on the GCC states.
  - To review the role of EU international institutions such as the European Patent Office (EPO) and the European Patent Convention (EPC) and its influence on the GCC states.
  - To review the current international intellectual property legislation, policies, free trade agreements, bilateral agreements and enforcement mechanisms that exist in the EU and US and their influence on the GCC states. Substantive provisions from the free trade agreements on intellectual property law and protection will be considered.
- **Chapter 5**
  - To investigate the development of intellectual property in the Gulf Co-operation Council (GCC) countries from pre-TRIPS, TRIPS and TRIPS Plus.
    - The Pre TRIPS analysis will focus on the level of intellectual property protection that existed before the GCC states began ascending to international treaties and agreements, covering a time period that runs from 1970 to 1990.

- The TRIPS compliance stage will be considered as it occurred at different times for all six states and the timeline examines the sheer amount of changes that took place from 1990 to 2010<sup>8</sup>.
- Trips Plus provisions will be examined to understand how they go beyond the standards set at TRIPS level and the overview for TRIPS Plus follows on from when the TRIPS agreement was decided by the GCC states to the current state of play.
- To understand the intellectual property development of each GCC state as to be able to inform the set of recommendations to be made for the overall purpose of an integrated intellectual property approach concerning how intellectual property rights protection can be improved.
- To investigate the role sharia law can play in intellectual property development and what the key issues are.
  - To gain an understanding of Islamic law to provide support for the protection of intellectual property law.
  - To identify the provisions that protect intellectual property rights with the aim of increasing innovations and stimulate economic development
  - To address the doctrine of public interest and how to create better recognition and acceptance of intellectual property by the GCC citizens.
- **Chapter 6**
  - There will be an in depth analysis of the following key research areas; TRIPS Plus as a higher set of standards for intellectual property protection, the significant provisions of TRIPS Plus that impact on the GCC states, the various proposed implementation clauses in TRIPS Plus and what the potential ramifications of the TRIPS Plus provisions are for the GCC states.
  - To analyse the influence of the US and EU on intellectual property protection in the GCC, with specific references to the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).
  - To review the role of international organisations on law making in the GCC countries such as the World Intellectual Property Office (WIPO), World Trade Organisation (WTO), the European Patent Office (EPO) and the Office of the United States Trade Representative (USTR). To assess the impact of the current international dispute settlement mechanisms on the GCC

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<sup>8</sup> See Chapter 2 at 2.3, Table One.

states outside of the WTO remit. The main mechanisms to consider are; bilateral state agreements and investor to state dispute settlements.

- **Chapter 7**

- To analyse the success of Islamic finance, in particular the creation of sharia compliant frameworks as an alternative to conventional banking and the role of sharia boards.
- To apply lessons learnt from the successes achieved in the Islamic finance sector to the development of an integrated approach to intellectual property rights protection.

- **Chapter 8**

- To make a series of recommendations based on the findings of the above research objectives in the development of an integrated approach to intellectual property rights. The aim will be for the research to set the ground for a novel approach to intellectual property protection in the GCC which takes into account; the structure of the GCC states, international agreements and pressures, the relevant international institutions, Islamic finance and both societal and religious views.

### **1.5 Research process**

The research is non empirical and theoretical in nature, it lays the foundations for further research in this area and for empirical research that could be carried out in the future. The research process has utilised a range of existing empirical studies in the field and the purpose of this chapter is to both outline and define the research process for the thesis. The research problem is focussed on how to improve the international standard setting of intellectual property rights in the GCC states, with a close analysis of the role of sharia law in the future of intellectual property as well as the conflicting influences of international trade agreements. Further, the research analyses the role that Islamic finance can play in giving the intellectual property protection agenda an enhanced platform. The research questions are designed to provide the theoretical basis to provide a solution to the research problem<sup>9</sup>.

Steps in designing the research process have followed a qualitative data analysis model. There are no absolute rules that exist for qualitative analysis and the most relevant approach to the research has been defined by Patton as:

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<sup>9</sup> See chapter 1 at 1.4.

*“Do your very best with your full intellect to fairly represent the data and communicate what the data reveal given the purpose of the study<sup>10</sup>”.*

The aim of qualitative analysis is to perform a selective process of representation of a given phenomenon with the overall objective of highlighting some of its properties<sup>11</sup>. The research process for the purpose of this research can be summarised as; searching the data, critical analysis of the data, data combination and synthesis, followed by an analysis of results and findings as established by Hart (2001)<sup>12</sup> and Strauss and Corbin (2007)<sup>13</sup>.

### **1.6 Proposed methodology**

The research design is a paper and online data collection method to find literature to date on intellectual property law development in the GCC states, the role of Islamic law in intellectual property rights protection and the development of the modern day Islamic finance industry. The literature is a collection of secondary sources from paper and online data collection and every attempt has been made to ensure the mainstream existing work in this area is accessed and analysed. Existing work from different databases will be used to identify relevant sources where data can be is available in relation to the GCC states. In respect of the Islamic sources, to confine the data to a timeframe is difficult as Islamic sources are by their nature historical and date back to when the Quran was first introduced. Therefore the Islamic sources will not be limited to a timeframe as such and will be accessed on the basis of relevance. Literature specific to intellectual property and sharia law can be placed in a timeframe as pre TRIPS there was not much by way of research in the area, however as the Gulf states started to gain independence from colonialization and develop their economies, there was more of an impetus towards knowledge based economies such as intellectual property rights. Consequently, a timeframe for the literature on the relationship between intellectual property law and sharia law as well as Islamic finance can be set from 1970 to the present day.

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<sup>10</sup> Patton, M. (2002), *Qualitative research and evaluation methods*, Third Edition, Sage: Thousand Oaks, London, New Dehli: 432.

<sup>11</sup> Corbin, J. & Strauss, A. (2007), *Basics of qualitative research: Techniques and procedures for developing grounded theory*, Third Edition, Thousand Oaks, CA: Sage Publications.

<sup>12</sup> Hart, S. (2001), *Doing a Literature Search: A Comprehensive Guide for the Social Sciences*, Sage Publications. Hart provides insight in to qualitative writing in social sciences and humanities and offers a practical and comprehensive guide to carrying out literature searches.

<sup>13</sup> Corbin, J. & Strauss, A. (2007), *Basics of qualitative research: Techniques and procedures for developing grounded theory*, Third Edition, Thousand Oaks, CA: Sage Publications. Corbin and Strauss have written a number of books in the qualitative research field with the first edition in 1990, then followed up in 1998 and the most recent version in 2007. The text is written with social sciences in mind and has crossover application to the current research as there are three distinct strands of; sharia law, intellectual property law and Islamic finance to be qualitatively analysed to provide an integrated model for intellectual property rights protection in the GCC.

The sample size is a census sample as all literature available through paper data collection and online searches in this field is collected and then selected based on its relevance to the research. The data collected has come from policy documents, legislation, statistics, books, peer-reviewed articles, press reports, internet based materials, research studies, scholars in the fields of intellectual property and Islamic finance as well as relevant theory<sup>14</sup>. The data will be analysed through a variation of the grounded theory method whereby data collected will be analysed to produce a theoretical framework that encompasses Islamic law and intellectual property law as set out by Strauss and Corbin (1990 and 1998)<sup>15</sup>.

The research methodology and data collection is split into three distinct categories:

- International intellectual property law development in the GCC in line with WIPO, international trade agreements, TRIPS provisions and the impact of corporate sovereignty and investor state dispute settlements in the GCC.
- Analysis of the protection of intellectual property rights in Islamic law, the sources of Islamic law and their application to intellectual property.
- Analysis of the protection of intellectual property rights through Islamic finance, how Islamic finance adheres to sharia law and how this can be applied to intellectual property protection.

The main research questions are to be answered through a theoretical analysis of secondary data across the different disciplines of; intellectual property law, Islamic law and Islamic finance. It is essential to get an in-depth knowledge of the existing principles of intellectual property law from a GCC perspective and a western perspective in order to inform a series of recommendations for an integrated approach to intellectual property rights protection in the GCC. The founding principles of Islamic finance and the sharia compliant structures that exist within Islamic finance will be researched from a qualitative and exploratory approach in order to gain better understanding of Islamic finance, and in turn be able to apply the research findings to developing an integrated intellectual property framework. This is a theoretical investigation as to date, the role Islamic finance can play in the development of intellectual property rights protection has not yet been explored, thus the research is a qualitative study exploring new phenomena. For the GCC states, Islamic finance is not a new phenomenon in itself, nor is intellectual property. A new perspective on the research area will be identified through the relationship

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<sup>14</sup> Braithwaite, J. (2000), *Global Business Regulation*, Cambridge University Press.

<sup>15</sup> Strauss, A. & Corbin, J. (1998), *Basics of qualitative research: Grounded theory procedures and techniques*. Thousand Oaks, CA: Sage Publications.



between Islamic law and intellectual property rights protection while taking into account; the structure of the GCC states, international agreements and Islamic finance. This therefore highlights the novel contribution the research will make in amalgamating different research strands to propose a set of new recommendations for the protection of intellectual property rights.

### **1.7 Grounded theory methodology**

*"If someone wanted to know whether one drug is more effective than another, then a double blind clinical trial would be more appropriate than grounded theory study. However, if someone wanted to know what it was like to be a participant in a drug study, then he or she might sensibly engage in a grounded theory project or some other type of qualitative study<sup>16</sup>."*

Grounded theory is a general methodology for developing theory that is grounded in data that is systematically gathered and analysed. Grounded theory originates from the mid-1960s with the pioneering work in medical sociology by Barney Glaser and Anselm Strauss<sup>17</sup>. This led to the subsequent publication of *The Discovery of Grounded Theory* by Glaser & Strauss in 1967. Grounded theory is a general method of comparative analysis that discovers theory within four main areas; the general work, the relevance of the work in creating an understanding, how fit for purpose the existing work is in terms of validity and modifiability. The last area is the main focus of the research as the purpose of the research is to make recommendations to modify the approach taken by the GCC states in protecting intellectual property rights. It requires an interpretation of Islamic sources, intellectual property laws and developments and an understanding of Islamic finance.

In essence, the methodology is predominantly based on the grounded theory method as the research is qualitative however there is some deviance from the method to account for Islamic law. The data collected will inform the substantive qualitative theory development on the influence of sharia law on international intellectual property protection in the GCC. What makes the grounded theory method the closest option for the research is that there is a continuous interplay between data collection and data analysis. For example, in chapter three, data is collected from the different Islamic sources and then analysed from the accepted translators to infer intellectual property reasoning.

Grounded theory alone is insufficient for the research as its ultimate aim is to provide a systematic generation of theory from research. Although the research will lead to the emergence of conceptual

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<sup>16</sup> Strauss, A. & Corbin, J. (1998), *Basics of qualitative research: Grounded theory procedures and techniques*, page 40, Thousand Oaks, CA: Sage Publications.

<sup>17</sup> Glaser, B. & Strauss, A. (1967), *The discovery of grounded theory: Strategies for qualitative research*. Chicago: Aldine.

categories, these concepts are limited in their application across all the research areas as theoretical explanations on Islamic sources are confined within the four sources of sharia. Therefore the research will follow the desk based research approach in gathering data from existing research and theory to be able to analyse international intellectual property development and the impact of TRIPS provisions on intellectual property rights protection in the GCC. In relation to sharia law the precepts of Islamic jurisprudence in relation to the relevant areas of sharia law, from the four main Islamic sources, will be applied as set out below.

### **1.8 Islamic law sources**

There are four main schools of Islamic jurisprudence; Hanbali, Shafii, Maliki, and Hanafi. Hanbali, is followed by Saudi Arabia and is the strictest of the four schools, adopting a literal interpretation of the Quran and Sunnah. The Shafii school of thought is more widely accepted as it allows the application of secondary Islamic sources to make legitimate analogies. The Maliki school differs slightly from the other schools as it relies on historical customs and practice and is observed in Kuwait, Bahrain and the United Arab Emirates.

The four main schools are followed by Sunni Muslims although there is a minority population of Shia Muslims who follow a different school of thought. Islamic jurisprudence from the Shia Muslim perspective is beyond the scope of the research, although it is an area that could potentially influence further research. The sources cited below are the established sources approved by the four main schools of Islamic jurisprudence.

#### **1.8.1 The Quran**

The main accepted source for the Quran is available at [www.quran.com](http://www.quran.com). Data sources for the website include Tanzil, QuranComplex, Zekr and Online Quran Project. Translations are provided by seven authors as approved by Saudi Arabia; Sahih International, Muhsin Khan, Pickthall, Yusuf Ali, Shakir and Dr. Ghali. The reason there is more than one single approved translator is because there is a general consensus among all Islamic scholars that the Quran cannot be completely translated into another language because it was written for the Arabic language. This is largely because the stylistic and syntactic properties of the Quran are language-specific.

As a result, sharia scholars are able to consider translations from authors that have been approved by Saudi Arabia however the most widely accepted translations to date come from Sahih International and Muhsin Khan.

### **1.8.2 Sahih International**

Sahih International is an approved translation by Saudi Arabia and is available at the King Fahad National Library in Saudi Arabia<sup>18</sup>.

### **1.8.3 Muhsin Khan**

Muhsin Khan's translation is the most widely disseminated Quran in most Islamic bookstores and Sunni mosques throughout the English speaking world and is approved by both the University of Medina and the Saudi Dar al-Ifta in Saudi Arabia<sup>19</sup>.

### **1.8.4 Pickthall**

Mohammed Marmaduke Pickthall's translation is entitled The Meaning of the Glorious Koran and was first published in 1930<sup>20</sup>. It is less common than Sahih International and Muhsin Khan, nonetheless it is an accepted translation available at [www.quran.com](http://www.quran.com).

### **1.8.5 Yusuf Ali**

Yusuf Ali's translation was first published in 1934. In 1989, Saudi Arabia's Ar-Rajhi banking company financed the US based Amana Corporation's project to revise the translation to reflect an interpretation more in conjunction with the line of Islamic thought followed in Saudi Arabia. Ar-Rajhi offered the resulting version for free to mosques, schools, and libraries throughout the world<sup>21</sup>.

### **1.8.6 Shakir**

The works of the translator Muhammed Habib Shakir are also available at [www.quran.com](http://www.quran.com) and he is one of the recognised translators of the Quran<sup>22</sup>.

### **1.8.7 Dr. Ghali**

Dr. Ghali was the head of the English language department in Al-Azhar University in Cairo. He spent around 15 years to finish his translation of the Quran. While working at King 'Abdul- 'Azeez University, Dr Ghali, along with a committee of further twelve professors, he was assigned to revise the most prominent translations of the Quran into English<sup>23</sup>.

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<sup>18</sup> Sahih International, (1997), The Quran: Arabic Text with Corresponding English Meanings, Almunatada Alislami, Abul Qasim Publishing House.

<sup>19</sup> Khan, M. (1996), The Noble Quran in the English Language, King Fahd Printing Complex, Madinah, Saudi Arabia.

<sup>20</sup> Pickthall, M. (1997), The Meaning of the Glorious Koran, Reprinted by Plume.

<sup>21</sup> Yusuf Ali, (2001), The Holy Quran: Translation and Commentary, Reprinted by Islamic Vision.

<sup>22</sup> Shakir, M. (1999), The Holy Quran Translated, Published by Tahrike Tarsile Quran.

<sup>23</sup> Ghali, M. (2001), Towards Understanding the Ever-glorious Qur'an, Cairo Publishing House for Universities.

## **1.9 The Sunnah**

Sahih Al Bukhari is the approved author of Sunnah sources. The Sunnah is often described as the practical companion to the Quran, demonstrating in practical terms the meaning behind the Quranic verses. Validity of the Sunnah is very important as a source of Islamic law as the Sunnah was in essence the acts, practices and statements attributable to Prophet Muhammed (PBUH), which were recorded and recapitulated for the Muslim world to follow.

Sahih Al Bukhari's Sunnah sources have received certificates of approval from; Sheikh 'Abdul 'Aziz bin 'Abdullah bin Baz, Dar-ul-Ifta', Presidency of Islamic Research, Ifta', Call and Propagation, Kingdom of Saudi Arabia, Sheikh 'Umar Muhammad Fullata, General Secretary of Islamic, University, Al-Madina Al-Munawwara and Dr. Muhammad Amin Al-Misri, Head of Higher Studies, Islamic University, Al-Madina Al-Munawwara.

The English translation of Sahih Al Bukhari Hadith is by Muhsin Khan who is an approved translator of the Quran. The translation is further approved by three scholars who have undersigned the translation. They are; Shakir Nasif Al-'Ubaydi, M.A. (English), Vanderbilt University, U.S.A., Teacher of English: Baghdad University & College of Education, Makka, Dr. Mahmud Hamad Nasr, Graduate of Khartum University, Physician: King Hospital, Al-Madina and Dr. M. Taqi-ud-Din Al-Hilali, PhD, Berlin University, Germany, Professor: Muhammad V University, Morocco, Islamic University, Al-Madina<sup>24</sup>.

## **1.10 Western methodology considerations**

### **1.10.1 Social constructionism**

Social constructionism stands out as a relevant method for the research. In terms of the knowledge matrix, social constructionism falls within an epistemology of interpreted realism<sup>25</sup>. Social constructionism focuses on how individuals and groups participate in their creation of perceived reality and their shared social constructions of meaning. Gergen defines social constructionism as “the terms on which the world is understood are social artefacts, products of historically situated interchanges among people”<sup>26</sup>. The discussion on language, discourse, society and knowledge is pertinent to the

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<sup>24</sup> The book of hadith is available online and the link is [http://www.dar-us-salam.com/inside/H01-Bukhari\\_Vol-1.pdf](http://www.dar-us-salam.com/inside/H01-Bukhari_Vol-1.pdf). Also it is available at [www.sunnah.com](http://www.sunnah.com)

<sup>25</sup> Hibberd, F. (2006), *Unfolding Social Constructionism*, Springer Science and Business Media, chapter 7, page 171.

<sup>26</sup> Gergen, K. (1995), *Relational theory and discourses of power* in Gergen, J. (1995), *Management and Organization: Relational Alternatives To Individualism*, Aldershot Avebury.

research as how language is interpreted under sharia law has a bearing on the level of intellectual property rights protection that a GCC state will allow. The theology expanded upon Burr's work that "If we accept the view...that a multitude of alternative versions of events is potentially available through language, this means that, surrounding any one object, event, person etc., there may be a variety of different discourses, each with a different story to tell about the object in question, a different way of representing it to the world"<sup>27</sup>.

### **1.11 Discourse analysis**

The discourse analysis has three strands: content, linguistic and narrative. Content analysis can be quantitative or qualitative, linguistic analysis is concerned with early structuralism and narrative analysis is based on stories. There is an argument that the discourse analysis on the research in question falls under both content and narrative analysis. The content analysis can be linked to western intellectual property rights principles and the discreet Islamic law principles of property rights can be better understood through the narrative analysis of the stories that support Islamic jurisprudence.

Although both social constructionism and discourse analysis can be shown in this work, they are not fit for purpose as the aim of the research is to make a set of recommendations on how to approach intellectual property rights protection through an integrated framework of established Islamic law principles. Therefore the research methodology will apply the grounded theory method to the research area. The research will follow the four criteria as outlined above of; discover a new set of recommendations within the general work in intellectual property, the relevance of the work in creating an understanding of intellectual property in the GCC, how fit for purpose the existing work is in terms of validity and making proposal for modification of the intellectual property systems in place. There is a deviation from classic grounded theory methodology as the research aims to investigate the research question through three distinct strands; intellectual property, Islamic law and Islamic finance.

### **1.12 Data collection**

Data has been collected through different strands; legislation, case law, governmental resources and international agencies, Islamic sources, scholarly work and publications by expert authors in their field. The data collected is split in to the three categories of data collection as outlined at 1.4 of this chapter as; intellectual property data, Islamic sources and Islamic finance.

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<sup>27</sup> Burr, V. (2002), *An Introduction to Social Constructionism*, Taylor & Francis.

### **1.13 Legislation**

Legislation is easily accessible for each GCC state via the WIPO and from the official publications of each GCC state on their e-government websites. Intellectual property legislation from the six GCC states is covered in Chapter Two. Legislation is easily accessible and available in English. Legislation is also considered from western states, predominantly from the US and EU which is readily available from legal research sites such as lexis library, lawtel, brill online and various other government websites.

### **1.14 GCC case law**

GCC states do not have an online repository that archives case law as would be found in the EU or US. Therefore access to case law is very problematic and provides a limitation to the research. In an attempt to overcome the limitations, reports produced by the GCC states such as annual crime and safety reports have been used. Also, quantitative research reports have formed part of the data collection process.

The enforcement mechanisms in operation within the GCC states have been assessed through statistical data, border measures statistics, crime reports and cases reported in the media. As the focus of the research is on making a set of recommendations for an integrated intellectual property protection approach, relevant international case law has been considered.

### **1.15 Intellectual property resources**

Intellectual property resources have been accessed under four main categories; the GCC, the US, the EU and other resources. The main data collection has taken place from the resources listed in appendix 1. For the GCC, these include; the GCC Charter, the GCC Patent Office, the Saudi Embassy, the Ministry of Information, Sultanate of Oman, Arab Human Development Reports, the constitutions of GCC states, Kuwait Programme on Development, Governance and Globalisation in the Gulf states, Political Economy of the Gulf Reports, Bahrain Economic Development Board, Gulf Research Center and the Emirates Center for Strategic Studies and Research.

### **1.16 Islamic finance methodology**

The research into the structures of Islamic finance, the sharia boards and governance practices has followed a similar research process as intellectual property. It has been desk based research with the gathering of data from; the institutional databases of each individual GCC state, Islamic finance institutions, GCC Islamic banks, international financial organisations, Islamic finance scholars, articles

by leading authors in the field of Islamic finance and the sharia sources as detailed at 1.8 and .9 earlier in this chapter.

### **1.17 Islamic finance resources**

Islamic finance is a well regulated industry with a number of key organisations and institutions both at a government level and from the business sector that control and oversee the development of Islamic finance. The main resources that have been accessed are from; financial services authorities, financial services centres, national Islamic banks, federal laws, sharia boards, reports, articles and authored work.

### **1.18 Conclusion**

The first chapter has set out the research proposal, the research objectives and outlined the methodology and research process. The research is non empirical and theoretical in nature as the thesis attempts to make a series of recommendations to develop an integrated approach to intellectual property rights which takes into account; the structure of the GCC states, international agreements and pressures, the international institutions, Islamic finance and both societal and religious views. The research objectives are novel and aim to provide a modified approach to international intellectual property rights protection. The intellectual property landscape is constantly changing, however at a time when new standards are being introduced, this research is very topical, shedding light on the international intellectual property standard setting debate.

Chapter 2 provides a background to the GCC states. It will discuss the reasons behind the formation of the GCC, the GCC charter, the political and religious structures that exist in the GCC states by way of a state by state analysis. The second chapter will also cover the national intellectual property laws in each GCC state as well as the international agreements that the GCC states are signatories to. It will also highlight the similarities and differences in individual state governance.

From chapter 3 onwards there is a clear breakdown of the research objectives and relevant analysis to answer the overall research aim of making a set of recommendations to support an integrated approach to intellectual property rights protection in the GCC states. There will also be spillovers from the research findings for other developing countries that abide by sharia law at a constitutional level. Chapter 3 will also focus on the sharia law that exists in the GCC states and the development of intellectual property under sharia law principles. Further, consideration will be given to the specific idiosyncrasies that sharia law poses for intellectual property developments given the fact that the Quran

makes no direct reference to intellectual property. However there are several inferences that can be drawn from the Quran and therefore all sources of sharia law, relevant to intellectual property, will be considered. An in depth analysis of the four main sources of sharia law with specific reference to intellectual property protection will be carried out in chapter 3.

Chapter 4 will answer the research objectives that concern outstanding free trade agreements with the European Union (EU) and the United States (US), the intellectual property perspective of the US and EU and the current phase of negotiations with the GCC. The chapter will highlight the working relationships the GCC states have with both the EU and the US and introduce key contentious issues around investor state dispute settlement mechanisms and corporate sovereignty.

Chapter 5 investigates the development of intellectual property in the Gulf Co-operation Council (GCC) countries from pre-TRIPS, TRIPS and TRIPS Plus. It analyses the level of intellectual property protection that existed before the GCC states began ascending to international treaties and agreements covering a time period that runs from 1970 to 1990. Then, leading on to the TRIPS compliance stage which occurred at different times for all six states and finally the impact of Trips Plus and the potential ramifications for the GCC states.

Chapter 6 analyses the key objectives concerning what the potential changes have been for the GCC states in order to increase compliance from TRIPS to TRIPS Plus. Building on from this are; the benefits/pitfalls of the TTIP on intellectual property and international trade and the impact of ISDS on intellectual property rights in the GCC. The chapter highlights the need for ISDS to be compliant with sharia law, given there is a potential risk it could conflict with Islamic principles.

Chapter 7 explores the role the Islamic finance sector can play in improving intellectual property rights protection in the GCC. Thus, it will identify the main principles of Islamic finance and apply lessons learnt from Islamic finance success to intellectual property protection. The main sharia compliant areas that will be considered in chapter 7 are; musharaka, mudaraba, murabaha, istisna, ijara, salam and sukuk. The chapter will outline the founding principles of Islamic finance, specifically in relation to; the sharia compliant frameworks, Islamic finance products, the role of sharia boards, governance and development. The chapter provides the foundations of the overall integrated framework for intellectual property protection from the perspective of Islamic finance success.

Finally chapter 8 will be a comprehensive summary chapter with a very clear objective to set out the framework for a modified approach to intellectual property rights protection in the GCC states. The final



chapter will recapitulate the main research findings from earlier chapters and make a series of recommendations to develop an integrated approach to intellectual property rights which takes into account; the structure of the GCC states, international agreements and pressures, the international institutions, Islamic finance and both societal and religious views. The research findings from the individual chapters will inform the overall content of the integrated approach to intellectual property rights protection in the GCC states through the three main research strands of; intellectual property rights protection from the western standard setting perspective, intellectual property rights protection expedited by Islamic law and Islamic finance. Also, further research points will be outlined as given the theoretical nature of this work, there will be a number of areas with the potential of development into further research avenues of research.

## **Chapter 2: Background to the GCC states**

### **2.1 Introduction**

The GCC is a union of six states in the Middle East and they have undergone many changes over the last thirty years. The purpose of a background chapter is to gain an understanding of the GCC as a union and as a collection of individual states, in terms of their political structures and legislative development.

The GCC union was founded on 26 May 1981 and the continued aim of the union is to promote coordination between member states in all fields in order to achieve unity. The main impetus behind the GCC union was in response to three main issues; the perceivable security threats to the different Gulf Arab regimes from the Iran – Iraq conflict around the time of formation, the Soviet communist threat from Afghanistan and to be better protected against security threats<sup>28</sup>. A failed coup attempt in Bahrain in 1981<sup>29</sup>, a series of bombings in Kuwait in 1983<sup>30</sup>, and the Iran-Iraq War caused regional instability and spearheaded the Internal Security Agreement in 1982<sup>31</sup>.

Therefore, the International Security Agreement addressed a number of security concerns for the GCC states and enhancing security protection has been and continues to be a primary concern. Along with the geographical commonalities the GCC states share, the states are the world's biggest oil producers and currently account for 29% of the world's proven oil reserves and 23% of global hydrocarbons reserves<sup>32</sup>. Collectively, the states are dependent, to varying degrees, on oil production<sup>33</sup>.

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<sup>28</sup> Hussain, A. (2012), *So History Doesn't Forget: Alliances Behaviour in Foreign Policy of the Kingdom of Saudi Arabia, 1979-1990*, AuthorHouse and Patrick, N. (2011), *The GCC: Gulf state integration or leadership cooperation? Kuwait Programme on Development, Governance and Globalisation in the Gulf States*.

<sup>29</sup> Matthiesen, T. (2014), *The Other Saudis, Shiisms, Descent and Sectarianism*, page 118, Cambridge University Press, Gorodetsky, G. (2014), *Soviet Foreign Policy, 1917-1991: A Retrospective*, page 206, Routledge and Joyce, M. (2012), *Bahrain from the Twentieth Century to the Arab Spring*, Palgrave McMillan.

<sup>30</sup> Shaked, H. (1986), *Middle East Contemporary Survey*, Volume 8, 1983-84, The Moshe Dayan Center.

<sup>31</sup> Partington, D. (1982), *The Middle East Annual, Issues and Events*, volume 2, page 178, G. K. Hall & Company.

<sup>32</sup> BP Statistical Review of World Energy 2013, pages 6 and 20. Available at [http://www.bp.com/content/dam/bp/pdf/statistical-review/statistical\\_review\\_of\\_world\\_energy\\_2013.pdf](http://www.bp.com/content/dam/bp/pdf/statistical-review/statistical_review_of_world_energy_2013.pdf). Accessed on 10.02.2015.

<sup>33</sup> Hvidt, M. (2013), *Economic diversification in GCC countries: Past record and future trends*, Kuwait Programme on Development, Governance and Globalisation in the Gulf States.



## **2.2 The GCC Charter**

The GCC Union is a co-operation agreement between the six GCC states that was established in 1981. The purpose of the GCC Charter was to set out the key objectives of the GCC states and to hold court in the international arena as a regional entity. The preamble to the GCC Charter is embedded with a statement outlining a respect for the shared religious views of its members stating: Each member state

is “fully aware of the ties of special relations, common characteristics and similar systems founded on the creed of Islam which bind them<sup>34</sup>”.

Before analysing intellectual property regimes in the GCC, understanding the structure of the GCC Charter is relevant to forming a complete picture of how deeply rooted in Islamic values the states are. The impact of religious beliefs on the GCC states is important as the GCC Charter deals with all aspects of business and commerce. For example, Article 4 of the GCC Charter lists the key field of its collective co-operation as: economic and financial affairs, commerce, customs and communications, education and culture<sup>35</sup>. The GCC Charter is a comprehensive document that sets out the charter over twenty two articles and deals primarily with establishing a Council and the main objectives of the union. The GCC has its own Supreme Council, Ministerial Council and Secretariat General<sup>36</sup>, Article Seven declares the Supreme Council as the highest authority in the GCC<sup>37</sup> and Article Eight lists the main functions of the Supreme Council. The Ministerial Council is formed of the Foreign Ministers of the member states or other delegated ministers; it is primarily concerned with proposing policies and recommendations<sup>38</sup>. The Secretariat General is led by a Secretary-General who is assisted by a number of staff and the Secretary-General is appointed by the Supreme Council<sup>39</sup>. Thus, despite the variances in the governance structures of the GCC states, there has been a conscious effort to develop a GCC Charter that is democratic and representative of all member states. The aim of the articles of the GCC charter is to set out how the states can collectively govern a single common market.

The GCC union recognised the need for more uniformity in regard to intellectual property rights and has its own patent office which acts as a regional patent office. What makes the GCC patent office such a

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<sup>34</sup> The GCC Charter Preamble. Available at <http://www.gcc-sg.org/eng/indexfc7a.html?action=Sec-Show&ID=1>. Accessed on 30.01.2015.

<sup>35</sup> The GCC Charter, Article 4. Available at <http://www.gcc-sg.org/eng/indexfc7a.html>. Accessed at 30.01.2015.

<sup>36</sup> GCC Charter Article Six states, “*Organization of the Cooperation Council - The Cooperation Council shall have the following main organizations: 1. The Supreme Council to which shall be attached the Commission for Settlement of Disputes. 2. The Ministerial Council. 3. The Secretariat General*” Each of these organizations establish sub-agencies as may be necessary. Available at <http://www.gcc-sg.org/eng/indexfc7a.html>. Accessed at 30.01.2015.

<sup>37</sup> Article seven states “*Supreme Council - The Cooperation Council shall be formed of the six states that participated in the Foreign Ministers’ meeting held in Riyadh on 4 February 1981. The Supreme Council is the highest authority of the Cooperation Council and shall be formed of heads of member states. Its presidency shall be rotatory based on the alphabetical order of the names of the member states. The Supreme Council shall hold one regular session every year. Extraordinary sessions may be convened at the request of any member seconded by another member. The Supreme Council shall hold its sessions in the territories of member states. A Supreme Council’s meeting shall be considered valid if attend by two-thirds of the member states*”.

<sup>38</sup> GCC Charter Articles Eleven to Thirteen. Available at <http://www.gcc-sg.org/eng/indexfc7a.html>. Accessed on 30.01.2015.

<sup>39</sup> GCC Charter Articles Fourteen to Sixteen. Available at <http://www.gcc-sg.org/eng/indexfc7a.html>. Accessed on 30.01.2015.

landmark development in the region is that it secures legal protection of the inventor's rights in all of the GCC states with authority to grant a regional community patent. The main reason behind the GCC community patent was to make available a uniform patent and co-ordinate efforts in the area of patent protection to enhance technological advancement in support of their joint economic weight.

The GCC patent office is based in Riyadh, Saudi Arabia and has a basic system which has been inaugurated in a similar fashion to the GCC Charter with a set of articles that clearly define the community patent system in line with the objective of overall cooperation between member states. The basic system statute consists of 13 articles which establish the main functions of the GCC patent office and sets out the composition of the patent office, the roles and responsibilities of the board of directors and the director. The patent system develops on from the foundational composition of the patent office and consists of 34 articles dealing with; the process of granting a patent, compulsory licensing, length and duration of a patent<sup>40</sup>.

As well as the GCC patent office, the GCC states have their own domestic patent offices and intellectual property rights protection and enforcement institutions. Although the GCC states have a community patent, each GCC state has national intellectual property offices. Saudi Arabia, the largest of the GCC states, has a department set up in the King Abdul-Aziz City for Science and Technology to assess and grant patents<sup>41</sup>. Saudi Arabia, as will be seen at 2.4 and Table One, has invested heavily in improving its intellectual property protection and continues to adhere to international agreements. Saudi Arabia has one of the more established patent systems in the GCC, accepting online applications. Other GCC national patent systems are not as well developed, for example in Oman, the main patent office is the Ministry of Commerce and Industry of Oman and it has only recently started formal examination of pending applications. Qatar shares similarities to Oman as the Ministry of Justice has the role of granting patents and has also recently started accepting local applications. In the UAE, the intellectual property institutions are extensive as the Ministry of Economy has several divisions dealing with different areas of intellectual property. In Bahrain, the Ministry of Information and Ministry of Industry and Commerce are responsible for domestic intellectual property. In Kuwait, Ministry of Trade and Industry, Trademarks and Patents Department is responsible for granting patents. Many of the GCC

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<sup>40</sup> See patent office of the cooperation council for the Arab states of the Gulf. Available at <http://www.gccpo.org/AboutUSEn.aspx#>. Accessed on 07.02.2015.

<sup>41</sup> Further details can be found on the WIPO Directory. Available at <http://www.wipo.int/directory/en/urls.jsp>. Accessed on 05.02.2015.

states have opted to assign intellectual property matters to a ministerial department with the exceptions of Saudi Arabia and UAE<sup>42</sup>.

The GCC has approved a unified GCC trademark law, it was issued in 2006 but has not yet come into force<sup>43</sup>. The purpose of the trademark law is to bring together the common legislative features of all six states into one trademark law and to streamline the process however there have been significant time delays in bringing the GCC trademark law into force. The GCC trademark law is dissimilar to the GCC patent office as filing in each state will mean adhering to national level registration processes that could lead to lengthy delays<sup>44</sup>.

### **2.3 Background to the GCC and international relations**

The GCC has made considerable efforts to develop international relations, most notably with the EU and US, along with others<sup>45</sup>. The GCC is currently the European Union's (EU) fifth largest export market and the EU is the GCC's second largest trading partner<sup>46</sup> and follows the main international provisions of the General Agreement on Trade and Tariffs (GATT), WTO and TRIPs. In the case of the GCC, these have been supplemented by further negotiations regarding international provisions concerning intellectual property.

The GCC has a strong desire to develop national laws and regulations in regard to intellectual property rights to bring it in on par with legislative and regulatory developments in the international arena. In the economic agreement between the GCC states, adopted by the GCC Supreme Council, the preamble states a desire to; *"to enhance the economy of the GCC Member States in the light of recent global economic developments which require further integration among the Member States to strengthen their negotiating position competitive capacity in international markets"*<sup>47</sup>.

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<sup>42</sup> For Saudi Arabia see Table One and Chapter 1 at 2.4, Oman at 2.5, Bahrain at 2.6, Qatar at 2.7, the UAE at 2.8 and Kuwait at 2.9.

<sup>43</sup> Salameh, Z. (2013), Saudi Arabia: Gulf Cooperation Council Trademark Law Published, International Trademark Association. Available at <http://www.inta.org/INTABulletin/Pages/SAUDIARABIAGulfCooperationCouncilTrademarkLawPublished.aspx>. Accessed on 10.02.2015 and Sultani, S. (2014), GCC Trademark Law Coming Soon, WIPO Magazine. Available at [http://www.wipo.int/wipo\\_magazine/en/2014/05/article\\_0010.html](http://www.wipo.int/wipo_magazine/en/2014/05/article_0010.html). Accessed on 10.02.2015.

<sup>44</sup> Shuai, A. (2013), Coming Together, Afridi and Angell Company, page 18. Available at [http://www.afriidiangell.com/wp-content/uploads/2013/12/Asia-IP-November-Issue\\_Coming-Together.pdf](http://www.afriidiangell.com/wp-content/uploads/2013/12/Asia-IP-November-Issue_Coming-Together.pdf). Accessed on 10.02.2015.

<sup>45</sup> Others include; Australia-Gulf Cooperation Council Free Trade Agreement negotiations, New Zealand-Gulf Cooperation Council (GCC) Free Trade Agreement, Singapore and the Gulf Cooperation Council, India and GCC, Asean and GCC FTA. Other countries include; Turkey, South Korea, Iran, Seoul, China and Pakistan.

<sup>46</sup> Delegation of the European Union to Bahrain, Kuwait, Oman, Qatar and Saudi Arabia. Available at [http://www.eeas.europa.eu/delegations/gulf\\_countries/eu\\_gulf\\_countries/trade\\_relation/index\\_en.htm](http://www.eeas.europa.eu/delegations/gulf_countries/eu_gulf_countries/trade_relation/index_en.htm). Accessed on 06.01.2015.

<sup>47</sup> The Economic Agreement between the GCC States Adopted by the GCC Supreme Council (22<sup>nd</sup> Session; 31 December 2001).

The economic agreement covers; trade, international economic relations, the GCC common market, scientific and technical research, development and infrastructure. In relation to international economic relations, the economic agreement focuses on securing better terms and more favourable conditions in their international economic relationships by conducting economic relations in a collective manner when dealing with other countries, blocs and regional groupings, as well as other regional and international organisations. Article 2 of the economic agreement states the GCC members come to an understanding to; *“negotiate collectively in a manner that serves the negotiating position of the Member States, collectively conclude economic agreements with trading partners, unify import and export rules and procedures and unify commercial exchange policies with the outside world<sup>48</sup>”*.

Please see the table below for all international agreements that each GCC state is a signatory to as it highlights the full spectrum of international intellectual property treaties and conventions from the most compliant of the GCC states to the least.

Table One: Gulf states and ratified international treaties<sup>49</sup>

Treaty	Kuwait	Bahrain	Oman	UAE	Saudi Arabia	Qatar
Berne Convention		✓	✓	✓	✓	✓

<sup>48</sup> The Economic Agreement Between the Gulf Cooperation Council States, (2001), Chapter 1, Article 2, International Economic Relations. Available at <http://www.cobus.net/images/middleeast/GULF%20COOPERATION%20COUNCIL%20ECONOMIC%20AGREEMENT.pdf>. Accessed on 11.02.2015.

<sup>49</sup> All information available at World Intellectual Property Office at <http://www.wipo.int/portal/en/index.html>. Accessed on 06.01.2015.

Brussels Convention		✓	✓			
Budapest Treaty			✓			
Hague Agreement			✓			
Madrid Protocol		✓	✓			
Nairobi Treaty			✓			✓
Nice Agreement		✓				
Paris Convention		✓	✓	✓	✓	✓
Patent Cooperation Treaty		✓	✓	✓		✓
Patent Law Treaty			✓			
Rome Convention		✓		✓		
Trademark Law Treaty		✓	✓			
UPOV Convention			✓			
WIPO Convention	✓	✓	✓	✓	✓	✓
WIPO Copyright Treaty		✓	✓			✓
WIPO Performances and Phonograms Treaty		✓	✓			✓

#### **2.4 The GCC as a collection of rentier states<sup>50</sup>**

The six states have similar autocratic monarchies, political and cultural identities, which historically stem from Islamic beliefs<sup>51</sup>. Unlike other international bodies, the GCC is unique in that all its member states are Islamic states<sup>52</sup>. Each individual state has varying degrees of sharia law incorporated in their constitutions as seen below:

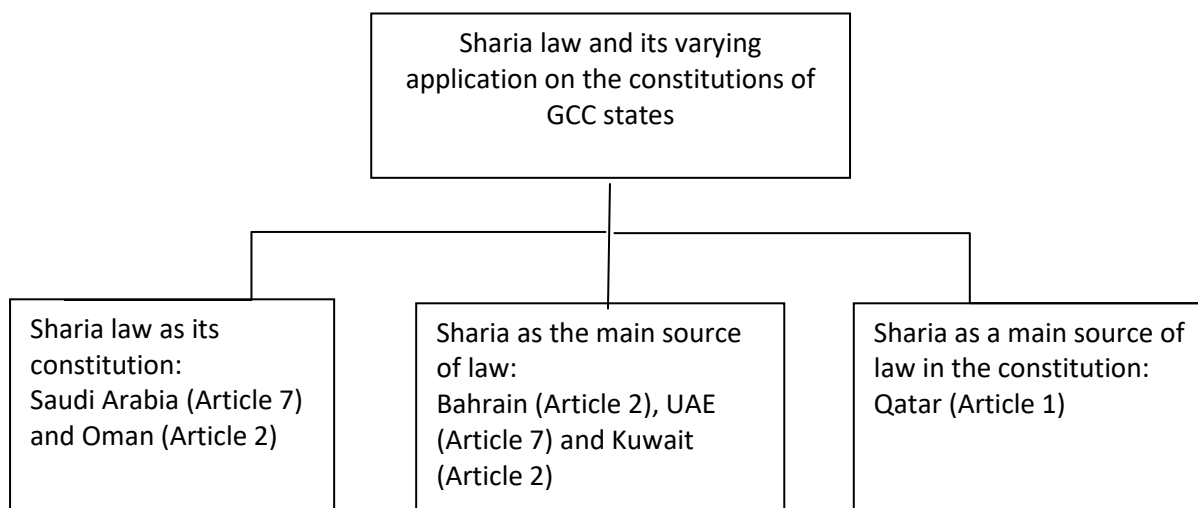
Table Two: Impact of sharia on GCC constitutions

<sup>50</sup> The GCC states are defined as rentier states as they satisfy the four conditions set out by Bablawi on what constitutes a rentier state namely; receiving rent from foreign individuals or governments as the predominating source of income, weak domestic productive sector, only a limited part of the population are involved in the generation of the rent and the state is the main recipient of the rent. See Bablawi, H. and Luciani, G. (1987), The Rentier State, Croom Helm.

<sup>51</sup> Khalaf, A. and Luciani, G. (2006), Constitutional Reform and Political Participation, Gulf Research Center.

<sup>52</sup> Bablawi, H. and Luciani, G. (1987), The Rentier State, Croom Helm, page 1.





There are unique features that are associated with the GCC union states as it is the only union where member states share similar infrastructures. For example, a substantial part of the revenues derived by the GCC states are from oil and gas exports, they are essentially small populations and the governments are dependent on their large oil and gas reserves<sup>53</sup>. The GCC states are often referred to as rentier states because of their government structures and due to the fact they share certain commonalities such as; providing economic necessities for citizens, no state tax and large populations of foreign labour in the private sector<sup>54</sup>.

Each of the Gulf rentier states have undergone significant development since the early 1980's and continue to develop<sup>55</sup>. However each state differs in terms of governance, religious influence, intellectual property development and economic progression. Specific to intellectual property, all six states ascended to the WTO between a ten year span, from 1995 and 2005. Whereas most of the GCC states became WTO members in close proximity of each other, Saudi Arabia lagged significantly behind by nearly a decade. Given Saudi Arabia has prominence within the GCC and several decision making seats, the time Saudi Arabia took to reach a decision can be linked to the constitutional significance of sharia law. This is discussed further in Chapter Three<sup>56</sup>.

<sup>53</sup> Commins, P. (2012), *The Gulf States – A modern history*, I.B. Tauris, page 103.

<sup>54</sup> Hvidt, M. (2013), *Economic diversification in GCC countries: Past record and future trends*, Kuwait Programme on Development, Governance and Globalisation in the Gulf States at pages 5 and 6.

<sup>55</sup> Beblawi, H. (1987), *The Rentier State in the Arab World*, New York Croom Helm. There are four main criterions to a rentier state: first, the rent belongs to the owners of all natural resources and the rent is prevailing, second, there is a weak domestic productive sector, third, there is a limited part of the population involved in the generation of rent and fourth, the state is the biggest recipient of the rent.

<sup>56</sup> See chapter 3 at 3.1.

Variations in economic progression are best seen through the ratio of government debt to gross domestic product (GDP) in each state<sup>57</sup>. It needs to be noted that there are a series of external factors which influence economic progression in a country and for the purpose of this research the focus is intellectual property therefore the role of intellectual property in economic progression against other variables is outside the scope of this research.

Saudi Arabia and Kuwait are similar as they are at the lower end of both debt to GDP and international agreements. Qatar, UAE and Bahrain also show similarities in debt to GDP and international agreements, they have the three highest debt figures and more international treaties in place than Saudi Arabia and Kuwait. Oman is an anomaly in that its debt to GDP is low and it is a signatory to the most international treaties. There are other variables which contribute to a state's debt to GDP as intellectual property is one determinant for foreign direct investment. Other factors that impact on a state's GDP include; human capital, physical capital, technology, fiscal productivity, research, labour productivity through exports and cost of imports.

Therefore the purpose of comparing GCC individual state GDP and legislative developments in international intellectual property law is to highlight that legislative developments alone are insufficient to justify a causal link between decrease in GDP and intellectual property. What Table Three shows is a comparison of GCC state GDP and international intellectual property development and therefore draws attention to certain factors. Firstly, there is a significant difference in government debt to GDP between the GCC states varying from Saudi Arabia with the lowest debt to GDP at 3.6% of the country's gross domestic product in 2012 to Bahrain at a tenfold increase of 31.6%<sup>58</sup>. Secondly, the data further highlights the main argument of the research that increasing international intellectual property agreements is not an automatic precursor to economic progression. Saudi Arabia has the lowest debt to GDP and the second least international agreements of all the GCC states. This therefore demonstrates that the GCC states can achieve economic success albeit with limited international intellectual property agreements.

Table Three: Comparison of the GCC states<sup>59</sup>

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<sup>57</sup> See chapter 1 at Table 3.

<sup>58</sup> Government debt to GDP as a percentage of each GCC state's gross domestic product is available at [www.tradingeconomics.com](http://www.tradingeconomics.com). Accessed on 23.02.2015.

<sup>59</sup> WTO ascension request and completion dates are available from World Trade Organisation at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm). Accessed on 24.02.2015. Government debt to gross domestic product (GDP) as a percentage of state's gross domestic product as at end of 2012. Available at <http://www.tradingeconomics.com/>. Accessed on 24.02.2015. The number of international intellectual property

GCC state	WTO ascension request	WTO ascension completed	Government debt to GDP % of state's gross domestic product (31.12.2012)	Number of international intellectual property agreements in place	Debt to GDP %/number of international treaties
Saudi Arabia	1995	2005	3.60	3	1.2
Bahrain	1995	1995	31.60	11	2.9
Qatar	1995	1996	29.50	7	4.2
Oman	1996	2000	4.50	14	0.32
UAE	1995	1996	14.60	5	2.9
Kuwait	1995	1995	6.2	1	6.2

## **2.5 Development of intellectual property laws**

To date, each individual Gulf state has developed its intellectual property laws at varying rates. The general pattern of change has been to deviate from a sharia based discretionary exercise of personal authority towards a codification of laws<sup>60</sup>. In theory, the Gulf states now display a set of intellectual property laws that are largely compliant with TRIPS. The GCC states have enacted detailed legislation to improve their intellectual property laws by introducing criminal prosecutions and civil sanctions. Intellectual property offices are set up in each GCC state offering intellectual property right holders a legal recourse where their rights have been infringed<sup>61</sup>. Further intellectual property laws have been enacted to meet TRIPS standards as seen later in this chapter<sup>62</sup>.

In order to raise existing TRIPS provisions to TRIPS Plus standards, in line with international trade agreement requirements, the GCC states have to consider whether there is enough scope in their current laws to comply with TRIPS plus provisions. This is the fundamental question at the core of the TRIPS Plus dichotomy, do the GCC states further develop their intellectual property legislation as required in international trade agreements or do they reconsider their standpoint?

This is a key question for both the GCC states and its international partners as at the heart of all the developments in intellectual property is the potential to increase economic progression and foreign direct investment (FDI). Foreign direct investment is where a company is based in one country and makes an investment in a foreign country by setting up a subsidiary, a joint venture or an associate

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agreements in place for each individual state accessed from WIPO and the debt to GDP was divided by the number of international treaties.

<sup>60</sup> Price, D. (2007), *The Dynamics of Intellectual Property Protection in the Arab Gulf States*, International Review of Business Research Papers, Volume 3, pages 147 to 161, Routledge.

<sup>61</sup> See chapter 2 from 2.6 to 2.11.

<sup>62</sup> See chapter 2 from 2.6 to 2.11.

entity. The foreign company has a minimum 10% of the voting stock, it invests equity and capital to generate earnings and contribute to the host country's fiscal developments<sup>63</sup>.

Foreign direct investment is actively sought by the GCC states and forms part of the GCC unified economic agreement<sup>64</sup>. From an economics point of view, foreign investment is more likely to take place where host countries have strong intellectual property protection. This is largely due to gaining investor confidence by offering legal remedies that can reduce the risks of infringement and leads to an economic boost for protected products<sup>65</sup>. This has a positive effect on the volume of foreign direct investment (FDI) as foreign firms are able to compete effectively in developing countries knowing there are intellectual property laws in place to safeguard against infringement and offer remedies.<sup>66</sup>

Foreign direct investment is need driven, therefore it will always exist in some shape or form, even when intellectual property rights are not as developed as the foreign investors would require however by increasing compliance, the path to economic progression has an increased chance of success.

## **2.6 Saudi Arabia**

In terms of size, Saudi Arabia is the largest province<sup>67</sup> in the GCC and is the world's largest oil exporter. It has 17% of the world's proven oil reserves and is the largest exporter of petroleum<sup>68</sup>. Given its mass oil reserves and production, Saudi Arabia's economy is heavily dependent on oil income. Further, due to Saudi Arabia's extensive oil reserves, their policies and procedures on export rules and tariffs are regularly reviewed as there is a direct impact on the global energy sector.

Saudi Arabia is an absolute monarchy which was ruled by King Abdullah bin Abdul Aziz Al Saud, who is now succeeded by King Salman bin Abdul Aziz Al Saud. Salman is the head of state and Prime Minister of Saudi Arabia. Article 1 of its Basic Law of Government states the Holy Qur'an is the

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<sup>63</sup> OECD Benchmark Definition of Foreign Direct Investment, (2008), Fourth Edition. Available at [https://www.lb.lt/n22873/benchmark\\_fdi\\_4-en.pdf](https://www.lb.lt/n22873/benchmark_fdi_4-en.pdf). Accessed on 12.05.2015.

<sup>64</sup> The Economic Agreement Between the GCC States, (2001), Article 2, International Economic Relations. Available at [www.gcc-sg.org](http://www.gcc-sg.org). Accessed on 24.02.2015.

<sup>65</sup> Carlos, A. (1998), The Relationship Between Intellectual Property Rights and Foreign Direct Investment, Duke Journal of Comparative and International Law, Volume 9, pages 163 to 187.

<sup>66</sup> Javorcik, B. (2003), Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages, The American Economic Review, Elsevier, Volume 48, pages 39 to 62.

<sup>67</sup> The current population of Saudi Arabia is 30 million according to 2015 Index of Economic Freedom which is available at <http://www.heritage.org/index/country/saudi-arabia>. Accessed at 10.02.2015.

<sup>68</sup> The World Factbook. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html>. Accessed at 30.03.2014.

constitution<sup>69</sup> while governance is according to Islamic law<sup>70</sup>. Out of all the GCC states, Saudi Arabia's judicial system is the most reliant on sharia principles<sup>71</sup> in relation to decision making in its criminal and civil courts, as compared to other GCC states<sup>72</sup>.

Although the Saudi Arabian judiciary portrays an independent status, its decisions cannot contravene sharia law and must reflect sharia principles as set out in the constitution<sup>73</sup>. The majority of the Muslim population is Sunni Muslim, with the Saud family following Wahabbism<sup>74</sup>. In Islamic law, there are four main schools of jurisprudence; Hanbali, Hanafi, Shafai and Maliki<sup>75</sup>. The Saudi courts and judicial committees apply the Hanbali school of jurisprudence<sup>76</sup>.

Saudi Arabia has a dual court system; the sharia courts and the board of grievances. Since 2007 Saudi Arabia has spent nearly \$2bn on overhauling its judicial system in an effort to streamline the legal process. Under the Basic Law of Governance in Saudi Arabia, the King has ultimate authority over all branches of the State<sup>77</sup>. The executive branch has the King as the chief of state and head of government. The cabinet consists of a council of Ministers appointed by the monarch every four years and includes many royal family members<sup>78</sup>.

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<sup>69</sup> Saudi Arabia Basic Law of Government Article 1 states *"The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet (PBUH)"*.

<sup>70</sup> The United Nations Development Programme. Available at [http://www.undp.org.sa/sa/index.php?option=com\\_content&view=article&id=3&Itemid=5](http://www.undp.org.sa/sa/index.php?option=com_content&view=article&id=3&Itemid=5). Accessed on 25.02.2015.

<sup>71</sup> Khan, A. (2000-2001), Islam as Intellectual Property My Lord! Increase Me in Knowledge, Cumberland Law Review Volume 31, Pages 1-46, Gattje, H. (1997), The Qur'an and its exegesis, [English trans. & ed. Alford T. Welch], Oxford Oneworld and Price, D. (2012), The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates, Routledge.

<sup>72</sup> Criminal punishments are still in existence in Saudi Arabia and include; capital punishment and amputation. See Law Of Criminal Procedure [2001], Part 5, Chapter 1, Articles 128 to 134. Available at <http://www.saudiembassy.net/about/country-information/laws/CriminalProcedures2001-2of3.aspx>. Accessed on 10.02.2015.

<sup>73</sup> Saudi Arabia Basic Law of Government Article 46 states *"the judiciary is an independent authority. There is no control over judges in the dispensation of their judgments except in the case of the Islamic Shari'ah"*.

<sup>74</sup> Wahabbism is a conservative interpretation of Sunni Islam. Please see Commins, D. (2006), The Wahhabi Mission and Saudi Arabia, I.B.Tauris Publishers.

<sup>75</sup> Lapidus, I. (2002), A History of Islamic Societies, Cambridge University Press, page 157.

<sup>76</sup> Oxford Business Group, The Report: Saudi Arabia 2008, page 202.

<sup>77</sup> The Basic Law of Governance, Saudi Arabia, Article 44 states: *"The Authorities of the State consist of: the Judicial Authority, the Executive Authority and the Regulatory Authority. These Authorities will cooperate in the performance of their functions, according to this Law or other laws. The King is the ultimate arbiter for these Authorities"*. Also Article 55 states *"The King shall rule the nation according to the Sharia. He shall also supervise the implementation of the Sharia, the general policy of the State, and the defense and protection of the country"*. Available at [http://www.saudiembassy.net/about/countryinformation/laws/The\\_Basic\\_Law\\_Of\\_Governance.aspx](http://www.saudiembassy.net/about/countryinformation/laws/The_Basic_Law_Of_Governance.aspx). Accessed on 10.02.2014.

Also see Ansary, A. (2008), A Brief Overview of the Saudi Arabian Legal System, Hauser Global Law School Program, New York University School of Law. Available at [http://www.nyu.edu/global/saudi\\_arabia.htm#a](http://www.nyu.edu/global/saudi_arabia.htm#a). Accessed on 10.02.2015.

<sup>78</sup> The World Factbook. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html>. Accessed on 24.02.2015.

Intellectual property legislation is a recent phenomenon for the GCC states and has brought about a vanguard of change in the intellectual property sector. Saudi Arabia had been negotiating its membership since July 1993; progress was slow in Saudi Arabia as a minimum level of TRIPS compliance was required to complete ascension to the WTO<sup>79</sup>. Saudi Arabia eventually joined the WTO in 2005<sup>80</sup>. Therefore, it took a twelve year period for Saudi Arabia to develop from a pre TRIPS model of intellectual property law protection to a TRIPS compliance stage<sup>81</sup>. Although this is not the longest time period for TRIPS compliance, the time taken by Saudi Arabia to reach TRIPS compliance was three times that of Oman<sup>82</sup>. Despite the time taken to reach TRIPS compliance, Saudi Arabia does now have extensive national legislation covering intellectual property law<sup>83</sup>. However, internationally, Saudi Arabia is only signed up to four international agreements, putting it second lowest out of the six GCC states<sup>84</sup>.

The improvements in Saudi Arabia's intellectual property legislation meant it no longer was a country on international intellectual property watch lists such as the US Special 301 report watch list as by 2010 it had made the required improvements to be removed from the list<sup>85</sup>. The US annually review intellectual property rights and enforcement levels by all of its trading partners and produces a watch list of countries that have high levels of intellectual property infringement or lack substantial intellectual property legislation<sup>86</sup>. Saudi Arabia has been ranked 38<sup>th</sup> on the global intellectual property index putting it second out of the GCC states<sup>87</sup>. The global intellectual property index measures innovation through; measuring innovative activity in research, development and the human factor in innovation<sup>88</sup>.

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<sup>79</sup> Fox, J. (2006), *Globalization and the Gulf*, Chapter 9, Saudi Arabia's role in the global economy, page 172, Routledge.

<sup>80</sup> The World Trade Organisation. Available at [http://www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm). Accessed on 05.02.2015.

<sup>81</sup> Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States* Infidels at the Gates Chapter 4, Routledge Cavendish research in intellectual property.

<sup>82</sup> See Table Three at X. Also see [http://www.wto.org/english/news\\_e/pres00\\_e/pr194\\_e.htm](http://www.wto.org/english/news_e/pres00_e/pr194_e.htm). Accessed on 03.02.2015.

<sup>83</sup> Legislation includes; Law Of Trade Names (2010), Law of Patents, Layout-Designs of Integrated Circuits, Plant Varieties, and Industrial Designs (2004), Copyright Law (2003), Law of Trademarks (2002), Commercial Register Law and its Explanatory Memorandum and Implementing Regulations (2011), Electronic Transactions Protection Law (2007), Regime of E-Transactions (2007), GCC Common Law on Anti-dumping and Countervailing Measures and Safeguards (2006), Retail Business Regime (2005), Competition Law (2004), Law Against Dissimulations (2004), Law of Commercial Data (2002), Law on Trade in Agricultural Fertilizers (2002), Law on Private Laboratories (2002), Law of Criminal Procedure (2001), Telecommunication Law (2001), Printing and Publishing Law (2000), Chartered Accountants Law (1991), Law against Commercial Fraud (1984), Arbitration Law (1983) and Saudi Arabia's Regime of commercial agencies (1962)

<sup>84</sup> See Chapter 2 at 2.3, Table One.

<sup>85</sup> The Report: Saudi Arabia, (2010), Oxford Business Group, page 257.

<sup>86</sup> The Office of the United States Trade Representative, (2013), Special 301 Report. Available at <http://ustr.gov/sites/default/files/05012013%202013%20Special%20Report.pdf>. Accessed on 24.02.2015.

<sup>87</sup> The Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 03.02.2015.

<sup>88</sup> The Global Innovation Index (2014), *The Human Factor in Innovation*, Chapter 2, pages 69-73. Available at <https://www.globalinnovationindex.org/content.aspx?page=gii-full-report-2014#pdfopener>. Accessed on 03.02.2015.

## 2.7 Oman

Oman is a small province with a population of 3.1 million inhabitants<sup>89</sup>. His Majesty Sultan Qaboos bin Said is the Head of State, Supreme Commander of the Armed Forces and Royal Oman Police<sup>90</sup>. Similar to Saudi Arabia, the constitution sets out very clearly that the basis of law is sharia law as stated at Article 2<sup>91</sup>. The majority of the Omani population follow the Ibadhi Muslim interpretation of Islam, with the remaining divided between Sunni, Shia and Hindu<sup>92</sup>. Oman has provisions in its legal system to allow non-Muslims to practice their religion which reflects the influence western laws have had on Oman<sup>93</sup>. The legislative structure has undergone reform, the Basic Statute of the State sets out at Article 58 that the Oman Council shall consist of the Shura Council<sup>94</sup> and the State Council<sup>95</sup>. The State Council's members include former ministers, undersecretaries, ambassadors, judges, senior officers and experts in specific fields<sup>96</sup>.

The legal system in Oman is similar to the civil law system, heavily influenced by Egyptian and French law<sup>97</sup>. In 1981, the Sultan ordered the establishment of the Consultative Council to provide Oman's citizens with opportunities to participate in the country's government<sup>98</sup>. The legislative branch of the Omani Government consists of a bicameral body<sup>99</sup> comprising of two chambers. The upper house has 70 members appointed by the monarch and has advisory powers only<sup>100</sup>. The lower chamber of 84 members is elected by popular vote<sup>101</sup>. Under the Royal Decree 13/97 of 1997 commercial courts were

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<sup>89</sup> Index of Economic Freedom, (2015). Available at <http://www.heritage.org/index/country/oman>. Accessed at 10.03.2015.

<sup>90</sup> Ministry of Information, Sultanate of Oman, <http://www.omanet.om/english/home.asp>. Accessed at 12.03.2015.

<sup>91</sup> Omani Constitution Article 2 reads, "*The State's religion is Islam and Islamic Sharia is the basis for legislation*".

<sup>92</sup> The World Factbook. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/mu.html>. Accessed on 11.03.2015.

<sup>93</sup> International Religious Freedom Report for 2012, United States Department of State, Bureau of Democracy, Human Rights and Labor.

<sup>94</sup> The Shura Council is an elected representative council whose members, including women, are chosen directly by the citizens in the governorates of Oman.

<sup>95</sup> Omani Constitution Article 58 reads, "*The Oman Council shall consist of: 1 - The Shura Council and 2 - The State Council the Law shall specify the jurisdiction of each, its term, sessions, and rules of procedure. Also the Law shall determine the number of its members, the conditions they should satisfy, the way they are selected or appointed, the reasons for their dismissal and other regulatory provisions.*"

<sup>96</sup> Sultanate of Oman, State Council. Available at [http://www.statecouncil.om/Kentico/Inner\\_Pages/CountryCommittee/overview.aspx](http://www.statecouncil.om/Kentico/Inner_Pages/CountryCommittee/overview.aspx). Accessed at 01.03.2015.

<sup>97</sup> Hassani, M. (2008), Bilateral WTO-plus free trade agreements in the Middle East: A case study of OFTA in the post-TRIPS era, *Intellectual Property Law Journal*, pages 161 to 197.

<sup>98</sup> Al-Haj, A. (1996), The Politics of Participation in the Gulf Cooperation Council States: The Omani Consultative Council, *Middle East Journal*, Volume 50, Number 4, Middle East Institute. Available at <http://www.jstor.org/discover/10.2307/4328990?sid=21105444355711&uid=2&uid=4>. Accessed on 16.02.2015.

<sup>99</sup> Referred to as "*the Majlis Oman*".

<sup>100</sup> Referred to as "*Majlis al-Dawla*".

<sup>101</sup> Referred to as "*Majlis al-Shura*".

established with a three-tier structure, with the Supreme Court in Muscat; six courts of appeals and 45 primary courts in various parts of the country<sup>102</sup>.

In 1996, Oman joined the WIPO and the treaty came into force shortly after<sup>103</sup>. Oman achieved TRIPS compliance and WTO membership within four years of starting the process, achieving WTO membership in 2000<sup>104</sup>. Oman entered into a Free Trade Agreement (FTA) with the United States in 2009<sup>105</sup>, one of the key issues in the agreement is to strengthen intellectual property rights protection and enforcement<sup>106</sup>. Oman's intellectual property law has developed in line with western jurisdictions<sup>107</sup>. Currently, Oman has national legislation to govern a number of intellectual property areas including; copyright<sup>108</sup>, industrial property<sup>109</sup>, protection of breeders' rights<sup>110</sup>, consumer protection<sup>111</sup>, civil and commercial procedure<sup>112</sup> and national heritage<sup>113</sup>. On an international level, Oman has ratified the highest number of intellectual property treaties followed closely by Bahrain<sup>114</sup>. Oman has good trade links with the US, the United States-Oman FTA 2006, built on existing FTAs to promote economic reform and to improve intellectual property rights protection and enforcement<sup>115</sup>. Oman ranks at 75 on the global innovation index which highlights the need for improvement in the level of investment in up skilling its human capital towards a knowledge based economy<sup>116</sup>.

## **2.8 Bahrain**

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<sup>102</sup> Bayliss Associates Pty Limited, (2008), Business Guides to the Arab Gulf - The Sultanate of Oman, Council for Australian-Arab Relations (CAAR) and Australia Arab Chamber of Commerce and Industry (AACCI).

<sup>103</sup> Omani Royal Decree No: 74/96. Also see WIPO at

[http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=1&country\\_id=135C](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=1&country_id=135C). Accessed on 03.02.2015. Oman acceded to WIPO in November 1996 and it came into force in February 1997.

<sup>104</sup> World Trade Organisation. Available at [http://www.wto.org/english/thewto\\_e/countries\\_e/oman\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/oman_e.htm). Accessed on 10.02.2015.

<sup>105</sup> United States Trade Representative Office. Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta>. Accessed on 11.02.2015.

<sup>106</sup> Byrnes, A. (2013), International Law in the New Age of Globalization, Page 413, Brill Publications.

<sup>107</sup> Price, D. (2011), The Development of Intellectual Property Regimes in the Arabian Gulf States Infidels at the Gates, Chapter 2, page 137, Routledge.

<sup>108</sup> Omani Royal Decree No. 65/2008 promulgating the Law on Copyright and Related Rights (2008).

<sup>109</sup> Omani Industrial Property Rights and their Enforcement for the Sultanate of Oman (Royal Decree No. 67/2008) (2008).

<sup>110</sup> Omani Royal Decree No. 49/2009 promulgating the Law on the Protection of Breeders' Rights in New Varieties of Plants (2010).

<sup>111</sup> Omani Royal Decree No. 81/2002 promulgating the Law on Consumer Protection (2002).

<sup>112</sup> Omani Royal Decree No.29/2002 promulgating the Law on Civil and commercial procedure (2002).

<sup>113</sup> Omani Royal Decree No. 6/80 promulgating the Law on the Protection of National Heritage (1980).

<sup>114</sup> See Chapter 2 at 2.3, Table One.

<sup>115</sup> United States Trade Representative Office. Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta>. Accessed on 02.02.2015.

<sup>116</sup> The Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 03.02.2015.



Bahrain is a small, independent Islamic Arab State with a population of 1.2 million<sup>117</sup>. It achieved independence from Britain in 1971 and has close ties with Britain and the US<sup>118</sup>. Given the historical presence of Britain in Bahrain, its legal system reflects traditional English law principles<sup>119</sup>. The US Navy has a long and established presence in Bahrain<sup>120</sup>. Bahrain, along with its oil reserves, stands out as a banking and financial services centre; its reasonably prosperous economy makes it less dependent on oil than other Gulf states<sup>121</sup>. However, given Bahrain does not have the same level of oil reserves as its neighbours<sup>122</sup>, it is imperative for Bahrain to develop other areas to drive its economy.

The Bahraini government adopted a second constitution on 14 February 2002 which amended the first constitution of 1975, changing the country's name, to the "Kingdom of Bahrain"<sup>123</sup>.

The new constitution established a hereditary constitutional monarchy with a bicameral parliament<sup>124</sup>. The constitution has developed a doctrine of separation of powers with the formation of the National Assembly as it is responsible for regulating legislative powers through an elected lower chamber of parliament and an independent judiciary<sup>125</sup>. The elected Council of Representatives and the all-appointed Shura Council together establish the National Assembly<sup>126</sup>. The Supreme Council of the Judiciary was established by Decree Law No. 19 of 2000. The legal system of Bahrain is based on several sources, including customary tribal law (urf), Islamic law and civil law<sup>127</sup>. Sharia law is a principal source of legislation<sup>128</sup>. The civil courts comprise of a three-tier system: the Courts of Minor Causes, which have jurisdiction over civil and commercial matters, the Middle Courts, which have jurisdiction over criminal matters and at the top level is the High Court of Appeal<sup>129</sup>.

Although Oman has the highest number of international agreements in intellectual property law, Bahrain has the most intellectual property legislation overall when compared to other GCC states, as it has

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<sup>117</sup> Index of Economic Freedom, (2015). Available at <http://www.heritage.org/index/country/bahrain>. Accessed on 18.02.2015.

<sup>118</sup> The Report: Emerging Bahrain, (2007), page 30, Oxford Business Group.

<sup>119</sup> Price, D. (2012), The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates, Chapter 2, page 14.

<sup>120</sup> Cordesman, A. (2004), The Military Balance In The Middle East, page 339, Praeger Publishers.

<sup>121</sup> Looney, R. (2009), The Omani and Bahraini Paths to Development, World Institute for Development Economic Research.

<sup>122</sup> Power, G. (2012), The difficult development of parliamentary politics in the Gulf - Parliaments and the process of managed reform in Kuwait, Bahrain and Oman.

<sup>123</sup> Constitution of the Kingdom of Bahrain (2002).

<sup>124</sup> Chapter 1, Article 1 (b), Constitution of the Kingdom of Bahrain (2002).

<sup>125</sup> Peck, M. (2008), The A to Z of the Gulf Arab States, Scarecrow Press Incorporated, page 40.

<sup>126</sup> Katzman, K. (2013), Bahrain: Reform, Security, and U.S. Policy, Page 6, Congressional Research Service.

<sup>127</sup> World Intellectual Property Organisation, Constitution of the Kingdom of Bahrain. Available at <http://www.wipo.int/wipolex/en/details.jsp?id=7264>. Accessed on 18.02.2015.

<sup>128</sup> Constitution of the Kingdom of Bahrain, Part One, Article 2 states "*The Islamic Sharia is a principle source for legislation*". Available at <http://www.wipo.int/wipolex/en/details.jsp?id=7264>. Accessed on 18.02.2015.

<sup>129</sup> Bahrain Economic Development Board, (2013), Bahrain Transparency, page 3.

legislated the most at the national level<sup>130</sup> and has ratified eleven treaties at the international level<sup>131</sup>. Bahrain was the first of the GCC states to agree a free trade agreement with the US, which came into force in 2006<sup>132</sup>.

Bahrain is continually reforming and amending its intellectual property laws. Bahrain's Shura Council members have approved the amendments to the intellectual property protection law in relation to out of court settlements and exemptions for educational use of intellectual property<sup>133</sup>. Intellectual property protection is tasked to the Directorate of Industrial Property in the Ministry of Industry and Commerce to set up internal infrastructures to improve intellectual property rights protection. Bahrain is currently 62<sup>nd</sup> on the global innovation index; therefore the index places it at the lower end of the GCC states<sup>134</sup>.

## **2.9 Qatar**

Qatar is another small GCC state with a population of 1.8 million<sup>135</sup>. Similar to Saudi Arabia, Qatar is rich in natural gas and oil reserves<sup>136</sup>, which has boosted its economy<sup>137</sup>. It is an independent sovereign Arab State and has been ruled by the Al-Thani family since it gained independence from Britain in

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<sup>130</sup> Act No. 22 of the Year 2006 relating to the Protection of Copyright and Neighbouring Rights (2006), Act No. 12 of 2006 amending some provisions of Law No. 7 of 2003 pertaining to Trade Secrets (2006), Act No. 14 of 2006 amending some provisions of Law No. 1 of 2004 in respect of Patents and Utility Models (2006), Act No. 5 of 2006 on Designs of Integrated Circuits (2006), Act No. 6 of 2006 on Industrial Designs and Models (2006), Act No. 16 of 2006 amending Law No. 16 of 2004 on the protection of Geographical Indications (2006), Act No. 35 of 2005 pertaining amendment of Article No. 5 of Law No. 7 of 2003 on Trade Secrets (2005), Act No. 16 of the Year 2004 relating to the Protection of Geographical Indications (2004), Act No. 1 of 2004 on Patents And Utility Models (2004), Act No. 7 of 2003 on The Trade Secrets (2003), Law No. 12 for the Year 2006 Amending Law No 7 for the year 2003 Pertaining to Trade Secrets, Law No. 16 for the year 2006 Amending Law No 16 for the year 2004 On the Protection of Geographical Indications, Law No. 35 For the year 2005 Amending Law No. 7 for the year 2003 on Trade Secrets, Law No. 35 For the year 2005 Amending Law No. 7 for the year 2003 on Trade Secrets, Law No. 5 for the Year 2006 On Designs of Integrated Circuits, Law No. 5 for the Year 2006 On Designs of Integrated Circuits, Law No.7 for the Year 2003 On The Trade Secrets, Law No.7 for the Year 2003 On The Trade Secrets, Law no 14 2002 The Law of the Shura Council and the Parliament, Legislative Decree No. 10 of 1991 with respect to Trade Marks (Arabic), Legislative decree No. 1 of 2004 with respect to Patent and Utility Models, Legislative decree No. 1 of 2004 with respect to Patent and Utility Models, Legislative Decree No. 10 of June 7, 1993 with respect to Copyright Law, Legislative decree No. 11 of 2006 with respect to Trade Marks, Legislative decree No. 11 of 2006 with respect to Trade Marks, Legislative decree No. 14 of 2006 amending certain provisions of Decree No.1 of 2004, Legislative decree No. 14 of 2006 amending certain provisions of Decree No.1 of 2004, Legislative decree No. 6 of 2006 with respect to Industrial Designs and Legislative decree No. 6 of 2006 with respect to Industrial Designs.

<sup>131</sup> See Chapter 2 at 2.3, Table One.

<sup>132</sup> United States Trade Representative Office. Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta>. Accessed on 24.02.2015.

<sup>133</sup> Bahrain approves property law amendments, (2013), Trade Arabia, Business News Information. Available at [http://www.tradearabia.com/news/LAW\\_232499.html](http://www.tradearabia.com/news/LAW_232499.html). Accessed on 25.02.2015.

<sup>134</sup> Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 03.02.2015.

<sup>135</sup> Index of Economic Freedom, (2015). Available at <http://www.heritage.org/index/country/qatar>. Accessed on 18.02.15.

<sup>136</sup> [Organisation of the Petroleum Exporting Countries, Qatar facts and figures. Available at http://www.opec.org/opec\\_web/en/about\\_us/168.htm](http://www.opec.org/opec_web/en/about_us/168.htm). Accessed on 18.02.15.

<sup>137</sup> Patrick, N. (2011), The GCC: Gulf state integration or leadership cooperation? Number 19, Kuwait Programme on Development, Governance and Globalisation in the Gulf States.

1971<sup>138</sup>. Sheikh Hamad bin Khalifa Al-Thani was the Emir of the State of Qatar up until 2013 and has been succeeded by his fourth son, Sheikh Tamim bin Hamad bin Khalifa Al Thani. Qatar has a similar autocratic system to its neighbouring GCC states. The Qatari constitution sets itself apart from the other GCC states as seen in Table Two<sup>139</sup>. It is not exclusively sharia based like Saudi Arabia and Oman, nor does it have sharia as a main source of law like the remaining GCC states.<sup>140</sup> Instead, it has sharia as a source of law as stated at Article 1 of the Qatari Constitution; “*its religion is Islam and Sharia law is a main source of its legislations*”<sup>141</sup>.

The legislative authority in Qatar is developing towards a more semi-democratic model. The legislative branch of Qatar is established in the Advisory Council, which approves the general policy of the government and exercises control over the executive authority<sup>142</sup>. The Advisory Council consists of 45 members. Thirty of them are elected directly by secret ballot, while the remaining 15 are appointed by the Emir from among ministers or others<sup>143</sup>. Although the Constitution does not directly deal with the protection of intellectual property rights, Article 27 of the Constitution recognizes the right to private property. Also, Article 24 protects and encourages the dissemination of arts, science, national and cultural heritage<sup>144</sup>.

Qatar shares similarities with Bahrain in terms of its national intellectual property legislation with a number of intellectual property areas covered by statute<sup>145</sup>. In 2009 Qatar set up the Centre for the

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<sup>138</sup> Cavendish, M. (2006), World and Its Peoples, Arabian Peninsula Bahrain, Oman, Qatar, Saudi Arabia, UAE, Yemen, Marshall Cavendish.

<sup>139</sup> See Chapter 2 at 2.4, Table Two.

<sup>140</sup> Price, D. (2012), The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates, Chapter 2, page 18, Routledge.

<sup>141</sup> Constitution of Qatar, 2004, Part One, Article One. The Qatari constitution has been amended and what is significant for the purposes of this research, sharia has been downgraded from the principal source of law to a main source of law. See further at Chapter 3 at 3.1.

<sup>142</sup> The committee, named the Permanent Constitution Drafting Committee, was formed, with a membership of a chairman, a deputy chairman and 30 members.

<sup>143</sup> World Intellectual Property Organisation, Constitution of Qatar, Part One, Article Seventy Seven. Available at <http://www.wipo.int/wipolex/en/text.jsp?code=QA>. Accessed on 18.02.2015.

<sup>144</sup> World Intellectual Property Organisation, Constitution of Qatar. Available at <http://www.wipo.int/wipolex/en/text.jsp?code=QA>. Accessed on 18.02.2015.

<sup>145</sup> Decree Law No. 16 of 2010 on the Promulgation of the Electronic Commerce and Transactions Law (2010), Law No. 21 of 2009 issuing the Income Tax Law (2010), Emiri Decree No. 53 of 2009 establishing the Center for the Protection of Intellectual Property Rights (2009), Law No. 8 of 2008 on Consumer Protection (2008), Commercial Law No. 27 of 2006 (2007), Decree Law No. 30 for the year 2006 To Issue Patents Law (2006), Law No. 19 of 2006 on the Protection of Competition and Prevent Monopolistic Practices (2006), Law No. 25 of 2005 on Commercial Register (2005), Law No. 5 of the year 2005 on Protection of Secrets of Trade (2005), Law No. 6 of the year 2005 on Protection of Layout Designs of Integrated Circuits (2005), Law No. 27 of 2004 on the Protection of the Signs, Slogans, Works and Related Rights of the Fifteenth Asian Games - Doha 2006 (2004), Law No. (11) of 2004 promulgating the Penal code (2004), Law No. 11 of 2003 on the State Merit Awards and Encouragement of Science, Arts and Letters (2003), Customs Law No. 40 of 2002 (2002), Law No. 9 of 2002 on Trademarks, Trade Names, Geographical Indications and Industrial Designs (2002), Law No. 7 of 2002 on the Protection of Copyright and Related Rights (2002), Law No. 5 of 2002 Issuing the Commercial Companies Law

Protection of Intellectual Property Rights. It operates within the Ministry of Justice and gives the justice minister the authority to appoint independent experts to help the centre carry out its functions<sup>146</sup>. In the most recent report by WIPO, the global innovation index puts Qatar 47<sup>th</sup> in the global rankings<sup>147</sup>.

## **2.10 The United Arab Emirates**

The United Arab Emirates, (UAE), is a federation of seven monarchies<sup>148</sup>. The UAE population size is 5.4 million<sup>149</sup>. Its main revenue is oil, construction industry and tourism. Free trade zones exist in UAE, whereby foreign ownership is permitted at 100 percent with zero taxation, to help diversify the economy<sup>150</sup>. Outside of the free trade zones, any foreign investment must be owned by a UAE national by at least 51 percent of the business.

The system of governance is monarchic with the exception that there is a federal head<sup>151</sup>. Islam is the State religion and sharia is the main source of legislation<sup>152</sup>. Abu Dhabi has natural oil reserves that account for approximately 90 percent of UAE oil production and allows Abu Dhabi to take a leading role in political and economic decision-making<sup>153</sup>. The federal system of government is composed of a Supreme Council, the Council of Ministers, a Federal National Council (FNC) that acts as a parliamentary body and the an independent judiciary through the Federal Supreme Court<sup>154</sup>. The Supreme Council is the highest constitutional authority; it elects a president and vice-president from amongst them to serve for a renewable five-year term in office<sup>155</sup>. The Supreme Council re-elected

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(2002), Decree Law No.14 of 1982 concerning the Deposit of Works in the National Library (1982), Law No. 2 of 1980 on the Antiquities (1980) and Law No. 8 of 1979 on the Press and Publication (1979).

<sup>146</sup> The Report Qatar 2012, Oxford Business Group, page 42, Oxford Business Group.

<sup>147</sup> The Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 03.02.2015.

<sup>148</sup> The seven monarchies are: Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al-Khaimah, Sharjah, and Umm al-Qaiwain.

<sup>149</sup> <http://www.heritage.org/index/country/unitedarabemirates>. Accessed at 19.02.2015. According to the index the UAE is ranked 2nd out of 15 countries in the Middle East/North Africa region, and its overall score is higher than the world and regional averages.

<sup>150</sup> Index of Economic Freedom, (2015). Available at <http://www.heritage.org/index/country/unitedarabemirates>. Accessed on 08.02.2015.

<sup>151</sup> The World Intellectual Property Office. Available at <http://www.wipo.int/wipolex/en/details.jsp?id=10673>. Accessed on 14.02.2015.

<sup>152</sup> UAE Constitution, Part One, Article 7 states "*Islam is the official religion of the Union. The Islamic Sharia shall be a main source of legislation in the Union*".

<sup>153</sup> Index of Economic Freedom, (2015). Available at <http://www.heritage.org/index/pdf/2012/countries/unitedarabemirates.pdf>. Accessed on 19.02.2015. For example in the UAE constitution, Chapter 1, Article 49 states "*Supreme Council on substantive matters shall be by a majority of five of its members provided that this majority includes the votes of the Emirates of Abu Dhabi and Dubai. The minority shall be bound by the view of the said majority*". Available at <http://www.uaecabinet.ae/English/UAEGovernment/Pages/TheSupremeCouncil.aspx>. Accessed at 19.02.2015.

<sup>154</sup> Permanent Mission of the United Arab Emirates to the United Nations. Available at <http://www.un.int/wcm/content/site/uae/cache/offonce/home/pid/18620;jsessionid=9DADD9BD10F9FC05E5995CC79ADD4BFF>. Accessed at 19.02.2015.

<sup>155</sup> UAE Constitution. Available at <http://www.uaecabinet.ae/English/UAEGovernment/Pages/TheSupremeCouncil.aspx>. Accessed at 19.02.2015. See for example UAE Constitution, Chapter 1, Article 46.

President H.H. Sheikh Khalifa bin Zayed Al Nahyan in November 2009, also he is the current ruler of Abu Dhabi.

The UAE joined the WIPO in 1974<sup>156</sup> and started addressing the issue of intellectual property protection<sup>157</sup>. National legislation exists in many areas of intellectual property including; copyright<sup>158</sup>, trademarks<sup>159</sup>, industrial designs<sup>160</sup> and other areas<sup>161</sup>. The UAE patent system operates under two systems; the Patent Cooperation Treaty (PCT) system for domestic patents, and the GCC Patent system for regional patent applications<sup>162</sup>. The UAE is also a signatory to several international treaties which puts it on par with Qatar's international obligations but below Oman and Bahrain<sup>163</sup>. The UAE can be seen to value a knowledge based economy as part of its Government strategy is to promote and enhance innovation, research and development by promoting and protecting intellectual property rights<sup>164</sup>. The UAE is the best performing GCC state on intellectual property rights protection, currently ranked 36<sup>th</sup> on the global innovation index<sup>165</sup>.

Further, the UAE is the first of the Middle Eastern countries to host the World Expo in 2020. The World Expo is a global event that spans across 6 months and takes place every 5 years. It was initiated in London in 1851 and has continued to act as a global community meeting conference to share business developments that impact global economy, sustainability and innovations. The World Expo exhibition is a catalyst to making progress on issues of international prominence such as economic transformation, cultural development and social regeneration<sup>166</sup>. Specifically for the UAE and the GCC region as a whole, hosting the World Expo further cements the region as a dynamic hub for global commerce and

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<sup>156</sup> The World Intellectual Property Office. Available at [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=1](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=1). Accessed at 19.02.2015.

<sup>157</sup> Benson-Colpi, M. The Report: Abu Dhabi (2010), Oxford Business Group, page 221.

<sup>158</sup> Federal Law No. 7 of the Year 2002 Concerning Copyrights and Neighbouring Rights (2002).

<sup>159</sup> Federal Law No. 37 of 1992 on Trademarks amended by Law No. 19 of 2000 and Law No. 8 of 2002 (1992).

<sup>160</sup> Federal Law No. 31 for the Year 2006 Pertaining to the Industrial Regulation and Protection of Patents, Industrial Drawings, and Designs (2002).

<sup>161</sup> Federal Law No. 17 of 2009 on the Protection of New Plant Varieties (2010), Federal Law No. 6 of 2008 on establishing a national council for tourism and Antiquities (2008), Federal Decree No.85 of 2007 on The Common Customs Law for the Arab States of the Gulf (2007), Federal Law No. 24 of 2006 Concerning Consumer Protection (2006), Law No. 1 Of 1992 Of the Emirate of Sharjah On Antiquities (1992), Federal Law No. 15 of 1980 on the Press and Publication (1980), Federal Law No. 8 of 1980, on Regulation of Labour Relation (1980) and Law No. 5 of 1973 on Commercial Register (1973).

<sup>162</sup> Latham and Watkins LLP, 2013, Doing Business in the United Arab Emirates, Middle East and Africa Technology, IP and Sourcing Focus.

<sup>163</sup> See chapter 2 at 2.3, Table One.

<sup>164</sup> Highlights of the U.A.E. Government Strategy 2011-2013, page 16 Available at [http://planipolis.iiep.unesco.org/upload/United%20Arab%20Emirates/United%20Arab%20Emirates\\_Government\\_strategy\\_2011-2013.pdf](http://planipolis.iiep.unesco.org/upload/United%20Arab%20Emirates/United%20Arab%20Emirates_Government_strategy_2011-2013.pdf). Accessed on 09.02.2015.

<sup>165</sup> The Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 03.02.2015.

<sup>166</sup> Expo 2020 Dubai, United Arab Emirates. Available at [http://expo2020dubai.ae/en/world\\_expos](http://expo2020dubai.ae/en/world_expos). Accessed on 24.02.2015.

the link between the East and West. In relation to intellectual property development, the build up to 2020 will be the optimum platform to drive innovation from local and international investors to meet consumer needs and increase infrastructure capacities at a national government level and regionally. By acting as a hub, Dubai has an opportunity to define its intellectual property future and by association that of the remaining GCC states, to develop an integrated working model of intellectual property rights protection that incorporates their traditional values with international obligations<sup>167</sup>.

## **2.11 Kuwait**

Kuwait is ruled by Amir Sabah al-Ahmad al-Jabr Al Sabah<sup>168</sup> and has a modest population size of 3.7 million<sup>169</sup>. Kuwait is a hereditary Emirate, with all rulers chosen from the Al Sabah family. It has a substantial crude oil reserve, second in the region behind Saudi Arabia, with 10% of the world's natural oil reserves<sup>170</sup>. Oil, at 90% of export revenues, is the main revenue for Kuwait<sup>171</sup>. It is a fully sovereign state with sharia as a main source of legislation<sup>172</sup>. It was the first of the GCC states to have a Constitution<sup>173</sup> and formed a precedent for other Gulf states<sup>174</sup>. It seeks to have a partly democratic composition in Parliament, similar to Qatar, as Parliament consists of fifty representatives that are directly elected; with a further fifteen members appointed by the Emir<sup>175</sup>. The Kuwait legal system is based on civil law jurisdiction<sup>176</sup> and has a clear system of separation of powers, distinguishing between the legislative and executive branches of government<sup>177</sup>. The Kuwait constitution does not refer to intellectual property, however Article 18(1) of the Constitution refers to private property rights<sup>178</sup>.

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<sup>167</sup> Please see further at chapter 7 from 7.14 to 7.20.

<sup>168</sup> Al Sabah family have ruled State of Kuwait since 1756. Full details of the rulers can be found at [http://www.e.gov.kw/sites/kgenglish/Portal/Pages/Visitors/AboutKuwait/GoverningBody\\_KuwaitGovernors.aspx](http://www.e.gov.kw/sites/kgenglish/Portal/Pages/Visitors/AboutKuwait/GoverningBody_KuwaitGovernors.aspx) Accessed at 23.02.2015.

<sup>169</sup> Index of Economic Freedom, (2015). Available at <http://www.heritage.org/index/country/kuwait>. Accessed on 24.02.2015.

<sup>170</sup> Rediff Business, 30 countries with highest proven oil reserves. Available at <http://www.rediff.com/business/slide-show/slide-show-1-countries-with-highest-proven-oil-reserves/20120301.htm>. Accessed on 21.02.2015. The Report: Kuwait, (2012), Oxford Business Group, page 15.

<sup>171</sup> United Arab Emirates Land Ownership and Agriculture Laws Handbook, 2011, Ibpus.com, USA International Business Publications.

<sup>172</sup> Kuwaiti Constitution, Part 1, Article 2 states "*The religion of the State is Islam, and the Islamic Shari'a shall be a main source of legislation*".

<sup>173</sup> Kuwait gained independence from Britain in 1961 and approved its first constitution in 1962.

<sup>174</sup> Price, D. (2012), The Development of Intellectual Property Regimes in the Arabian Gulf States Infidels at the Gates, Chapter 2, page 30.

<sup>175</sup> Power, G. (2012), The difficult development of parliamentary politics in the Gulf - Parliaments and the process of managed reform in Kuwait, Bahrain and Oman. The Kuwait Programme on Development, Governance and Globalisation in the Gulf States.

<sup>176</sup> The World Intellectual Property Office. Available at <http://www.wipo.int/wipolex/en/details.jsp?id=6148>. Accessed on 15.02.2015.

<sup>177</sup> Kuwaiti Constitution, Part IV, Powers, Chapter I, Article 50, Separation and Constitutionality of Powers.

<sup>178</sup> Kuwaiti Constitution, Part II, Article 18, Private Property, Inheritance states "*private property is inviolable. No one shall be prevented from disposing of his property except within the limits of the law. No property shall be expropriated except for*

Intellectual property development in Kuwait is not at the same level of Bahrain, Qatar, Oman and UAE. Kuwait currently has four statutes dealing with intellectual property<sup>179</sup>.

Kuwait is the only GCC state on the US Special 301 Report Watch List for its lack of progress on enforcement efforts against piracy and counterfeiting. The main shortcomings identified by the report were the failure of the judiciary to enforce penalties that were seen as severe enough penalties to act as a deterrent to intellectual property infringement and the lack of legislative reform in Kuwaiti copyright law<sup>180</sup>. This is further highlighted in the global innovation index which ranks Kuwait as the lowest of all the GCC states, with an overall ranking of 69<sup>181</sup>. Internationally, Kuwait is only signed up to the WIPO, unlike the other GCC states which are signed up to many more.

## **2.12 Conclusion to the background of the GCC states**

Intellectual property laws in the GCC states have a very clear development timeline. From the 1970's onwards each autocratic monarchy has developed its own national laws and generally they have all chosen to follow a Western style legal framework. The GCC focus is to develop international standards as this has become a growing challenge for the development and diversification of national exports and international trade<sup>182</sup>. Each state varies in its number of international agreements with Kuwait being signed up to one international treaty to Oman which has 13 international treaties in force. The number of national and international membership for each State can be linked to the weight Sharia holds in legislative matters. The six GCC states can be separated in respect to the level of sharia compliance observed. The strictest following of sharia law is by Saudi Arabia which cites sharia as the constitution of the state. Below Saudi Arabia is Oman which has sharia as the basis of legislation. Qatar follows behind Oman with sharia considered to be the main source of law and lastly Qatar, Bahrain and Kuwait have sharia as a main source of law.

Improvements in the enforcement of intellectual property rights and protection from infringement, from a GCC perspective, have been slow. In terms of patent protection, the GCC Patent Office started

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*the public benefit under the circumstances and in the manner specified by law, and on condition that just compensation is paid*<sup>179</sup>.

<sup>179</sup> Decree-Law No. 68 of 1980 on Trademarks, as amended by Decree-Law No. 10 of 1987 and Law No. 1 of 2001 (2001), Law No. 4 of 1962 relating to Patents, Designs and Industrial Models as amended by Law No. 3 of 2001 (2001), Law No. 64 of 1999 concerning Intellectual Property Rights including Explanatory Memorandum (1999) and Law No. 56 of 1996 promulgating the Industrial Law (1996).

<sup>180</sup> The United States Trade Representative Office. Available at <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>. Accessed on 14.02.2015.

<sup>181</sup> The Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 03.02.2015.

<sup>182</sup> International Monetary Fund, 2012, Economic Prospects and Policy Challenges for the GCC Countries.

receiving applications for patents in 1998; however given that it did not have TRIPS standards until 2001, the first patent application was not granted until 2002<sup>183</sup>. Since 2002, the annual number of patents granted has risen from 10 to 340 for 2012<sup>184</sup>. Of the 2402 patents granted by the GCC, 93% of the innovators are non-residents<sup>185</sup>. Therefore, there is a much greater demand for intellectual property protection by non-residents than GCC nationals. This ties in neatly with the current demands on the GCC states to adopt more stringent intellectual property provisions under TRIPS plus as the protection is aimed at benefiting foreign innovators with the knock on positive effect of increased foreign direct investment.

This chapter has provided a background overview of the six GCC states and the GCC itself. The brief historical look at the states adds context to the understanding of their infrastructure, governance and shapes current legislative procedures. The intellectual property issues that exist in the GCC states will be analysed and examined to reflect their developments to date in later chapters. However before considering the intellectual property issues, there is an anomaly raised in this chapter which will be addressed next. All of the GCC states abide by sharia law as per their constitutions and all have adopted a suite of intellectual property laws without integrating sharia law principles. Therefore chapter 3 will examine the relevant sharia law principles to intellectual property right protection in order to inform the main recommendations for an integrated approach to intellectual property rights protection.

### **Chapter Three: The development of intellectual property under sharia law principles in the GCC states**

#### **3.1 Introduction**

This chapter will identify key sharia law principles to show that there are three key stages in the development of intellectual property in the GCC states; a foundation stage, a development stage and an advanced stage. This chapter will focus on the foundation stage and will show how intellectual property is justifiable under sharia law. The findings of the chapter will inform the content of the key research outcomes around; developing an integrated approach to intellectual property in the GCC and

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<sup>183</sup> Al-Hajeri, M. (2006), The Gulf Cooperation Council (GCC) patent office. World Patent Information, Volume 28, pages 14 to 19 at page 14.

<sup>184</sup> GCC Patent Office at <http://www.gccpo.org/Statistics/en/AnnualPatent.aspx>. Accessed on 09.02.2015.

<sup>185</sup> GCC Patent Office at <http://www.gccpo.org/Statistics/en/ResidentsNonResidentsPatents.aspx>. Accessed on 09.02.2015.



progressing from the foundation stage to a development stage that incorporates sharia principles with western style intellectual property provisions.

The GCC states are historically Islamic states and they have all incorporated sharia law into their written constitutions as discussed in chapter 2<sup>186</sup>. The influence of sharia law principles is not ubiquitous among all six of the GCC states as each state is independent in how it governs and develops national laws. Among all the GCC states, the main primary source of sharia law is the Quran, however what weight sharia law has in influencing the law making process and legislative developments differs from state to state. Saudi Arabia has sharia as the source of law<sup>187</sup>, for Oman it is the basis of legislation<sup>188</sup> and for Qatar, UAE and Kuwait it is a main source of law<sup>189</sup>. This leaves Bahrain with sharia as a principle source of law at a constitutional level<sup>190</sup>.

Despite the uniform banner of the GCC, how individual GCC countries observe sharia laws and incorporate religion in to their intellectual property law development differs from state to state. Intellectual property law, in the GCC states, has developed in line with the WIPO and TRIPS standards and therefore the states have adopted a number of western style intellectual property laws<sup>191</sup>. To fully understand the influence of sharia law on intellectual property development, it is necessary to consider Islamic jurisprudence in this area and draw attention to the relevant intellectual property references from the four main sources of Islamic law<sup>192</sup>.

Existing intellectual property laws in the Gulf have been criticised for lacking teeth and effective enforcement.<sup>193</sup> The study of sharia law in relation to intellectual property is key to the successful implementation of intellectual property as through Islamic principles the Islamic states citizens can identify with the rights as opposed to seeing them as principles imposed through western thinking and accompanying law making structures.

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<sup>186</sup> See chapter 2 at 2.4 to 2.9.

<sup>187</sup> Saudi Arabia gives the Quran the highest importance in its law making as at Saudi Arabia Basic Law of Government Article 1 which states: "*the Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, the Holy Qur'an, and the Sunna (Traditions) of the Prophet (PBUH)*". Available at [http://www.saudiembassy.net/about/country-information/laws/The\\_Basic\\_Law\\_Of\\_Governance.aspx](http://www.saudiembassy.net/about/country-information/laws/The_Basic_Law_Of_Governance.aspx). Accessed on 10.02.2015.

<sup>188</sup> Oman has sharia as the basis for legislation at Omani Constitution Article 2.

<sup>189</sup> Qatar has sharia as a main source of law at Constitution of Qatar, 2004, Part One, Article One. Also, UAE has sharia as a main source of law at UAE Constitution, Part One, Article 7 and Kuwait at Kuwaiti Constitution, Part 1, Article 2.

<sup>190</sup> Bahrain has sharia as a principal source of law at Constitution of the Kingdom of Bahrain, Part One, Article 2.

<sup>191</sup> All six GCC states have achieved minimum TRIPS compliance and have membership to WIPO since national intellectual property legislation has been put in place.

<sup>192</sup> Matulionyte, R. (2013), Iran: in search of a balanced approach to copyright, *Intellectual Property Quarterly*, page 2.

<sup>193</sup> Hassanein, M. (2008), *Bilateral WTO-Plus Free Trade Agreements In the Middle East: A Case Study of OFTA In The Post-Trips Era*. Wake Forest Intellectual Property Law Journal Volume 8, pages 161 to 197 and Raslan, H. (2007), *Shari'a and the Protection of Intellectual Property: The Example of Egypt*, *The Intellectual Property Law Review*, pages 497 to 559.

As the GCC states currently stand, they all have sharia enshrined in their constitutions and secular laws regulating intellectual property. Although sharia does not prohibit intellectual property protection or enforcement in the Gulf, the two concepts lack a catalyst principle to amalgamate the Islamic jurisprudence to enhance intellectual property development in the region and satisfy international agreements<sup>194</sup>. This is the main reason as to the intention behind proposing an integrated intellectual property framework in the GCC which can harmonise intellectual property with Islamic law through an Islamic law perspective as currently Islamic law is being forced to fit around international intellectual property laws, creating a square peg in a round hole scenario.

Intellectual property legislation has developed in the Gulf over a period of thirty years as has been discussed in Chapter One. As the states do not lack minimum intellectual property legislation, the reason for analysing sharia principles is to address the lack of protection offered as opposed to the enactment of the laws<sup>195</sup>.

In this chapter there are two main objectives:

- To give an overview of the principles of sharia law and analyse the influence of sharia law on intellectual property protection and enforcement. Primary and secondary sources of sharia law will be examined to draw clear conclusions on the influence of sharia law sources on intellectual property rights development.
- To consider the research to date on the relationship between sharia law and intellectual property to understand sharia law principles for intellectual property with specific references to defining intellectual property within the laws of Islam and addressing the international demand for higher standards of intellectual property protection.

### **3.2 Overview of sharia law principles**

*“Classical Muslim methodology (usul) refers to the basic textual sources and methods used in producing Muslim attitudes in different spheres of life including international relations. These sources are the Qur'an, Sunnah, ijma (consensus), and ijthihad (the use of human reason or aql) in elaboration and interpretation of the Shari'ah. Ijthihad includes the fourth major source of Muslim thought, the qiyas (analogy)”<sup>196</sup>.*

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<sup>194</sup> Malmvig, H. (2006), An unlikely match or a marriage? EU-GG relations in a changing security environment, Danish Institute for International Studies, pages 1 to 15.

<sup>195</sup> The relevance of considering cultural norms in assessing intellectual property social and economic development on intellectual property protection is considered by Margaret Chon, see Chon, M. (2006), Intellectual Property and the Development Divide, Seattle University School of Law, Cardozo Law Review, Volume 27, pages 2821 to 2912.

<sup>196</sup> AbdulHamid, A. (1987), The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought, The International Institute for Islamic Thought, Islamization of Knowledge (Series 1). See page 58.

Sharia law impacts on protection parameters in respect of copyright, patent and trademark protection<sup>197</sup>. The GCC states have enacted intellectual property laws in; copyrights, trademarks, patents, trade names, integrated circuits, industrial designs and plant varieties on the stipulation that the intellectual property asset is not prohibited by Islam nor does it significantly harm the doctrine of public interest<sup>198</sup>.

The influence of sharia on intellectual property is dependent on three main factors: applying Islamic law principles to support the protection of intellectual property law, identifying provisions to protect intellectual property rights with the aim of increasing innovations and stimulate economic development and assessing the effectiveness of intellectual property law against society both recognising and accepting it<sup>199</sup>. To address the three main factors identified above, the remainder of this chapter is dedicated to applying Islamic law principles to support the protection of intellectual property law through an analysis of primary and secondary sharia law sources. Secondly, provisions will be identified in chapters 5 and 6 that can better protect intellectual property rights with the aim of increasing innovation and stimulate economic development<sup>200</sup>. Thirdly, an assessment of the dependence of intellectual property law development on society both recognising and accepting it will be carried out in chapters 6 and 7<sup>201</sup>.

The argument by some Islamic scholars against intellectual property protection is based on the principle that the level of effort invested in producing the intellectual property asset is heavily outweighed by the profit made, however the main counter argument for this is that not all the assets of an intellectual property right holder are profitable and therefore by denying a monopoly right, intellectual property development is hindered as innovation is stifled<sup>202</sup>.

### **3.3 Primary sources of sharia law**

Sharia law is a legal framework developed primarily from the Quran and where the Quran is clear and unambiguous on setting a legal precedent, other sources of law are subordinate to the Quran. It is split into 114 chapters and is considered to be a compilation of the verbal revelations given to the Prophet Muhammad

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<sup>197</sup> Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates*, Routledge Research in Intellectual Property, Routledge.

<sup>198</sup> Zimowski, S. (2013), *Consequences of the Arab Spring: How Shari'ah Law and the Egyptian Revolution Will Impact IP Protection and Enforcement*, Penn State Journal of Law and International Affairs, Volume 2, Issue 1.

<sup>199</sup> Alghamdy, N. (2005), *Protection of Intellectual Property in Islamic Jurisprudence and Its Economic Consequences* (in Arabic), presented at the third international conference for Islamic economics, Umm al-Qura University, Mecca.

<sup>200</sup> See Chapter 5 at 5.14 and Chapter 6 from 6.11 to 6.15.

<sup>201</sup> See Chapter 6 at 6.3, 6.5 and 6.10. Also see Chapter 7 at 7.20.

<sup>202</sup> Al-Fadhli, S. (2009), *The Ethical Dilemma of Software Piracy in Islamic Societies: The Case of Kuwait*, *The Electronic Journal of Information Systems in Developing Countries*, Volume 39. Available at <http://www.eijsdc.org/ojs2/index.php/eijsdc/article/view/586/295>. Accessed on 12.05.2015.

over a period of twenty two years from God through the Angel Gabriel<sup>203</sup>. The chapters of the Quran are known as “surahs”. Each chapter is broken down into “ayas” (verses) and has a specific title covers a particular topic. The structure of the chapters varies, the longest chapter is the second chapter, titled “*Al-Baqarah*” (Arabic for *The Cow*), containing 292 ayas and also containing the longest ayat at verse 282. The second chapter is relevant to intellectual property protection as it details Islamic jurisprudence on financial matters including; debiting money, lending, borrowing and interest. The key ayas from the second chapter of the Quran that deal with business ethics are from verse 252 to 286. The Quran gives a moral framework for Muslims to abide by and integrates all aspects of life in to its 114 chapters<sup>204</sup>. The Quran is deemed authentic text by Muslims and as such no part, surah or ayat, can be amended or disregarded<sup>205</sup>.

To supplement the Quran, the Sunnah is the second most important source of authority. The Sunnah is based on model behaviour of the Prophet Muhammed, statements and sayings which have been collected and recorded as short reports known as hadiths. The Quran and Sunnah are seen as primary sources of Islam whereas other sources, such as ijma and qiyas, are considered secondary. Unlike conventional primary sources of law, such as common law and legislation, the primary sources of Islamic law are based on a divine law. It does not have the same historical development linked with societal progression in western laws; there is no binding precedent or amendable legislation<sup>206</sup>. However, what the Quran and Sunnah do allow for is the interpretation of primary sources of sharia law in regard to translation and approval. The Quran is considered as the word of God, therefore it supersedes any historical law making that was in place prior to its revelation and cannot be altered<sup>207</sup>.

From an intellectual property stance, the Quranic revelations were at a time when intellectual property rights did not exist. Thus, the Quran predates any cultural norm approach, within Islamic or western states, to intellectual property protection. Knowledge in the Quran is protected as the word of God and was revealed to the Prophet Muhammed as an intangible asset on the basis that is a divine asset that has been bestowed

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<sup>203</sup> Haleem, M. (2010), *The Qur'an: English translation with parallel Arabic text*, Oxford University Press. See Introduction, The Life of Muhammed and Historical background Page 4. Also see Ali, A. and Razwy, S. (2009), *The Qur'an: A Translation*, Mass Market Paperback for general principles on Quran structure and formation. The Quran can be accessed on [www.quran.com](http://www.quran.com).

<sup>204</sup> The Quran, across its chapters, has established jurisprudence on; financial matters, marriage and family life, property, contract law, morality and moral values, welfare, economics, trade, environmental matters, gender, and inheritance.

<sup>205</sup> Rahman describes the Quran as “*it works by its own laws and is autonomous; but not autocratic, for, in itself, it has no warrant for its own existence and it cannot explain itself.*” See Rahman, F. (2009), *Major Themes of the Qur'an*, University Of Chicago Press, page 3.

<sup>206</sup> Coulson, N. (1978), *A History of Islamic Law*, The Scholar Press Limited, page 5.

<sup>207</sup> The Quran was recited by the Prophet off by heart; the Prophet’s followers would also recite the Quran by heart until it was written down after which it is believed to have been rewritten without alteration.

upon mankind<sup>208</sup>. The knowledge from the Quran was then extended upon by the Sunnah as a form of teaching the way the Quran should be applied. For example, primary sharia sources on property rights are not expressly limited to tangible property and therefore Quranic references on proprietary rights have been extended to intellectual property rights as will be discussed later in this chapter at 3.8.

The source of law in the Quran, is God, as in Surah Yusuf, Verse 40, the text states; “*Legislation is not but for Allah*”<sup>209</sup> and therefore the Quran stipulates mankind to be a trustee of the knowledge passed down in the Quran. As the number of extensive legal references in the Quran and Sunnah are limited, secondary sources of Islamic jurisprudence have been developed over the centuries. Islam is established as a divine law encompassing belief (Imān), ethics and moral character (Ihsān).

### **3.4 Overview of secondary sources of sharia law**

The secondary sources of sharia law act as a framing device used to set precedents where the Quran and/or sunnah have not provided sufficient, if any, guidance to reach a consensus. The two main sources of secondary law are ijma and qiyas. Ijma, is a source of law that is applied when consensus on a point of law is needed that has not been adequately dealt with by the primary sources<sup>210</sup>. Qiyas is a form of analogical reasoning as Adigun describes qiyas as “... *a mode of reasoning to legislate for novel questions, to reveal the divine rule of law and to harmonize between divine legislation and human interests*”<sup>211</sup>.

#### **3.4.1 Ijma as a secondary source of sharia law**

Of the two secondary sources, Ijma is ranked as the third source of law due to it originating from a unanimous viewpoint, after the Quran and Sunnah. There are two forms of ijma. Firstly, the authentic ijma is the consensus of the Prophet Mohammed’s companions. Second is a consensus of an interpretation of Islamic law scholars in a particular country, on a particular issue, in a specific moment<sup>212</sup>. A scholar also known as an “Ulama”, when presented with an interpretation matter, applies ijihad (their own reasoning) to come to an

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<sup>208</sup> Khan, A. (2001), *Islam As Intellectual Property My Lord! Increase Me In Knowledge*, Cumberland Law Review, Ray Rushton Distinguished Lecturer Series.

<sup>209</sup> See the Quran at 12:40. The full translation of the verse is; “*You worship not besides Him except [mere] names you have named them, you and your fathers, for which Allah has sent down no authority. Legislation is not but for Allah. He has commanded that you worship not except Him. That is the correct religion, but most of the people do not know*”. Available at <http://quran.com/12>. Accessed at 29.04.2015.

<sup>210</sup> El-Bialy, N. (2011), *Can Shari'a be a Deterrent for Intellectual Property Piracy in Islamic Countries?* The Journal of World Intellectual Property Volume 14, pages 441-466. At page 12, the use of ijma is for when there is no direct Quran and Sunnah reference for a topic of law, “*then if a certain point in history can be found when all Muslim legal scholars agreed upon a particular interpretation of a certain Islamic text, then in this case, their consensus may be relied upon as a valid source of Islamic legal traditions*”.

<sup>211</sup> Adigun, T. (2005), *The Relevance of Qiyas as a source of Islamic Law in Contemporary Times*, page 8.

<sup>212</sup> Ramadan, H. (2006), *Toward honest and principled Islamic Law scholarship*, Michigan State Law Review, pages 1573 to 1606.

interpretation. The reason ijma is ranked as the third source is due to it originating from a unanimous viewpoint. There are references from the Quran to support the use of ijma. For example, Surah Imran at Verse 103 reads; *"hold fast to the rope of Allah, all of you, and do not split into factions"*<sup>213</sup>. The historic Sunnah reference used to reach a consensus and validate ijma is in the hadith of the Prophet Muhammed stating; *"My community will never agree upon an error"*<sup>214</sup>.

#### **3.4.2 Qiyas as a secondary source of sharia law**

Qiyas is a fairly limited concept and ranks as the fourth source of law. The literal meaning of qiyas is to ascertain the weight and quality of something. In terms of qiyas methodology, scholars apply it through four distinct areas; as an original case (Asl), a new case (Far), an effective cause (Illah) and a ruling (Hukm)<sup>215</sup>. The method is to find a verse in the Quran, in Sunnah or a rule on which consensus was achieved as the point of departure. The direct purpose must be determined, and the relationship between the rule, and the question considered in extending the rule, must be clearly explained to justify the extension of the rule.

A common example of qiyas is in the extension of the Quranic prohibition on drinking wine which is found in the Quran at Surah Maidah, Verse 90, which states; *"O you who have believed, surely wine...are only an abomination of Ash-Shaytan's (The all-vicious, the Devil) doing, so avoid it, that possibly you would prosper"*<sup>216</sup>. The point of departure can be established here as a ban on wine drinking. From the four essential areas of analogical reasoning, Asl has been applied to extend the original case, of a prohibition from wine, to a unanimous consensus by Ulama to apply qiyas reasoning to extend the ban to all alcoholic drinks<sup>217</sup>. Qiyas are relevant to Islamic justification for intellectual property protection as analogical reasoning is applied to Quranic rules on proprietary rights, contract law, international transactions and public interest to justify intellectual property rights as will be seen later in this chapter from 3.7 to 3.12. The relationship between sharia and intellectual property rights protection is further analysed in chapters 5 and 7<sup>218</sup>.

#### **3.5 Criticism of secondary sources of sharia law**

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<sup>213</sup> See the Quran at 3:130. Other references to support ijma from the Quran can be found at 4:59, 4:115, 18:29 and 42:14. All available at [www.quran.com](http://www.quran.com). Accessed on 10.02.2014.

<sup>214</sup> Brown, D. (2009), A New Introduction to Islam, Wiley-Blackwell, page 157.

<sup>215</sup> Hukm, Far and Illah are discussed at Page 20 by Kamali, H. (1989), Principles of Islamic Jurisprudence, Khalifa Books. Asl is explained further at page 19. Qiyas operate by identifying an original case known as Asr and relating it to a new case, Far, through an effective cause known as Illah. The effective cause therefore triggers the new law that leads to a ruling, the Hukm.

<sup>216</sup> See the Quran at [www.quran.com](http://www.quran.com). Dr Ghalil interpretation at 5:90. Accessed on 27.03.2015.

<sup>217</sup> Jamar, S. (1992), The protection of intellectual property under Islamic law, Capital University Law Review, page 2. Available at <http://www.iefpedia.com/english/wp-content/uploads/2009/10/The-Protection-of-Intellectual-Property-Under-Islamic-Law.pdf>. Accessed on 11.03.2014. Viktor, K. (2006), Between God and the Sultan, A History of Islamic Law, Oxford University Press.

<sup>218</sup> See chapter 5 from 5.11 to 5.14 and chapter 7 from 7.13 to 7.21.

The main criticism of secondary sources has to be their lack of uniformity, the application of ijma and qiyas varies depending on the school of thought followed by each individual country and region<sup>219</sup>. There are four main schools of Islamic jurisprudence; Hanbali, Shafii, Maliki, and Hanafi. Hanbali, is followed by Saudi Arabia and is the strictest of the four schools, employing Qiyas only as a last resort<sup>220</sup>. The Shafii school of thought is more widely accepted as it allows the application of qiyas to make legitimate analogies<sup>221</sup>. The Maliki school differs slightly from the other schools as it relies on historical customs and practice of the Medinan people as a source and is observed in Kuwait, Bahrain and the United Arab Emirates.

The final school, Hanafi, gives consideration to the four main sources as discussed above, however if a consensus cannot be reached then historical custom and practice is considered along with juristic preference (Istishan). In the GCC, intellectual property protection has been considered as sharia compliant although the approval is not attributed to any one school of thought<sup>222</sup>. There is criticism that the use of secondary sources for the basis of intellectual property laws should not be allowed as the Quran and Sunnah are a form of intellectual property from which new inferences should not be made<sup>223</sup>. The main argument against the use of secondary sources to justify intellectual property rights has always revolved around the fact that that intellectual property is a new concept that is not regulated by Sharia, and as a result, not protected according to its principles<sup>224</sup>.

### **3.6 Conduct under sharia law**

Once a relevant rule under sharia has been determined, the relevant conduct under the rule must then be determined<sup>225</sup>. There are five types of conduct under sharia: mandatory, recommended, permitted, recommended against, and banned<sup>226</sup>. As a result, some areas of law have been governed under a strong

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<sup>219</sup> The four main schools are followed by Sunni Muslim as the law making power in the GCC States rests with Sunni Muslims and not Shia Muslims. Islamic jurisprudence from Shia scholars has not been considered in this research and is beyond the scope of the research.

<sup>220</sup> Zimowski, S. (2013), Consequences of the Arab Spring: How Shari'ah Law and the Egyptian Revolution Will Impact IP Protection and Enforcement, Penn State Journal of Law and International Affairs, Volume 2, Issue 1.

<sup>221</sup> Abdal-Haqq, I. (2002), Islamic Law: An Overview of Its Origin and Elements, Journal of Islamic Law and Culture at pages 1 to 61.

<sup>222</sup> Carroll, J. (2001), Intellectual Property Rights in the Middle East: A Cultural Perspective, Fordham Intellectual Property, Media and Entertainment Law Journal Volume 11, Issue 3.

<sup>223</sup> Khan, A. (2000), Islam as Intellectual Property My Lord! Increase Me in Knowledge, Cumberland Law Review, Volume 31, at page 361.

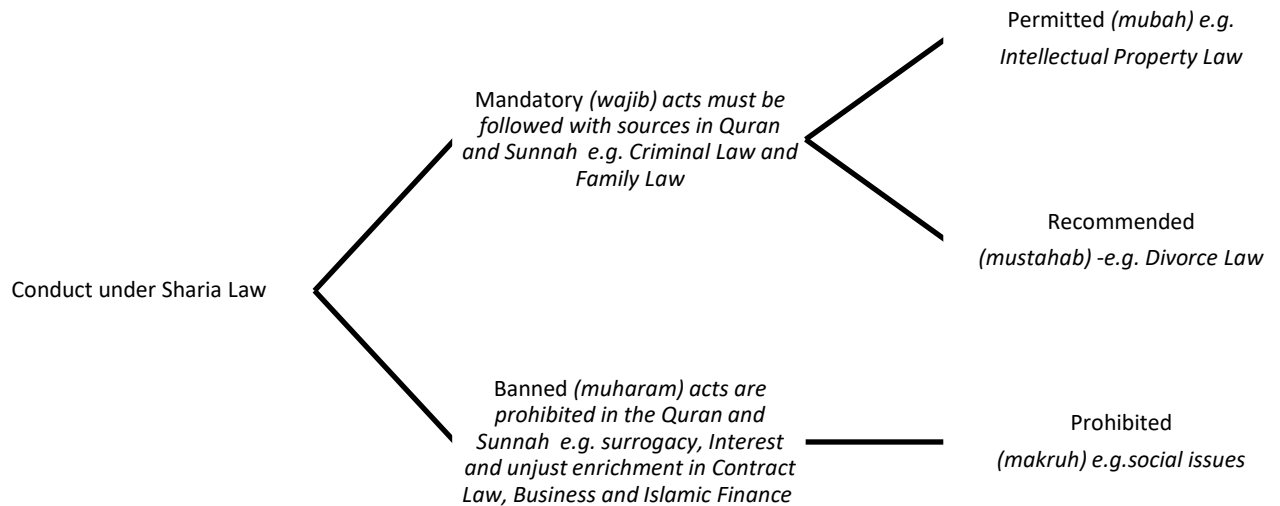
<sup>224</sup> Raslan, H. (2007), *Shari'ah* and the Protection of Intellectual Property: The Example of Egypt, The Intellectual Property Law Review, page 498.

<sup>225</sup> Cullen, C. (2010), Can TRIPS Live In Harmony With Islamic Law: An Investigation Of The Relationship Between Intellectual Property And Islamic Law? Page 13.

<sup>226</sup> Nabil, S. (1989), The Law Governing Contracts in Arabia, International and Comparative Law Quarterly Review, pages 761 to 781; Gamal, M. (1978), Islamic Law: Its Reaction to Other Legal Systems, 26 American Journal of Comparative Law, pages 187 to 189 and Jamar, S. (1992), The protection of intellectual property under Islamic law, Capital University Law Review, pages 1 to 26 at page 2 and Vikor, K. (2005), Between God and the Sultan, C Hurst and Co Publishers.

sharia influence and others have not. The table below highlights the main types of conduct and roles of sharia law:

Table Four: The five types of conduct under sharia



### **3.7 Classifying intellectual property law**

Intellectual property cannot be classed as mandatory or recommended as it is not mentioned in the primary sources of sharia law. Likewise there is an argument that it cannot be classed as recommended against or banned for the same reason<sup>227</sup>. This has left the majority of scholarly work in the area on whether intellectual property protection can be permitted under sharia law to draw inferences from sharia law on; property law, contract law and public interest<sup>228</sup>.

#### **3.7.1 No Quranic reference for intellectual property law**

The Quran makes no reference to intellectual property law and therefore makes no legal provisions in its regulation<sup>229</sup>. In terms of applicability, there is an argument that there is an inherent weakness in producing

<sup>227</sup> Zimowski, S. (2013), Consequences of the Arab Spring: How Shari'ah Law and the Egyptian Revolution Will Impact IP Protection and Enforcement, Penn State Journal of Law and International Affairs, Volume 2, Issue 1.

<sup>228</sup> See Jamar, S. (1992), The protection of intellectual property under Islamic law, Capital University Law Review, pages 1 to 26, Raslan, H. (2007), *Shari'a* and the Protection of Intellectual Property: The Example of Egypt, The Intellectual property Law Review, page 497, Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law, pages 55 to 94 and Carroll, J. (2001), Intellectual Property Rights in the Middle East: A Cultural Perspective, Fordham Intellectual Property, Media and Entertainment Law Journal Volume 11, Issue 3.

<sup>229</sup> Cullen, C. (2010), Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law? Page 13.



new laws in areas where there is no Quranic or Sunnah reference<sup>230</sup>. Laws that can be identified from primary sharia sources have more weight in Islamic courts and in legislation. For example, punishments in criminal law can be found in both the Quran and Sunnah, as a result many Islamic countries still have capital punishment. It is generally accepted that an argument against intellectual property on the main ground that it is not mentioned in the Quran and Sunnah is weak given that there are several areas of law that are not expressly mentioned in the primary sources however secondary sources have been used to establish legal norms.

An example is in the use of qiyas in defining classes of women that are prohibited to a man for marriage. The Quran refers to certain women that a man cannot marry at Surah Nisa at Verse 23; *“prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously”*<sup>231</sup>. The verse does not account for the father's aunt however through jurist use of analogical reasoning, the father and mother's aunts are prohibited because the reasoning takes into account of the close proximity in a blood relationship<sup>232</sup>.

### **3.7.2 Inferential reasoning for intellectual property law**

Intellectual property has been understood using inferential reasoning as the topic is a new concept<sup>233</sup>. Legal reasoning in property law, contract law and public interest has formed the basis of sharia approval for

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<sup>230</sup> See Shaykhul-Hadeeth Maulana Zakariyya Kandhalwi (RA) published by Muhammad Shahid Saharunpuri entitled, “Kutub-e-Fadhail Par Ashkalat Aur Unkay Jawabaat” and Shaykhul (Mufti) Rasheed Ahmed Gangohi(RA) from Fatawa e Rashidiya.

<sup>231</sup> See the Quran at 4:23 Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>232</sup> Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law, Capital University Law Review, Adigun, T. (2005), The Relevance of Qiyas as a source of Islamic Law in Contemporary Times, Page 8, *“Qiyas therefore is a mode of reasoning to legislate for novel questions, to reveal the divine rule of law and to harmonize between divine legislation and human interests”*, the point made here at page 72 is relevant; *“classes of prohibited women are mentioned. Although father's aunt were not included in the verse, but father and mother's aunt are prohibited by jurist based on analogy of father's sisters and mother's sister, because of close blood relationship”*, Kamali, M. (1998), Principles of Islamic Jurisprudence, 2nd Edition Kuala Lumpur, Ilmiah Publishers, page 267, Zaidan, A. (1994). Al-Wajiz fi Usul Fiqh, Beirut: Muassasah Risalah. Pages 236 to 244, Arafa, A. (2012), Corruption and bribery in Islamic law: are Islamic ideals being met in practice? Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2149982](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149982). Accessed on 11.03.2015, Cullen, C. (2010), Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law? El-Bialy, N. (2011), Can Shari'a be a Deterrent for Intellectual Property Piracy in Islamic Countries? The Journal of World Intellectual Property Volume 14, pages 441 to 466 and Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law, pages 55 to 94.

<sup>233</sup> Hallaq W. (2009), An Introduction to Islamic Law, Cambridge University Press pages 22 to 25, Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law, Capital University Law Review and Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law, pages 55 to 94.

intellectual property protection<sup>234</sup>. Islamic law on proprietary rights is the most obvious example of established law that can be manipulated to support intellectual property.

### **3.8 The use of proprietary rights to justify intellectual property law**

*“Property institutions fundamentally shape a society. These legal relationships between individuals, different sorts of objects, and the state are not easy to justify. This is especially true of intellectual property.”*<sup>235</sup>

#### **3.8.1 John Locke on property as a natural right**

Proprietary rights in law have been in existence for many centuries<sup>236</sup>. Leading philosophers, Immanuel Kant and John Locke, have written significant pieces of work to influence and shape proprietary rights<sup>237</sup>. John Locke, in his work entitled *Locke's Second Treatise on Civil Government*, defines proprietary rights in its simplest form in the appropriation of an apple from a tree at Chapter Five. He ascribes the labour used to collect apples to a private right; *“the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask then, when did they begin to be his? when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up? and it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right”*<sup>238</sup>.

From his initial work on property rights, Locke developed the labour theory that people have a right to the fruits of their labour. Locke believed that the labour right is a natural right, not dependent on the particular laws in a society<sup>239</sup>.

#### **3.8.2 The Sunnah on property as a natural right**

The Sunnah also makes reference to property rights as a right under natural law<sup>240</sup>. The Sunnah is translated as the path to be followed by all Muslims based on the example of the Prophet Muhammad. The Quran stipulates such following at Surah Al Ahzab Verse 21; *“There has certainly been for you in the Messenger of*

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<sup>234</sup> Jamar, S. (1992), *The Protection of Intellectual Property under Islamic Law*. Capital University Law Review and Beltrametti, S. (2010), *The Legality of Intellectual Property Rights under Islamic Law*. The Prague Yearbook of Comparative Law, pages 55 to 94.

<sup>235</sup> Hettinger, E. (1989), *Justifying Intellectual Property*, Philosophy and Public Affairs, Volume 18, Number 1, Blackwell Publishing, pages 31 to 52.

<sup>236</sup> Philosophers have written on property rights from Plato and Aristotle to Locke, Kant and Marx.

<sup>237</sup> Merges, R. (2011), *Justifying Intellectual Property*, Chapter Ten, Harvard University Press Cambridge, Massachusetts London, England.

<sup>238</sup> Locke, J. (1690), *Second Treatise on Civil Government*, Chapter Five, Section 28. Available at <http://www.constitution.org/jl/2ndtr05.htm>. Accessed on 30.03.2015.

<sup>239</sup> For further analysis of John Locke's philosophy on copyright protection, see chapter 6 at 6.3.

<sup>240</sup> See *The Book of Paradise*, its Description, its Bounties and its Inhabitants, Chapter 53, section 16 which states *“The property which I have conferred upon them is lawful for them”*. Available at <http://sunnah.com/muslim/53/76>. Accessed on 28.03.2015.

*Allah an excellent pattern*". Given the Sunnah is based on the example, legislative actions, character, manners, and habits of the Prophet there is a large body of Sunnah from which specific references can be found to justify intellectual property rights protection. Examples from the Sunnah include: "no person's property is lawful to be taken except by his consent"<sup>241</sup> and "he who cultivates barren land is entitled to the ownership of that land"<sup>242</sup>. The barren land can equate to the idea in intellectual property which in itself is not protected, the cultivation of the barren land represented the expression of the idea and it is this expression that makes the inventor entitled to intellectual property protection.

Consent is also a key principle in Islamic property rights. Where consent is not given, a person looking after the property of another is a trustee of the property and on the trust that the property will be returned to its legal owner. Applying this to intellectual property, Muslims act as trustees of knowledge based asset, not owners of the protected knowledge and must use the asset with the permission of the right holder<sup>243</sup>. Therefore there is a strong equity analogy rooted in the Sunnah principles that have been written to establish property rights as natural rights. The right of a beneficiary under a trust allows action to be taken against people to impose sanctions or injunctions. The right of a beneficiary is a proprietary right because it is effective against third parties and therefore there are classes of proprietary rights which exist in Islamic law. The law of equity is instrumental in the creation of some intellectual property rights such as trademarks, equitable actions for breach of confidence and passing off. Equity therefore serves as a form of analogical reasoning, providing an effective cause between the original Islamic rights of property, *Asr*, aligned with a new case, *Far*, for intellectual property rights<sup>244</sup>.

### **3.8.3 Quranic proprietary rights to justify intellectual property law**

Quranic verses make precise references to proprietary rights<sup>245</sup>. The common theme of the Quranic verses is to strive with your efforts in your property and has formed a basis for a similarity to the Lockean labour theory<sup>246</sup>. Theoretically there is a strong foundation of knowledge within the Quran and Sunnah in relation to

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<sup>241</sup> Narrated by Muaz bn Jabal Al-Wahbah Al-Zuhaili, *Fiqh Al-Islam Wa Adillahtuh*, Volume V, (Damascus, Darul Fikr), (Arabic Text), (1989), page 561. See Quran at 4:29 for the reference.

<sup>242</sup> Gulaid, M. (1991), *Land Ownership in Islam (A Survey)*, Research Paper Number 14, Islamic Research & Training Institute, Islamic Development Bank, Jeddah, page 45.

<sup>243</sup> Claypool, J. (2007), *Islamic Law and Modern Patent Law*, Center for Advanced Study & Research on Intellectual Property.

<sup>244</sup> Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates*, Chapter 2, page 29, Routledge Research in Intellectual Property.

<sup>245</sup> See the Quran for example at; 2:188, 2:220, 2:275, 2:278-279, 4:2, 4:5-6, 4:95, 4:161, 6:152, 9:41, 9:88, 49:15 and 61:11. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>246</sup> Vaughan, R. (1996), *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, *International and Comparative Law*, pages 354–59 and Pilvar, R. (2012), *Theory of labor as justification of ownership in Islam and philosophy of John Locke*, *The Journal of Studies in Islamic Law & Jurisprudence*, Volume 3, pages 63-85 and Cullen, C. (2010), *Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law?*

property law which can be connected to intellectual property<sup>247</sup>. A Quranic reference is made in the Surah An-Najm, Verse 39, linking Locke's labour theory to Islamic proprietary rights; *"And that man hath only that for which he maketh effort"*<sup>248</sup>. Islam allows a person to own property, possess and enjoy wealth which has been acquired through lawful means and effort<sup>249</sup>.

Therefore, a common analogy was to attribute Islamic principles of property to the protection of intellectual property. While this has a certain degree of standing, particularly in regard to appropriation, as the natural rights under Locke's labour theory, a distinction is drawn between tangible assets and intangible assets. How the two are measured can vary significantly and more relevant to the current economic climate, how the value of intangible assets can be assessed and protected can have a profound effect on economic growth potential. The Hedaya, a Guide on the Mussulman Laws, refers to historical Islamic text which was composed in the twelfth century and it set out the legal system which was central to the entrenchment of British rule in India.

It provided the framework for active control of civil administration and the courts and the first English translation was written in 1791 to aide British rule of India. Although the Hedaya is now superseded, it remains a valid document as it set out Islamic laws in key areas of; charity (zakat), marriage, fostering, divorce, slavery, oaths, and relevant to intellectual property, punishments. The Hedaya distinguishes between punishment for theft of a tangible as set versus an intangible asset and as such categorised incidents of theft which should lead to the amputation of a hand and those which should not. Relevant to the study of intellectual property in Islamic law, is the what the Hedaya states as the punishment for the theft of a book; *"the hand of a thief is not cut off for stealing a book, whatever be the subject of which it treats, because there the object of the theft can only be the contents, and that is not property"*<sup>250</sup>.

The Hedaya states that the theft of a book would not lead to the amputation of a hand as the object of the theft is the content of the book and not the book itself, concluding amputation cannot take place for stealing ideas, as ideas are not property. This is found in an Islamic text which dates back to the twelfth century and translated in to English in the eighteenth century. The same legal principle was heard in the English Criminal Appeal Court in 1979 where a Defendant could not be prosecuted for stealing an exam paper as the purpose

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<sup>247</sup> See the Quran 3:77. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>248</sup> See the Quran at 53:39 Sahih International Translation. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>249</sup> See the Quran at 2:195, 2:254, 2:267 and 9:103. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>250</sup> The Hedaya, Or Guide: a Commentary on the Mussulman Laws: Translated by Charles Hamilton, Volume 1-4, London, T. Bensley 1791 Book VIII, page 92.

of the theft was not to steal paper<sup>251</sup>. The Hedaya commentary further distinguishes the punishment for theft of a book stating the theft of a book of accounts would be theft of appreciable property as in this case the contents are not the object but the paper and other materials of which the book is composed.

Therefore the Hedaya predates anything of a similar nature in western texts, clarifying the Islamic justification for differences in the punishment applicable to theft of a tangible asset from an intangible asset. Therefore, the Hedaya concept of not allowing amputation for the theft of a book relates well with the foundational tenets of intellectual property as you cannot protect a physical book. Tangible assets are documented in detail in the Quran and greater inferences can be drawn from how property is protected in the sacred verses of the Quran and how the reasoning behind property protection can extend to intellectual property protection.

#### **3.8.4 Quranic reform on property law**

The principal Quranic reform in the area of property was the introduction of the doctrine of Istikhlaf developed from Surah Al Hadid, Verse 7 where the Quran declares that all property belongs to God, and that man has been made a successor of that property in his lifetime, in the capacity of a mere trustee<sup>252</sup>. The exercise of the right of ownership is subject to the public interest of society to be supervised by the government<sup>253</sup>. Where the interpretation of Islamic proprietary rights to intellectual property rights falls short is in establishing an Islamic principle to deal with economic free riders<sup>254</sup>. The issue of economic free riders in Islamic states has been raised by various scholars however there is no definitive Islamic doctrine resolving the issue<sup>255</sup>.

#### **3.8.5 Linking theft of property to intellectual property infringement**

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<sup>251</sup> See Oxford v. Moss (1979) 68 Cr App Rep 183 which highlighted the exact same principal, albeit minus the threat of amputation, where the case is an example that intellectual property is intangible as the thief never intended to steal the paper and therefore there was no theft of a tangible property.

<sup>252</sup> There is an equity parallel here and a state, king and/or god rationale. See Hallaq, W. (2009), An Introduction to Islamic Law, Cambridge University Press.

<sup>253</sup> See the Quran at 57:7. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015. Kamali, M. (2002), Principles of Islamic Jurisprudence, Ilmiah Publishers, page 44.

<sup>254</sup> Scholarly writers include; Ebrahim, M. (1995), Behavioral norms in the Islamic doctrine of economics: A comment, Journal of Elsevier, Journal of Economic Behavior and Organization, Volume 27, pages 151 to 157, Kuran, T. (1986), The economic system in Contemporary Islamic thought: interpretation and assessment, International Journal of Middle East Volume 18, pages 135-164, Khan, S. (2004), Intellectual property law and globalization, Elsaman, R. and Eldakak, A. (2012), Is the Middle East moving toward Islamism after the Arab spring? The case study of the Egyptian Commercial and Financial Laws, Richmond Journal of Global Law and Business and Hassanein, M. (2008), Bilateral WTO-Plus Free Trade Agreements In the Middle East: A Case Study of OFTA In The Post-Trips Era. Wake Forest Intellectual Property Law Journal Volume 8, pages 161 to 197.

<sup>255</sup> Azhar, R. (2010) Economics of An Islamic Economy, chapter 7, page 232, Brill. Available at [https://books.google.co.uk/books?id=qhTf7tFNDYwC&pg=PA232&lpg=PA232&dq=The+issue+of+economic+free+riders+in+Islam&source=bl&ots=WWXlI2y1f1&sig=K3JNNF7ekOJTavo47Doridjct\\_Y&hl=en&sa=X&ei=dDP2VNCqLIK3PM7jgYgK&ved=0CD8Q6AEwBA#v=onepage&q=The%20issue%20of%20economic%20free%20riders%20in%20Islam&f=false](https://books.google.co.uk/books?id=qhTf7tFNDYwC&pg=PA232&lpg=PA232&dq=The+issue+of+economic+free+riders+in+Islam&source=bl&ots=WWXlI2y1f1&sig=K3JNNF7ekOJTavo47Doridjct_Y&hl=en&sa=X&ei=dDP2VNCqLIK3PM7jgYgK&ved=0CD8Q6AEwBA#v=onepage&q=The%20issue%20of%20economic%20free%20riders%20in%20Islam&f=false). Accessed on 03.03.2015. Khan, M. (1994), An Introduction to Islamic Economics, chapter 6, International Institute of Islamic Thought and Institute of Policy Studies. Khoury, A. (2009), Dubai's New Intellectual Property-Based Economy: Prospects for Development Without Dependency, Marshall Review Intellectual Property Law. Available at <http://repository.jmls.edu/cgi/viewcontent.cgi?article=1199&context=rjpl>. Accessed on 03.03.2015.

Theft of property is referenced in the Quran to prevent unjust use of property that does not belong to the perpetrator; *“And eat up not one another’s property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully”*. The closest Quranic reference to intellectual property can be found in Surah Al-Nisa, Verse 29; *“O you who have believed, do not consume one another’s wealth unjustly but only [in lawful] business by mutual consent”*. This would support principles of intellectual property protection as when intellectual property infringement takes place; the loss of revenue for the right holder is against his permission. The punishment for theft of physical property in the GCC states is based on the severity of the crime and the loss incurred. In intellectual property law, the loss incurred is not always as clear. For example, speculative losses can be recovered as damages in intellectual property infringement cases however the damages sought cannot always be given a clear numerical value as easily as the theft of a tangible asset.

### **3.8.6 Sharia principles on mutual consent**

Mutual consent is mentioned at Surah Al-Nisa Verse 29 as a piece of property cannot be stolen if there is mutual consent between the parties concerned on how the property can be used. Mutual consent can be extended to compulsory licensing as it gives an intellectual property right holder monopoly over his wealth (mal) in the form of a knowledge based asset. Compulsory licensing allows the patent holder to be paid for authorised copies of the product and to be adequately remunerated when taking into account the economic value of the patent. The mutual consent can be inferred from governments allowing someone else to produce the patented product while adequately remunerating the patent holder<sup>256</sup>.

A monopoly right generates wealth for the right holder, the intangible asset can thus be considered as the source of income for the intellectual property right holder for his invention. The economic value of any intellectual property asset can vary from a nominal amount to extremely high amounts, however the Quran stipulates against excessive wealth in the hands of a few and critics have raised this as a concern where a monopoly right can generate disproportionate wealth<sup>257</sup>. To allow intellectual property right holders overcome

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<sup>256</sup> Adam, M. (2005), Remarks about the TRIPS Agreement with Particular Reference to Compulsory Licensing. Available at <http://www.dradamiprgroup.com/forms/Remarks.pdf>. Accessed on 12.03.2015.

<sup>257</sup> See Quran at 59:7. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2013. See Usmani, M. (2009), Present Financial Crisis Causes And Remedies From Islamic Perspective. Available at [http://www.muftitaiusmani.com/index.php?option=com\\_content&view=article&id=41:present-financial-crisis-causes-and-remedies-from-islamic-perspective-&catid=12:economics&Itemid=15](http://www.muftitaiusmani.com/index.php?option=com_content&view=article&id=41:present-financial-crisis-causes-and-remedies-from-islamic-perspective-&catid=12:economics&Itemid=15). Accessed at 16.03.2015. Also see Chaudhry, M. (2003), Islam And Other Economic Systems, Chapter 20. Available at [http://www.muslimtents.com/shaufi/b16/b16\\_20.htm#3.Monopoly](http://www.muslimtents.com/shaufi/b16/b16_20.htm#3.Monopoly). Accessed at 16.03.2015. The interplay between intellectual property rights and the Quranic references against excessive wealth is considered in the following articles;

this barrier, the granting of a monopoly right is counter balanced by the publication of specifications in patents. Developing on from this are the legal remedies available to property right holders when intellectual property infringement takes place. Punishment for the theft of property is based on the severity of the theft. With intellectual property infringement, the GCC states have sought to pass laws that offer intellectual property right holders some recourse whilst keeping a distinction between property theft and intellectual property infringement<sup>258</sup>.

### **3.8.7 Defining intellectual property infringement**

There are some pitfalls with the inference that theft of intellectual property equates to theft of physical property. Firstly, where an intellectual property asset is used without the consent of the right holder, an infringement has taken place and not theft in the same sense as the theft of a tangible asset<sup>259</sup>. This is largely due to the fact that primary sources of sharia law have laid down criterion for assessing the severity of physical property theft and the subsequent punishments but not for the theft of intangible assets. Secondly, the intellectual property right holder's main concern is financial and therefore compensation as a remedy for infringement ties in more with Islamic principles on the remedies available for failure to honour contractual obligations, international business and trade than theft of physical property. For example, remedies sought by intellectual property right holders include; prohibitory injunctions and where necessary interim injunctions, seizure of infringing goods, compensation, exemplary damages and in extreme cases imprisonment. In comparison, offences related to theft of tangible assets lead to a different set of sanctions with imprisonment at the forefront of the possible punishments. Therefore defining violations of intellectual property assets as infringement is more appropriate than theft.

### **3.9 Sharia sources on contract law**

There are a number of Quranic references in relation to contract law. Quranic references attributed to contract law include Surah Al-Mā'idah, Verse 1, "*O you who have believed, fulfill [all] contracts*"<sup>260</sup>. Further references

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Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law. The Prague Yearbook of Comparative Law and Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law, Capital University Law Review.

<sup>258</sup> See for example the UAE Federal Law No (3) of 1987 on Issuance of The Penal Code in regard to punishments for theft which can be anywhere from a nominal term to 15 years as opposed to intellectual property infringement which carries a maximum 5 year term. The UAE Federal Law No (3) of 1987 on Issuance of The Penal Code is available at [https://www.icrc.org/ihl-nat/6fa4d35e5e3025394125673e00508143/e656047207c93f99c12576b2003ab8c1/\\$FILE/Penal%20Code.pdf](https://www.icrc.org/ihl-nat/6fa4d35e5e3025394125673e00508143/e656047207c93f99c12576b2003ab8c1/$FILE/Penal%20Code.pdf). Articles 378 and 379 of the UAE Federal Law No (3) of 1987 on Issuance of The Penal Code relates to data privacy with a maximum 5 year prison term.

<sup>259</sup> Malkawi, B. (2013), The Alliance Between Islamic Law And Intellectual Property: Structure And Practice, University of St. Thomas Law Journal, Volume 10, Issue 3. Available at <http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1318&context=ustlj>. Accessed on 06.03.2015.

<sup>260</sup> See the Quran at 5:1, Sahih International Translation. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

focus on honouring contractual promises and documenting the contract<sup>261</sup>. In considering contract law it is useful to have a comparator. In English contract law there are seven key elements which make up contract formation; agreement, consideration, intention to create legal relations, form, capacity, consent and legality. Even where all the required elements of a contract are met, a contract will not have legal effect under sharia law if it contains an attribute of gambling<sup>262</sup>, alcohol<sup>263</sup> or forbidden meat<sup>264</sup>. Taking agreement first of all, in sharia law this is not as straightforward as one party making an offer which the other accepts given the influence of the doctrines of *riba*<sup>265</sup> and *gharar*<sup>266</sup>. *Riba* is the doctrine on the prohibition of interest payments, undue profits or excessive gain from a transaction and *gharar* deals with risk, speculative transactions, ambiguity or excessive uncertainty in contracts<sup>267</sup>.

Two key elements of general theory of contract are evident at Surah An-Nisā', Verse 4, to have mutual consent and gainful exchange<sup>268</sup>. The Sunnah further expands on the obligations on contracting parties to fully disclose the value of their bargain and any defects that exist; *"both the buyer and the seller give the option of either confirming or cancelling the bargain three times, and if they speak the truth and mention the defects, then their bargain will be blessed, and if they tell lies and conceal the defects, they might gain some financial gain but they will deprive their sale of (Allah's) blessings*<sup>269</sup>." As the Gulf states have embarked on

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<sup>261</sup> See the Quran at 2:282, Sahih International Translation reads, "O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. And let not the witnesses refuse when they are called upon. And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you, except when it is an immediate transaction which you conduct among yourselves. For [then] there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is [grave] disobedience in you". Available at [www.quran.com](http://www.quran.com). Accessed on 01.03.2015. Also see Quran at 2:177, 4:12, 4:33, 5:89, 9:1, 9:111, 17:34 and 23:8.

<sup>262</sup> See the Quran at 2:219, 5:3, 5:90, 5:91 and 5:92. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015. The link between intellectual property and gambling comes from the potential for royalties to be deemed so uncertain as to be like gambling and therefore further research in the relationship between intellectual property and gambling within an Islamic context will shed light on how a potential reward for risk can exist. See Jamar, S. (1992), The protection of intellectual property under Islamic law, Capital University Law Review. Available at <http://www.iefpedia.com/english/wp-content/uploads/2009/10/The-Protection-of-Intellectual-Property-Under-Islamic-Law.pdf>. Accessed on 11.05.2015.

<sup>263</sup> See the Quran at 2:219, 5:3, 5:90, 5:91, 5:92 and 16:67. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>264</sup> See the Quran at 2:259,, 5:3, 6:121, 6:145, 16:14, 22:37. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>265</sup> Fisho-Oridedi, A. (2009), The prohibition of *riba* under Islamic law: what are the implications for international contracts? See Quran 4:161 *"And [for] their taking of usury while they had been forbidden from it, and their consuming of the people's wealth unjustly. And we have prepared for the disbelievers among them a painful punishment"*.

<sup>266</sup> Al Satti, A. (2003), The Permissible *Gharar* (Risk) in Classical Islamic Jurisprudence, Islamic Economy, Volume 16, No 2, Pages 3 to 19. See page 3.

<sup>267</sup> Wilson, R. (2009), The development of Islamic finance in the GCC Working Paper, Kuwait Programme on Development, Governance and Globalisation in the Gulf States at page 27.

<sup>268</sup> See the Quran at 4:29. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>269</sup> Sahih Bukhari Chapter Number 34, Hadith number 327.



international contracts and treaties, *riba* and *gharar* have played a significant role in financial transactions<sup>270</sup>, particularly in Islamic finance which will be considered in more detail later<sup>271</sup>.

### **3.10 Sharia sources on international transactions**

In terms of sharia references to international transactions and conducting business, the Quran has clear statements regarding honouring agreements and the need for certainty whilst forbidding *riba* and *gharar*<sup>272</sup>. The clearest reference can be found in Surah Al Baqarah at Verse 275; *“Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, “Trade is [just] like interest.” But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein*<sup>273</sup>”. Through trade, different models of contractual arrangements have emerged which although are sharia compliant, allow a trader or investor to earn some return on the capital that has been invested without breaching the prohibition on interest. It is the distinction between return on investment and interest that has been the cornerstone of the Islamic finance industry.

Therefore, the key to a successful application of intellectual property rights in the Gulf states is striking a balance between permissible trade and circumventing *riba* and *gharar* similar to how sharia compliant models have evolved in Islamic Finance. In an international context, intellectual property protection is at the heart of all trade agreements and the greater the protection, the more trade takes place through foreign direct investment<sup>274</sup>. When a developing country can demonstrate stronger intellectual property protection, there are obvious advantages as foreign companies and multinationals are more willing to invest where they have confidence that there is a legal recourse for intellectual property infringement<sup>275</sup>. This then has a direct impact on tax revenues and transaction costs as there is evidence of a viable legal structure to protect intellectual property and associated knowledge based assets<sup>276</sup>. This is where an integrated approach to intellectual

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<sup>270</sup> Fisho-Oridedi, A. (2009), The prohibition of *riba* under Islamic law: what are the implications for international contracts?

<sup>271</sup> See chapter 7.

<sup>272</sup> See the Quran at 2:275, 3:130, 4:29, 4:161,5:1, 5:62, 5:90, 9:4-12, 13:20 and 30:39. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>273</sup> See the Quran at 2:275. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>274</sup> Carlos, A. Braga, P. and Fink, C. (1998), The Relationship between Intellectual Property Rights and Foreign Direct Investment, Duke Journal of Comparative and International Law, Volume 9, pages 163-188 and Javorcik, B. (2004), Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages, The American Economic Review, Volume 94, Number 3. Available at <http://spot.colorado.edu/~utar/javorcik.pdf>. Accessed on 06.03.2015.

<sup>275</sup> Drahos, P. (2003), When the Weak Bargain win the Strong, Kluwer Law, pages 79 to 109.

<sup>276</sup> Penubarti, M. and Maskus, K. (1995), How trade-related are intellectual property rights? Journal of International Economics, Volume 39, Issues 3-4, pages 227 to 248.

property is needed to marry sharia compliant intellectual property models to international standards, notably TRIPS and FTA's.

Along with the three areas of law considered in the primary sharia sources, there are a number of references to honouring obligations in treaties made irrespective of the religion of the contracting parties<sup>277</sup>. This principle has been extended to international treaties between Gulf states and non-Islamic states as can be seen in the many international agreements the Gulf states have with other countries and organisations<sup>278</sup>. There are also relevant references that can be found for moral rights. At the time of the Prophet Muhammed, both the Quran and Sunnah were recorded orally; as such there was a great need for exactness and accuracy in the sayings and for the sources to be attributed correctly<sup>279</sup>.

### **3.11 Sharia sources on public interest**

Public interest, known as *maslaha*, is the third area of Islamic law that has been related to intellectual property protection<sup>280</sup>. Public interest aims to protect and progress the legitimate interests of the community within the recognised sources of Islamic law and secure public welfare through promoting the benefits of a rule or protecting against harm<sup>281</sup>. If public interest is applied broadly to intellectual property protection, there is a negative impact on protection for inventors as the argument would be that a monopoly right cannot be granted on public interest grounds<sup>282</sup>. Thus the relationship between public interest and intellectual property law has steered away from a broad application of the doctrine of public interest to allow sharia approval of intellectual property rights. However, if public interest is construed too narrowly, there would be a risk of harm to the public welfare<sup>283</sup>. This is especially apparent in new developing areas of intellectual property law such as corporate sovereignty and investor to state dispute mechanisms which will be considered in more detail in chapter 6<sup>284</sup>.

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<sup>277</sup> See the Quran at 9:1, 9:4, 9:7, 9:8, 9:10, 9:12 and 13:20. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015. Also see Beltrametti, S. (2010), *The Legality of Intellectual Property Rights under Islamic Law*. The Prague Yearbook of Comparative Law, pages 55 to 94.

<sup>278</sup> In relation to intellectual property, see for example, the Berne Convention and Paris Convention.

<sup>279</sup> Khoury A. (2003), *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, Volume 43, Number 2, IDEA: The Journal of Law and Technology, Franklin Pierce Law Center, pages 151 to 206.

<sup>280</sup> Kamali, M. (1998), *Principles of Islamic Jurisprudence*, 2nd Edition, Kuala Lumpur, Ilmiah Publishers, page 267. See also Zaidan, A. (1994), *Al-Wajiz fi Usul Fiqh*, Beirut, Muassasah Risalah, pages 236 to 244.

<sup>281</sup> Kamali, M. (1989), *Principles of Islamic Jurisprudence*, 1-2 Pelanduk Publications and Raslan, H. (2007), *Shari'a and the Protection of Intellectual Property: The Example of Egypt*, *The Intellectual property Law Review*, page 497.

<sup>282</sup> Hasan, Z. (2007), *Islamic perspective on the competition law and policy in issues in law and syariah*, Islamic Science University of Malaysia, pages 61 to 76.

<sup>283</sup> Jamar, S. (1992), *The Protection of Intellectual Property under Islamic Law*, *Capital University Law Review and Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law*, *The Prague Yearbook of Comparative Law 2009*, pages 55-94. Also public interest plays a significant role in patents associated with medicines, see the Doha Declaration on the TRIPS Agreement and Public Health.

<sup>284</sup> See chapter 6 at 6.11 to 6.15.

The purpose of Islam is to safeguard the public welfare. Further research is needed on the impact public welfare provisions, from the four sources of sharia law, can have on intellectual property protection. Islamic scholars often apply analogical reasoning to address public welfare changes. When there are contradictions between laws and social norms, jurists reconcile such differences through principles of necessity and expediency<sup>285</sup>. There is a significant gap between the enactment of intellectual property laws and acceptance of the laws by the general public. These lacunae can be addressed through further analysis of the importance of public interest in strengthening intellectual property protection and will be a contributing factor in the recommendations of an integrated approach to intellectual property rights in the GCC which takes into account Islamic principles from existing sharia compliant frameworks and international intellectual property rights obligations<sup>286</sup>.

### **3.12 Sharia sources on economic gain**

A final important principle in the Quran that supports intellectual property protection is the doctrine of economic gain<sup>287</sup>. The Quran encourages economic prosperity where business transactions are made honestly and in line with the doctrine of fair dealings as seen at Surah Al-Anfal; *“do not betray Allah and the Messenger or betray your trusts while you know [the consequence]”*. The purpose of economic gain is linked to a person’s right to reap the benefits of his hard work and to not be deprived of the subsequent wealth acquired from it<sup>288</sup>. Economic gain also correlates to the basic pillars of Islam which are cited as; the declaration of faith, five daily prayers, zakat, fasting and pilgrimage to Mecca<sup>289</sup>. Zakat is one of the five pillars of Islam and is a payment of 2.5% of a person’s wealth towards the poor on an annual basis. This has a direct link to economic prosperity as the more income a person generates, the more Zakat payments they are obliged to make<sup>290</sup>. The zakat payments in turn ensure an improvement in the economic position of the poor; therefore can be linked to public welfare<sup>291</sup>.

There are references in the Quran that prohibit false attribution and mutilation of someone else's work. Surah Al-'Aḥqāf at Verse 4 states the need for evidence in verifying a person’s right<sup>292</sup>. Moral and conduct towards

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<sup>285</sup> Khalid, M. (2001), Muslim Jurist’s Quests for the Normative Basis of Shariah, ISIM Newsletter, Leiden, page 13.

<sup>286</sup> See chapter 7.

<sup>287</sup> Olwan, R. (2013), Intellectual Property and Development: Theory and Practice, Springer Publishing.

<sup>288</sup> See the Quran at 11:15 stating; *“we fully repay them for their deeds therein, and they therein will not be deprived”*.

<sup>289</sup> Delong-Bas, N. (2010), The Five Pillars of Islam: Oxford Bibliographies Online Research Guide, Oxford University Press.

<sup>290</sup> Zakat is mentioned at several points in the Quran; 2:3, 2:43, 2:83, 2:177, 2:267, 2:277, 3:17, 3:180, 4:77, 4:162, 5:12, 5:55, 6:141, 7:156, 9:5, 9:11 and 9:18. Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>291</sup> See Chapter 2 at 2.11.

<sup>292</sup> See the Quran at 46:4 stating, *“Show me what they have created of the earth; or did they have partnership in [creation of] the heavens? Bring me a scripture [revealed] before this or a [remaining] trace of knowledge, if you should be truthful”*.

others is also evidenced in the Quran and is an all-encompassing statement that can be extended to conduct in business. There are references in the Quran which state the need for a moral and ethical code to be adopted in conducting daily tasks and activities<sup>293</sup>. References can be found in *Hadiths* that give prominence to moral and financial rights, further evidencing support for intellectual property protection<sup>294</sup>.

### **3.13 Previous work on sharia and intellectual property law**

Previous work on the relationship of Islamic law and intellectual property law has developed under two main strands; defining intellectual property within the laws of Islam<sup>295</sup> and addressing the international demand for higher standards of intellectual property protection<sup>296</sup>.

### **3.14 Sharia and intellectual property**

Starting with the first strand, in ancient Islamic customs there was a system of knowledge acknowledgement known as *ijaza* (certificate). If a person is to teach, quote or reproduce certain Islamic knowledge, then he or she must obtain an *ijaza* from the author. This system of a chain of authority is designed to ensure authenticity in the passing of knowledge from one person to another and also as a form of respect for authors. *Ijaza* only protects the moral right of an author to a certain degree as it is believed that the knowledge itself belongs to God, not to any individual<sup>297</sup>. Al' Afghani (2005) distinguished *ijaza* from any association to copyright principles on the grounds that *ijaza* aims to ensure accurate passage of knowledge. Although, by applying inferential reasoning, if the moral rights of the author are protected within limitations then as a result, *ijaza* protects copyrightable material to a divine source, with an unlimited length of time.

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<sup>293</sup> See the Quran at 16:90 states; *"Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded."* Available at [www.quran.com](http://www.quran.com). Accessed on 06.03.2015.

<sup>294</sup> The Book of Virtue, Good Manners and Joining of the Ties of Relationship (Kitab Al-Birr was-Salat-I-wa'l-Adab) Translation of Sahih Muslim, Book 32 at Chapter 27.

<sup>295</sup> Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law. Capital University Law Review, Khoury A. (2003), Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks, The Journal of Law and Technology at 153 and 154, Raslan H.(2009), Shari'a And The Protection Of Intellectual Property—The Example Of Egypt, The Intellectual Property Law Review 47(4), pages 497-559, Mahafzah Q.(2009), The Perspective of Moral and Financial Rights of Intellectual Property in Islam, Arab Law Quarterly, Volume 23, Issue 4, pages 457 to 468, Loutfi, M. (2003), The Protection of Intellectual Property Rights: The views of the Pharos, Islamic Jurisprudence and Masters of Poetry and Literature, pages 232 to 233, Cullen, C. (2010), Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law? and Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law. The Prague Yearbook of Comparative Law, pages 55 to 94.

<sup>296</sup> Hassanein, M.(2008),Bilateral WTO-Plus Free Trade Agreements In The Middle East: A Case Study Of OFTA In The Post-Trips Era, Wake Forest Intellectual Property Law Journal, Volume 8, pages 161 to 197, Said, E. (2007), The European Trips Plus Model and the Arab World, Liverpool Law Review, Said, E. (2005), The Road from TRIPS-Minus, to TRIPS, to TRIPS-Plus Implications of IPRs for the Arab World, Tamimi, E. (1999), Current U.A.E. Copyright Law and how it Compares and Contrasts with WTO's Trips-Agreement and the Berne Convention, The Journal of World Intellectual Property, Volume 2, pages 371 to 391, Price, D. (2011), Politics, Piracy and Punishment: Copyright Protection in the Arabian Gulf, Journal of World IP Volume 14, Numbers 3-4, pages 276 to 300 and Deere, C. (2009), The implementation game: the TRIPS agreement and the global politics of intellectual property reform in developing countries.

<sup>297</sup> Al 'Afghani, M. (2005), Islam in IP, Commons Law, Beaver Group. Available at <http://www.16beavergroup.org/mtarchive/archives/001607print.html>. Accessed on 11.02.2015.

Intellectual property protection in the Arab world is not a completely new phenomenon. Although legislative progress in the field of intellectual property law can be seen to have taken place very recently<sup>298</sup>, informal tenets of intellectual property rights protection did exist. Poetry was highly regarded and copyright infringement of such works was heavily disapproved of<sup>299</sup>. Jamar (1992) examined the legal protection of intellectual property within the framework of Islamic legal structures and principles, while focussed on the role of government regulations and various substantive Islamic law principles. Jamar's suggestion of a three tier approach to Islamic law is widely accepted and cited by many authors<sup>300</sup>. They are: firstly areas in which Islamic law have spoken with a relatively full voice, such as spiritual duties, personal status, and inheritance. Secondly where it has provided some general principles as in contract law and thirdly where it is silent, such as in the field of intellectual property, where the ruler of the people is free to act provided that the laws promulgated do not run afoul of sharia prohibitions and are consistent with sharia principles. For example, this can be seen in the fundamental principles that states apply in their governance when balancing intellectual property rights and freedoms of its citizens.

Price (2009) highlights the tensions between safeguarding Islamic law values and pressure from developed countries to conform to pro-west standards<sup>301</sup>. Price's work focuses on the Gulf countries and in terms of subject matter, the countries are very interesting as not only are they revered Islamic states they have undergone dramatic intellectual property development in a short span of a few decades. Beltrametti (2010) raises an important question on the effectiveness of intellectual property laws that are made by Islamic states as despite the significant legislative changes that have taken place, issues of enforcement still remain<sup>302</sup>.

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<sup>298</sup> See chapter 2.

<sup>299</sup> Khoury, A. (2003), *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, The Journal of Law and Technology, Raslan, H. (2009), *Shari'a And The Protection Of Intellectual Property—The Example Of Egypt*, The Intellectual Property Law Review, Volume 47, pages 497 to 559, Mahafzah Q. (2009), *The Perspective of Moral and Financial Rights of Intellectual Property in Islam*, Arab Law Quarterly, Volume 23, Issue 4, pages 457 to 468, Loutfi, M. (2003), *The Protection of Intellectual Property Rights: The views of the Pharos*, Islamic Jurisprudence and Masters of Poetry and Literature, pages 232–233, Beltrametti, S. (2010), *The Legality of Intellectual Property Rights under Islamic Law*. The Prague Yearbook of Comparative Law and Jamar, S. (1992), *The Protection of Intellectual Property under Islamic Law*, Capital University Law Review.

<sup>300</sup> Price, D. (2012) *The Development of Intellectual Property Regimes in the Arabian Gulf States*, Infidels at the Gates, Routledge Research in Intellectual Property, Chapter 2, Beltrametti, S. (2010), *The Legality of Intellectual Property Rights under Islamic Law*, The Prague Yearbook of Comparative Law, see pages 55 to 94, Cullen, C. (2010), *Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law?*, Raslan H. (2009), *Shari'a And The Protection Of Intellectual Property—The Example Of Egypt*, The Intellectual Property Law Review, Volume 47, pages 497 to 559, Mahafzah, Q. (2009), *The Perspective of Moral and Financial Rights of Intellectual Property in Islam*, Arab Law Quarterly, Volume 23. Issue 4, pages 457 to 468 and Loutfi, M. (2003), *The Protection of Intellectual Property Rights: The views of the Pharos*, Islamic Jurisprudence and Masters of Poetry and Literature, pages 232 to 233.

<sup>301</sup> Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates*, Routledge Research in Intellectual Property.

<sup>302</sup> Beltrametti, S. (2010), *The Legality of Intellectual Property Rights under Islamic Law*. In: *The Prague Yearbook of Comparative Law states; "At the end of the day the effectiveness of a law is ultimately dependent on it being recognized by*

Intellectual property law is evolving as international trade agreements are including intellectual property chapters, investors are able to challenge foreign governments through corporate sovereignty and investor to state dispute settlements. As such, the relationship between sharia law and intellectual property law could potentially change and this will be considered in more detail in chapters 6 and 7<sup>303</sup>.

### **3.15 The religion loyalty index**

El Bialy and Gouda (2011) developed a religious loyalty index that assessed the interplay between intellectual property violations in a given country and the importance of religion to the citizens of a given country. Muslim countries have the highest level of religiosity to Islam than other religions<sup>304</sup>. Their empirical research has found that Muslim developing countries have a high level of both intellectual property based piracy as well as a high level of religiosity to Islam<sup>305</sup>. Therefore, there is an anomaly between how Islamic law supports intellectual property and how citizens of Islamic countries with a high religiosity are high intellectual property infringers. The findings of Bialy and Gouda's research is not a new concept, a number of scholars argue the view that for citizens of Islamic countries, intellectual property is seen as a foreign concept, protecting western interests and benefits<sup>306</sup>. Consequently, many citizens of Islamic countries do not view intellectual property infringement as a crime in the same sense they would view theft of a tangible asset.

Bialy and Gouda argued sharia does support intellectual property protection as Muslim judges use *qiyas* in dealing with intellectual property piracy. The reasoning was based on the interpretation of property law which has been expanded to include intellectual property<sup>307</sup>. The main relevant finding of the empirical research was that Muslim countries were found to have a high level of religiosity to Islam and a high level of intellectual property infringement. This will be a running thread throughout the research as the argument for an integrated

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*society. A state may implement laws that can be wholly or partially Shari'a compliant, but the ultimate judge on the acceptance and effectiveness of such laws is the public at large."*

<sup>303</sup> See chapter 6 from 6.11 to 6.16 and chapter 7 from 7.14 to 7.21.

<sup>304</sup> The religious loyalty index is based on the adherence of followers to their religion and the research of El Bialy and Gouda found that Muslims have the highest level of religiosity as seen in El Bialy, N. and Gouda, M. (2011), Can Shari'a be a Deterrent for Intellectual Property Piracy in Islamic Countries?, The Journal of World Intellectual Property, Volume 14, pages 441 to 466.

<sup>305</sup> El-Bialy, N. and Gouda, M. (2011), Enforcing IPR Through Informal Institutions: The Possible Role of Religion in Fighting Software Piracy, Joint Discussion Paper Series in Economics, by the Universities of Aachen, Gießen, Göttingen, Kassel, Marburg and Siegen.

<sup>306</sup> Abu-Ghazaleh, T. (2001), Challenges to Arab Industries in Acquiring and Selling Appropriate Technologies, Beltrametti, S. (2009), The Legality of Intellectual Property Rights under Islamic Law. In: The Prague Yearbook of Comparative Law and Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law, Capital University Law Review, Carroll, J. (2001), Intellectual Property Rights in the Middle East: A Cultural Perspective, Fordham Intellectual Property, Media and Entertainment Law Journal Volume 11, Issue 3 and Cullen, C. (2010), Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law?

<sup>307</sup> El-Bialy, N and Gouda, M. (2011), Enforcing IPR Through Informal Institutions: The Possible Role of Religion in Fighting Software Piracy, Joint Discussion Paper Series in Economics by the Universities of Aachen, Gießen, Göttingen, Kassel, Marburg and Siegen, page 26.

approach to intellectual property rights in the GCC is supported by the religion loyalty index as given the adherence citizens of Muslim countries have to religion, the role sharia law can potentially play in bridging the gap between religiosity and intellectual property infringement will be addressed further in chapters 4 to 6<sup>308</sup>.

### **3.16 Conclusion**

The purpose of the chapter was to give an overview of the relevant principles of sharia law and analyse the influence of sharia law on intellectual property protection. In summary, although there are no primary sharia law sources that make reference to intellectual property law, there are relevant principles of sharia law that can be found in secondary sources. In terms of conduct under sharia law, intellectual property law is classified as permitted on the basis that the Quran is silent on intellectual property rights protection and therefore it cannot be mandatory, recommended, prohibited or banned<sup>309</sup>. The main sharia law principles that have been considered are; proprietary rights, contractual rights and public interest. The sharia principles on ownership of property, obligations on property right holders, remedies for property right holders and appropriation of property can justify the existence of intangible assets in intellectual property. Theft of property is also referenced in the Quran and carries a severe punishment however there is a distinction between intellectual property theft and infringement as the criterion laid down by primary sources of sharia law for assessing the severity of physical property theft and the subsequent punishment cannot be applied to theft of intangible assets. The second key distinction between intellectual property theft and infringement is the remedies sought by the intellectual property right holder<sup>310</sup>. The remedies for intellectual property infringement share more similarities to breaches of contract law whereby the primary remedies sought are financial and criminal prosecutions are for the most severe cases. Therefore, the remedies for infringement under Islamic law can be found in the primary sharia sources of contract law for failure to honour; contractual obligations, international business and trade agreements rather than theft of physical property<sup>311</sup>. The Islamic concept of contract law has been applied to intellectual property law as there are clear and unambiguous primary sharia law sources concerning certainty in contractual agreements and rules on honouring agreements. It strengthens the argument for intellectual property protection as principles of Islamic contract law can be seen in contractual agreements licensing the use of knowledge based assets and granting monopolies for a given

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<sup>308</sup> See chapter 4 at 4.6 and 4.10, chapter 5 from 5.6 to 5.14, chapter 6 at 6.3 and from 6.10 to 6.16.

<sup>309</sup> See 3.6 and 3.7 of this chapter.

<sup>310</sup> See chapter 3 at 3.8.7.

<sup>311</sup> See chapter 3 at 3.9 to 3.10.

time period.

Other areas of sharia law that have been considered namely; public interest, moral rights, financial rights, business, trade and economic gain, create a vacuum within the sharia law in which intellectual property can exist and develop. Public interest, as an Islamic doctrine, is a competing interest to intellectual property protection and as such has required careful analysis of the relationship between intellectual property protection and public interest. If Islamic countries apply public interest very broadly, then it will conflict with other areas of Islamic jurisprudence, namely contract, business, trade and economic gain. The primary sources of Quran and Sunnah encourage business, fair dealings and earning profit. The Quran expressly forbids *riba* and *gharar*, therefore there is a distinction between profit and loss as opposed to interest and speculative risk. The role secondary sources have played in developing Islamic approval of intellectual property rights protection, is to draw inferences from the various sources of primary sharia law and balance public interest against gains in business as well as moral and financial rights to permit rules and regulations in intellectual property law.

The research to date on the relationship between sharia law and intellectual property has favoured sharia approval for the existence and protection of intellectual property rights. However at the heart of intellectual property protection, is acceptance by the public at large of intellectual property as predicated with Islamic law<sup>312</sup>. At present, laws exist without the necessary understanding or awareness for their existence. Empirical research by Bialy and Gouda has shown that Islamic countries display both a high affinity to religion and a high percentage of intellectual property rights violations. This leaves the relationship between sharia and intellectual property law at a developmental stage. The foundational stage has been met through the GCC states acceptance of the use of secondary sharia sources to permit intellectual property rights. However the development stage requires an integrated intellectual property approach to enforcement that is a hybrid of clear and unambiguous sharia principles and international intellectual property laws. The GCC states have chosen to adopt western laws on intellectual property rights protection and incorporated a number of laws as highlighted in chapter 2 without paying attention to the role Islamic law can play in integrating intellectual property law in a the legal system of an Islamic state. There is therefore a need for a foundation of mutual understanding between a western philosophy on intellectual property law and Islamic concepts. An industry that has been successful in bridging the differences between western practices and Islamic principles is the

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<sup>312</sup> See Khan, A.(2001), *Islam as Intellectual Property My Lord! Increase Me In Knowledge*, Cumberland Law Review, Volume 31, Part 3, pages 631-684.



Islamic finance industry where Islamic finance has its own set of sharia compliant financial products<sup>313</sup>.

Continuing on the theme for a foundation of mutual understanding between western approaches on intellectual property law and Islamic concepts, chapter Four will consider international intellectual property laws and highlight the intellectual property stand point of the US and EU to then analyse the relationship between the two powerhouses and the GCC. The chapter will focus on the historical development of intellectual property in both the US and EU, the current international intellectual property law demands on the GCC states within the context of intellectual property protection and enforcement as this will facilitate a holistic approach to the development of intellectual property in the GCC and inform the series of recommendations for an integrated intellectual property model. It is imperative to understand the direction the EU and the US are coming from when they are demanding higher levels of intellectual property protection in the GCC as this will then influence how an integrated approach to intellectual property rights protection can take shape and evolve.

## **Chapter Four: A foundation of mutual understanding - The United States and the European Union's stance on intellectual property protection**

### **4.1 Introduction**

At the heart of all trade agreements and negotiations between different states and blocs is one fundamental principle, to increase economic ties between the trading partners. Intellectual property infringement costs the G20 countries \$125 billion annually; this includes losses in tax revenue from counterfeiting and piracy<sup>314</sup>. In terms of the global economy, the International Chambers of Commerce (ICC) estimates the losses to the global economy from intellectual property infringements at \$1 trillion

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<sup>313</sup> See chapter 7.

<sup>314</sup> Frontier Economics, Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy, February 2011.

annually<sup>315</sup>. This chapter will analyse the intellectual property standpoint of both the EU and the US and the relationship each powerhouse has with the GCC. Further, the GCC also has pending trade agreements with other countries and therefore how the GCC handles its current negotiations with the US and the EU, will impact on the GCC's foreign trade and economic interests with other countries<sup>316</sup>. The GCC has outstanding free trade agreements with the European Union (EU) and the United States (US). The EU is a uniquely large economic and political partnership between 28 European countries that are collectively represented in the global arena<sup>317</sup>. The US has the largest economy in the world and similar to many of the EU countries, export and import goods around the globe. The US and the GCC have set up a joint committee since 2012 to examine opportunities for enhancing economic, commercial, investment and technical cooperation as set out in the framework trade agreement<sup>318</sup>. The US-GCC Strategic Cooperation Forum was convened in 2012 in Riyadh, Saudi Arabia with Secretary of State Hillary Rodham Clinton representing the United States and Foreign Minister Prince Saud Al-Faisal representing the Kingdom of Saudi Arabia<sup>319</sup>. The main impetus for a trade agreement is largely due to an increased effort to raise the volume of trade and investment between the US and the GCC<sup>320</sup>. The negotiations for the trade agreement between the EU and the GCC began in 1988<sup>321</sup>. The purpose behind the trade agreement is similar to that of the framework trade agreement between the US and the GCC, to harmonise investment rules in the GCC to allow corporations to participate more directly in oil, banking, investment and other industries, however political issues have slowed down the progress of the EU-GCC trade agreement<sup>322</sup>. To understand the individual relationships that both the US and the EU have with the GCC on international intellectual property protection, this chapter will analyse the

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<sup>315</sup> Business Action To Stop Counterfeiting And Piracy (BASCAP) (2011), Estimating The Global Economic And Social Impacts of Counterfeiting And Piracy, Frontier Economics.

<sup>316</sup> For the purpose of this research, the GCC's free trade agreements, both concluded and pending, with other countries is outside the scope of this research but will be a topic for further research.

<sup>317</sup> For full details on the working of the EU see [http://europa.eu/about-eu/index\\_en.htm](http://europa.eu/about-eu/index_en.htm). Accessed on 06.01.2015.

<sup>318</sup> U.S.-GCC Framework Agreement for Trade, Economic, Investment and Technical Cooperation, (2012). Available at <https://ustr.gov/sites/default/files/uploads/agreements/Trade%20Investment/U.S.-GCC%20TIFA%20Final%20Text%20--%20English%209-25-12.pdf>. Accessed on 06.03.2015.

<sup>319</sup> US-GCC Strategic Cooperation Forum, Saudi-US Relations Information Service. Available at <http://susris.com/glossary/us-gcc-strategic-cooperation-forum/>. Accessed on 06.03.2015.

<sup>320</sup> The United States Trade Representative. Available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/september/ustr-kirk-announces-agreement-gcc>. Accessed on 04.01.2015.

<sup>321</sup> The United States Trade Representative. Available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/september/ustr-kirk-announces-agreement-gcc>. Accessed on 04.01.2015.

<sup>322</sup> Ayadi, R. (2013), EU-GCC Trade and Investment Relations: What Prospect of an FTA between the Two Regions?, Sharaka Enhancing Understanding and Cooperation in EU-GCC Relations, Number 4. Available at <http://www.ceps.eu/book/eu-gcc-trade-and-investment-relations-what-prospect-fta-between-two-regions>. Accessed on 06.03.2015. Kostadinova, V. (2013), What is the Status of the EU-GCC Relationship?, Gulf Research Center Papers. Available at <http://eu-gcc.kcorp.net/common/publicationfile/29.pdf>. Accessed on 06.03.2015.

development of intellectual property rights from the perspectives of the EU and the US to facilitate a meeting of minds between western intellectual property systems and the developing systems in the GCC.

The research objectives addressed in this chapter are:

- To provide a background to the western development of intellectual property rights to gain a holistic view of the international intellectual property industry.
- To review the current international intellectual property legislation, policies, free trade agreements, bilateral agreements and enforcement mechanisms that exist in the EU and the US and their influence on the GCC states.

#### **4.2 Background to the US intellectual property law**

The US has been dealing with intellectual property protection from as early as 1790 when the first ever patent was granted to Samuel Hopkins for a process of making potash, an ingredient used in fertilizer<sup>323</sup>. The US Constitution protects two types of intellectual property, "Writings" and "Discoveries." At Article 1, section 8, the US Constitution states; *"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"*<sup>324</sup>. In order to protect the writings and discoveries within the intentions of the constitution, the US Congress passed legislation to protect "writings" in the form of copyright law. In 1790, the US passed its first copyright law<sup>325</sup>. Similarly, the intention behind protecting "discoveries" was in essence patent protection, which led to the Patent Act of 1790 being passed.

From when these Acts were enacted to where we currently stand, the US has had over two centuries to extend and enhance the value of intellectual property assets. For example, in copyright law, the protection has developed significantly from written works and novels to computer programs<sup>326</sup>. Many landmark cases have originated from the US<sup>327</sup> and influenced international courts and policy

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<sup>323</sup> The first patent was signed by President George Washington on July 31, 1790 and has been archived at the Chicago Historical Society. Online reference is available at <http://www.uspto.gov/news/pr/2001/01-33.jsp>. Accessed on 13.03.2015.

<sup>324</sup> US Constitution, 1787, Article 1, Section 8, Part 8.

<sup>325</sup> Copyright Act of 1790 Available at <http://www.copyright.gov/history/1790act.pdf>. Accessed on 13.03.2015.

<sup>326</sup> Friedman, D. (1994), Standards As Intellectual Property: An Economic Approach, University of Dayton Law Review, Volume 19, Number 3, pages 1109 to 1129.

<sup>327</sup> Example US cases include; A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (9th Cir. 2001), MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) and Evenson, E. (1928), The Telephone Patent Conspiracy of 1876: The Elisha Gray-Alexander Bell Controversy and Its Many Players. Other inventors contested Bell's patents and founding principles of first to file and originality in patent law were established in the Bell case.

making<sup>328</sup>. The US currently has thirty six intellectual property related laws<sup>329</sup>. The main legal provisions cover; trademark law<sup>330</sup>, copyright<sup>331</sup>, patent law<sup>332</sup>, trade secrets<sup>333</sup> and antitrust law<sup>334</sup>.

The US government has set up specialist offices to regulate the different areas of intellectual property. The US Patent and Trademark Office (USPTO) is a highly skilled federal organisation that deals with all aspects of patents and trademarks from filing an application to infringement rights and policy development<sup>335</sup>. The USPTO works closely with the United States Trade Representative (USTR) and other United States Government (USG) agencies to review intellectual property policies and regulations in foreign countries to assess how key countries are tackling intellectual property infringement and how they are progressing with action plans to strengthen intellectual property protection nationally and in line with regulations worldwide<sup>336</sup>. Enforcing intellectual property rights through bilateral trade agreements has been a more effective method of raising international intellectual property standards than pursuing intellectual property rights as a standalone agreement. This is largely due to the unique trading commodity within intellectual property, knowledge as a good is far more difficult to protect than tangible assets<sup>337</sup>.

#### **4.3 The US and international intellectual property law**

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<sup>328</sup> In 1898, when the US took over the governance of the Philippines, any patent applications made in the Philippines went to the US Patent and Trademark Office and were considered under US law. For more information see Drahos, P. (2002), Developing Countries and International Intellectual Property Standard-Setting, The Journal of World Intellectual Property. Available at <http://www.anu.edu.au/fellows/pdrahos/articles/pdfs/2002devcountriesandipstandards.pdf>. Accessed on 18.03.2015.

<sup>329</sup> Legislation is available at <http://www.wipo.int/wipolex/en/profile.jsp?code=US#a1>. Accessed on 13.01.2014.

<sup>330</sup> The trademark laws in the US are extensive and the most recent are; U. S. Trademark Law, 15 U.S.C. §§ 1051 et seq. (as amended in 2013), U.S. Trademark Law, Rules of Practice, 37 C.F.R. 2 et seq. & Federal Statutes, 15 U.S.C. § 1051 et seq. and 35. U.S.C. 1 (2012) and Trademark Technical and Conforming Amendment Act of 2010 (Pub. Law No. 111-146, 124 Stat. 66, 2010) Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=US>. Accessed on 13.03.2015.

<sup>331</sup> The most recent update on the US Copyright Act was in 2009; U.S. Copyright Act of 1976, 17. U.S.C. §§ 101 et seq. (2009) Available at <http://www.wipo.int/wipolex/en/details.jsp?id=6637>. Accessed on 13.03.2015.

<sup>332</sup> The US Patent law was amended in 2013; U.S. Patent Law, 35 U.S.C. §§ 1 et seq. (2013) Available at <http://www.wipo.int/wipolex/en/details.jsp?id=12928>. Accessed on 14.03.2015.

<sup>333</sup> Uniform Trade Secrets Act With 1985 Amendments, drafted by the National Conference Of Commissioners on Uniform State Laws.

<sup>334</sup> Sherman Anti-Trust Act of 1890, codified at 15 U.S.C. 1-7; Clayton Act of 1914, codified at 15 U.S.C. 12-27, 29 U.S.C. 52-53; The Federal Trade Commission Act of 1914, 38 Stat. 717 (Sept. 26, 1914), codified at 15 U.S.C. 41 et seq. Available at [https://www.law.stanford.edu/organizations/programs-and-centers/transatlantic-technology-law-forum/technology-law/us-intellectual-property-law#Other\\_aspects](https://www.law.stanford.edu/organizations/programs-and-centers/transatlantic-technology-law-forum/technology-law/us-intellectual-property-law#Other_aspects). Accessed on 14.03.2015.

<sup>335</sup> Detailed information on USPTO and all aspects of its work and protection of intellectual property rights for US citizens can be found at <http://www.uspto.gov/index.jsp>. Accessed on 14.03.2015.

<sup>336</sup> The US Office of Policy and International Affairs in Trade produce an annual Special 301 report and Special Out-of-Cycle Reviews (OCRs) which was established through the Trade Act 1998. With the Special 301 provisions, the USTR can, under the amendments made to the Trade Act of 1974, identify foreign countries that deny US intellectual property right holders the level of intellectual property protection required to give right holders a fair and equitable market access. For full details of the workings of the Special 301 and the different watch lists, see [http://www.uspto.gov/ip/global/trade/ir\\_trade\\_special301.jsp](http://www.uspto.gov/ip/global/trade/ir_trade_special301.jsp). Accessed on 01.02.2015.

<sup>337</sup> Pugatch, M. (2007) A Transatlantic Divide? The US and EU's Approach to the International Regulation of Intellectual Property Trade-Related Agreements, ECIPE Working Papers.

Intellectual property rights granted to American inventors by US authorities are applicable across all US territories. However, these rights are ineffective outside of the US and an inventor who requires patent protection overseas must apply for his invention to be patented in the patent office of the foreign country or a regional office like that in the GCC which is discussed further in chapter 5. It is the question of how intellectual property right holders can protect their intangible assets in foreign territories that has led to the momentum behind developing minimum standards of international intellectual property laws. If the US can influence foreign intellectual property policies and enforcement, it can have a heavy impact on the establishment and progress of a global intellectual property market<sup>338</sup>. This is why a thorough examination of the development of intellectual property in the US is relevant to the GCC as in order for the GCC to meet its international obligations, it must first seek to understand the framework within which intellectual property has developed. This will give the GCC states a fighting chance of implementing rules and regulations that will be seen as a GCC state led approach to intellectual property.

#### **4.3.1 International agreements**

The solution to protecting intellectual property rights overseas for the US and other developed countries has come in the form of international agreements<sup>339</sup> and treaty memberships<sup>340</sup>. Over the years the US, in its trade agreements, has incorporated a number of intellectual property provisions with many countries<sup>341</sup>. In respect of bilateral investment treaties, the US has thirty nine agreements in force<sup>342</sup>.

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<sup>338</sup> See for example the Madrid Protocol which allows a trademark right holder to file for trademark registration in several countries. By filing one trademark registration application with USPTO, US applicants can be granted protection for their intellectual property asset in as many as 84 countries.

<sup>339</sup> The US has many bilateral agreements in place with several countries around the globe including; Jamaica, Mongolia, Panama, Columbia, Korea, Peru, Oman, Uruguay, Bahrain, Morocco, Mozambique, Australia, Singapore, Chile, Jordan, Vietnam, Lithuania, Azerbaijan, Croatia, Bolivia, Korea, Bulgaria, Grenada, Cameroon, Bangladesh, Zaire, Poland, Congo, Ukraine, Trinidad and Tobago, Czech, Slovakia, Argentina, Hungary, Cambodia, Turkey, Sri Lanka, Albania, Ecuador, Kyrgyzstan, Tunisia, Kazakhstan, Armenia, Egypt, and Senegal. Each agreement can be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=US>. Accessed on 04.03.2015.

<sup>340</sup> Patent Law Treaty, Beijing Treaty on Audio-visual Performances, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, Singapore Treaty on the Law of Trademarks, Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, WIPO Performances and Phonograms Treaty, WIPO Copyright Treaty, Trademark Law Treaty, Berne Convention for the Protection of Literary and Artistic Works, Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedures, Patent Cooperation Treaty, Strasbourg Agreement Concerning the International Patent Classification, Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, Convention Establishing the World Intellectual Property Organization and Paris Convention for the Protection of Industrial Property. Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=US>. Accessed on 14.01.2015.

<sup>341</sup> Kaminski, M. (2014), The Capture Of International Intellectual Property Law Through The U.S. Trade Regime, Southern California Law Review.

<sup>342</sup> See [http://tcc.export.gov/Trade\\_Agreements/Bilateral\\_Investment\\_Treaties/index.asp](http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp) for each individual bilateral investment treaty. Accessed on 30.01.2015.

Although the US is in trade talks with all of the GCC states, Bahrain and Oman concluded their bilateral agreements with the US in 2006 and 2009 respectively<sup>343</sup>.

Both FTA's have very similar provisions on substantive intellectual property law and protection. The US-Oman FTA provisions on intellectual property required Oman to accede to; the Patent Cooperation Treaty (1970), the Convention Relating to the Distribution of Programme-Carrying Signals transmitted by Satellite (1974), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989), the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980), the International Convention for the Protection of New Varieties of Plants (1991), the Trademark Law Treaty (1994), the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996)<sup>344</sup>. The US-Bahrain FTA agreed to ratify the same international agreements as Oman.

#### **4.4 The US approach to intellectual property**

The driving force behind the emergence of international protection of intellectual property rights in the US came largely from the formation of an American Intellectual Property Committee (US IPC) in 1986<sup>345</sup>. The Committee was a US Coalition of its most powerful corporations across various industries, mainly; pharmaceutical, IT sector, entertainment, software industries, generic pharmaceutical industries and chemical companies<sup>346</sup>. CEO's of the twelve original corporations lobbied for standard setting in international property law to better protect their intellectual property assets on a global scale, particularly in developing countries<sup>347</sup>.

In the 1980's, dominant organisations within the US IPC were frustrated with the lack of protection of their knowledge assets beyond the US, with the CEO of Pfizer criticising numerous countries of

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<sup>343</sup> US-Oman FTA Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text> Accessed on 16.01.2014 and US-Bahrain FTA Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text>. Accessed on 16.03.2015.

<sup>344</sup> Chapter 15(2) US-Oman FTA Available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset\\_upload\\_file715\\_8809.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file715_8809.pdf). Accessed on 16.01.2015.

<sup>345</sup> The committee originally consisted of twelve multinational US organisations including; Pfizer, IBM, Bristol-Myers, CBS; Hewlett-Packard, Monsanto, Du Pont, General Electric, General Motors, Johnson & Johnson and Merck. For the US IPC, its main commonality among its members was that they all lost millions in revenues from intellectual property infringement and there was a consensus amongst the member organisations to compel the US government to steer changes in the international trade arena.

<sup>346</sup> Sell, S. (2003), Private Power, Public Law, the Globalization of Intellectual Property Rights, Cambridge Studies in International Relations, Pugatch, M. (2004), The International Political Economy of Intellectual Property Rights, Edward Elgar Publishing, page 209 and Drahos, P. (2002), Developing Countries and International Intellectual Property Standard-setting. Report commissioned by IPR Commission.

<sup>347</sup> Mirza, B. (2006), A Dilemma of Intellectual Property Rights For Developing Countries? Economics of Technological Innovation.

designing domestic laws that allowed them to “legally take” US inventions<sup>348</sup>. The US government sought to influence the WTO through its powerful position in global trade and by linking intellectual property protection and trade in the form of trade agenda setting process. By 1994, the TRIPS agreement had been signed and the US seized the opportunity to be more active in forming bilateral agreements since TRIPS entered into force<sup>349</sup>. The US intellectual property strategy can be seen as a tiered plan, starting with an increase in bilateral agreements with developing countries and then to extend intellectual property protections through multilateral agreements<sup>350</sup>.

The US strategy incorporated the creation of corresponding programs to safeguard intellectual property rights of international US corporations and further facilitate support mechanisms to help achieve the end result coveted by the US IPC. The main support mechanism created by the US was the special 301 program, which allows the USTR to monitor a watch-list of countries that are violating intellectual property rights, and depending on how substantial the violations are, trade sanctions can be applied against the countries with the most prolific infringement record.

#### **4.5 The US and international agreements**

The US is pursuing international agreements that are binding and contain enforcement provisions. The stumbling block for the US and other developed countries, in raising the intellectual property protection bar in developing countries, has always been the infrastructures and level of technological and economic development of individual states<sup>351</sup>. For the US, incorporating intellectual property into trade agreements became a pressing matter as the US IPC, led by the US private sectors, campaigned to have intellectual property included in the Uruguay Round, 1986 Agenda<sup>352</sup>, of the General Agreement

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<sup>348</sup> Drahos, P. and Braithwaite, J. (2002) Information Feudalism: Who Owns the Knowledge Economy? Earthscan Publications Limited and the original article by Pfizer is; MacTaggart, B. (1982), Stealing from the Mind, New York. Times and can be found at <http://fabien.benetou.fr/Archives/StealingFromTheMind>. Accessed on 30.01.2015. The article criticised a number of countries for developing laws that allowed them to legally use US intellectual property assets and also criticised WIPO. See extract; *“Through political and legal dealings, many governments, including Brazil, Canada, Mexico, India, Taiwan, South Korea, Italy and Spain, to name a few, have provided their domestic companies with ways to make and sell products that under proper enforcement and honourable treatment of patents would be considered the property of the inventors. And now, the United Nations, through its World Intellectual Property Organization, is trying to grab high technology inventions for underdeveloped countries”*.

<sup>349</sup> Morin, J. (2009), Multilateralizing TRIPS-Plus Agreements: Is the US Strategy a Failure? The Journal of World Intellectual Property, pages 175 to 197.

<sup>350</sup> Braithwaite, J. and Drahos, P. (2000), Global Business Regulation, Cambridge, Cambridge University Press.

<sup>351</sup> Tellez, V. (2009), The changing global governance of intellectual property enforcement: a new challenge for developing countries, Chapter One and Editors, Li, X. and Correa, C. (2009), Intellectual Property Enforcement: International Perspectives, Edward Elgar Publishing.

<sup>352</sup> The Uruguay Round took seven years to reach conclusion in 1993 with 123 countries agreeing to the agenda. The agenda is still to date the largest trade negotiation to reach completion, it covered fifteen subjects; tariffs, non-tariff barriers, natural resource products, textiles and clothing, agriculture, tropical products, GATT articles, Tokyo Round codes,

on Tariffs and Trade negotiations, GATT<sup>353</sup>. Further, the US IPC lobbied to have intellectual property integrated into US trade law and other international agreements such as the North American Free Trade Agreement (NAFTA)<sup>354</sup>.

Therefore, the force behind the inclusion and regulation of intellectual property into the international trade agenda was in fact the US IPC and a victory for multinational organisations within the US and ally organisations in Europe and Japan<sup>355</sup>. Therefore it is easily adduced that the furore behind constantly improving intellectual property rights protection and enforcement will only increase with time. For the GCC states, as they walk the tight rope between TRIPS and TRIPS Plus compliance, understanding the basis of their international agreements and the structures that exist within the agreements will determine how successful they are in developing an approach to TRIPS Plus and intellectual property rights protection.

The TRIPS agreement is not without its critics with the United Nations Trade Conference on Trade and Development (UNCTAD), report in 1977 branding the agreement as “*a reverse system of preferences granted to foreign patent holders in the markets of developing countries*”<sup>356</sup>. UNCTAD, which is governed by its 194 member states, is one arm of the United Nations with the responsibility of dealing with international trade development issues for all its member states<sup>357</sup>. This issue of introducing

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Anti-dumping, subsidies, intellectual property, investment measures, dispute settlement, the GATT system and services. Available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm). Accessed on 26.02.2015.

<sup>353</sup> The General Agreement on Tariffs and Trade came into force in 1948 and was applied provisionally by all contracting parties. The full agreement is available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) and covered; agriculture, health regulations for farm products, textiles and clothing, product standards, investment measures, anti-dumping measures, customs valuation methods, pre shipment inspection, rules of origin, import licensing, subsidies and counter-measures, safeguards, movement of natural persons, air transport, financial services, shipping and telecommunications. What the GATT agreement did not cover was intellectual property rights and the Uruguay Round addressed the lack of intellectual property protection along with creating the WTO to address the failings of GATT in sustaining an international trade organisation. Accessed on 27.03.2015.

<sup>354</sup> Pratt, E. (1998), Intellectual Property Rights and International Trade, Pfizer Incorporated, Available at [http://www.iatp.org/files/Intellectual\\_Property\\_Rights\\_and\\_International.htm](http://www.iatp.org/files/Intellectual_Property_Rights_and_International.htm). Accessed on 30.01.2015. To strengthen the impact of the US IPC, the USTR advised the committee to forge links and join forces with its equivalent European counterpart, namely the Union of Industrial and Employers Confederations of Europe and also the Japan business federation group, Keidanren.

<sup>355</sup> Drahos, P. and Braithwaite, J. (2003), Three tests of US trade policy on intellectual property rights, Nth Position, Ilias, S. and Ferguson, I. (2011) Intellectual Property Rights and International Trade, Congressional Research Service and Sell, S. (2003), Private Power, Public Law, the Globalization of Intellectual Property Rights, Cambridge Studies in International Relations.

<sup>356</sup> Ramachandran, A. (1977), Self-Reliance in Technology and the Patent System in WIPO, World Symposium on the Importance of the Patent System to Developing Countries, page 304.

<sup>357</sup> UNCTAD acts as a forum for where member states can engage in dialogue and discuss ways to establish a better balance in the global economy. It offers technical assistance to developing countries and countries with economies in transition, in order to build capacities in developing countries to become more integrated into the global economy. UNCTAD holds a ministerial-level meeting every four years to discuss major global economic issues and every two years, UNCTAD organizes the World Investment Forum. The Forum brings together the international investment community to discuss challenges and opportunities and to promote investment policies and partnerships for sustainable development and equitable growth. Available at <http://unctad.org/en/Pages/AboutUs.aspx>. Accessed on 06.03.2015.



intellectual property legislation to fit the needs of foreign investors as opposed to intellectual property rights protection that is fit for purpose has been highlighted as one of the stumbling blocks of international intellectual property rights protection by the UNCTAD in its biannual investment forum reports<sup>358</sup>. How do the GCC states promote better intellectual property rights protection when the protection offered by the legal system are seen as giving preferences to foreigners? This question can be answered by considering UNCTAD reports on how developing countries can improve domestic regulatory frameworks by introducing a set of rules and regulations which are more than simply a suite of foreign based legislation and reflect the needs and development timelines of individual states<sup>359</sup>.

#### **4.5.1 The US and TRIPS standards**

Given that developing countries' seeking WIPO ascension imitated provisions of the Paris Convention to formulate national laws or continued with laws already laid out whilst under colonial rule, it can be argued that TRIPS started a mirror image phenomena with the US wanting more and more reflection of its own intellectual property laws and enforcement mechanisms copied into the laws of its trading countries and other developing countries<sup>360</sup>. The counter argument to this theory is that, from the point of view of developing countries, they accept the restrictions placed upon their sovereignty on the basis that the protection from political and other business risks will lead to an increase in foreign direct investment<sup>361</sup>. What this has subsequently created is a somewhat artificial state of intellectual property reality as when the level of legislative protection for intellectual property law in the GCC states is considered, there is a body of law that meets minimum TRIPS requirements and domestic remedies available. However, as will be seen in subsequent chapters, for the GCC states to further develop their intellectual property regimes, an integrated approach to intellectual property rights is required that takes into account not only international intellectual property rights obligations but also incorporate Islamic law principles to further increase intellectual property rights protection.

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<sup>358</sup> United Nations, (2006), Investment Provisions In Economic Integration Agreements, United Nations Conference On Trade and Development, United Nations Publication.

<sup>359</sup> Qaqaya, H. And Lipimile, G. (2008), The Effects Of Anti-Competitive Business Practices On Developing Countries and Their Development Prospects, United Nations Papers Publication. Available at [http://unctad.org/en/docs/ditcclp20082\\_en.pdf](http://unctad.org/en/docs/ditcclp20082_en.pdf). Accessed on 06.03.2015. United Nations, (2013), Investment Policy Monitor a Periodic Report by the UNCTAD Secretariat, United Nations Conference On Trade And Development, Number 11. Available at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d11\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d11_en.pdf). Accessed on 06.03.2015.

<sup>360</sup> Sell, S. (2011), Everything Old Is New Again: The Development Agenda Then and Now, WIPO Journal, Issue 1, Thomson Reuters (Professional) UK Limited and Contributors.

<sup>361</sup> Neumayer, E. and Spess, L. (2005), Do bilateral investment treaties increase foreign direct investment to developing countries? [online] London: LSE Research Online. Available at <http://eprints.lse.ac.uk/archive/00000627>. Accessed on 30.01.2015.

There are other advantages that the US offers as part of the treaty and agreements deals. For instance, as the US has developed significant intellectual property law through its national courts and decisions with Europe, it gives the developing country a body of developed law and effectively brings states like the GCC up to speed without having to invest the centuries of time that the Americans and other developed countries have had to<sup>362</sup>. Here again is a systematic flaw, it is one principle to offer states access to case law and judicial decisions to a field that is new to their judiciaries and legal experts. It is another feat altogether to then be able to mirror the legal system of a country that has developed the law of intellectual property. The differences cannot simply be bridged by legislative changes alone as the US have developed intellectual property over; a significantly longer period of time, with far more sophisticated institutional support, a large number of expert judges and advocates who have the capacity to apply the law and where needed interpret the law in an area that may lead to redefining intellectual property law.

It is in the area of redefining intellectual property law where developing countries lag significantly behind as developed states will take into account their own cultural and capitalist norms to pass new rulings in the intellectual property field, not those of developing states. On a surface level understanding, it would be unreasonable to expect developed states to make landmark decisions in intellectual property law that did not reflect their own territorial norms. However, in the international arena, so far, the developed states do expect developing states such as the GCC to adopt international intellectual property standards based on their protocols and practices, with minimal regard to the discreet facets of societal, cultural and religious customs<sup>363</sup>.

The economic impact of protecting intellectual property trade, at present, outweighs the somewhat draconian measures developed countries like the US take in establishing intellectual property laws and enforcement mechanisms<sup>364</sup>. However within this is another issue for international intellectual property

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<sup>362</sup> See for example US cases on the idea-expression dichotomy in copyright law that have developed over a number of years; Baker v. Seldon 1879 101 U.S. 99, Mazer v. Stein 1954 347 U.S. 201, Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corporation 9th Cir. 1977 562 F.2d 1157, Durham Industries, Inc. v. Tomy Corporation 2d Cir. 1980 630 F.2d 905 and Apple Computer, Inc. v. Franklin Computer Corporation 3d Cir. 1983 714 F.2d 1240.

<sup>363</sup> Davis, N. (2012), The GCC Countries and the World: Scenarios to 2025, Chapter 3. Available at [http://www.weforum.org/pdf/Global\\_Competitiveness\\_Reports/Reports/chapters/3\\_1.pdf](http://www.weforum.org/pdf/Global_Competitiveness_Reports/Reports/chapters/3_1.pdf). Accessed on 06.03.2015. European Parliament, (2010), Report on European Union relations with the Gulf Cooperation Council, Committee on Foreign Affairs. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0042+0+DOC+XML+V0//EN>. Accessed on 06.03.2015. El Said, M. (2012), The Compatibility of Modern Intellectual Property Protection Norms with Islamic Principles: Lessons from History, The WIPO Journal, Analysis of Intellectual Property Issues, Volume 4, Issue 1, page 121. Available at [http://www.wipo.int/edocs/pubdocs/en/intproperty/wipo\\_journal/wipo\\_journal\\_4\\_1.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/wipo_journal/wipo_journal_4_1.pdf). Accessed on 06.03.2015.

<sup>364</sup> The universality of intellectual property will always be problematic as unlike human rights which are steeped in international law making history, intellectual property is quintessentially a territorial being and inevitably remains the

rights and developing countries as discussed above. Developing countries can never truly mirror intellectual property laws as they lack the knowledge and expertise to apply the requisite level of judicial interpretation in complex intellectual property law cases. Take for example, *Warner Bros. Entertainment, Inc. and J. K. Rowling v. RDR Books*<sup>365</sup>, a copyright infringement case, where Rowling argued successfully that the decision to allow a Harry Potter encyclopaedia to exist is hers alone and no other person or enterprise can use the characters in her books without her permission as this falls under her protected intellectual property rights<sup>366</sup>. Unlike other areas of law, where quite clear precedents can be set out and followed in an international arena<sup>367</sup>, judicial analysis of intellectual property doctrines such as fair use, outsider works and copyrightable material can turn on the minutia detail of the case<sup>368</sup>.

Further there are cases where intellectual property law clashes with competition law and the case law in this area is equally abstruse<sup>369</sup>. This does lead to a very significant conundrum for developing GCC countries as they are expected to bring intellectual property legislation on par with developed countries without fully appreciating the area of law is quite esoteric and constantly evolving even in countries like the US, despite their self-proclaimed intellectual property pioneer status<sup>370</sup>.

#### **4.5.2 The US and bilateral agreements**

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preserve of domestic law. For further analysis see Murumba, S. (2012), Foxes and hedgehogs at the intersection of human rights and intellectual property, Monash University Law Review, Volume 38, Number 1.

<sup>365</sup> Warner Bros. Entertainment, Inc. and J. K. Rowling v. RDR Books, 575 F.Supp.2d 513 (SDNY 2008).

<sup>366</sup> For further comments see <http://michaelrisch.com/tiki/Warner+Bros.+Entertainment,+Inc.+v+RDR+Books>, [http://www.nytimes.com/packages/pdf/nyregion/20080909\\_POTTER.pdf](http://www.nytimes.com/packages/pdf/nyregion/20080909_POTTER.pdf). Reid, D. (2012), Intellectual Property Rights: A Comparative Perspective on Asia, the EU, and North America, Norteamérica Volume 7, Number 1, México ene. /jun. 2012. Available at [http://www.scielo.org.mx/scielo.php?pid=S1870-35502012000100002&script=sci\\_arttext](http://www.scielo.org.mx/scielo.php?pid=S1870-35502012000100002&script=sci_arttext). Accessed on 02.02.2015 and Dinwoodie, G. (2013), Methods and Perspectives in Intellectual Property, ATRIP Intellectual Property Series, Edward Elgar Publishing at page 41 deliberating on the developments the Rowling case made to the fair use doctrine.

<sup>367</sup> Other areas of law include human rights and criminal law. Human Rights are enshrined in the Universal Declaration of Human Rights since 1948. Available at <http://www.un.org/en/documents/udhr/> and for criminal law, the International Criminal Court has been established since 1998. Available at [http://www.icc-cpi.int/EN\\_Menus/ICC/Pages/default.aspx](http://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx). Both accessed on 02.02.2015.

<sup>368</sup> Kimbrough, A. (2012), Transformative use vs. Market impact: why the fourth fair use factor should not be supplanted by transformative use as the most important element in a fair use analysis, Alabama Law Review, Volume 63 Issue 3, page 625.

<sup>369</sup> See T 201/ 04 Microsoft Corporation v. Commission of the European Communities. The case involved the US software giant, Microsoft, losing its patented right to refuse interoperability information. Microsoft asserted intellectual property rights over its interoperability information. The Court of First Instance assessed Microsoft's intellectual property rights against its abuse of a dominant position in the common market and found Microsoft to be in violation of competition law. The change made by the Microsoft decision was that the existence of an intellectual property right can be challenged under exceptional circumstances. It is however unrealistic to expect the GCC States to develop as sophisticated an intellectual property legal system that has the capacity to deal with very fragmented case by case specific intellectual property assets. For further details on intellectual property law and competition law see Korah, V. (2006) Intellectual Property Rights and EC Competition Rule, Hart Publishing.

<sup>370</sup> Liu, H. (2005) The Coming Trade War, Part 5 Intellectual property rights: Bad TRIPS. Available at [http://atimes.com/atimes/Global\\_Economy/GH05Dj01.html](http://atimes.com/atimes/Global_Economy/GH05Dj01.html). Accessed on 03.02.2015.

Although the TRIPS Agreement was a valid vehicle through which to drive international intellectual property, US investors have continued to seek more stringent measures. Around the same time as the TRIPS Agreement was in its final stages, the US initiated a number of bilateral investment treaties with specific aims of; protecting private investments, developing market-oriented policies in partner countries, promoting U.S. exports, reducing the political risk to investors' and reducing investors' exposure to uncertain business environments<sup>371</sup>. By guaranteeing certain standards of treatment that can be enforced through binding states to an investor-to-state dispute settlement mechanism, outside of the domestic judicial system, bilateral investment treaties offer protection beyond the realm of TRIPS. Again, this highlights the strong consensus from the US to fiercely protect intellectual property rights in foreign states. The GCC states, while mindful of their ties with the US, must stop and consider their position before bowing down to investor-to-state dispute settlement mechanisms. The area of investor-to-state dispute settlement mechanisms is considered in more detail in chapter 6<sup>372</sup>.

Further, by tackling intellectual property rights through bilateral trade agreements and regional trade agreements, the US has created and secured a level of agreement to safeguard intellectual property which goes beyond TRIPS<sup>373</sup>. Whereas TRIPS sets minimum standards, the US approach is in essence a to-do list, or as Pugatch describes it, a "nanny" approach<sup>374</sup>. The US FTA's confine the ability of its signatory countries to less flexible implementation time scales when compared to the TRIPS provisions in areas such as; public health, compulsory licensing, extension of patent terms, parallel imports and data exclusivity rules<sup>375</sup>. This raises a number of concerns when considering intellectual property development from the GCC point of view. If the system of intellectual property rights protection is viewed as being "nannied" by the US, then the GCC will have an uphill struggle in increasing the level of protection it can offer intellectual property right holders, who are predominantly foreign investors, as its citizens will see the rules as foreign. What is needed is a clear breakdown of TRIPS provisions, what each provision within the TRIPS agreement means and how the provisions can be interpreted in such

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<sup>371</sup> Leo, B. (2010), Where are the BITs? How U.S. Bilateral Investment Treaties with Africa Can Promote Development, Centre for Global Development. Available at [http://www.cgdev.org/sites/default/files/1424333\\_file\\_Leo\\_BITs\\_FINAL.pdf](http://www.cgdev.org/sites/default/files/1424333_file_Leo_BITs_FINAL.pdf). Accessed on 30.01.2015.

<sup>372</sup> See chapter 6 from 6.8 to 6.14.

<sup>373</sup> Special 301 Report. Available at [http://www.uspto.gov/ip/global/trade/ir\\_trade\\_special301.jsp](http://www.uspto.gov/ip/global/trade/ir_trade_special301.jsp). Accessed on 05.01.2015. Trade agreements have allowed the US to set TRIPS Plus provisions with other countries.

<sup>374</sup> Special 301 Report. Available at [http://www.uspto.gov/ip/global/trade/ir\\_trade\\_special301.jsp](http://www.uspto.gov/ip/global/trade/ir_trade_special301.jsp). Accessed on 05.01.2014.

<sup>375</sup> Pugatch, M. (2007) A Transatlantic Divide? The US and EU's Approach to the International Regulation of Intellectual Property Trade-Related Agreements", ECIPE Working Papers and Chu, Y. (2010), The Evolution of US and EU Approaches to Intellectual Property Provisions Related to Public Health in Free Trade Agreements: Are They Responding to Public Health Concerns? Available at SSRN: <http://ssrn.com/abstract=1739488>. Accessed on 05.01.2015.

a way that the GCC states take ownership of the interpretation and thus create a set of intellectual property rights based law that is in line with their own standard setting in their national governance and at a higher authoritative level within the regional GCC framework.

TRIPS standards offer developing countries flexibility in four areas; implementation, substantive standards of protection, enforcement and flexibilities in areas outside the scope of TRIPS.<sup>376</sup> The US approach is to erode the flexibilities afforded to developing countries in the four TRIPS flexibility areas<sup>377</sup>. The GCC states, as a series of emerging markets, need to be careful in writing off all the flexibilities that are available to them under TRIPS or opting out as in previous bilateral agreements.

#### **4.6 The US and the GCC**

The US already have FTA's with Bahrain and Oman. In the US-Bahrain FTA, the provisions on intellectual property go beyond TRIPS. The scope of patentability is extended by mandating that patents must be available for new uses of known products, enhancing patent protection for plants and animals, an additional three years of data exclusivity when new clinical information is established, test data exclusivity and for customs authorities to stop trade in counterfeit and pirated goods<sup>378</sup>. Further, in TRIPS fines are required to adequately compensate intellectual property right holders who have suffered monetary damages however the FTA stipulates an imposition of fines irrespective of the damage caused<sup>379</sup>. Imposing fines irrespective of the damage caused is not a method of punishment that sits nicely in existing sharia law principles as speculative risk is prohibited.

For Bahrain the FTA has, for now, lived up to its promise. Bilateral trade between the US and Bahrain has grown from approximately \$1.1 billion in 2006 to just over \$2bn in 2012, this was largely down to Bahrain's tariff-free access to the US economy<sup>380</sup>. For Bahrain, the economic benefits gained from

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<sup>376</sup> The flexibilities are found at Article 1.1 of the TRIPS Agreement. See [http://www.wipo.int/ip\\_development/en/legislative\\_assistance/advice\\_trips.html](http://www.wipo.int/ip_development/en/legislative_assistance/advice_trips.html). Accessed on 03.02.2015.

<sup>377</sup> Mehta, P. (2004), TRIPS Plus: Enhancing Right Holders' Protection, Eroding TRIPS flexibilities, Briefing Paper, CUTS Centre for International Trade, Economics & Environment.

<sup>378</sup> U.S. International Trade Commission, (2004), U.S.-Bahrain Free Trade Agreement: Potential Economywide and Selected Sectoral Effects, Chapter Eighteen, Diane Publishing Company.

<sup>379</sup> Fink, C. and Reichenmiller, P. (2006) Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements, World Bank Organization. Available at [http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/Trade\\_Doha\\_Devt\\_A\\_Windo\\_into\\_the\\_Issues.pdf#page=292](http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/Trade_Doha_Devt_A_Windo_into_the_Issues.pdf#page=292). Accessed on 03.02.2015. Also see Abbott, F. (2010), Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law, UNCTAD - ICTSD Project on IPRs and Sustainable Development and Deere, C. (2008), The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries, Oxford University Press.

<sup>380</sup> See <http://www.moic.gov.bh/En/Main/News/Pages/%E2%80%9CFree-Trade-Agreement-and-Export-Opportunities-for-entrepreneurs-and-Small-and-Medium-Bahraini-enterprises%E2%80%9D-Seminar--is-ope.aspx> and between 2005 and 2011, U.S. exports to Bahrain grew by 246% to \$1.21 billion while imports from Bahrain increased by 20% to \$518 million, therefore there has been a steady increase since the inception of the FTA. Available at <http://www.state.gov/e/eb/tpp/bta/fta/c26474.htm>. Accessed on 05.02.2015.

increase in trade outweigh the flexibilities lost in FTA's. Likewise for Oman, there have been similar economic benefits. Although Oman did not conclude its FTA with the US until 2009, their 2011 trade figures are on par with Bahrain<sup>381</sup>. This highlights a key observation in this research. Trade takes place whether an FTA is in place or not, FTA's may have the promise of increasing trade but they should not be considered as the be all and end all to trade. States have traded based on need, FTA's aim to reduce trade barriers and thus are attractive to GCC states as there is an economic benefit to the agreement, likewise for the US, it creates more leverage to enforce their standard setting. As will be seen in chapter 8, the role of FTA's and the process by which the GCC should modify its systems, to protect its autonomy while maintaining international development, will be a vital component of the integrated intellectual property protection framework.

For the other GCC states, the potential gain from concluding a regional agreement with the US could also lead to similar increased levels of economic benefit, above existing goods and services trade<sup>382</sup>. Trade figures for the GCC states have increased significantly since the GCC was established and with negotiations for a GCC-US FTA, further relations would supplement existing agreements the US have with Bahrain and Oman<sup>383</sup>. The US, despite having the biggest economy globally, needs to be mindful of the knock on effect other emerging markets will have on its trade agreements with the GCC and what the implications are for TRIPS Plus provisions<sup>384</sup>. The upcoming Transatlantic Trade and Investment Partnership (TTIP), will further impact on the international intellectual property landscape and will require all countries involved in international intellectual property standard setting and protection to be mindful of its impact. The Transatlantic Trade and Investment Partnership (TTIP) is considered in detail in chapter 6.

#### **4.7 The EU on intellectual property law**

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<sup>381</sup> In 2011, the US imported \$2.2 billion in goods from Oman and exported \$1.4 billion in American-made products to Bahrain. See <http://www.state.gov/e/eb/tpp/bta/fta/c26474.htm>. Accessed on 05.03.2015.

<sup>382</sup> Saudi Arabia is the biggest GCC trader with the US, latest figures show trade in services, both imports and exports, exceeded \$61 billion making Saudi Arabia the 12<sup>th</sup> biggest trading partner for the US. Trade with Kuwait for the US stands at \$10.5 billion a year, with the UAE annual trade is at \$18.3 and UAE is the 34<sup>th</sup> largest goods trading partner for the US. Qatar also has trading ties with the US trading in the region of \$4 billion. See <http://www.ustr.gov/countries-regions/europe-middle-east/middle-east/north-africa/qatar> and <http://www.ustr.gov/about-us/press-office/press-releases/2012/september/ustr-kirk-announces-agreement-gcc>. Accessed on 05.02.2015.

<sup>383</sup> The Report: Kuwait 2013, Trading up: Both internal and external GCC imports and exports have increased considerably Available at <http://www.oxfordbusinessgroup.com/news/trading-both-internal-and-external-gcc-imports-and-exports-have-increased-considerably>. Accessed on 04.02.2015.

<sup>384</sup> Economist Intelligence Unit, (2011), GCC trade and investment flows the emerging-market surge, The Economist Intelligence Unit Limited 2011.

The EU has extensive legislation on intellectual property law and a body of case law to match. EU countries have for centuries tried to regulate and protect different forms of intellectual property rights<sup>385</sup>. Similar to the US, EU countries were also dealing with protecting copyright and patents from as early as the eighteenth century. Over many years intellectual property assets have become more diverse and varied, requiring discreet private laws to govern what constitutes an intellectual property asset and how it is protected beyond the realm of civil liabilities and remedies. Currently, the EU leads other political unions, in terms of quantity, as the EU has enacted 74 intellectual property laws to date<sup>386</sup>.

The EU has specific institutions and departments designated with the task of regulating the various aspects of intellectual property law including; copyright and related rights<sup>387</sup>, protection of inventions<sup>388</sup>, trademark law<sup>389</sup>, community design and other intellectual property areas<sup>390</sup>. In terms of international treaties, the EU has supported several international negotiations most notably TRIPS provisions in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994. Other key international developments from the EU are evident in the number of WIPO treaties the EU is a signatory to<sup>391</sup>.

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<sup>385</sup> See for example the Statute of Anne from Britain which was the first copyright Act in the world, dated back to 1710. A facsimile is at the British Library, 8 Anne c. 19. Also see John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, Publishing History, 19(8), 1980, page 39 (note 3).

<sup>386</sup> Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=EU#a1>. Accessed on 13.01.2015.

<sup>387</sup> EU legislation on copyright covers; copyright in the knowledge economy, management of copyright and related rights in the internal market, copyright and related rights: term of protection, resale right for the benefit of the author of an original work of art, rental right and lending right, orphan works, copyright and related rights: satellite broadcasting and cable retransmission, legal protection of databases, legal protection of services based on, or consisting of, conditional access, legal protection of computer programs, copyright and related rights in the information society and management of online rights in musical works. Available at

[http://europa.eu/legislation\\_summaries/internal\\_market/businesses/intellectual\\_property/index\\_en.htm](http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/index_en.htm). Accessed on 04.01.2015.

<sup>388</sup> Key areas for EU inventions covers; the European patent system, Community patent, establishment of the Community Patent Court, legal protection of biotechnological inventions and genetic engineering and legal protection of topographies of semiconductor products.

[http://europa.eu/legislation\\_summaries/internal\\_market/businesses/intellectual\\_property/index\\_en.htm](http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/index_en.htm). Accessed on 04.01.2015.

<sup>389</sup> The Trademark law covers; The European trademark law, community trademark regulation and trademark directive. Available at [http://ec.europa.eu/internal\\_market/indprop/tm/index\\_en.htm#maincontentSec1](http://ec.europa.eu/internal_market/indprop/tm/index_en.htm#maincontentSec1). Accessed on 04.01.2015.

<sup>390</sup> Other areas include; counterfeit goods and piracy, European anti-counterfeiting and anti-piracy plan, industrial property rights strategy, enforcement of intellectual property rights, combating counterfeiting and piracy in the single market, customs response to latest trends in counterfeiting and piracy, goods infringing intellectual property rights, technology transfer agreements, defence-related products: rules on transfer within the EU, geographical indications and designations of origin and traditional specialities.

<sup>391</sup> In total the EU has the highest number of statutes in the area of intellectual property law. These are broken down into; intellectual property laws, implementing rules and regulations, geographical Indications, treaty approvals intellectual property legal literature and jurisprudence, administered intellectual property-related treaties and treaty memberships. All are available at <http://www.wipo.int/wipolex/en/profile.jsp?code=EU>. Accessed on 06.01.2015.

From the point of view of the EU, there is a strong focus on enforcement regimes both within the EU<sup>392</sup> and with improving the protection and enforcement of intellectual property rights in third countries<sup>393</sup>. The EU and the US have established a good level of cooperation on intellectual property issues, which has facilitated a level of dialogue between the two entities to discuss common intellectual property rights enforcement challenges in third countries<sup>394</sup>.

For the EU, intellectual property assets carry substantial economic benefits and revenue. Michel Barnier, Member of the European Commission and European commissioner in charge of the Internal Market and Services, states; “*intellectual property is the backbone of a competitive European economy, creating jobs and bringing innovative products and services to consumers and companies.*”<sup>395</sup> This is evident in a recent report carried out by the EPO and the OHIM, showing the intellectual property industries sector contribute; 39% of total economic activities in the EU, 26% of all employment in the EU and a further 9% of jobs have been indirectly created as a result of the work of intellectual property industries<sup>396</sup>.

#### **4.8 The European Union’s intellectual property systems**

Europe has two main systems in place for patent protection. These are; the national patent system and the European patent system, with plans for a unitary patent by 2015<sup>397</sup>. The Convention on the Grant of European Patents (European Patent Convention, EPC) came into force in the late 1970’s and set up two instrumental organs of the European Patent Organisation (EPOrg), the EPO and the Administrative

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<sup>392</sup> The EU has extensive resources and policies governing intellectual property within the EU such as; the European Patent Office (EPO), European Commission Internal Market and services and the Office for Harmonization in the Internal Market (OHIM). Also the EU has a strong presence in intellectual property business initiatives, namely, React the Anti Counterfeiting Network and Business Action to Stop Counterfeiting and Piracy (BASCAP). All available at <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/>. Accessed on 08.01.2015.

<sup>393</sup> The EU has pioneered and steered many international rules in intellectual property. For example, in 2004, a Strategy for the Enforcement of Intellectual Property Rights in Third Countries was set up by the EU and it set out an enforcement framework dealing with intellectual property infringement outside the of the EU. Other enforcement regimes are developed by the EU through bilateral activities. These include; bilateral agreements, intellectual property dialogues, intellectual property and working groups. The bilateral agreements contain extensive intellectual property rights chapters. The chapters aim to offer similar levels of protection as is in the EU, while taking into account where a particular country or union of countries is at within the global market and its level of development. All available at <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/> Accessed on 08.01.2015.

<sup>394</sup> European Commission, 2013, Report on the protection and enforcement of intellectual property rights in third countries, Commission staff working document at page 19.

<sup>395</sup> Barnier, M. (2013), European Commission in charge of Internal Market and Services, Intellectual Property Rights, Europe’s asset, Europe’s priority, European Commission.

<sup>396</sup> European Patent Office and the Office for Harmonization in the Internal Market, 2013, “*Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union*”

<sup>397</sup> The Unitary Patent will come into force once 13 of the 38 member states, that includes the UK, France and Germany have ratified the Agreement on a Unified Patent Court, although current plans forecast the unitary patent to be made available by the end of 2015. See <http://www.ipo.gov.uk/pro-types/pro-patent/p-policy/pro-p-upandupc/pro-p-up.htm>. Accessed on 05.02.2015.



Council<sup>398</sup>. The EPC has thirty eight members making a European patent applicable over a European population of six hundred million<sup>399</sup>. The EU institutional framework did not initiate European intellectual property systems largely because the European Union intervenes on provisions of the European Treaty which authorise it to act<sup>400</sup>. The EPC has, as a result, developed its own legal institution to regulate patent protection and other similar institutions have been set up for different forms of intellectual property<sup>401</sup>. The provisions of the EPC are reflected in the EPO decisions<sup>402</sup> and aim to make decisions which are then implemented in the national courts of a contracting state however the system is far from water tight and issues arise in applying EPO rulings to national courts as was seen in *Re Astron Clinica* (2008)<sup>403</sup>. As a general rule, national courts do aim to apply EPO decisions and European Patent Office Technical Board of Appeal decisions where it has adopted a consistent approach as seen in *Human Genome Sciences Inc. v. Eli Lilly and Company*<sup>404</sup>.

#### **4.9 The EU and the GCC**

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<sup>398</sup> The two institutions were set up under the EPC at Article 4 which states; (1) A European Patent Organisation, hereinafter referred to as the Organisation, is established by this Convention. It shall have administrative and financial autonomy. (2) The organs of the Organisation shall be: (a) the European Patent Office; (b) the Administrative Council. (3) The task of the Organisation shall be to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council. Available at <http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/ar4.html>. Accessed on 28.01.2015.

<sup>399</sup> Not all members of the EPC are members of the EU; therefore EPC can offer intellectual property protection across a larger number of individuals than the EU. See Wild, J. (2005), European Patent Office, Patents in Europe Helping Business Compete in Global Economy, Intellectual Asset Management Magazine Supplement.

<sup>400</sup> Treaty of the European Union states at Article 5 (1-2): the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. For further detail see Geiger, C. (2013), Constructing European Intellectual Property Achievements and New Perspectives, Edward Elgar publishing at page 6.

<sup>401</sup> OHIM deals with registration of community trademarks and designs. Available at <https://oami.europa.eu/ohimportal/en/>. Accessed on 05.02.2015.

<sup>402</sup> The history of the EPO: A look back at the history of the European Patent Convention, the Organisation and the Office. Available at <http://www.epo.org/learning-events/40epc/timeline.html>. Accessed on 28.01.2015.

<sup>403</sup> *Re Astron Clinica Ltd and others* [2008] EWHC 85 (Pat); [2008] WLR (D) 12. The UK High Court augmented the situations under which a computer program can be granted a patent to be more in line with the EPO and reversed the UK practice on computer programs to allow computer program claims that unequivocally refer to admissible methods. Claims resumed being granted by examiners at the UK Intellectual Property Office, as they have been at the EPO, but with the stipulation that the UK test for patentability must be consistent with the Aerotel/Macrossan four step test in preference to the 'technical character' test at the EPO. For full details see <http://jolt.law.harvard.edu/digest/patent/in-re-astron-clinica>. Accessed on 06.03.2015. In *Re Astron Clinica Ltd*, the UK High Court broadened the circumstances under which a computer program can be granted a patent. This is very significant. In *Re Astron* a category that was previously exempt from patent protection was given the right to be patented.

<sup>404</sup> *Human Genome Sciences Inc. v. Eli Lilly and Company*, [2011] UKSC 51. The five UK Supreme Court collectively reversed the Court of Appeal decision that Human Genome Sciences (HGS) Neutrokin- $\alpha$  was invalid as it lacked industrial application. This is further evidence the UK courts are conscious that in order to uphold international intellectual property rights they need to make judicial decisions that are in line with the (EPO) and in HGS the Supreme Court adopted EPO'S interpretation of industrial applicability. The UK Supreme Court ruled that Article 57 of the EPC does not require patent application for new genes to go as far as providing clinical tests to meet the burden of proof of industrial application.

By the early 1980's the European Community (EC) sought to strengthen relations with the GCC and leading countries from both regions reached a framework agreement with the purpose of establishing trade relations and increasing commercial transactions between the two regions<sup>405</sup>. Over a number of years, as interactions between the regions increased, the scope of the framework agreement was steadily extended and bilateral relations grew between the two regions<sup>406</sup>. Negotiations for the establishment of a Cooperation Agreement were instigated by the GCC<sup>407</sup>, these continued between the EC and GCC until they concluded in 1988<sup>408</sup>. The agreement aimed to "*promote overall cooperation between equal partners on mutually advantageous terms in all spheres between the two regions and further their economic development, taking into consideration the differences in levels of development of the parties*"<sup>409</sup>. This developed to the EU and GCC FTA which although initially was expected to be completed within a relatively short space of time, over 25 years have passed and it is currently ongoing and remains a work in progress<sup>410</sup>. Negotiations often start and gain momentum only to be halted when the EU and GCC are unable to reach a consensus on trade provisions.

The EU and the GCC FTA, has at its roots, three main common interests; economic progress, political alliances and security issues<sup>411</sup>. However, in terms of trade relations, the trade between the EU and GCC has continued to grow over the years despite their differences in the FTA<sup>412</sup>. Trade figures for

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See Torremans, P. (2013), Holyoak and Torremans Intellectual Property Law, Seventh Edition, Oxford University Press at page 150.

<sup>405</sup> Ayadi, R. and Gadi, S. (2013), EU-GCC Trade and Investment Relations: What Prospect of an FTA between the Two Regions? Sharaka Enhancing Understanding and Cooperation in EU-GCC Relations.

<sup>406</sup> Luciano, G. and Schumacher, T. (2004), Relations Between the European Union and the Gulf Cooperation Council, Record and Promises for the Future, Gulf Research Center.

<sup>407</sup> Commission Of The European Communities, 1995, Communication From The Commission To The Council, Improving Relations Between The European Union And The Countries Of The Gulf Cooperation Council (GCC).states "*the original premises of EU-GCC cooperation, namely a high degree of economic and energy inter-dependence, have not changed*". Available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1995:0541:FIN:EN:PDF>. Accessed on 20.02.2015.

<sup>408</sup> Kostadinova, V. (2013), What is the Status of the EU-GCC Relationship? Gulf Research Center.

<sup>409</sup> Preamble to the EU-GCC Cooperation Agreement, Official Journal of the European Communities No L 54/3 of 25 February 1989, pages 3-15. Available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1989:054:0003:0010:EN:PDF>. Accessed on 20.02.2015.

<sup>410</sup> There are several media sources citing the completion of the FTA as imminent over the years. See for example; Charalambous, L. (2013), GCC-EU Free Trade Agreement Is 99 Percent Complete [http://www.taxnews.com/news/GCCEU\\_Free\\_Trade\\_Agreement\\_Is\\_99\\_Percent\\_Complete\\_61559.html](http://www.taxnews.com/news/GCCEU_Free_Trade_Agreement_Is_99_Percent_Complete_61559.html). Accessed on 06.03.2015. Isaac, J. (2007) GCC, EU closer to FTA deal, [http://www.khaleejtimes.com/DisplayArticleNew.asp?xfile=data/business/2007/February/business\\_February385.xml&section=business](http://www.khaleejtimes.com/DisplayArticleNew.asp?xfile=data/business/2007/February/business_February385.xml&section=business). Accessed on 06.03.2015. Ali, J. (2005), FTA with EU looks more imminent than ever, <http://gulfnews.com/news/gulf/uae/general/fta-with-eu-looks-more-imminent-than-ever-1.283851>. Accessed on 06.03.2015.

<sup>411</sup> Koch, C. and Stenberg, L. (2010), The EU and the GCC: Challenges and Prospects under the Swedish EU Presidency, Gulf Research Center.

<sup>412</sup> See for example, Hashmi, M. and Al-Eatan, F. (2014), Is There A Need For A Free Trade Agreement Between The European Union And Gulf Cooperation Council? International Business & Economics Research Journal, Volume 13, Number 1.

exports to the GCC from the EU have grown from €65.3 billion in 2010 to €83.5 billion in 2012 in trade in goods statistics and a more modest level of increase in trade in services<sup>413</sup>. Therefore although agreement cannot be reached on all components of the EU-GCC FTA, each facet of the agreement can run independently of others. There are knock on effects of the delays in concluding the EU-GCC FTA. The GCC have looked to other countries for FTA's and have completed agreements with Asian countries. For example, the GCC signed the FTA with Singapore in 2008, two years after the start of the negotiation and it took effect in September 2013<sup>414</sup>.

#### **4.10 The EU, the US and the GCC**

The EU and the US are negotiating the Transatlantic Trade and Investment Partnership (TTIP), a trade agreement that aims to remove trade barriers across different economic sectors to increase trade between the EU and the US<sup>415</sup>. The TTIP will have spill over effects for the GCC as it raises key questions for both the EU-GCC FTA and US-GCC framework agreement<sup>416</sup>. For instance, will the US and EU be on an equal footing or will one triumph over the other, will third party countries like the GCC states be expected to adopt new standards as a result of the partnership and will it lead to more competition? The EU have included investor to state dispute settlement (ISDS) in the TTIP. ISDS enables foreign investors to circumvent domestic legal processes and hold governments in foreign states to account in arbitration tribunals, without having to go through WTO, in effect creating a corporate sovereignty<sup>417</sup>. Sovereignty is itself a contentious issue, with all three entities, US, EU and GCC, having very different political structures and as a result their individual sovereignty issues. ISDS poses a series of sovereignty threats as it puts investors on par with nations giving them authority to seek compensation directly from states with some draconian measures such as powers to seize state assets<sup>418</sup>.

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<sup>413</sup> European Commission, European Union, Trade in goods with GCC, Directorate-General for Trade, 2012 Available at: [http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113482.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113482.pdf). For trades in services the level of EU exports have increased from €11.5 billion in 2010, to €22 billion in 2011 and a smaller growth to €22.5 billion in 2012.

<sup>414</sup> Ali, J. (2014) GCC looks east for win win trade deals, <http://www.bilaterals.org/?gcc-looks-east-for-win-win-trade#sthash.HcAFUifL.dpuf>. Other agreements include the GCC-Malaysia framework agreement on economic, commercial, investment and technical cooperation in 2011. The GCC trade agreements with other countries will be a further research area as it will be a point of interest to investigate whether the integrated approach recommended in this research is fit for purpose for all the GCC trading partners.

<sup>415</sup> See [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf). Accessed on 20.03.2014.

<sup>416</sup> See Pratap, J. (2013), Proposed US-EU trade deal may impact business in GCC: Report. Available at <http://www.bilaterals.org/?proposed-us-eu-trade-deal-may#sthash.aXZVR17g.dpuf>. Accessed on 21.03.2014.

<sup>417</sup> Friends of the Earth Europe, (2013), The TTIP of the anti-democracy iceberg. Available at [http://www.foeeurope.org/sites/default/files/foee\\_factsheet\\_isds\\_oct13.pdf](http://www.foeeurope.org/sites/default/files/foee_factsheet_isds_oct13.pdf). Accessed on 10.03.2015.

<sup>418</sup> United Nations Conference On Trade And Development, World Investment Report, 2013, Global Value Chains: Investment and Trade for Development, Chapter 3, page 110. Available at [http://unctad.org/en/publicationslibrary/wir2013\\_en.pdf](http://unctad.org/en/publicationslibrary/wir2013_en.pdf). Accessed on 13.03.2015.

ISDS has an added layer of issues with the GCC states as a question arises as to whether ISDS is compatible with sharia law. Further analysis will be carried out in chapter 6 on the implications of ISDS on the GCC states as all the states have accepted ISDS as an acceptable dispute settlement mechanism<sup>419</sup>. Investment carries with it risk, foreign investment would in turn carry higher risks as investors would be acting in markets with different political and legal structures. If the risk is too speculative then it potentially falls under the Islamic principle of gharar<sup>420</sup>.

#### **4.11 Conclusion**

The EU and the US have played a significant role in the development of intellectual property rights through the course of time. From its humble beginnings of two centuries ago to the modern day era of intellectual property rights, the law on intellectual property has developed at a steady pace. From the birth of the internet age, protecting intellectual property rights became more cumbersome and countries have had to step up their efforts in protecting intellectual property rights of their inventors as intellectual property can no longer be confined to one territory. The advantage for both the EU and the US is that the many years it has had to develop intellectual property law has allowed the EU and the US to develop its judicial expertise and experience, its laws and regulations as well as research and development in the field.

The free trade agreements that are in negotiation with the GCC offer a sharing of knowledge and expertise to bring the GCC states a step closer to western based standard setting and intellectual property law development and protection. As the chapter demonstrates, intellectual property is not a simple field of law development, the EU and the US are often involved in high profile intellectual property law cases that involve substantial amounts of money and require a very high level of expertise by the judiciary to make a decision. The EU and the US are periodically updating legislation and adjudicating on landmark intellectual property cases which are changing the law on intellectual property law in their respective jurisdictions. Rather than play follow the leader with the EU and the US, the GCC would stand a better chance of successfully protecting intellectual property rights by taking on board their international obligations and aligning it with their own political, religious and cultural beliefs. These recommendations will be further developed in chapters 6 to 8.

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<sup>419</sup> MENA-OECD Investment Programme, Assessing Investment Policies Of Member Countries Of The Gulf Cooperation Council Stocktaking analysis, page 57. Available at <http://www.oecd.org/mena/investment/Preliminary%20assessment%20GCC%20inv%20policies.pdf>. Accessed on 14.03.2015.

<sup>420</sup> See Chapter 3 at 3.9.

As the EU-US FTA is aiming to conclude in the near future and there is a lot of momentum to complete the Transatlantic Trade and Investment Partnership (TTIP), now would be the optimal time for the GCC states to take this as an opportunity to reassess its relationship with both the EU and GCC. Up until now, the GCC has been able to enter into negotiations with the EU and US relatively independently. However where the EU and US can agree, there will be a harmonisation of regulations. This therefore has repercussions for the GCC which will be further analysed in chapters 6 and 8.

The next chapter considers the impact of TRIPS standards on the GCC states and the ramifications for the GCC states from the current emphasis on a TRIPS Plus Era. The following chapter will focus on the current international intellectual property law demands within the context of intellectual property protection and enforcement in the GCC states and answer key research objectives on; the pre TRIPS analysis of the level of intellectual property protection that existed before the GCC states began ascending to international treaties and enacting intellectual property laws, the TRIPS compliance stage that occurred at different times for all six states and will analyse the potential ramifications for the GCC states from adhering to TRIPS Plus provisions.

## **Chapter Five: Sharia and TRIPS, the rocky road from pre TRIPS to TRIPS plus in the GCC**

### **5.1 Introduction**

In order to investigate the development of intellectual property in the GCC states from pre-TRIPS, to TRIPS and subsequently TRIPS plus, this chapter will analyse intellectual property protection and enforcement on a state by state basis. The chapter will address the following research objectives; to investigate the development of intellectual property in the GCC countries from pre-TRIPS, TRIPS and TRIPS plus, the pre TRIPS analysis on the level of intellectual property protection that existed before the GCC states began ascending to international treaties and agreements and the TRIPS compliance stage that occurred at different times for all six states. Specifically, the level of intellectual property protection that existed before the GCC states joined the WTO, the impact of the TRIPS compliance stage on each individual state and the magnitude of changes that took place from pre TRIPS to TRIPS compliance by all states (1990 to 2010). Further, the chapter will analyse the potential ramifications for the GCC states from adhering to the TRIPS

plus provisions.

The development of international standard setting is best understood at three distinct stages; pre TRIPS, TRIPS standard and TRIPS Plus. The research objectives addressed in this chapter therefore are:

- To analyse the GCC states at a pre TRIPS stage examine the level of intellectual property protection that existed before the GCC states began ascending to international treaties and agreements, covering a time period that runs from 1970 to 1990.
- To consider the substantive provisions of the TRIPS compliance stage as TRIPS occurred at different times for all six states covering changes that took place from 1990 to 2010<sup>421</sup>.
- To examine; TRIPS Plus provisions, to understand how they go beyond the standards set at TRIPS level and an overview of TRIPS Plus follows on from when the TRIPS agreement was complied with by the GCC states to the current state of play.
- To understand the intellectual property development of each GCC state to then be able to set out how intellectual property rights protection can be improved

The research objectives will inform the overall purpose of the research to make a series of recommendations to develop an integrated approach to intellectual property rights which takes into account; the structure of the GCC states, international agreements and pressures, the international institutions, Islamic finance, societal and religious views.

## **5.2 The Berne and Paris Convention**

Pre TRIPS, the main international treaties governing intellectual property protection are; the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works on Copyrights (1886). TRIPS recognised that the Berne and Paris Convention provided standards for intellectual property protection and therefore the key issue TRIPS addressed was the level of protection. TRIPS set standards by making the substantive obligations of the Paris and Berne Convention, in their most recent versions, compulsory as stated in Articles 2.1 and 9.1 of the TRIPS Agreement. The TRIPS Agreement adds a substantial number of additional obligations and the point of departure is expressed in Articles 2.1 and 9.1 obliging member states to comply with the substantive provisions of the Paris and Berne Convention<sup>422</sup>.

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<sup>421</sup> See chapter 2 at 2.3, Table One.

<sup>422</sup> WTO Analytical Index: TRIPS, Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 9.1. Available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/trips\\_01\\_e.htm#article9B1](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_01_e.htm#article9B1). Accessed on 09.03.2015.

The Berne Convention is the oldest international agreement in the field of copyright and was set up to create a union amongst countries who would abide by the Convention for the protection of authors literary and artistic works<sup>423</sup>. The Paris Convention was the first international Convention to make extensive provisions for industrial property<sup>424</sup>. Both the Paris and Berne Convention are overseen by WIPO which acts as an overarching, uniform standard for minimum levels of intellectual property protection<sup>425</sup>. The two main treaties addressed the lack of effective protection, in particular the lack of regulation of local laws that could provide protection to foreign intellectual property right holders. Especially in countries where the intellectual property laws were less developed than others<sup>426</sup>.

Where the Paris and Berne Conventions remained inadequate was in the lack of an effective legally binding dispute settlement mechanism and detailed provisions on enforcement of intellectual property rights<sup>427</sup>. The Berne Convention is essentially a private international agreement that entitles private parties with rights in literary and artistic works to copyright protection<sup>428</sup>. TRIPS, on the other hand, extended its protection of intellectual property rights to act as a public international law instrument encompassing disputes between public entities and national states by creating mechanisms to adjudicate and settle disputes by sanctioning states for violating the TRIPS agreement<sup>429</sup>.

The main sanctioning power of the WTO under TRIPS can be enforced where a state is seen to not meet its obligations under TRIPS and consequently face dispute settlement measures against unacceptable trade

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<sup>423</sup> Article 1, Berne Convention. The Berne Convention has been amended several times; September 9, 1886, May 4, 1896, November 13, 1908, March 20, 1914, June 2, 1928, June 26, 1948, July 14, 1967, July 24, 1971 and September 28, 1979. Initially, the Union was composed of the main developed countries pioneering intellectual property right protection and included; Switzerland, Belgium, Spain, Italy, United Kingdom, Tunisia, France and Germany. This can be compared to the GCC States ascension to the Berne Convention with the first State joining in 1996 (Bahrain), followed by Oman in 1999, Qatar 2000, Saudi Arabia 2003, UAE 2004 and Kuwait is yet to join.

<sup>424</sup> The Paris Convention was needed as prior to the enactment of the Convention patent applications had to be made at the same time in each country the property right holder was seeking a monopoly. This was mainly because if the patent applications were made at different times in different countries, then the requirement of novelty in the invention would be lost as a patent cannot be granted if the invention is made public in any way, anywhere in the world. The Paris convention addressed this hurdle and created a uniform law to avoid destroying the novelty of the invention in other countries.

<sup>425</sup> WIPO was established as a UN Agency responsible for administering intellectual property issues for its member states. See Tejan-Cole, A. (2011), International Copyright Law- Part I: The Berne Convention for the Protection of Literary and Artistic Works, 1886, <http://www.belipo.bz/wp-content/uploads/2011/12/copyrightlaw.pdf>. Accessed at 14.03.2015.

<sup>426</sup> For the Paris Convention see [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html). For the Berne Convention see <http://www.wipo.int/treaties/en/ip/berne/>. Accessed at 14.03.2015.

<sup>427</sup> Vrms, O. and Schneider, M. (2006), Enforcement Of Intellectual Property Rights Through Border Measures, Oxford University Press.

<sup>428</sup> World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, May 4, 1896, available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html). Accessed at 02.03.2015.

<sup>429</sup> See the TRIPS Agreement, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. Available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm). Accessed at 02.03.2015. See also Article 64, TRIPS Agreement, dispute settlement procedures.

practices under Part V of the TRIPS agreement<sup>430</sup>. The purpose of the sanctions, to withdraw trade concessions, is to act as a deterrent and attempt to minimise intellectual property infringement. Although the numbers of litigated cases are few and far between, by including the dispute settlement mechanism in TRIPS, trade and intellectual property has conflated as intellectual property decisions are adjudicated on within the trade system<sup>431</sup>. This has a direct negative impact on the flexibilities afforded to developing countries as there is increasing pressure to conform to TRIPS standards at a foreign pace and not in line with local and national needs, technology and capacity<sup>432</sup>.

### **5.3 The GCC at the pre TRIPS stage**

The Gulf region, pre TRIPS, was mainly influenced by international intellectual property rules that began during the colonial era. As colonial powers imposed their respective legal regimes in their colonies, variations of intellectual property protection and regimes emerged in developing countries<sup>433</sup>. In terms of pre TRIPS intellectual property law, there was little, if any, attention paid to the protection of intellectual property rights<sup>434</sup>. Influences of British India extended to Kuwait, Bahrain, Qatar, Abu Dhabi, Dubai, Sharjah, Ajman and Oman until 1947<sup>435</sup>; however the main interests of Britain in the Gulf states were dictated largely by their desire to maintaining the British Indian Empire in relation to commerce, strategic position, diplomacy and imperial defence<sup>436</sup>.

From the 1970's onwards, the Gulf states were each going through different rates of transformation in terms of governance, independence and both national and international legislative developments<sup>437</sup>. This had a direct impact on intellectual property legislation development in the GCC states as in the midst of international legislative reform and international agreements, the progression from pre TRIPS to TRIPS compliance

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<sup>430</sup> Trade Related Intellectual Property Rights, Part V. Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm). Accessed on 06.03.2015. Nair, M. (2009), TRIPS, WTO and IPR – How Effective is the Dispute Settlement Process? Journal of Intellectual Property Rights, Volume14, pages 346 to 348. Available at <http://nopr.niscair.res.in/bitstream/123456789/5351/1/JIPR%2014%284%29%20346-348%20%28Opinion%29.pdf>. Accessed on 09.03.2015.

<sup>431</sup> Land, M. (2012), Rebalancing TRIPS, Michigan Journal of International Law, Volume 33, Issue 3. Available at <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1019&context=mjil>. Accessed on 09.03.2015.

<sup>432</sup> Yu, P. (2009), The Objectives and Principles of the TRIPs Agreement, Drake University Law School, Houston Law Review, Volume 46, pages 797 to 1046.

<sup>433</sup> Deere, C. (2009), Developing Country Perspectives on Intellectual Property in the WTO: Setting the Pre-Trips Context. See more at <http://ssrn.com/abstract=1405430>. Accessed at 30.03.2015.

<sup>434</sup> El-Said, M. (2005), The Road from TRIPS-Minus, to TRIPS, to TRIPS-plus, Implications of IPRs for the Arab World, The Journal of World Intellectual Property, page 53.

<sup>435</sup> Onley, J. (2005), Britain's Informal Empire in the Gulf, 1820—1971, Journal of Social Affairs, Volume 22, Number 87, American University of Sharjah, pages 29 to 45.

<sup>436</sup> Peterson, J. (2009), Britain and the Gulf: At the Periphery of Empire, Chapter 14, Edited by Lawrence G. Potter. The Persian Gulf in History. [Online] Available at <http://www.palgraveconnect.com/pc/doi/10.1057/9780230618459>. Accessed at 10.03.2015.

<sup>437</sup> See Chapter 2 for further details in relation to the legal development of each individual state.



resulted in new legislation being brought in as a somewhat rushed process<sup>438</sup>. It was not until the late 1990's that the GCC states started to accede to international intellectual property conventions. Therefore whereas several developed nations have had over a century to develop extensive international intellectual property laws from their initial ratification or ascension to the Berne and Paris Convention, the GCC states introduced a suite of legislation in a few decades.

#### **5.4 Impact of the internet age and globalisation**

As intellectual knowledge has become more readily available, it has, as a result, become more difficult to protect by the GCC states and by the western governments<sup>439</sup>. This has presented both strengths and weaknesses for national and international economies. For example, the Gulf states are major exporters to China, China's subsequent exports to the US, Europe and Japan would not be possible without the plastics supplied to it by the Gulf<sup>440</sup>. An obvious strength of globalisation is in the escalation in investments and capital movement amongst member states and foreigners as intellectual property protection mechanisms are enhanced<sup>441</sup>. Certain areas of intellectual property protection can be directly linked to trade concessions, thus this highlights the benefits of better levels of protection to the GCC states. For example; improved industrial design protection has led on to concession in textiles and likewise protection of geographical indications has led to concessions in agriculture<sup>442</sup>. More specifically, trade concessions have taken place individually with each GCC state as can be seen in the US -Bahrain's FTA which has granted duty free

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<sup>438</sup> Hassanien, M. (2008), Bilateral WTO-Plus free trade agreements In the Middle East: A case Study of OFTA in the Post-Trips Era, *Intellectual Property Law Journal*, pages 161 to 197.

<sup>439</sup> Noland, M. (2008), Arab Economies at a Tipping Point, Peterson Institute for International Economics. Available at <http://www.petersoninstitute.org/publications/papers/noland-pack02081.pdf>. Accessed on 09.03.2015. Davis, W. and Hayashi, C. (2007), The Gulf Cooperation Council (GCC) Countries And The World: Scenarios To 2025: Implications For Competitiveness, World Economic Forum. Momani, B. (2007), A Middle East Free Trade Area: Economic Interdependence and Peace Considered, *World Economy*, Volume 30, Issue 11, pages 1682 to 1700. Habibi, N. (2011), Growth in economic relations of China and India with the GCC countries, *Asian-Pacific Economic Literature*, Volume 25, Issue 2, pages 52 to 67. Penubarti, M. and Maskus, K. (1995), How trade-related are intellectual property rights?, *Journal of International Economics* Volume 39, Issues 3-4, pages 227 to 248. Kim, Y. (2012), Appropriate Intellectual Property Protection and economic growth in countries at different levels of development, *Research policy*, Volume 41, Number 2, pages 358 to 375, Elsevier Publications.

<sup>440</sup> Seznec, J. (2011), *Industrialization in the Gulf - A Socioeconomic Revolution*, Routledge Studies in Middle Eastern Economies, Routledge Taylor and Francis Group, page 25, where the interdependence of East and West States and their respective international economies has been described by Seznec as the "rayon route" to replace the original "silk route".

<sup>441</sup> Maskus K. (2000), *Intellectual Property Rights and Economic Development*, [www.colorado.edu/Economics/mcguire/workingpapers/cwrurev.doc](http://www.colorado.edu/Economics/mcguire/workingpapers/cwrurev.doc). Accessed on 11.02.15.

<sup>442</sup> Carvalho, N. (2010), *The TRIPS Regime of Patent Rights*, Kluwer Law International, page 36, [http://books.google.co.uk/books?id=ZZaq6JYAh0C&dq=trips+intellectual+property+and+gcc&source=gbs\\_navlinks\\_s](http://books.google.co.uk/books?id=ZZaq6JYAh0C&dq=trips+intellectual+property+and+gcc&source=gbs_navlinks_s). Accessed at 14.02.2015. Musungu, S. and Dutfield, G. (2003), *Multilateral Agreements and a TRIPS – plus world: The World Intellectual Property Organisation (WIPO), TRIPS Issues Papers 3*, Quaker United Nations Office and Quaker International Affairs Programme. Biadgleng, E. and Maur, J. (2011) *The Influence of Preferential Trade Agreements of Intellectual Property Rights in Developing Countries, A First Look*, UNCTAD – ICTSD Project on IPRs and Sustainable Development, Issue Paper, Number 33.

exports for most eligible exports<sup>443</sup> and also the US - Oman FTA has a clause for suspension of concessions if there is non-compliance<sup>444</sup>. However, the global economic crisis, headed by the US financial crisis and the further debt problems of Greece and other EU countries, critically damaged the world economy, which has slowed down growth rates in developing economies<sup>445</sup>.

### **5.5 The GCC at the TRIPS compliance stage**

To present a current snapshot of the GCC at the TRIPS compliance level, the GCC is currently the European Union's (EU) fifth largest export market and the EU is GCC's second trading partner and follows the main international provisions of the General Agreement on Trade and Tariffs (GATT), WTO and TRIPS<sup>446</sup>. The GCC have developed national laws and regulations in intellectual property rights to bring it in on par with legislative and regulatory developments in the international arena<sup>447</sup>. Since the formation of the GCC, the GCC Patent Office was established in Riyadh, Saudi Arabia, in 1992 and can grant patents across all Member States<sup>448</sup>. The focus of developed countries, in particular the US, is to develop international standards beyond those offered by the GCC Patent Office. Despite its union status, the GCC has yet to finalise uniform provisions to meet the growing challenges posed for the development and diversification of national exports and international trade<sup>449</sup>. For instance, in an attempt to unify legislation, the GCC states have enacted a Trademark Law however this has not yet been put into effect<sup>450</sup>. The enforcement lacunae in the GCC approach to intellectual property is a common theme; laws are set up, legislation is enacted but the

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<sup>443</sup> Butcher, A. (2004), US – Bahrain Free Trade Agreement: Political Economywide and Selected Sectoral Effects, United States International Trade Commission Publication 3726.

<sup>444</sup> Hassanien, R. (2010), United States Bilateral Free Trade Agreements: Consistencies Or Conflicts with Norms in the Middle East?, Chapter 1, page 33, Kluwer Law International. Available at [https://books.google.co.uk/books?id=40BLy5XT2mAC&pg=PA33&dq=OMAN+US+FTA+TRADE+CONCESSIONS&hl=en&sa=X&ei=b9\\_9VlvTJsHI08qugJAJ&ved=0CDMQ6AEwAQ#v=onepage&q=OMAN%20US%20FTA%20TRADE%20CONCESSIONS&f=false](https://books.google.co.uk/books?id=40BLy5XT2mAC&pg=PA33&dq=OMAN+US+FTA+TRADE+CONCESSIONS&hl=en&sa=X&ei=b9_9VlvTJsHI08qugJAJ&ved=0CDMQ6AEwAQ#v=onepage&q=OMAN%20US%20FTA%20TRADE%20CONCESSIONS&f=false). Accessed on 09.03.2015.

<sup>445</sup> Hvidt, M. (2013), Economic diversification in GCC countries: Past record and future trends. Kuwait Programme on Development, Governance and Globalisation in the Gulf States pages 1-55, Al-Yousif, Y. (2002), Oil Economies and Globalization: The Case of the GCC Countries, Polczynski, M. (2008), Protecting Intellectual Property in a Global Environment, Maskus, K. (2000), Intellectual Property Rights In The Global Economy, Chapter 3.; Arewa, O. (2006), TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks. Case Research Paper Series in Legal Studies Working Paper, Dahrendorf, A. (2009), Global Proliferation of Bilateral and Regional Trade Agreements: A Threat for the World Trade Organization and/or for Developing Countries, Maastricht Faculty of Law Working Paper Number 6, Drahos, P. (2003), The Global Intellectual Property Ratchet: Why it Fails as Policy and What Should be Done About It and Birnhack, M. (2008), Trading Copyright: Global Pressure On Local Culture.

<sup>446</sup> European Union, EU relations with the Gulf Cooperation Council (GCC). Available at [http://eeas.europa.eu/gulf\\_cooperation/index\\_en.htm](http://eeas.europa.eu/gulf_cooperation/index_en.htm). Accessed at 25.03.2015.

<sup>447</sup> The Economic Agreement between the GCC States Adopted by the GCC Supreme Council (22<sup>nd</sup> Session; 31 December 2001). Also, EU, US and China are all offering to finalise FTA's with the GCC states.

<sup>448</sup> The Patent Office of the Cooperation Council for the Arab States of the Gulf. See more at <http://www.gccpo.org/AboutUSEn.aspx>. Accessed on 25.03.2015.

<sup>449</sup> GCC Charter, Foundations and Objectives. Available at <http://www.gcc-sg.org/eng/index895b.html?action=Sec-Show&ID=3>. Accessed on 15.03.2015.

<sup>450</sup> The closing statement Of the Twenty-Seventh Session of the Supreme Council of the Cooperation Council for the Arab States of the Gulf (GCC) <http://www.gcc-sg.org/eng/indexf5cf.html?action=Sec-Show&ID=129>. Accessed at 20.02.2015.

implementation stage of the laws lacks effective infrastructure-related action.

Each GCC state has incorporated TRIPS into their national laws and allowed TRIPS requirements to influence policies and procedures<sup>451</sup>. After the Uruguay Round of trade negotiations, TRIPS was initiated as an agreement was reached between WIPO and WTO on the implementation of intellectual property worldwide<sup>452</sup>. TRIPS promote a free market ideology, giving intellectual property right holders a minimum level of protection in foreign territories<sup>453</sup>. The TRIPS agreement outlines several important trade related aspects of intellectual property. It requires signatory countries to adhere to the Paris Convention, Berne Convention and other WTO Conventions<sup>454</sup>, giving it the alternative title of “Berne and Paris-plus” Agreement<sup>455</sup>. It necessitates implementation of its criteria for intellectual property protection through monopoly grants of limited duration, granting a monopoly over any type of intellectual property, enforcement provisions and dispute settlements methods. Each individual GCC state observes and strengthens their interests relating to TRIPS based on their internal development strategies and there is considerable variation between the states<sup>456</sup>.

To clearly understand the intellectual property development of the GCC states, each GCC state will be considered individually. As a common thread, all GCC states have intellectual property legislation however it is their border measures which have the most significant impact on intellectual property violators. A second common thread can be seen in software piracy rates as all GCC states made significant improvements when they achieved TRIPS compliance, however they have not been able to keep their momentum going and

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<sup>451</sup> Adolf, H. (2001), Trade-Related Aspects of Intellectual Property Rights And Developing Countries, The Developing Economies. Kernohan, D. (2004), Measuring the Economic Impact of an EU-GCC Free Trade Agreement, Centre for European Policy Studies, pages 1 to 68. Lindstrom, B. (2010), Scaling Back TRIPS-Plus an Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific. Social Science Research Network. Maur, E. (2011), The Influence of Preferential Trade Agreements on the Implementation of Intellectual Property Rights in Developing Countries: A First Look, World Bank; Groupe d'Economie Mondiale (GEM) UNCTAD-ICTSD Project on IPRs and Sustainable Development Paper Number 33. Mercurio, B. (2006), TRIPS-Plus Provisions in FTAs: Recent Trends, Regional Trade Agreements and the WTO Legal System, pages 215 to 237. Mohamadieh, K. (2006), Free Trade Agreements in the Arab Region, The Arab NGO Network for Development. Ruse-Khan, H. G. (2011), The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?, Journal of Intellectual Property Law Volume 18, Number 2. Gervais, D. (2007), IP Trade and development, Strategies to optimize economic development in a TRIPS plus Era.

<sup>452</sup> Khanna, N. (2002), Trade Related Intellectual Property Rights and Their Effects on World Trade, The Saskatchewan Economics Journal, Volume 4. Available at <http://artsandscience.usask.ca/economics/skjournal/2002edition4.php>. Accessed on 05.03.2015.

<sup>453</sup> Landes, W. (2009), The Economic Structure of Intellectual Property Law, Harvard University Press, page 414. Available at [http://books.google.co.uk/books?id=L2P3EHagf8cC&dq=free+market+ideology+intellectual+property&source=gbs\\_navlink\\_s\\_s](http://books.google.co.uk/books?id=L2P3EHagf8cC&dq=free+market+ideology+intellectual+property&source=gbs_navlink_s_s). Accessed on 04.03.2015.

<sup>454</sup> Treaty on Intellectual Property in Respect of Integrated Circuits and International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

<sup>455</sup> Editor Stamatoudi, I. (2010), Copyright Enforcement and the Internet, Kluwer Law International, Part 1, Taylor, M. The Global System of Copyright enforcement: Regulation, Policies and Politics, page 73.

<sup>456</sup> UNDP and the UNDP Special Unit for South-South Cooperation, (2008), The Challenge of Assessing the Creative Economy: towards Informed Policy-making, Creative Economy Report 2008.

further reduce piracy rate at the same level<sup>457</sup>. As will be seen in the table below, the Business Software Alliance (BSA) Piracy study has assessed rates of software piracy across the world and provided statistical data on each GCC state. What a comparison of the BSA studies shows is that once all GCC states achieved TRIPS compliance by 2000, there was a subsequent improvement in combating software piracy as the 2006 study showed a significant improvement. However, from the 2010 study results it is evident that the GCC states have not maintained the same momentum<sup>458</sup>.

Table Five Gulf states piracy rates (2000-2010)<sup>459</sup>

Gulf State	BSA Piracy Rates from 2000	BSA Piracy Rates from 2006	BSA Piracy Rates from 2010	Increase/Decrease in software piracy reduction from 2000 to 2006	Increase/Decrease in software piracy reduction from 2006 to 2010
Oman	78%	62%	62%	16%	0%
Qatar	81%	58%	49%	23%	9%
Saudi Arabia	59%	52%	52%	7%	0%
UAE	44%	35%	36%	9%	-1%
Kuwait	80%	64%	60%	16%	4%
Bahrain	80%	60%	54%	20%	6%

The statistical analysis of software piracy shows that the Gulf states have improved their intellectual property enforcement in this area as the rates of infringement are falling. However the pressure to incorporate TRIPS plus standards will require the states to adhere to stricter enforcement action across all areas of intellectual property protection when the example of software piracy shows they are barely managing to maintain current improvements. There is a stark contrast between the initial improvements made by the Gulf states post TRIPS compliance and the rate of improvement from 2006 to 2010.

It is not in the best interests of the GCC states or the international market for that matter to continue to impose stringent laws on intellectual property protection without a deeper understanding of the individual GCC states. By understanding the intellectual property development of each GCC state, the jigsaw pieces of an integrated intellectual property approach can be put together to give a complete picture of how intellectual property rights protection can be improved. Therefore a state by state analysis of intellectual property right in the GCC will be one component of the overall set of recommendations for an integrated approach to intellectual property protection.

## **5.6 Saudi Arabia's intellectual property development**

<sup>457</sup> Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates*, Chapter 5, Routledge.

<sup>458</sup> Business Software Alliance, *Global Software Piracy Study 2011*. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 28.03.2015.

<sup>459</sup> Business Software Alliance, *Global Software Piracy Study 2011*. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 28.03.2015.

As seen in Chapter Two, Saudi Arabia was quite slow in ascending to the WTO and updating its legislation to meet TRIPS compliance<sup>460</sup>. The main national laws in Saudi Arabia for intellectual property protection are in patents, copyright and trademarks<sup>461</sup>. The current intellectual property enforcement system is administered by the Saudi patent office in King Abdulaziz City for Science and Technology (KACST). For intellectual property violations, the Saudi patent office prefers to deal with matters mainly by arbitration and not the court process<sup>462</sup>. When an infringement has taken place, the council makes a decision about settlement; however the court process tends to be used in more serious cases. As an example, the Saudi Arabia Board of Grievances imposed criminal sanctions for intellectual property violations for the first time in 2012 when the Board of Grievances sentenced a Saudi national to 10 days in jail for intellectual property violations<sup>463</sup>. Saudi Arabia does not have a public repository on intellectual property based sentences however the international intellectual property alliance (IIPA) publishes an annual special 301 report on copyright protection and enforcement where it details enforcement action taken by countries<sup>464</sup>. Unlike most intellectual property systems that follow two tracks for intellectual property infringement, criminal or civil, Saudi Arabia handles all piracy and counterfeiting from both criminal and civil perspectives<sup>465</sup>. The power lies with the Board of Grievances who can apply a broad range of punishments if intellectual property violations are found. Therefore, the level of transparency in the Saudi Arabian judicial system is insufficient and not fit for purpose as by not having two separate tracks that regulate intellectual property infringement, the judicial system lacks certainty. Consequently, one of the salient features of set an integrated approach to intellectual property rights protection will be to take into account the level of Islamic law compliance in Saudi Arabia and how the Saudi Arabian intellectual property laws can incorporate sharia principles.

### **5.6.1 Saudi Arabia's copyright law**

The Ministry of Culture and Information (MCI) is responsible for punishing copyright violations and follows

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<sup>460</sup> See Chapter 1 at 1.4.

<sup>461</sup> Business Software Alliance, Global Software Piracy Study 2011. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 28.04.2014.

<sup>462</sup> Wati, R. (2012), Study on Specialized Intellectual Property Courts, joint project between the International Intellectual Property Institute (IPI) and the United States Patent and Trademark Office (USPTO). Available at <http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf>. Accessed on 14.03.2015.

<sup>463</sup> Saudi Arabia 2014 Crime and Safety Report: Riyadh. Available at <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=15563>. Accessed on 15.03.2015.

<sup>464</sup> International intellectual property alliance (IIPA) 2013 special 301 report on copyright protection and enforcement. Available at <http://www.iipa.com/rbc/2013/2013SPEC301SAUDIARABIA.PDF>. Accessed on 09.03.2015. The reason as to why Saudi Arabia does not have a public repository links back to its political structure as discussed in chapter 2 at 2.6. Saudi Arabia lacks transparency in its judicial system and a public repository would be an area of development.

<sup>465</sup> World Trade Review, (2011), Saudi Arabia, Contributing firm United Trademark & Patent Services in association with Dr Hasan Al Mulla Law Office, Page 191. Available at <http://www.worldtrademarkreview.com/issues/article.ashx?g=1ac1ba27-2a48-48bf-8839-722f21f53cfa>. Accessed on 02.02.2015.

the Saudi copyright system when imposing sanctions. The MCI established the Violation Review Committee (VRC) on Copyrights in order to review copyright infringement cases and it is a requirement that one member of the VRC be a sharia advisor<sup>466</sup>. During 2010, 483 cases were reviewed and judgments included fines, confiscations and a set number of closure days for infringing shops<sup>467</sup>. For example, the MCI have ordered closure of shops, between 7 days to 60 days, for copyright violations and imposed fines<sup>468</sup>. However the Saudi Arabian law on copyright protection is less transparent when the case involves Saudi nationals. A state may implement laws that can be wholly or partially sharia compliant, but the acceptance and effectiveness of such laws are dependent on it being recognized by society<sup>469</sup>. Take for example the recent victory of Saudi author, Salwa Aededan against a renowned cleric, Sheikh Ayad al-Qarni for copyright infringement<sup>470</sup>. The court process took over a year with a fine as the final outcome and for the cleric's books to be removed from bookstores<sup>471</sup>. What makes this case so relevant is that the cleric ascertained he had not committed intellectual property infringement and further had support from the public<sup>472</sup>.

This case highlights the diverging opinions on intellectual property rights in the region<sup>473</sup>. It also adds weight to the need for a different approach to intellectual property protection. The laws enacted by any government are subject to the public acceptance of the law and the issue this case brings to the forefront is the acceptance of intellectual property right protection. For the GCC states to develop higher standards in intellectual property

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<sup>466</sup> The full powers of the Violations Review Committee are stated in the Saudi Arabia Copyright Law (2003) at Article 25 which states at least one member shall be a Sharia advisor. See Article 25: Violation Review Committee (1) *A Committee to review the violation shall be formed by the Minister's decision, with a minimum of three members, provided that one of them is a legal advisor and the other a Shari'ah advisor.* (2) *Decisions of the Committee shall be made by majority vote, which shall be endorsed by the Minister.* Available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=129516](http://www.wipo.int/wipolex/en/text.jsp?file_id=129516). Accessed on 30.03.2015.

<sup>467</sup> World Trade Organization, (2011), Trade Policy Review, Report by The Kingdom Of Saudi Arabia, Page 12.

<sup>468</sup> World Intellectual Property Review, (2014), More than 70 Saudi shops closed for copyright violations. Available at <http://www.worldipreview.com/news/more-than-70-saudi-shops-closed-for-copyright-violations-6525>. Accessed on 28.03.2015.

<sup>469</sup> Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law, pages 55 to 94 and El-Bialy, N. (2011), Enforcing IPR Through Informal Institutions: The Possible Role of Religion in Fighting Software Piracy.

<sup>470</sup> Intellectual Copyright Committee of The Ministry of Culture and Information in Jeddah, found that Al-Qarni had copied some chapters from a book written by the female Saudi author, Salwa Aededan. See <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20120125116308>. Accessed at 10.03.2015

<sup>471</sup> See <http://english.al-akhbar.com/content/saudi-writer-wins-plagiarism-case-against-prominent-cleric>. Accessed at 12.03.2015.

<sup>472</sup> According to the Saudi Gazette, Sheikh Ayad al-Qarni responded by saying, "“People of knowledge usually benefit from each other without referring to the source,” and “I need not mention that Ibn Taimiyya had copied tens of scholars without referring to them. Does this mean he was incapable? I’m not incapable. I can author one complete book without referring to a single reference”.

<sup>473</sup> The case is unusual as firstly, both the Applicant and Respondent are Saudi nationals and there is no Western intellectual property right holder seeking remedies and secondly, the Applicant was female and the Respondent male. Although gender issues in the Gulf State are beyond the scope of this research, it is an underlying issue for national born female intellectual property right holders. For further details see Sidani, Y. (2005), Women, work, and Islam in Arab societies, Women In Management Review, Volume 20, Issue 7, pages 498 to 512 and Abou, E. (2001), Speaking in God's Name: Islamic Law, Authority and Women, Oxford, Oneworld.

protection they must shake off the “foreigner rights” connotation that is associated with intellectual property rights protection<sup>474</sup>. This will be discussed further in chapters 7 and 8<sup>475</sup>.

### **5.6.2 Saudi Arabia’s patent law**

The Saudi Arabia patent law grants different terms of protection for patents such as twenty years for plant varieties, ten years for industrial designs and ten years for layout designs of integrated circuits. Therefore the protection terms are in line with TRIPS standards; however where Saudi Arabia differs is on any inventions that violate sharia principles. The Saudi Arabian patent law, at Article Four, states that the protection shall not be granted if it is found that the commercial exploitation of the patent violates sharia law<sup>476</sup>. The main reasons behind the sharia law clause in the Saudi Arabian patent law are to protect against; harm to life, to human, animal or plant health and the environment. The exclusion clause in the Saudi Arabian patent law shares similarities with the principle of moral rights in the Berne Convention at section 2a<sup>477</sup>.

At present, there is no reported case law where Article 4 of the Saudi patent law has been invoked by the Saudi Arabian courts. This therefore is an area of further research, specifically the potential impact that moral rights can have in sharia complaint states and how to protect intellectual property assets in such situations<sup>478</sup>.

### **5.6.3 Border Measures in line with TRIPS**

Saudi Arabia’s intellectual property enforcement is best seen in its border measures. Saudi Arabia passed new border measures in 2004 in compliance with Part III, section 4 of the TRIPS Agreement<sup>479</sup>. A large proportion of the customs committees’ cases concern two main areas of; potential intellectual property infringement and commercial fraud. Between 2009 and 2012; out of the 1,625 cases adjudicated by the Jeddah Customs Committee (a court of first instance), 984 of these cases related to intellectual property infringement and commercial fraud<sup>480</sup>. The border measures are becoming more robust as the number of

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<sup>474</sup> Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law, pages 55 to 94.

<sup>475</sup> See chapter 7 at 7.17 and chapter 8 at 8.4.

<sup>476</sup> Saudi Arabia Law of Patents (2004), Article 4. The full article covers exemption for conflicts with Sharia, plant and human life and the environment. Article Four: “(a) The protection document shall not be granted if its commercial exploitation violates the Shari’ah. (b) The protection document shall not be granted if its commercial exploitation is harmful to life, to human, animal or plant health, or is substantially harmful to the environment”.

<sup>477</sup> The Berne Convention, section 2 sets rules for the protection of moral rights, that is, the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author’s honour or reputation.

<sup>478</sup> Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law, pages 55 to 94.

<sup>479</sup> Uruguay Round Agreement, TRIPS, Part III, Section 4, Articles 51-60. Available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm). Accessed on 02.03.2015.

<sup>480</sup> Aljehani, K. (2013), Better protection: the KSA’s fight against counterfeiters at the border, World Intellectual Property Review. Available at <http://www.worldipreview.com/article/better-protection-the-ksa-s-fight-against-counterfeiters-at-the-border>. Accessed on 02.03.2015.

seizures of counterfeit goods has increased from 2011 to 2012. The number of units seized in 2012 was approximately 54.8 million units which was an increase of 13.8% when compared to 2011. The total value of the seized goods amounted to 763 million riyals<sup>481</sup>. However is the increasing number of seizures a reflection of Saudi Arabia improving the level of intellectual property protection it offers or that there is a greater amount of counterfeit goods imported to Saudi Arabia than previous years?

#### **5.6.4 Saudi Arabia headed back to the US Special 301 Watch List**

As noted in Chapter Two<sup>482</sup>, Saudi Arabia was removed from the US Special 301 watch list in 2009 as it had made significant improvements to its intellectual property laws. The IIPA have recommended that Saudi Arabia be placed back on the US Special 301 watch list<sup>483</sup>. The main findings of the IIPA were; high piracy rates, insufficient government resource allocation and market barriers such as import restrictions on many copyright products and complicated content review processes<sup>484</sup>. The IIPA recommendations highlight the imbalanced relationship the US and Saudi Arabia have as by placing Saudi Arabia back on the watch list, it could negate all the work carried out by the various Saudi bodies over the past ten years. Taking a look at software piracy rates as an example, Saudi Arabia was able to make a considerable improvement from reaching TRIPS compliance and implementing new measures, however further improvements have not been apparent<sup>485</sup>. Therefore the integrated intellectual property approach for Saudi Arabia requires consideration of its sharia framework as discussed in chapters 1 and 2 as well as its intellectual property development and make recommendations of a modified approach to amalgamate sharia law and intellectual property. As will be seen next in the case of the UAE, their intellectual property systems differ from Saudi Arabia as does their level of sharia compliance.

#### **5.7 UAE's intellectual property development**

Dubai has made the most progress in intellectual property enforcement through its customs intellectual property rights units with specialist units in place to confiscate infringing goods. For example, Dubai Customs unit investigates goods suspected of infringing intellectual property rights. Once a complaint is filed, Dubai Customs take a sample of the suspect goods from the shipping consignment or from the free zone location

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<sup>481</sup> Annual Report, Saudi Customs, (2012), Sixth Chapter: Commercial Fraud & Counterfeiting and Protecting of Intellectual Property Rights (IPR), page 84. Available at

[http://www.customs.gov.sa/CUSTOMSNEW/AnnualReport/1433H\\_2012G/shapsix.pdf](http://www.customs.gov.sa/CUSTOMSNEW/AnnualReport/1433H_2012G/shapsix.pdf). Accessed on 04.03.2015.

<sup>482</sup> See Chapter 2 at 2.6.

<sup>483</sup> Saudi Arabia, International Intellectual Property Alliance (IIPA) 2014 Special 301 Report On Copyright Protection and Enforcement. Available at <http://www.iipa.com/rbc/2014/2014SPEC301SAUDIARABIA.PDF>. Accessed on 05.03.2015.

<sup>484</sup> Saudi Arabia, International Intellectual Property Alliance (IIPA) 2014 Special 301 Report On Copyright Protection and Enforcement. Available at <http://www.iipa.com/rbc/2014/2014SPEC301SAUDIARABIA.PDF>. Accessed on 05.03.2015.

<sup>485</sup> See Chapter 4 at Table Five.



where it has been confiscated and submit the sample to an official laboratory for testing to determine whether or not it is genuine<sup>486</sup>. Dubai Customs made 750 seizures of intellectual property infringing goods between 2011 and 2012, with a value exceeding AED 50 million in seized goods<sup>487</sup>. Further, in 2008<sup>488</sup>, the Dubai Declaration called for a new set of standards to be developed at the national and regional levels to bring in more effective remedies for both civil and criminal proceedings and enhance border measures to improve enforcement of intellectual property rights<sup>489</sup>. Thus, Dubai can demonstrate a real commitment to protecting intellectual property rights and taking action through its border measures to seize infringing goods.

Despite developments in the UAE, similar to Saudi Arabia, the IIPA has recommended that the UAE also be put back on the US Special 301 watch list<sup>490</sup>. The reason for the recommendation for the UAE to be on the watch list after many years is in connection with the UAE copyright law and the IIPA requirement that the software piracy rates in the UAE are lowered. However, in contrast to the IIPA findings, the global intellectual property index placed Dubai at the top of the GCC states for its investment in human capital for innovation and research progress. The report highlighted how the UAE has promoted innovation by targeted policies and initiatives to develop human capital through its financial and technological sector<sup>491</sup>. The divergence in opinion between how the IIPA see development in the UAE and the global innovation index highlights the key question of the thesis. The IIPA represent the western demands on the GCC states to adhere to higher standards, however they overlook the progress and development that is being made as shown in the global innovation index. It is for this reason that an integrated intellectual property rights protection approach is quintessential to the success of intellectual property reform in the GCC. By modifying the existing approach to take into account the nuances and differing sources of law of the GCC states, an intellectual property approach that is fit for purpose can be instigated.

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<sup>486</sup> O'Connell, N. (2010), United Arab Emirates: Working With Dubai Customs To Fight The Infringement Of IP Rights, Al Tamimi & Company, Available at <http://www.mondaq.com/x/113760/Trademark/Working+With+Dubai+Customs+To+Fight+The+Infringement+Of+IP+Rights>. Accessed on 02.03.2015.

<sup>487</sup> See Dubai Customs at <http://www.dubaicustoms.gov.ae/en/NewsCenter/Pages/NewsDetail.aspx?NewsID=334>. Accessed on 02.03.2015.

<sup>488</sup> See Fourth Global Congress on Combating Counterfeiting and Piracy Dubai Declaration, held in Dubai, U.A.E, 3-5 February 2008. Available at <http://www.wcoomd.org/en/about-us/legal-instruments/~media/8B70762244B74C3BB2CB40F2BBA0668D.ashx>. Accessed on 02.03.2015.

<sup>489</sup> Obeidat, O. and Suboh, M. (2011), United Arab Emirates, Al Tamimi and Co, World Trade Review Available at <http://www.worldtrademarkreview.com/issues/article.ashx?g=72abeedb-5519-4f03-9dda-784d305dbfc7>. Accessed on 02.03.2015.

<sup>490</sup> United Arab Emirates, International Intellectual Property Alliance (IIPA), 2014 Special 301 Report On Copyright Protection And Enforcement. Available at <http://www.iipa.com/rbc/2014/2014SPEC301UAE.PDF>. Accessed on 21.03.2015.

<sup>491</sup> Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/userfiles/file/reportpdf/GII-2014-v5.pdf>. Accessed on 05.02.2015.

## **5.8 Qatar's intellectual property development**

Qatar cites sharia law as a main source of law; it places the least importance on sharia law principles when compared to the other Gulf states<sup>492</sup>. It has the highest gross domestic product (GDP) per head in the GCC. It ranks 13th in the global competitiveness index and is above all the other GCC states<sup>493</sup>. Although intellectual property laws are relatively new in Qatar, the intellectual property legislation is the most comprehensive of all the GCC states. Qatari laws protect almost all types of intellectual property rights<sup>494</sup>. Further Qatar has enacted TRIPS plus provisions even though they are not mandatory as of yet. TRIPS plus provisions are evident in Qatar's 2011 Law on Intellectual Property Rights Border Measures<sup>495</sup>.

Whereas the other GCC states abide by TRIPS standards and apply Part III, Section 4 of TRIPS, Qatar goes beyond the minimum standard of protecting trademark and copyright counterfeiting to protecting any intellectual property rights<sup>496</sup>. As Qatar has a comprehensive set of intellectual property laws, it has not been subject to an IIPA report since 2003 and unlike Saudi Arabia and UAE, Qatar is not headed towards the US special 301 watch list any time soon. Qatar does not issue its own patents despite having a patent law. Instead, patents are issued through the GCC patent office<sup>497</sup>.

Against the backdrop of a need for convergence between intellectual property and Islamic law is the need of both developed and developing countries to complete free trade agreements as foreign investment is more likely to take place where host countries have strong intellectual property protection<sup>498</sup>. The main benefit of effective intellectual property protection is a reduction in risks of infringement which then leads to an economic boost for protected products<sup>499</sup>. This has a positive effect on the volume of foreign direct investment (FDI) as foreign firms are able to compete compliant GCC states is a lack of ability to effectively enforce the intellectual property laws that were brought into meet TRIPS standards<sup>500</sup>. Also, not all the GCC states are

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<sup>492</sup> See chapter 2 at 2.9.

<sup>493</sup> UK Trade and Investment, (2014), Guidance Exporting to Qatar. Available at <https://www.gov.uk/government/publications/exporting-to-qatar/exporting-to-qatar>. Accessed on 29.03.2015.

<sup>494</sup> See chapter 2 at 2.9.

<sup>495</sup> Drahos, P. (2013), Emerging Markets and the World Patent Order, Edward Elgar Publishing, Page 338.

<sup>496</sup> See Law No. (17) of 2011, Article 3 which states: "*a right holder can lodge an application with the Customs Department to stop the clearance process and request suspension of the release into free circulation of the imported goods which involve an infringement of the right holder's rights.*"

<sup>497</sup> Trade Policy Review, (2014), Report by the Secretariat Qatar, Page 41. Available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/s296\\_e.pdf](http://www.wto.org/english/tratop_e/tpr_e/s296_e.pdf). Accessed on 05.03.2015.

<sup>498</sup> Mina, W. (2010), Do Bilateral Investment Treaties Encourage FDI in the GCC Countries?" African Review of Economics and Finance 2(1) and Ramady, M. and Saeed, J. (2007), Foreign direct investment: A strategic move toward sustainable free enterprise and economic development in Saudi Arabia, Thunderbird International Business Review, pages37-56.

<sup>499</sup> Braga, P. (1998), Reforming Intellectual Property Rights Regimes: Challenges for Developing Countries, Journal of International Economic Law Volume 1, pages 537 to 554.

<sup>500</sup> Cullen, C. (2010), Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law?

developing their laws and systems to a uniform level<sup>501</sup>.

### **5.9 Economic view on international intellectual property**

Increasing and enhancing trade flows through liberalisation remains a priority for policymakers in developing countries<sup>502</sup>. A common view among economists assumes that trade liberalisation is an engine for economic development<sup>503</sup>. Empirical evidence to date highlights the importance of trade for economic growth in developing countries<sup>504</sup>. However, states with political instability have struggled to enforce macroeconomic policies towards trade reform and the role of foreign investment is ambiguous<sup>505</sup>. Transparency in intellectual property development and legislation is also a contributing factor<sup>506</sup>. Economists argue international trade under the guise of bilateral and multilateral agreements remains unfair to developing states, given that the large proportion of benefits from trade are amassed by developed countries<sup>507</sup>. Therefore, consideration needs to be given to the economic impact of intellectual property to developing countries.

There is scholarly work on intellectual property in developing countries, particularly on the economic impact of intellectual property and achieving TRIPS compliance<sup>508</sup>. Although the general body of literature supports economic growth through stronger intellectual property laws, there is very little empirical data to measure the economic impact of intellectual property rights at varying points of time<sup>509</sup>. The purpose of TRIPS is to

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<sup>501</sup> See for example Qatar, Bahrain and Oman who have installed a Software for the Management of Automated Systems of Arab Industrial Property Offices which is the implementation of automated information systems for the national intellectual property offices in order to improve the performance of services and to satisfy the automation requirements in the framework of modernization of the intellectual property systems. Further information available at WIPO at [http://www.wipo.int/arab/en/activities/inf\\_tech.html](http://www.wipo.int/arab/en/activities/inf_tech.html). Accessed on 17.03.2015. Also Bahrain and Oman both have bilateral trade agreements with the US and the intellectual property provisions accede those specified by TRIPS as the agreements require ratification to further international treaties. For example the 2006 Bahrain bilateral agreement requires Bahrain to ratify or accede to the International Convention for the Protection of New Varieties of Plants, the Trademark Law Treaty, the Brussels Convention Relating to the Distribution of Programme-Carrying Satellite Signals, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms, the Patent Cooperation Treaty, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Available at [http://www.ustr.gov/webfm\\_send/2629](http://www.ustr.gov/webfm_send/2629). Accessed on 14.03.2015.

<sup>502</sup> Sundaram, J. (2008), Economic liberalization and constraints to development in sub-Saharan Africa, Working Papers 67.

<sup>503</sup> Thirwall, A. (2000), Trade, Trade Liberalisation and Economic Growth: Theory and Evidence, Economic Research Papers, Volume 63, Issue 30.

<sup>504</sup> Berg, H. (2007), International trade and economic growth, M E Sharpe Incorporated.

<sup>505</sup> International Institutions and Global Governance Program 2012. Available at <http://www.cfr.org/us-strategy-and-politics/global-finance-regime/p20177>. Accessed on 24.01.2015.

<sup>506</sup> Kuwait is still on the United States Trade Representative (USTR) Special 301 Watch List whereas Saudi Arabia has been removed from the list in February 2010.

<sup>507</sup> Drahos, P. (2003), When the Weak Bargain win the Strong, Kluwer Law, pages 79 to 109.

<sup>508</sup> Maskus, K. (2000), Intellectual Property Rights in the Global Economy, Institute for International Economics, US. Winter, S. (1989), Patents in Complex Contexts: Incentives and Effectiveness, In Weil and Snapper, Owning Scientific and Technical Information. New Brunswick, NJ: Rutgers University Press, pages 41 to 60. Braga, C. (1995), Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and Its Economic Implications, The Uruguay Round and Developing Economies, Washington, DC, W. Martin and L.A. Winters Editions, World Bank, Discussion Paper, Chapter 12, pages 381 to 412.

<sup>509</sup> See for example, Ferris, K. (2012), The Compliance with Intellectual Property Laws and their Enforcement in Jordan - A post - WTO Review & Analysis. The analysis of Jordan's intellectual property laws by Ferris shows intellectual property laws

address the different ways in which intellectual property rights are protected around the world and to narrow down the deviances in protection under the umbrella of uniform international rules<sup>510</sup>. TRIPS established minimum levels of intellectual property protection that each WTO Member State is required to provide in order to gain membership status<sup>511</sup>. The TRIPS agreement sets out a “one size fits all” approach to international intellectual property setting<sup>512</sup>, extending the reach of the Berne Convention. Under TRIPS, the principles of national treatment, automatic protection and independence of protection bind WTO members who are not party to the Berne Convention. In addition, the TRIPS Agreement imposes an obligation of “most-favoured-nation treatment”, under which advantages conferred by a WTO Member to the nationals of any other country must also be conferred to the nationals of all WTO members<sup>513</sup>.

For the GCC states, this was the beginning of unprecedented international pressure to develop a requisite level of intellectual property regimes that conformed to Western standards<sup>514</sup>. Compliance to the TRIPS Agreement can be seen in the recent proliferation of regional and bilateral free trade agreements between the GCC States and developed countries that include elements of intellectual property protection and

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are incompatible with Jordan’s economic stage of development, having little economic impact on the Jordanian economy. This he states is mainly due to the majority of technologies used in Jordan being unrelated to intellectual property right issues. The GCC countries have similar systems to Jordan, taking on several intellectual property laws to gain more foreign direct investment without fully measuring the economic impact of these new laws over certain time intervals. Also see, Olwan, R. (2013), *The History of International Intellectual Property and Development*, Chapter 2, where the author states at page 35 that there is no evidence that the development of developing countries has been encouraged by intellectual property laws.

<sup>510</sup> Yu, P. (2009), *The Objectives and Principles of the Trips Agreement*, *Houston Law Review*, Volume 46, pages 797 to 1046, Social Science Research Network. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1398746](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398746). Accessed on 17.03.2015.

<sup>511</sup> TRIPs covers: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents; the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data. The trips agreement has three main strands; standards, enforcement and dispute settlement. The standards set out the minimum standards of protection to be provided by each Member in respect of each of the main areas of intellectual property covered by the agreement. This covers; a definition of the minimum protection required for intellectual property assets, a definition of the subject-matter, the minimum duration of protection, the rights to be granted and the exceptions to those rights. The TRIPS Agreement contains enforcement obligations. The main set of provisions includes domestic procedures and remedies for the enforcement of intellectual property rights that are applicable to all intellectual property rights enforcement procedures. The provisions are; civil procedures and remedies, administrative procedures and remedies, measures, special requirements related to border measures and criminal procedures. TRIPs have a powerful enforcement mechanism. States which do not adopt TRIPs compliant intellectual property systems can be disciplined through the WTO’s dispute settlement mechanism, which is capable of authorising trade sanctions against nonconformist states. Thirdly, the Agreement has incorporated a dispute settlement procedure as part of the minimum TRIPS requirements to deal with disputes between members. See World Trade Organisation at [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm). Accessed on 09.03.2015. The full TRIPS Agreement is available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm). Accessed on 09.03.2015.

<sup>512</sup> Yu, P. (2009), *The Objectives And Principles Of The TRIPS Agreement*. " *Houston Law Review*, Volume 46, pages 797 to 1046, Social Science Research Network. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1398746](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398746). Accessed on 17.03.2015.

<sup>513</sup> Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886). Available at [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html). Accessed on 13.03.2015.

<sup>514</sup> Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States* *Infidels at the Gates*, chapter 6, Routledge.

development as defined by minimum TRIPS standards<sup>515</sup>. Free trade agreements are themselves multi-faceted as there are not only implications on intellectual property development in the GCC as a result of its free trade agreements with other states<sup>516</sup>, but also where non GCC states are entering into trade agreements between themselves there is a consequential effect on GCC trade and services<sup>517</sup>.

The free trade agreements between the GCC and western states are now intrusively integrating TRIPS-plus standards into a GCC region that has developed from pre TRIPS to TRIPS standards in a very short space of time<sup>518</sup>. The developing GCC countries are as a result under increasing pressure to develop national intellectual property regimes, which work in line with those of developed countries<sup>519</sup>. Many analysts have criticised the increased pressure from developed countries on developing countries to conform to western standards as opposed to allowing progression in line with the needs of individual developing countries<sup>520</sup>.

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<sup>515</sup> Hassanein, M. (2008), Bilateral WTO-Plus Free Trade Agreements in The Middle East: A Case Study of OFTA in the Post Trips Era, Wake Forest Intellectual Property Law Journal, pages 161 to 197. Dahrendorf, A. (2009), Global Proliferation of Bilateral and Regional Trade Agreements: A Threat for the World Trade Organization and/or for Developing Countries, Maastricht Faculty of Law, Working Paper Number 6. Ranjan, P. (2010), Bilateralism, MFN and TRIPS: Exploring Possibilities of Alternative Interpretation, International Trade Law and Regulation, Volume 13, Number 4, pages 67 to 78.

<sup>516</sup> The GCC has a number of free trade agreements pending. The GCC-EFTA agreement was signed in 2009 but is yet to come into force, the GCC-India agreement is not finalised and the EU-GCC agreement is currently stated as 99% complete. See more at [http://www.tax-news.com/news/GCCEU\\_Free\\_Trade\\_Agreement\\_Is\\_99\\_Percent\\_Complete\\_61559.html](http://www.tax-news.com/news/GCCEU_Free_Trade_Agreement_Is_99_Percent_Complete_61559.html). Accessed on 02.03.2015. Ayadi, R. and Gadi, S. (2013), EU-GCC Trade and Investment Relations: What Prospect of an FTA between the Two Regions? Sharaka Enhancing Understanding and Cooperation in EU-GCC Relations.

<sup>517</sup> Apart from the free trade agreements the GCC is involved in, the GCC has to take into consideration the impact of agreements made by its trading partners between themselves. For example, the proposed Transatlantic Trade and Investment Partnership (TTIP) between the US and Europe will have implications for the GCC as standards adopted under the partnership will become globally binding with third party trading countries. See more at <http://www.bilaterals.org/spip.php?article23725#sthash.neapVWDO.dpuf>. Accessed on 03.03.2015.

<sup>518</sup> Turk, M.(2010), Bargaining and IP Treaties: The case for a pro-development interpretation of TRIPS but not TRIPS Plus, New York University Journal of International Law and Politics, Volume 42, pages 981 to 1030, The New York University Law School. Also see Price, D. (2009), The Development of Intellectual Property Regimes in the Arabian Gulf States Infidels at the Gates chapter 5 and Said, E. (2007), The European Trips Plus Model and the Arab World, Liverpool Law Review.

<sup>519</sup> Alexander, D. (2002), Integrating Intellectual Property Rights and Development Policy.

<sup>520</sup> See Yaqub, D. (2009), Intellectual Property and Developing Countries, A review of the literature, RAND Cooperation, Said, E. (2007), The European Trips Plus Model and the Arab World, Liverpool Law Review, Cottier, T. and Foltea, M. (2012), Global Governance in Intellectual Property Protection: Does the Decision-making Forum Matter? The WIPO Journal Volume 3 Issue 2. Price, D. (2009), The Development of Intellectual Property Regimes in the Arabian Gulf States Infidels at the Gates, chapter 1, Routledge. Rizk, N. and Shaver, L. (2010), Access to Knowledge: Economic, Global and Local Perspectives. Hassanein, M. (2008), Bilateral WTO-Plus Free Trade Agreements In The Middle East: A Case Study Of OFTA In The Post Trips Era, Wake Forest Intellectual Property Law Journal, Volume 8, pages 161 to 197. Khoury, A. (2003), The Development of Modern Trademark Legislation and Protection in Arab Countries of the Middle East, The Transnational Lawyer. Tamimi, E. (1999), Current U.A.E. Copyright Law and how it Compares and Contrasts with WTO's Trips-Agreement and the Berne Convention, The Journal of World Intellectual Property, pages 371 to 391. Said, E. (2005), The Road from TRIPS-Minus, to TRIPS, to TRIPS-Plus Implications of IPRs for the Arab World, The Journal of World Intellectual Property, Volume 8, pages 53 to 65. Lai, E. (2001), The economics of intellectual property protection in the global economy. OseiTutu, J. (2010), A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law, Legal Studies Research Paper Series. Malbon, J. (2008), TRIPS-plus Treaty Terms: Dealing with Coercion, Chapter 8: In Interpreting and Implementing the TRIPS Agreement: Is it fair? Ruse-Khan, H. (2011), The International Law Relation Between Trips And Subsequent Trips-Plus Free Trade Agreements: Towards Safeguarding Trips Flexibilities? Journal of Intellectual Property Law, Volume 18. Yu, P. (2011), Are Developing Countries Playing a Better TRIPS Game? Legal Studies Research Paper Series Drake University Research Paper, Number 12. Morin, J. (2008), Multilateralising TRIPS-Plus Agreements: Is the US Strategy a Failure. Mohamadieh, K. (2007), The Arab Region And Trade Liberalization Policies A Look into Sectoral Implications, Arab NGO Network for Development Working Paper. Yu, P. (2011), TRIPS and Its Achilles '

The crux of the dichotomy between western pressure for more stringent level of intellectual property protection and national legislative inadequacies is in what both sides perceive to be effective action<sup>521</sup>. For example, the statistical analysis of intellectual property infringement shows that the Gulf states have improved their intellectual property enforcement in areas such as software piracy as the rates of infringement are falling<sup>522</sup>. However the pressure to incorporate TRIPS plus standard will require the GCC states to adhere to stricter enforcement action when they are barely managing to maintain previous levels of improvements<sup>523</sup>.

### **5.10 What does TRIPS plus really mean?**

TRIPS plus provisions are defined as “commitments which go beyond what is already included or consolidated in the TRIPS Agreement”<sup>524</sup>. The relationship between TRIPS plus regimes and international trade has become so inextricably woven by the dominant developed countries that it is difficult to see the two as separate entities<sup>525</sup>. For the GCC to meet its TRIPS plus requirements for both the US and the EU it is required to harmonise its current laws to that of its international counterparts<sup>526</sup>. The US/EU presents a resolute standing point for the Arab region of making trade liberalization and foreign investment dependent on agreement and implementation of TRIPS Plus provisions<sup>527</sup>. From the current EU-GCC trade agreement, it is clear the EU want more harmonisation in policies and law making, preferring to deal with regional blocs

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heel, Journal Of Intellectual Property Law. Frankel, S. (2012), Challenging Trips-Plus Agreements: The Potential Utility of Non-Violation Disputes, Victoria University of Wellington Faculty of Law Research Papers.

<sup>521</sup> Pastor, R. (2006), The Impact of Free Trade Agreements on Intellectual Property Standards in a Post-TRIPS World , Pastor highlights three main areas of TRIPS compliance which require analysis in intellectual property and international trade; The following issues should always be followed when dealing with IPR and international trade: to firstly ensure effective competition and avoid the risk of limitations in competition in smaller developing countries because of the monopolising nature of patent protection, secondly to give greater weight to public health inventions and the cost reflecting the financial situation in the specific developing countries, thirdly addressing the knowledge gap in technological advances between developed and developing countries and lastly ensuring protection of traditional knowledge, recognizing the complications in establishing patents in this area. Available at <http://www.bilaterals.org/spip.php?article4311#sthash.YOQ4kVgY.dpuf>. Accessed on 30.03.2015.

<sup>522</sup> Business Software Alliance News Release, Business Software Alliance urges Gulf countries to further intensify campaign against piracy. Available at [http://portal.bsa.org/globalpiracy2010/downloads/press/pr\\_gulfregion.pdf](http://portal.bsa.org/globalpiracy2010/downloads/press/pr_gulfregion.pdf). Accessed on 25.02.2015.

<sup>523</sup> Business Software Alliance for 2012 showed improvement in software piracy in the six Gulf States from 2000 to 2006; Oman 16%, Qatar, 23%, Saudi Arabia, 7%, UAE, 9%, Kuwait, 16% and Bahrain, 20%. However from 2006 to 2012, there have been little or no improvements; Oman 0%, Qatar, 9%, Saudi Arabia, 0%, UAE, -1%, Kuwait, 4% and Bahrain, 6%.

<sup>524</sup> Vivas, D. (2003), Regional and bilateral agreements and a TRIPS-plus world: the Free Trade Area of the Americas (FTAA), TRIPS Issues Papers 1, QUNO/QIAP/ICTSD, 2003, page 4.

<sup>525</sup> Unctad and the UNDP Special Unit for South-South Cooperation, (2008), The Challenge of Assessing the Creative Economy: towards Informed Policy-making, Creative Economy Report 2008.

<sup>526</sup> Said, E. (2007), The European Trips Plus Model and the Arab World, Liverpool Law Review. Sakmar, S. (2008), Globalization and Trade Initiatives in the Arab World: Historical Context, Progress to Date, and Prospects for the Future, University of San Francisco School of Law. Mohamadieh, K. (2006), Free Trade Agreements in the Arab Region, The Arab NGO Network for Development and Morin, J. (2009), Multilateralizing TRIPS-Plus Agreements: Is the US Strategy a Failure? The Journal of World Intellectual Property.

<sup>527</sup> TRIPS Plus is not a defined concept, it is not a minimum standard that must be adhered by all WTO Member States and therefore the TRIPS Plus requirements for the GCC States may not necessarily be the same as other developing countries.

as opposed to individual States<sup>528</sup>.

There are certain TRIPS plus requirements that set it apart from the level of TRIPS compliance which is currently in place. TRIPS plus can be seen to exert pressure for stronger obligations in intellectual property areas such as: data exclusivity, patent terms, compulsory licensing, industrial rights, trademark protection, plant and animal patents from national patent laws, copyright protection terms, membership to further international agreements, transition period privileges, dispute settlement methods, border measures and enforcement against intellectual property violation particularly criminal sanctions through court action<sup>529</sup>.

### **5.11 TRIPS plus and the GCC**

Applying this to the GCC, there are certain discreet facets of the GCC states which require consideration. The oil-led growth has created weak structural foundations in Arab economies resulting in an import dependent economy<sup>530</sup>. The issue of poor traditional, local knowledge development has had a negative economic impact on Arab agriculture, manufacturing and industrial production as highlighted in the Arab Human Development Report<sup>531</sup>. The report does highlight the real question for economic growth for the Arab world at large. As oil prices increase and developed countries look to previous unviable options for potential development<sup>532</sup>, now is the optimum time for the Gulf States to form a strategy which seeks economic development in line with the internet age and knowledge based assets for sustainable long term development<sup>533</sup>. The GCC states are aware of the benefits of a knowledge driven economy where intangible assets are potentially becoming much more valuable than physical assets<sup>534</sup>. Therefore improving intellectual

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<sup>528</sup> Santa Cruz, M. (2007), Intellectual Property Provisions in European Union Trade Agreements, ICTSD Intellectual Property and Sustainable Development Series, page 12.

<sup>529</sup> Said, E. (2007), The European TRIPS Plus Model and the Arab World: from co-operation to association – a new era in the Global IPRS regime? Liverpool Law Review, Volume 28, Number 1, pages 143-174, Springer Science and Business Media and Said, E. (2005), From TRIPS-minus to TRIPS to TRIPS-plus: Implications of IPRs for the Arab world, The Journal of World Intellectual Property, Volume 8, Number 1.

<sup>530</sup> Arab Development Challenges Report and Staff of the International Monetary Fund (2012), Arab Countries in Transition: Economic Outlook and Key Challenges, International Monetary Fund. Hvidt, M. (2013), Economic diversification in GCC countries: Past record and future trends, Kuwait Programme on Development, Governance and Globalisation in the Gulf States. Fassano, U. (2003), GCC Countries: From Oil Dependence to Diversification, International Monetary Fund. Devaux, P. (2013), Economic diversification in the GCC: dynamic drive needs to be confirmed, BNP Paribas.

<sup>531</sup> Arab Human Development Report 2009. Available at <http://www.arab-hdr.org/>. Accessed on 08.02.2015.

<sup>532</sup> Exploration in Falkland Islands by a number of British firms such as; Rockhopper, Desire Petroleum and Argos Resources.

<sup>533</sup> The transition to a knowledge based economy relies on the privatisation of information. For examples see Khoury, A. (2009), Dubai's New Intellectual Property-Based Economy: Prospects for Development without Dependency, The John Marshall Review of Intellectual Property Law and the Arab World Competitiveness Report, (2013), World Economic Forum.

<sup>534</sup> Each GCC State has produced official documentation with an emphasis on developing knowledge based economies. See for example;

[http://www.insead.edu/facultyresearch/centres/innovation\\_policy\\_initiative/breakfasts/upcoming/documents/measuring\\_innov\\_RD\\_uae](http://www.insead.edu/facultyresearch/centres/innovation_policy_initiative/breakfasts/upcoming/documents/measuring_innov_RD_uae). Also see <http://www.ictqatar.qa/sites/default/files/documents/Draft%20for%20public%20consultation>.

Rasem, H. (2011), Saudi Arabia's economic development: entrepreneurship as a strategy, International Journal of Islamic and Middle Eastern Finance and Management. Available at <http://www.arabnews.com/news/451416> and

<http://www.gulf-times.com/pdflinks/PDFs/2012/11/27/8f374ab2-a5fc-42cb-be39-441cb9c0fa3d>. Accessed on

02.03.2015. Brinkley, I. (2012), Kuwait and the Knowledge Economy, The Work Foundation and the Kuwait Programme on

property protection will not simply appease the EU and US in bringing trade agreements to a conclusion and increasing foreign direct investment, but will develop a solid foundation of legislation and policy that will enable the Gulf states and similar regions to expand their knowledge based economies<sup>535</sup>.

### **5.12 Not a level playing field – developed countries versus the GCC**

There is a stark contrast in the resources available to countries with developed intellectual property systems to those that are still at the development stage<sup>536</sup>. This is mainly because developed countries can utilise independent reports, legislation and case law to influence policy, whereas developing countries lack the infrastructure to effectively catch up<sup>537</sup>. The GCC states will want to draw on the technical expertise and experience of its international partners to advance its intellectual property agenda<sup>538</sup>. If the Gulf states can satisfy TRIPS plus obligations, the potential to open up new markets brings with them opportunities for economic growth<sup>539</sup>. However TRIPS plus is case specific and its effect on bilateral agreements is not to the same uniform standard as standard TRIPS compliance<sup>540</sup>. How the TRIPS plus obligations are firstly incorporated and then implemented will be a matter of concern for the Gulf states. The TRIPS plus obligations specific to the GCC are: to move away from the flexibilities offered under TRIPS obligations, extend the

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Development, Governance and Globalisation in the Gulf States, The London School of Economics and Political Science. Hertog, S. (2007) The GCC and Arab economic integration: a new paradigm, Middle East policy, pages 52 to 68. Economist Intelligence Unit, 2010, The GCC in 2020: Broadening the economy, report from the Economist Intelligence Unit, Sponsored by Qatar Financial Centre Authority and Ahmad, E. and Al Faris, A. (2010), Fiscal Reforms In The Middle East, Edward Elgar Publishing Limited.

<sup>535</sup> Fabry, E. (2013), Think Global – Act European v Thinking Strategically about the EU’s External Action, Centre for European Policy Studies and Elsrug, H. (2008), Enhancing The Competitiveness Of The Arab SMEs, Open Journal of Economic Research.

<sup>536</sup> Endeshaw, A. (2006), Intellectual Property and the WIPO Development Agenda, Maur, E. (2011), The Influence of PTAs on the implementation of intellectual property rights in developing countries, International Centre for Trade and Sustainable Development (ICTSD) and Rizk, N. and Shaver, L. (2010), Access to Knowledge: Economic, Global and Local Perspectives.

<sup>537</sup> Correa, C. (2000), The Strengthening Of IPRS In Developing Countries And Complimentary Legislation, DFID, Yaqub, D. (2009), Intellectual Property and Developing Countries A review of the literature, RAND Cooperation and Foray, D. (2007), Patents and Development In The Knowledge Economy, International Centre for Trade and Sustainable Development (ICTSD).

<sup>538</sup> Joint Action Programme for Implementation of the GCC-EU Cooperation Agreement of 1988, 2010-2013 part 9 “Exchange of views and experience in the area of intellectual property rights. Establish cooperation between the EU and the GCC in the field of patents in order for the GCC to benefit from the EU experience. Such cooperation could include exchange of expertise and technical assistance in various fields such as capacity building, training, expert missions, patent databases, IT and seminars. In this respect, cooperation between the European Patent Office and the GCC Patent Office will be encouraged.” Also see Jaruzelski, B. (2013), Strengthening Innovation Hubs in the GCC, The Role of Enterprise Champions, The Global Innovation Index 2013: The Local Dynamics of Innovation, INSEAD. Driouchi, A. (2008), Domestic Institutions, Intellectual Property Rights & Development in the EU-Mediterranean Partner Countries, The Political Economy of Governance in the Euro-Mediterranean Partnership and the World Intellectual Property Organization. Ulrichsen, K. (2011), Knowledge Economies in the GCC States, The Political Economy of the Gulf, Summary Report, Center for International and Regional Studies Georgetown University School of Foreign Service in Qatar.

<sup>539</sup> Said, E. (2007), The European Trips Plus Model and the Arab World, Liverpool Law Review and Turk, M. (2011), Bargaining And Intellectual Property Treaties: The Case For A Pro-Development Interpretation of Trips But Not Trips Plus, Journal of International Law & Politics.

<sup>540</sup> Kim, Y. (2012), Appropriate Intellectual Property Protection and economic growth in countries at different levels of development, Research policy, Volume 41, Number 2, pages 358 to 375, Elsevier Science B V Amsterdam.



definition of “data” and scope of data exclusivity, extension of patent terms, restrictions on use of compulsory licensing, increasing minimum protection for industrial rights and trademark protection, relinquish transition period privileges granted from WTO and increased enforcement against intellectual property violation through criminal proceedings and judicial decisions<sup>541</sup>. Out of all the TRIPS plus obligations it is the enforcement criteria which is the most complex to implement due to the lack of societal awareness/acceptance of the criminality of intellectual property infringement<sup>542</sup>. There isn’t a substantive body of case law from the GCC states dealing with intellectual property infringement that can be referred to by the courts to aide interpretation<sup>543</sup>. This will be one of the main recommendations in an integrated intellectual property model as more transparency and disclosure is needed by the court system to aide legal interpretation of intellectual property and to create certainty and consistency in the law, all of which will support better intellectual property rights protection.

### **5.13 Customs law in the GCC**

In safeguarding against intellectual property infringement and offering better protection, Customs law has been an area of development for the Gulf region<sup>544</sup>. The Common Customs Law of the Cooperation Council for the Arab states of the Gulf is adhered to by all the GCC states and prohibits the admission, transit or exit of prohibited or infringing goods except with the approval of the customs authorities<sup>545</sup>. It also prohibits the admission into free zones of goods that infringe intellectual property rights<sup>546</sup>. Qatar passed the first stand-alone legislation regulating intellectual property protection in border measures with an emphasis on improving the intellectual property eco system in relation to enforcement against piracy and counterfeiting<sup>547</sup>.

### **5.14 The role of sharia in intellectual property development**

Intellectual property development in the GCC is not solely dominated by the US and EU, the GCC states

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<sup>541</sup> Said, E. (2008), The development of intellectual property protection in the Arab world, Edwin Mellen Press. Ruse-Khan, H. (2011), The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities? *Journal of Intellectual Property Law*, Volume 8, Number 2.

<sup>542</sup> Muhaisen, W. (2009), Share’a: Intellectual Theft or Intellectual Infringement? *Journal of International Commercial Law and Technology*, Volume 4, pages 71 to 74.

<sup>543</sup> The Dubai International Financial Centre (DIFC) is governed by the Law of Obligations DIFC Law No. 5 of 2005. Articles 37 and 38 make provisions for breach of confidence and passing off however to date no case has been brought in the DIFC under Article 37 or 38.

<sup>544</sup> For the GCC and its states there is a clear recognition of the protection of intellectual property to its continued development as a dominant trading hub in the Middle East. It is the development of international trade and services via multilateral and bilateral trade agreements which allows the GCC States to act as a hub between Eastern and Western markets.

<sup>545</sup> The Gulf Cooperation Council Customs Union was formed in 2003.

<sup>546</sup> See Common Customs Law of the Cooperation Council for the Arab States of the Gulf Available at [http://www.customs.ae/gccstates\\_en.aspx](http://www.customs.ae/gccstates_en.aspx). Accessed on 02.02.2015.

<sup>547</sup> Qatar Law Number (17) of 2011 on the Border Measures for the Protection of Intellectual Property Rights, The law reflects on the wording of section 4 of TRIPS on “special requirements related to border measures”.

through increased legislative measures are emerging towards TRIPS Plus standards<sup>548</sup>. However, the GCC states need to avoid creating hollow intellectual property policies and pay more than lip service to the influences of sharia Law on intellectual property development and enforcement<sup>549</sup>. Tenets of Islamic law and its underlying principles have been described as “the golden thread that binds the sharia and intellectual property protection”<sup>550</sup>. Before the 1980’s and at the early stages of the intellectual property revolution that was to sweep the GCC States, the codification of the new laws in the GCC states and sharia were depicted as the codification of laws in the Islamic states to be an irresistible force while the sharia was an irremovable object<sup>551</sup>. The anomaly that existed between the two has shifted in favour of clear domination of western-based secular laws in the commercial and civil context, raising doubt as to whether sharia is an irremovable object in the enactment of intellectual property law making.

The conundrum has now shifted to being one where the position of sharia is uncertain. As the area of intellectual property law continues to develop in the GCC region, there are three possibilities for the influences of the doctrines of sharia law; whether it is to be further eroded, maintained as an underlying set of principles to uphold intellectual property, or re-asserted to influence policy making and legislative reform. However the Gulf states in particular are not the mere pushovers as developed countries would assume<sup>552</sup>. There are legislative frameworks in place which are heavily influenced by the West (for example, Bahrain, Kuwait and UAE) however given the recent Arab Spring; there is an undercurrent of political unrest that requires the GCC states to review their internal infrastructures<sup>553</sup>.

Sharia law impacts on protection parameters in respect of copyright, patent and trademark protection. The growing influence of sharia on intellectual property is dependent on three main factors: an understanding of Islamic law to provide support for the protection of intellectual property law, provisions to protect intellectual

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<sup>548</sup> Ramdy, M. (2012), *The GCC Economies: Stepping Up To Future Challenges*, Springer Science and Business Media, Chapter 11, Price D, *The GCC Intellectual Property Regimes: Global Harmonization or Regional Integration?* Page 133 Available at

[http://books.google.co.uk/books?id=W98WDUkV00UC&pg=PA133&lpg=PA133&dq=gcc+and+trips+plus&source=bl&ots=jXtx65Lfmj&sig=siofs9v09jQnD\\_THZCv5xAbPwGc&hl=en&sa=X&ei=Ddt2Uq7HN4Sf0QX32oDYDQ&ved=0CC4Q6AEwAA#v=onepage&q=gcc%20and%20trips%20plus&f=false](http://books.google.co.uk/books?id=W98WDUkV00UC&pg=PA133&lpg=PA133&dq=gcc+and+trips+plus&source=bl&ots=jXtx65Lfmj&sig=siofs9v09jQnD_THZCv5xAbPwGc&hl=en&sa=X&ei=Ddt2Uq7HN4Sf0QX32oDYDQ&ved=0CC4Q6AEwAA#v=onepage&q=gcc%20and%20trips%20plus&f=false). Accessed on 02.02.2015.

<sup>549</sup> El-Bialy, N. (2011), *Can Shari'a be a Deterrent for Intellectual Property Piracy in Islamic Countries?* *The Journal of World Intellectual Property*, pages 441 to 466.

<sup>550</sup> Price, D. (2009), *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates*, Routledge Research in Intellectual Property.

<sup>551</sup> Ballantyne, W. (1986), *Commercial Law in the Arab Middle East*, Lloyds of London Press.

<sup>552</sup> Gulf states have been described as having little influence in the intellectual property standard-setting process, see for example, Drahos, P. (2003), *Developing countries and International Intellectual Property Standard Setting Process*, [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp8\\_drahos\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf). Accessed on 15.12.13.

<sup>553</sup> Charafeddine, R. (2011), *The Economic and Financial Impact1s of the Arab Awakening*, Available at <http://belfercenter.ksg.harvard.edu/files/The%20Economic%20and%20Financial%20Impacts%20of%20the%20Arab%20Awakening%20-%20Raed%20H%20%20Charafeddine%20-%20Sep%20%202011.pdf>. Accessed on 24.02.2015.

property rights with the aim of increasing innovations and stimulate economic development and the effectiveness of any law being dependent on society both recognizing and accepting it<sup>554</sup>.

To date, sharia law has had minimal, if any, bearing on intellectual property law development. In the UAE, the Departments of Economic Development (DED) have jurisdiction for administrative action to enforce intellectual property rights in their own emirate and Article 14 of DED states; “*Islamic law codified in the Shari’ah is applied in family courts but is less evident in the commercial sphere*”.<sup>555</sup>

The GCC states are aware of the benefits of a knowledge driven economy where intangible assets have the potential to become much more invaluable than physical assets<sup>556</sup>. Intellectual property rights are the way forward for new business opportunities and as a driving force behind economic growth<sup>557</sup>. Therefore for the Gulf states, intellectual property protection is a vital lever to business success. There needs to be a reinvention in how intellectual property law is projected in the public arena. The legislative changes in the region act as the foundations from which interpretation of the laws is essential to providing a working model towards TRIPS Plus standards. The main hurdle for intellectual property enforcement in the GCC states is a lack of specialised Courts to deal with cases, making civil litigation in the region difficult. Right holders opt instead to file complaints with customs authorities where the issues are related to trade mark and copyright infringement<sup>558</sup>.

### **5.15 Conclusion**

In conclusion, the GCC states are in a position to make landmark decisions in the implementation of intellectual property rights in the international arena and in respect of demonstrating Islamic approval for the enactment of more effective intellectual property laws. The Gulf states are in an enviable position; the development of international trade and services via multilateral and bilateral trade agreements allows them

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<sup>554</sup> Beltrametti, S.(2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law 2009, pages 55 to 94.

<sup>555</sup> Ministry of Economic Development, UAE Departments of Economic Development, Articles 37 and 38 Available at [http://www.uibm.gov.it/attachments/article/2006096/judicial\\_protection\\_of\\_ipr\\_in\\_the\\_uae.pdf](http://www.uibm.gov.it/attachments/article/2006096/judicial_protection_of_ipr_in_the_uae.pdf). Accessed on 15.03.2015.

<sup>556</sup> The GCC states differ in their approaches. The UAE has established a number of free zones, each with customised regulatory and federal legal requirements that provide incentives for organisations operating in specific sectors such as Dubai’s Internet City offering free zone incentives to a number of high profile companies to operate their business including IBM and Microsoft. Saudi Arabia on the other hand doesn’t have free zones but has heavily invested in the King Abdulaziz City for Science and Technology for Scientific Research Support and the King Abdullah University of Science and Technology, therefore the university-focused model adopted in Saudi Arabia is different from the free zone model adopted in the UAE.

<sup>557</sup> Each GCC state has set up its own associations to raise awareness of intellectual property. For instance, the Dubai eGovernment signed memorandum of understanding with Emirates Intellectual Property Association (EIPA) in January 2013 for raising awareness of intellectual property rights and reducing software piracy.

<sup>558</sup> See Manto, S. (2009), United Arab Emirates, Anti-counterfeiting 2009 – A Global Guide, pages 199 to 202.

to act as a hub between Eastern and Western markets<sup>559</sup>. The GCC has an opportunity to not simply rush forward from TRIPS to TRIPS Plus standards but to take a side step and develop strategies to best implement intellectual property laws that are accepted by the public. Islamic finance could prove to be a successful vehicle to not only highlight that distinct features of sharia law can be amalgamated with western influenced products such as modern day banking financial products that satisfy business growth and societal acceptance in the Muslim world, but also to promote the existence of intellectual property in Islamic finance products and beyond. Chapters 7 and 8 assess the impact of Islamic finance on intellectual property development and of Islamic finance embodying a significant role in the development of an integrated intellectual property model.

There are significant outcomes from this chapter that will influence the overall set of recommendations for an integrated intellectual property approach. The GCC states have individual nuances and traits which influence the level of sharia compliance that exists at a constitutional level, they have international agreements that they have entered into as sovereign nations and agreements they have entered into collectively. As can be seen in this chapter, Saudi Arabia has made a concerted effort to develop intellectual property protection systems in line with sharia law. For example, by stipulating that its Violation Review Committee (VRC) on Copyrights must have at least one member that is a sharia advisor, there is an attempt by Saudi Arabia to not let copyright protection act on its own volition and keep it in tandem with sharia law. A concern for Saudi Arabia will be the recommendation it be placed back on the US Special 301 Watch list as this would undermine the efforts by Saudi Arabia to implement better intellectual property strategies. There has also been a recommendation by the International Intellectual Property Alliance (IIPA) to put Dubai back on the US Special 301 Watch list and Kuwait is already still on the watch list. Therefore, an integrated intellectual property framework would be of benefit to all the GCC states as it will further enhance the protection they offer.

The next chapter considers TRIPS Plus in more detail and what the potential changes will be for the GCC states in order to increase compliance from TRIPS to TRIPS Plus with a close analysis of the economic impact of TRIPS Plus. The key question raised by this chapter is what room for manoeuvre, if any, to the GCC states have in controlling how foreign companies protect their intellectual property rights in their states.

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<sup>559</sup> Economist Intelligence Unit 2011 states 30 years ago the Organisation for Economic Co-operation and Development, (OECD), accounted for 85% of GCC trade, however with the influx of emerging markets, by 2009 45% of GCC trade stems from emerging markets . Also see Habibi, N. (2011), Growth in economic relations of China and India with the GCC countries. Asian-Pacific Economic Literature, Volume 25, pages 52 to 67.

The next chapter will assess the impact of current international dispute settlement mechanisms on the GCC, outside of the WTO remit. The main mechanisms to consider are; international trade agreements, bilateral state agreements, the Transatlantic Trade and Investment Partnership (TTIP) and investor to state dispute settlement mechanisms.

## **Chapter Six: The International Trojan Horse - TRIPS plus, TTIP and Investor to State Dispute**

### **Settlements - spill over effects on the GCC**

#### **6.1 Introduction**

There are challenges facing the GCC states in stepping up from their current TRIPS compliance level of intellectual property protection to TRIPS Plus. The research carried out in this thesis up until this chapter has investigated the sharia law perspective on intellectual property law, the main sources and the justification for intellectual property. The research has also examined individual developments of the GCC states in terms of governance, intellectual property enforcement and institutional structures. The proposal of an integrated model, which is the main research aim of the thesis, would not be complete without considering the impact of international trade agreements and investor to state dispute settlement mechanisms on the GCC states. Therefore the purpose of this chapter is to research international developments and the spill over effects they potentially have for the GCC states and in turn apply the findings to the overall integrated intellectual property framework. This chapter will also take into account the western justifications of intellectual property rights and how the different intellectual property systems have developed over time.

There is a great deal of uncertainty in the realm of international intellectual property law, the EU and the US

are negotiating the Transatlantic Trade and Investment Partnership (TTIP), a trade agreement that aims to remove trade barriers across different economic sectors to increase trade between the EU and the US<sup>560</sup>. The TTIP will have spill over effects on the Middle East and North Africa (MENA) region, the GCC, Australia and the Asian sub-continent as it will require a fresh analysis of intellectual property laws and international trade agreements<sup>561</sup>. As the US and EU finalise the TTIP, there is also the Trans Pacific Partnership (TPP) that could impact third party countries like the GCC states. The chapter will analyse both the TTIP and TPP in regard to the potential ramifications of the agreements on the GCC states in respect of intellectual property protection.

Nations involved in international agreements, both bilateral and multilateral, have sought to include investor to state dispute settlements (ISDS) in the agreements as an arbitrational action. ISDS enables foreign investors to circumvent domestic legal processes and hold governments in foreign states to account in arbitration tribunals, without having to go through WTO, in effect creating a corporate sovereignty<sup>562</sup>. Sovereignty is itself a contentious issue, as different states and regions have very different political structures, resulting in individual sovereignty issues. ISDS poses a series of threats to national sovereignty as it puts investors on par with nations giving them authority to seek compensation directly from states with powers such as seizing state assets<sup>563</sup>. Therefore, within the ambit of international intellectual property law, future GCC developments must take into account the following research objectives as outlined below.

## **6.2 Research objectives**

The research objectives addressed in this chapter are:

- To set out the western justifications of intellectual property rights in the differing areas of; copyright, design rights, patents, confidential information and trademarks in order to inform the content of an integrated intellectual property framework.
- To carry out an in depth analysis of TRIPS Plus proposals, the significant provisions of TRIPS Plus that impact the GCC, analyse the various proposed implementation clauses in TRIPS Plus and what the potential ramifications for the GCC states are.

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<sup>560</sup> See [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf). Accessed on 20.09.2014.

<sup>561</sup> See Pratap, J. (2013), Proposed US-EU trade deal may impact business in GCC: report. Available at <http://www.bilaterals.org/?proposed-us-eu-trade-deal-may#sthash.aXZVR17g.dpuf>. Accessed on 21.09.2014.

<sup>562</sup> Friends of the Earth Europe, (2013), The TTIP of the anti-democracy iceberg. Available at [http://www.foeeurope.org/sites/default/files/foee\\_factsheet\\_isds\\_oct13.pdf](http://www.foeeurope.org/sites/default/files/foee_factsheet_isds_oct13.pdf). Accessed on 10.03.2015.

<sup>563</sup> United Nations Conference On Trade And Development, World Investment Report, 2013, Global Value Chains: Investment and Trade for Development, Chapter 3, page 110. Available at [http://unctad.org/en/publicationslibrary/wir2013\\_en.pdf](http://unctad.org/en/publicationslibrary/wir2013_en.pdf). Accessed on 13.03.2015.

- To analyse the influence of the US and the EU on intellectual property protection in the GCC, with specific references to the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).
- To review the role of international organisations on law making in GCC countries and to assess the impact of current international dispute settlement mechanisms on the GCC, outside of the WTO remit. The main mechanisms to consider are; bilateral state agreements, corporate sovereignty and investor to state dispute settlements.

### **6.3 Justifications of intellectual property rights**

The justifications of intellectual property rights have evolved under three main headings of; economics, labour and social benefit<sup>564</sup>. The majority of new intellectual property assets are drawn from an existing stock of knowledge, ideas and language, known as the common stock. If the parameters of intellectual property rights are too widely construed, the common stock will be depleted, inhibiting intellectual production and impoverishing intellectual growth. Therefore, every patent application will not be successful, nor will every copyright claim as certain criteria need to be satisfied before protection can be granted.

Intellectual property rights have established and refined functionalities in areas of; copyright, confidential information, trademark, patents and design rights. The rights were borne out of existing legal principles from contract and equity law and each individual area of intellectual property law has been developed in accordance with the specific requirements of the asset warranting protection. For example, copyright has developed under an aesthetic model, initially focussed on protecting artist rights in domestic legal systems and has expanded as a set of moral, economic and social benefit principles in the TRIPS agreement and international agreements. On the other hand, unregistered design rights have followed a functional rights approach with a focus on the definition of a design, the originality of the design, the relationship between originality and the commonplace in the design and exclusions from protection.

Despite the deviances in the approach to different types of intellectual property assets, one fundamental commonality they all share is their intangible or abstract form<sup>565</sup>. Not all nations recognise or enforce all the doctrines of intellectual property, however due to international obligations; most nations must have minimum

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<sup>564</sup> Drahos, P. (1996), *A Philosophy of Intellectual Property*, Aldershot, UK, Dartmouth Publishing Company. Menell, P. (1999), *Intellectual Property: General Theories*, Berkeley Centre for Law and Technology, pages 129 to 188.

<sup>565</sup> Drahos, P. (1996), *A Philosophy of Intellectual Property*, Aldershot, UK, Dartmouth Publishing Company.

levels of compliance to the main types of intellectual property assets<sup>566</sup>. The first family of intellectual property rights to consider is the justifications for copyright protection.

### **6.3.1 Justifications for copyright protection**

Copyright was initially justified as a form of protection for the creative investment of the author, with Locke's labour theory setting out the rights of an author to the fruits of her labour. In chapter 3, Locke's labour theory was considered as a connecting factor between the sharia law principles of natural rights and western philosophy on the natural rights in intellectual property law<sup>567</sup>. To understand how copyright protection came into existence and has developed as an aesthetic model will impact on the recommendations for an integrated intellectual property rights approach in the GCC. Copyright has developed at a domestic level in three areas; as a natural labour right, very much in accordance with the philosophical writings of John Locke<sup>568</sup>, as a commercial model providing an economic incentive for authors to create intangible assets<sup>569</sup> and as a utilitarian model which rewards the endeavours of the inventor with a perceived social benefit in mind that after a limited term of copyright, the works are freely availability in the public domain<sup>570</sup>.

John Locke's labour theory is centred on the labour argument that each person has a property right in their own body and the subsequent labour of their own body. Property rights are then acquired when the common stock is mixed with labour to produce a new form of property which can be owned by the labourer<sup>571</sup>. Locke's theory had its limitations when applied to intellectual property law as the labour to property equation was restricted to two conditions; 'no spoilage' and 'enough and as good for others'<sup>572</sup>. The spoilage restriction of only appropriating as much as one can use before it spoils ceases to be a meaningful restriction as value can now be stored as a monetary commodity and not solely property. Secondly, the sufficiency restriction, of leaving 'enough and as good for others', also has limitations to property rights and is less applicable to intellectual property rights<sup>573</sup>.

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<sup>566</sup> Gordon, W. (2003), Intellectual Property, Chapter 28, Boston University School of Law Working Paper Series, Law and Economics Working Paper, Number 3. Available at <http://www.bu.edu/law/faculty/papers>. Accessed on 23.03.2015.

<sup>567</sup> See chapter 3 at 3.8.

<sup>568</sup> Locke, J. (1690), Second Treatise on Civil Government, Chapter Five, Section 28. Available at <http://www.constitution.org/il/2ndtr05.htm>. Accessed on 30.03.2015.

<sup>569</sup> Maskus, K. (2005), Intellectual Property and Development, Lessons from Recent Economic Research, The International Bank for Reconstruction and Development / The World Bank and Oxford University Press. Available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/IPRs-book.pdf>. Accessed on 22.03.2015.

<sup>570</sup> Menell, P. (1999), Intellectual Property: General Theories, Berkeley Centre for Law and Technology, University of California at Berkeley. Available at <http://www.levine.sscnet.ucla.edu/archive/itttheory.pdf>. Accessed on 22.03.2015.

<sup>571</sup> Hughes, J. (1988), The Philosophy of Intellectual Property, Georgetown Law Journal, Volume 77. Available at [www.law.harvard.edu/faculty/tfisher/music/Hughes1988.html](http://www.law.harvard.edu/faculty/tfisher/music/Hughes1988.html). Accessed on 22.03.2015.

<sup>572</sup> Locke, J. (1690), Second Treatise on Civil Government, Chapter Five. Available at <http://www.constitution.org/il/2ndtr05.htm>. Accessed on 30.03.2015.

<sup>573</sup> Drahos, P. (1996), A Philosophy of Intellectual Property, Aldershot, UK, Dartmouth Publishing Company.



Given the need to balance author rights against the common stock, copyright law developed beyond the founding philosophies of Locke's labour theory and in the 1894 case of *Hollinrake v Truswell*, the idea expression dichotomy was established whereby it is the expression of an idea that is protected and not the idea itself<sup>574</sup>. The primary focus therefore is originality in the expression of an idea, which is a different approach to other areas of intellectual property law such as the requirement of 'novelty' and 'inventive step' in patents. The TRIPS agreement enshrines the idea expression dichotomy of protecting the expression of an idea and not the idea itself as seen at Article 9.2 of the TRIPS agreement<sup>575</sup>. To protect the expression of an idea through copyright, the law governing copyright protection has evolved more in favour of a commercial model. The economic growth based justification for copyright protection has had the most impact in the TRIPS agreement as investors are cautious when it comes to expanding in to foreign markets, to counteract this TRIPS allows for proprietary knowledge to be sold above its marginal cost, to offer an incentive for the production of knowledge<sup>576</sup>.

The third area of relevance to copyright protection is the perceived social benefit doctrine and moral rights. The perceived social benefit doctrine marries well with the commercial incentive model for copyright protection as both allow for rewarding the right holder with a monopoly over the asset for a fixed term, the social benefit doctrine balances the monopoly against the eventual release of the material in the public domain whereas the economic argument is that it leads to an increase in intellectual production. Moral rights recognise the continuing interest of the author in her work, that it is treated with respect even where the copyright is transferred and the economic interest no longer lies with the original author. The TRIPS agreement excludes moral rights from the minimum level of requirements stating members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6 relating to moral rights or of the rights derived there from<sup>577</sup>.

### **6.3.2 Justifications for design rights**

A design right is a form of intellectual property which subsists in an original design, any aspect of the shape, configuration of the whole or any part of an article. The aesthetic model is more applicable to registered

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<sup>574</sup> *Hollinrake v Truswell* (1894), 3 Ch 420; 63 LJ Ch 719.

<sup>575</sup> TRIPS Agreement, Article 9.2 states that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm). Accessed on 22.03.2015.

<sup>576</sup> Braga, P. (1996), Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and its Economic Implications, in W. Martin and L.A. Winters Editions, The Uruguay Round and the Developing Economies, World Bank Discussion Paper Number 307, pages 381 to 411, Washington, DC, the World Bank.

<sup>577</sup> World Trade Organization, (2015), Overview: the TRIPS Agreement, Substantive standards of protection, Copyright. Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm). Accessed on 23.03.2015.

designs as an unregistered design right will not protect surface decoration. The need for unregistered design rights arose from industries such as textile and fashion that develop large numbers of designs and needed to protect the appearance of a product. The unregistered design right comes into existence automatically whenever an original design is created and it replaced the indirect protection, afforded as part of copyright law, to essentially functional designs<sup>578</sup>.

A design can be protected as a registered design if the design is new, has individual character or constitutes a component part of a complex product<sup>579</sup>. Registered design rights require a formal application for registration of the design before the rights can be granted whereas copyright protection does not involve a formal registration. Design rights protection provides a course of action against someone producing the identical design or a design substantially similar to the registered design and gives the owner a monopoly in the shape, configuration, pattern and ornamentation of the design. However, copyright requires the owner to show that copying has taken place and only provides protection against somebody copying the work.

Copyright protection gave the same protection to design documents from which functional, mass produced articles were produced, as it gave to artistic works. There were therefore significant anomalies in the law relating to design rights and the aesthetic model of generic copyright protection. Aesthetics and functionality can be components of an individual design system, making it a difficult area of law to develop and distinguish from copyright protection. National laws have often had difficulty in deciding which elements belong to a design, and to what extent they should be recognised<sup>580</sup>. The TRIPS Agreement has set specific guidelines on the protection of industrial designs at section 4, providing protection of independently created industrial designs that are new or original for a minimum of ten years<sup>581</sup>.

### **6.3.3 Justifications for patent protection**

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<sup>578</sup> Alikhan, S. (2009), *Intellectual Property and Competitive Strategies in the 21st Century*, Chapter 1, page 10, Kluwer Law International. Available at

[https://books.google.co.uk/books?id=QvKDZ8\\_YWh8C&pg=PA10&dq=A+design+right+registered+or+unregistered?&hl=en&sa=X&ei=wX4UVZSINYjyPO3SgJgP&ved=0CD4Q6AEwBQ#v=onepage&q=A%20design%20right%20registered%20or%20unregistered%3F&f=false](https://books.google.co.uk/books?id=QvKDZ8_YWh8C&pg=PA10&dq=A+design+right+registered+or+unregistered?&hl=en&sa=X&ei=wX4UVZSINYjyPO3SgJgP&ved=0CD4Q6AEwBQ#v=onepage&q=A%20design%20right%20registered%20or%20unregistered%3F&f=false). Accessed on 25.03.2015.

<sup>579</sup> Waelde, C. (2013), *Contemporary Intellectual Property: Law and Policy*, Chapter 8, Oxford University Press. Available at <https://books.google.co.uk/books?id=PaicAQAAQBAJ&pg=PA299&lpg=PA299&dq=A+design+can+be+protected+as+a+registered+design+if+the+design+is+new,+has+individual+character+or+constitutes+a+component+part+of+a+complex+product.&source=bl&ots=fr57-TGgI3&sig=OFFzQwUD8IrtU1IEmtLURhD5H4&hl=en&sa=X&ei=tn8UVclgOJLuaKn1gcgD&ved=0CD4Q6AEwBQ#v=onepage&q&f=false>.

Accessed on 25.03.2015.

<sup>580</sup> Grove, P. (1997), *Sourcebook on Intellectual Property Law*, Chapter 5, Cavendish Publishing.

<sup>581</sup> TRIPS: Agreement On Trade-Related Aspects Of Intellectual Property Rights, (1995), Part II— Standards concerning the availability, scope and use of Intellectual Property Rights, Section 4, Articles 25 and 26. Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm3\\_e.htm#4](https://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm#4). Accessed on 24.03.2015.

Patent protection originates from three broad justifications; inventor rights, to encourage investment in innovation and to disseminate information in the public domain to encourage others to innovate<sup>582</sup>. The justification for inventor rights is on the premise that the labour, time and effort that are invested into creating a patentable asset require protection against economic free riders<sup>583</sup>. The rationalisation for patent protection is embedded in the basic principle that information, the founding basis of intangible market drivers, is expensive to create but cheap to copy<sup>584</sup>. Competitors can copy the information and appropriate the value of the property at a lower price, in effect reaping the benefits of someone else's invention and causing a loss to the original producers<sup>585</sup>. The economic free rider therefore causes several losses to the original producer namely; removes value from the product, impinges on the primary producer's ability to recoup costs, loss of revenues and incentives to invest diminish<sup>586</sup>. The issue is exacerbated by the fact that in some cases the value of the invention is in the information it contains and not its physical structure. Therefore patent protection requires exclusionary boundaries through secrecy, marketing skills and various types of first mover advantages<sup>587</sup>.

A patent is an official document that confers proprietorship of an invention on the recipient, grant of a patent is preceded by examination of applications by the patenting authority. The fundamental principle behind patents is that the government awards exclusive control over an invention for a fixed number of years to the individual who first discloses the invention within its territory.

In most systems, a patent is granted to an applicant who is first to submit a detailed description of the invention, for example in the UK, the system operates on a first to file model. The TRIPS agreement sought to set international minimum standards in patent protection and at Article 27 stated the requirements for;

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<sup>582</sup> Menell, P. (1999), Intellectual Property: General Theories, Berkeley Centre for Law and Technology, University of California at Berkeley. Available at <http://www.levine.sscnet.ucla.edu/archive/itttheory.pdf>. Accessed on 22.03.2015.

Drahoš, P. (1996), A Philosophy of Intellectual Property, Aldershot, UK, Dartmouth Publishing Company.

<sup>583</sup> Maurer, E. (2001), An Economic Justification for a Broad Interpretation of Patentable Subject Matter, Northwestern University Law Review, Volume 95, Number 3. Fink, C. (1999), How Stronger Protection of Intellectual Property Rights Affects International Trade Flows, Policy Research Working Papers, The World Bank. Available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2051>. Accessed on 22.03.2015.

<sup>584</sup> Dollinger, J. (2008), Entrepreneurship Strategies and Resources, Fourth Edition, Kelley School of Business, Indiana University, Marsh Publications Lombard, Illinois USA.

<sup>585</sup> Gordon, W. (2003), Intellectual Property, Chapter 28, Boston University School of Law Working Paper Series, Law and Economics Working Paper, Number 3. Available at <http://www.bu.edu/law/faculty/papers>. Accessed on 23.03.2015.

<sup>586</sup> Paepke, O. (1987), Economic Interpretation of the Misappropriation Doctrine: Common Law Protection for Investments in Innovation, Berkeley Technology Law Journal, Volume 2, Issue 1, Article 2. Available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1057&context=btlj>. Accessed on 23.03.2015.

<sup>587</sup> Munari, F. (2005), Review of Literature on the Use and Impact of IPRs at the Firm Level: Patents, Trademarks and Designs, University of Bologna, EU Observatory. Available at <https://oami.europa.eu/ohimportal/documents/11370/80606/Review+of+Literature+on+the+Use+and+Impact+of+IPRs+at+the+Firm+Level.+Patents,+Trademarks+and+Designs>. Accessed on 24.03.2015.

novelty, inventiveness, industrial applicability and exclusions<sup>588</sup>. A successful patent application grants the inventor the right to exclude others from utilising the patented invention for a given amount of time, under the TRIPS Agreement, the monopoly right is granted for twenty years<sup>589</sup>. In return, the inventor is under an obligation to describe the invention in detail to give notice to the public. The counterargument to the monopoly right granted to the inventor is that monopoly is against public interest.

This is addressed through domestic patent laws and the TRIPS Agreement to provide exemptions to not let the monopoly right interfere with the public interest aspect. Articles 7 and 8 of the TRIPS Agreement include a number of flexibilities with the aim of safeguarding and protecting the public interest. This is particularly relevant to developing countries as Article 8 of the agreement makes provisions to “promote the public interest in sectors of vital importance to their socio-economic and technological development”<sup>590</sup>. Therefore, the public interest exception is subjective as it requires consideration of the socio political needs of a country and gives some level of flexibility to developing countries to harmonise the inconsistencies in their public interest measures with the overall TRIPS framework.

#### **6.3.4 Justifications for trademark law**

Trademark protection has traditionally followed an indicator of origin model whereby the purpose of a trademark is to be able to identify and verify the origin of the goods and services to which it attaches<sup>591</sup>. Trademark protection has developed to have both intrinsic functions as indicators of origin and extrinsic functions of quality and reputation<sup>592</sup>. Trademark law has developed in the following key areas; what constitutes a trademark, distinctiveness, scope of protection, terms of protection, absolute and relative grounds for refusal, exhaustion of rights, licensing, genuine use, cancellation and revocation<sup>593</sup>. The justifications for trademark protection can be distinguished from copyright and patents as the reasoning behind trademark protection is not rooted in functionality or aesthetics, it is the right of producers to identify their products. Also, a trademark may be enforceable indefinitely as long as it continues to serve to identify the origin of the goods or services, as oppose to the limited durations of protection in copyright and patents.

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<sup>588</sup> TRIPS Agreement, (1995), Uruguay Round Agreement, Part II, Section 5, Article 27, Patentable Subject Matter. Available at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#TRIPs](https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs). Accessed on 22.03.2015.

<sup>589</sup> TRIPS Agreement, (1995), Uruguay Round Agreement, Part II, Section 5, Article 33, Terms of Protection. Available at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#TRIPs](https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs). Accessed on 22.03.2015.

<sup>590</sup> TRIPS Agreement, (1995), Uruguay Round Agreement, Part I — General Provisions and Basic Principles, Article 8, Principles. Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm). Accessed on 18.05.2015.

<sup>591</sup> Dinwoodi, G. (2008), Trademark Law and Theory: A Handbook of Contemporary Research, Chapter 4, Edward Elgar Publishing Limited.

<sup>592</sup> Schechter, F. (1927), The Rational Basis of Trademark Protection, Harvard Law Review, Volume 40, Number 6, pages 813 to 833. Available at <http://www.jstor.org/stable/1330367>. Accessed on 23.03.2015.

<sup>593</sup> Gielen, C. (2014), Trademark Dilution Under European Law, The Trademark Reporter, Volume 104, Number 3. Available at [http://www.inta.org/TMR/Documents/Volume%20104/vol104\\_no3\\_a1.pdf](http://www.inta.org/TMR/Documents/Volume%20104/vol104_no3_a1.pdf). Accessed on 23.03.2015.

Existing trademark laws from EU countries and the US have in effect harmonised to create a minimum standard of trademark protection under the TRIPS Agreement. The TRIPS Agreement defines a trademark as; any sign, capable of being represented graphically and capable of distinguishing the goods or services of one undertaking from those of other undertakings<sup>594</sup>. Trademarks are acquired at a domestic level through registration, many countries require local use of the registered mark to maintain the registration. Therefore, whether a given mark can be registered in a particular country will depend on the law of that country. The Madrid Protocol<sup>595</sup>, an international treaty, removes some of the difficulties for the international registration of trademarks by offering a convenient and economical means of securing trademark registration in member countries. From the GCC states, Bahrain and Oman are signatories.

### **6.3.5 Justifications for confidential information law**

The law pertaining to confidential information can be traced back to maxims of equity and contract law. From as early as the middle of the nineteenth century, courts were able to identify an equitable jurisdiction for breach of confidentiality, as can be seen in cases such as *Morison v Moat* (1851)<sup>596</sup> and *Prince Albert v Strange* (1849)<sup>597</sup>. In both cases, as well as actions for breach of contract and trust, the courts also identified breach of confidence as a standalone cause of action<sup>598</sup>.

Law of equity has ingrained its influence in the development of legal obligations in respect of confidential information as the law on confidential information is not contingent upon any form of contract, express or implied. Rather, it developed as an equitable doctrine of confidence, unaffected by contract and on the broad equitable principle of not taking unfair advantage of information received in confidence<sup>599</sup>.

Confidential information is not a form of physical property; it is the right to protect the confidentiality of the information and not its physical embodiment. Unlike copyright, the law of confidence protects information that may be communicated orally and not written down or recorded in any material form. In English law there are three elements which need to be satisfied for a breach of confidence action claim to be successful which were set out in the case of *Coco v AN Clark (Engineering) Ltd* (1969); the information in question must have

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<sup>594</sup> TRIPS Agreement, Part II — Standards concerning the availability, scope and use of Intellectual Property Rights, Section 2: trademarks, Article 15, Protectable Subject Matter. Available at [https://www.wto.org/English/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm#2](https://www.wto.org/English/docs_e/legal_e/27-trips_04_e.htm#2). Accessed on 23.03.2015.

<sup>595</sup> Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks. (1989). Available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283530](http://www.wipo.int/treaties/en/text.jsp?file_id=283530). Accessed on 23.03.2015.

<sup>596</sup> *Morison v. Moat* (1851), 9 Hare 492.

<sup>597</sup> *Prince Albert v. Strange* [1849], 1 Mac & G 25.

<sup>598</sup> Aplin, T. (2012), *Gurry on Breach of Confidence: The Protection of Confidential Information*, Oxford University Press.

<sup>599</sup> See *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203; *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.* [1960] R.P.C. 128 and *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923; [1967] R.P.C. 349 and *Coco v A.N. Clark (Engineers) Limited* [1968] F.S.R. 415.

the necessary quality of confidence about it, that information must have been imparted in circumstances importing an obligation of confidence and there must be an unauthorised use of that information to the detriment of the party communicating it<sup>600</sup>.

Countries vary on what constitutes confidential information and what the elements of a breach of confidence action entail. Countries that have acceded to the TRIPS Agreement have introduced laws on the protection of confidential information in line with TRIPS requirements which states that for information to be legally protectable: the information must be secret, as in not generally known or readily accessible to persons that normally deal with that kind of information, it must have commercial value because it is secret and the owner must have taken reasonable steps to keep it secret<sup>601</sup>.

Article 39 of the TRIPS Agreement is the first multilateral acknowledgement of the essential role that trade secrets play in the global industry and represents the American and European notion of protecting confidential information as a means of fully protecting intellectual property rights<sup>602</sup>. Therefore, TRIPS standards have created minimum standards of protections in the main areas of intellectual property law based on existing national laws of EU countries and the US. Each area of intellectual property law has followed its own development line, criteria for registration, exclusions and actions for infringement. For the GCC, the existing knowledge from the TRIPS Agreement needs to be considered against increasing pressure to adopt TRIPS Plus standards.

#### **6.4 TRIPS to TRIPS plus – a higher level of compliance**

The provisions for TRIPS have been considered in detail in chapter 5<sup>603</sup>. In terms of TRIPS Plus, there are three main areas of intellectual property rights that are a concern for the GCC. Firstly, under TRIPS Plus, there is a requirement for an extension of the duration of patent protection that is currently available under TRIPS. The GCC states currently adhere to TRIPS standards and offer TRIPS compliant patent protection of twenty years from the date of filing,<sup>604</sup> this is in compliance with the TRIPS Agreement at Article 33<sup>605</sup>.

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<sup>600</sup> The elements of a confidential information action were set out by Meggary, J. in *Coco v. A.N. Clark (Engineers) Ltd* [1969] RPC 41.

<sup>601</sup> Irish, V. (2003), *Disclosing Confidential Information*, World Intellectual Property Office. Available at [http://www.wipo.int/sme/en/documents/disclosing\\_inf\\_fulltext.html#P4\\_37](http://www.wipo.int/sme/en/documents/disclosing_inf_fulltext.html#P4_37). Accessed on 24.03.2015.

<sup>602</sup> TRIPS: agreement on trade-related aspects of intellectual property rights, part II — Standards concerning the availability, scope and use of Intellectual Property Rights, Article 39. Available at [https://www.wto.org/English/docs\\_e/legal\\_e/27-trips\\_04d\\_e.htm](https://www.wto.org/English/docs_e/legal_e/27-trips_04d_e.htm). Accessed on 14.03.2015.

<sup>603</sup> See chapter 5 at 5.5.

<sup>604</sup> Patent Regulation of the Cooperation Council for the Arab States of the Gulf, Article 15. Available at <http://www.gccpo.org/conven/PatentRegulation.pdf>. Accessed on 10.03.2015.

<sup>605</sup> TRIPS: agreement on trade-related aspects of intellectual property rights, part II — Standards concerning the availability, scope and use of Intellectual Property Rights, Article 33. Available at [https://www.wto.org/English/docs\\_e/legal\\_e/27-trips\\_04d\\_e.htm](https://www.wto.org/English/docs_e/legal_e/27-trips_04d_e.htm). Accessed on 14.03.2015.

TRIPS Plus calls for the time period to be above twenty years, the EU and the US are in effect trying to write-off provisions of TRIPs through their FTAs and subsequently bypassing the WTO agreement. As of January 2015, the GCC patent office has 28667 filed applications, of the number filed, 3253 have been granted. The number of invalid applications is at 8978 and applications in process are a staggering 15221<sup>606</sup>. Therefore, the GCC are struggling to manage at a TRIPS compliance level, increasing the standards to TRIPS Plus could bring the patent system to a halt. Oman already has TRIPS Plus in its FTA with the US, for example, at Article 15.8 of the FTA there is a provision to extend the patent term in pharmaceutical based patents<sup>607</sup>. The second main TRIPS Plus provision is in the area of compulsory licensing. The scope for compulsory licensing and parallel importing is considerably narrowed in TRIPS Plus, limiting the circumstances where parties can use the measures<sup>608</sup>. Article 31 of TRIPS and the Doha Declaration reiterates member states' rights to compulsory licensing and government use<sup>609</sup>. FTA's impose TRIPS Plus restrictions such as the Article 4.20 of the US-Jordan which limits anti-competitive practice and the overall scope of compulsory licensing<sup>610</sup>. The benefits of compulsory licensing to developing countries cannot be understated. In 2003, Malaysia became the first Asian country to issue a government use, compulsory licence to import antiretroviral drugs. The Malaysian Minister of Domestic Trade and Consumer Affairs issued a two-year government use compulsory license to import from India<sup>611</sup>. Although compulsory licensing itself is sharia compliant<sup>612</sup>, the same cannot be said for the restrictions posed by TRIPS Plus. The arguments for TRIPS Plus are spear headed by the pharmaceutical corporations who do not want drug prices reduced, however TRIPS Plus may contradict sharia principles of public interest. Therefore there is a potential risk posed to the GCC from restrictions on compulsory licensing in

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<sup>606</sup> Statistics from the GCC Patent Office. Available at <http://www.gccpo.org/DefaultEn.aspx>. Accessed on 04.01.2015.

<sup>607</sup> US-Oman FTA, Article 15.8, 6(b) states "with respect to patents covering pharmaceutical products or their method of use:(i) each Party shall make available an adjustment of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term". Available at

[http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset\\_upload\\_file715\\_8809.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file715_8809.pdf). Accessed on 18.03.2015.

<sup>608</sup> Kerry, V. (2007), TRIPS, the Doha declaration and paragraph 6 decision: what are the remaining steps for protecting access to medicines?, Globalization and Health. Available at <http://www.globalizationandhealth.com/content/3/1/3>. Accessed on 06.11.2014. Castro, S. (2009), Compulsory Licensing and Public Health: TRIPS-Plus Standards in Investment Agreements, Social Science Research Network. Available at <http://ssrn.com/abstract=2101574>. Accessed on 06.03.2015.

<sup>609</sup> TRIPS Agreement, Article 31. Available at [http://www.wto.org/english/tratop\\_e/trips\\_e/wtl641\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm). Accessed on 17.03.2015.

<sup>610</sup> US-Jordan FTA, Article 4.20. Available at [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005607.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005607.asp). Accessed on 20.03.2015.

<sup>611</sup> Minister of Domestic Trade and Consumer Affairs, Malaysia, (29 October 2003), Authorisation for exploitation of patented invention in Malaysia. Available at <http://www.cptech.org/ip/health/c/malaysia/arv-license.html>. Accessed on 18.03.2015. Also see El Said, M. (2013), Patent-Related Flexibilities in Multilateral Treaties and their Importance for Developing Countries and LDCs, 2nd WIPO Inter-Regional Meeting on South-South Cooperation on Patents, Trademarks, Geographical Indications, Industrial Designs and Enforcement.

<sup>612</sup> See chapter 3 at 3.8.6.

pharmaceutical products<sup>613</sup>. Public interest aims to protect the legitimate interests of the community within the recognised sources of Islamic law and secure public welfare through promoting the benefits of a rule that is for the good of the public and has been an area of Islamic law that impacts on intellectual property protection<sup>614</sup>. It also creates a dichotomy between principles of riba and gharar against honouring international agreements as discussed in chapter 3<sup>615</sup>.

Thirdly and most pressing, is the TRIPS Plus enforcement criterion. TRIPS Plus demands stronger enforcement measures from developing countries. These include; criminal sanctions, higher damages, mandatory injunctions, and transitional liability, above and beyond the TRIPS Agreement. The impacts of the enforcement criterion are potentially substantial. It is the elimination of enforcement flexibilities allowed by TRIPS that is the crux of the problem. For the GCC the problems are interwoven, there is a lack of technical expertise to incorporate and implement TRIPS Plus, coupled by an insufficient domestic research and manufacturing capacity as well as infrastructure issues.

The GCC has minimal anti-competitive practices and the TRIPS Plus enforcement criteria will necessitate higher standards. The GCC states are all developing intellectual property institutions such as the Dubai International Financial Centre (DIFC)<sup>616</sup>, however there is less evidence of success at enforcement of intellectual property rights than there is legislative development. It is here where an integrated intellectual property approach that takes into account; the structure of the GCC states, international agreements and pressures, the international institutions, Islamic finance and both societal and religious views will have significant impact on re-evaluating intellectual property rights in the GCC.

### **6.5 The TRIPS plus increased enforcement criteria**

The main TRIPS plus criteria that the GCC will struggle with is the increased enforcement requirements. Efforts to reduce intellectual property infringement since TRIPS have been met with lukewarm success at best as seen in areas such as software piracy which are stagnant and therefore the Gulf states need to do more than simply make legislative changes<sup>617</sup>. The danger for the GCC is a widening gulf between its intellectual property laws and the public acceptance of the new regimes.

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<sup>613</sup> Compulsory licensing and pharmaceutical products will be a further area of research as further analysis is outside the scope of the current research.

<sup>614</sup> See chapter 3 at 3.11.

<sup>615</sup> See chapter 3 at 3.10.

<sup>616</sup> GCC Quarterly Review , Quarter 4, (2014). Available at <http://www.linklaters.com/Insights/GCC/Q4-2014/Pages/Index.aspx>. Accessed on 04.01.2015.

<sup>617</sup> Price, D. (2012), *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates*, Routledge



These lacunae can be addressed through understanding the development and expansion of successful initiatives such as sharia compliant banking which under the heading of Islamic finance is an industry worth \$2 trillion globally<sup>618</sup>. Islamic finance products boost the economy in the GCC and by translating the successful sharia compliant banking model to intellectual property protection there is an opportunity to fuel a knowledge driven economy that promotes intellectual property rights in conjunction with established Islamic law principles as concepts of sharia law play a significant role in Islamic finance products<sup>619</sup>.

The rationale for riba and gharar comes from the concepts of speculative risk and unjust enrichment respectively. The argument against intellectual property protection therefore lies within the definition of unjust enrichment and links with the length of time an intellectual property right holder is awarded a monopoly right over the invention. Patents for Islamic finance products exist and are still a growth area for the Gulf states as this is an emerging market. For example, sukuk, also known as Islamic bonds, are being developed with intellectual property rights as the asset. German based FWU group, with its subsidiary in Dubai, developed the first ever intellectual property based sukuk worth \$55 million<sup>620</sup>.

Further, there has been an increase in licensing agreements between the GCC and Malaysia as well as negotiations for a FTA. The Malaysian trade agreement is still under review however it can set the precedent for incorporating Islamic Finance in other negotiations. Islamic Finance will be considered in more detail in chapter 7. There are further developments in the international community which may act as a catalyst for further intellectual property change; the TTIP is being negotiated and will have knock on effects for the GCC as well as the doctrines of ISDS and corporate sovereignty.

## **6.6 Transatlantic Trade and Investment Partnership (TTIP) on intellectual property and international trade**

As the EU-US TTIP is aiming to conclude in 2015, the GCC has an opportunity to reassess its relationship with both the EU and GCC. Up until now, the GCC was able to enter into negotiations with the EU and US relatively independently. However where the EU and US can agree, there will be a harmonisation of regulations. This therefore has repercussions for the GCC which will be further analysed in this chapter. The TTIP has three main aims; to increase trade and investment through market access, increase employment

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<sup>618</sup> Vizcaino, B. (2015), Islamic finance looks to outgrow bad habits as it expands, Thomson Reuters News. Available at <http://www.ifsc.ie/article.aspx?idnews=299168>. Accessed on 26.03.2015.

<sup>619</sup> See further analysis in chapter 7.

<sup>620</sup> A detailed analysis of Islamic finance and the potential of Islamic finance structures to offer an alternative approach to intellectual property protection in the GCC is discussed in chapter 7.

and competitiveness and create a harmonised approach to global trade<sup>621</sup>. In order to harmonise global trade, the EU and US aim to harmonise their intellectual property rights through an intellectual property rights chapter that deals specifically with enhancing protection and recognition for geographical indications, build on TRIPS and patentability<sup>622</sup>.

Marietje Schaake, member of the European Parliament for the Liberal Group organised a conference on intellectual property in the TTIP through the Alliance of Liberals and Democrats for Europe on 15<sup>th</sup> May 2013 entitled "What Role for Intellectual Property Rights in the TTIP?" Guest speakers included Bernd Hugenholtz, director of the Institute for Information Law at the University of Brussels who spoke on the intellectual property chapter. During the meeting, questions were raised over the lack of transparency of free trade negotiations and to not repeat the mistakes of the anti-counterfeiting trade agreement (ACTA)<sup>623</sup>.

The main furore against an intellectual property chapter in the TTIP is due to the fears that the TTIP could place more extensive legal powers in the hands of big business which in turn has been perceived as an attempt by both the US and EU corporations to revive the spirit of the defunct anti-counterfeiting trade agreement (ACTA). It seems remnants of ACTA, which was successfully defeated in the European Parliament in 2012<sup>624</sup>, are creeping back in through the intellectual property chapter. The intellectual property chapter in the TTIP is controversial at best; some argue that the inclusion of such a chapter in the TTIP will drive the economy and investment<sup>625</sup> whereas others argue it will do very little by way of advancing public interest and the overall good of the economy<sup>626</sup>.

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<sup>621</sup> Grlig, C. (2014), Overcoming Transatlantic differences on intellectual property, European Parliamentary Research Service, Page 25. Available at [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140760/LDM\\_BRI\(2014\)140760\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140760/LDM_BRI(2014)140760_REV1_EN.pdf). Accessed on 14.03.2015.

<sup>622</sup> Council of the European Union, (2014), Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America. Available at <http://www.salzburg24.at/2014/10/TTIP.pdf>. Accessed on 10.03.2015.

<sup>623</sup> Highlights of the meeting are available at [http://www.youtube.com/watch?v=1mpu\\_wdEtMc](http://www.youtube.com/watch?v=1mpu_wdEtMc). Also see Ermert, M. (2013), IPR Lists for Trans-Atlantic Trade Deal Still Growing; Risk Of Locking In Old IPR Regimes? Available at <http://www.ip-watch.org/2013/05/15/ipr-lists-for-ttip-still-growing-risk-of-locking-in-old-ipr-regimes/>. Accessed on 03.03.2015. The main criticisms against ACTA were; lack of transparency, too vague, open to misinterpretation, risk to civil liberties and contrary to freedom of expression on the Internet.

<sup>624</sup> European Parliament News, (2012), European Parliament rejects ACTA. Available at <http://www.europarl.europa.eu/news/en/news-room/content/20120703ipr48247/html/European-Parliament-rejects-ACTA>. Accessed on 11.03.2015.

<sup>625</sup> Federation of German Industries, Department for External Economic Policy, (2014), Position Paper: The "I" in TTIP Why the Transatlantic Trade and Investment Partnership Needs an Investment Chapter. Available at [http://www.bdi.eu/BDI\\_english/download\\_content/BDI\\_The\\_I\\_in\\_TTIP\\_140930.pdf](http://www.bdi.eu/BDI_english/download_content/BDI_The_I_in_TTIP_140930.pdf). Accessed on 23.03.2015. See also Miller, S. (2014), Keeping the "I" in TTIP: Investor Experience in the EU, for Strategic and International Studies. Available at <http://csis.org/publication/keeping-i-ttip-investor-experience-eu>. Accessed on 20.03.2015.

<sup>626</sup> Bizzarri, K (2013), A Brave New Transatlantic Partnership, The proposed EU-US Transatlantic Trade and Investment Partnership (TTIP/TAFTA) and its socio-economic & environmental consequences. Seattle to Brussels Network. Available at [http://corporateeurope.org/sites/default/files/attachments/brave\\_new\\_transatlantic\\_partnership.pdf](http://corporateeurope.org/sites/default/files/attachments/brave_new_transatlantic_partnership.pdf). Accessed on 11.03.2015.

## **6.7 The benefits and pitfalls of the TTIP on intellectual property and international trade**

The TTIP promises a great deal. There is the very obvious positive correlation between the increase of trade and the increase in revenues<sup>627</sup>. Positive ramifications of the TTIP are to reduce regulations and tariffs to drive market access. The EU and the US want to make their regulations more compatible and where necessary, amend existing regulations. In terms of perceived benefits, cutting costs in trade tariffs or potentially eliminating them proposes to increase GDP in both the EU and the US. The previous EU Commissioner of Trade, Karel de Gucht, has given several speeches on the positive benefits of the TTIP<sup>628</sup>. Karel de Gucht has been succeeded by Cecilia Malmström who is the current EU Commissioner of Trade and has called for a modified version of the investment chapter in the TTIP<sup>629</sup>. During her hearing by the European Parliament's Committee on International Trade (INTA) on 29 September 2014, Malmström spoke of limiting the scope of ISDS, reducing the risk of abuse and increasing transparency<sup>630</sup>.

According to a study carried out by the Centre for Economic Policy Research, export volume is estimated to increase by 6% for the EU and up to 8% for the US. Additional profit is estimated from 68 up to 119 billion for the EU and up to 95 billion for the US<sup>631</sup>. A study by the Bertelsmann Foundation in collaboration with the Information und Forschung Institute, (IFO), uses statistic based evidence to show that an increase in the volume of trade between the EU and US would increase growth for EU countries and the US. Reducing non-tariff barriers has clearly greater effects on real per capita incomes in Europe than just eliminating tariffs. It predicts that the UK would principally benefit from the initiative with a growth of 9.7%. Other findings include the creation of 2,000,000 new jobs in the OECD countries and trade growth up to 90%<sup>632</sup>.

## **6.8 Criticisms of the TTIP**

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<sup>627</sup> Francois, J. (2013), Reducing Transatlantic Barriers to Trade and Investment, An Economic Assessment, Centre for Economic Policy Research, London. Available at [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf). Accessed on 19.05.2015.

<sup>628</sup> See for example several articles on Europa news at; <http://www.neurope.eu/article/de-gucht-ttip-strengthening-our-values>, <http://www.neurope.eu/article/de-gucht-fresh-momentum-transatlantic-economic-partnership> and <http://www.neurope.eu/article/trade-commissioner-defends-ttip>. Accessed on 04.03.2015.

<sup>629</sup> <http://www.paneuropeannetworks.com/government/malmstrom-and-meps-debate-ttip-talks/>. Accessed on 6.12.2014. See also <https://www.youtube.com/watch?v=OfBXhtdBnSg>. Malmström speaks of ISDS clauses being "frozen" pending further consultation and dissemination of research.

<sup>630</sup> See <http://www.vieuws.eu/foreign-affairs/5-toughest-questions-faced-by-cecilia-malmstrom-trade-hearings-of-juncker-commission/>. Accessed on 22.03.2015.

<sup>631</sup> Francois, J. (2013), Reducing Transatlantic Barriers to Trade and Investment An Economic Assessment, Final Project Report, March 2013, Prepared under implementing Framework Contract TRADE10/A2/A16. Available at [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf). Accessed on 06.03.2015.

<sup>632</sup> Felbermayr, G. (2013), Transatlantic Trade and Investment Partnership (TTIP) who benefits from a free trade deal? Part 1: Macroeconomic Effects, Global Economic Dynamics, Bertelsmann Stiftung, The Bertelsmann Foundation. Available at <http://www.bfna.org/sites/default/files/TTIP-GED%20study%2017June%202013.pdf>. Accessed on 05.03.2015. Also see European Commission, (2013), Transatlantic Trade and Investment Partnership, The Economic Analysis Explained, Centre for Economic Policy Research. Available at [http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151787.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf). Accessed on 07.03.2015.

The issue therefore is how multilateral rules and legislation cooperation will be established as it is far too naïve to assume that regulations and tariffs can be agreed to a level that is satisfactory to both sides. There are many critics of the TTIP, most recently critics have accused the European Commission of overstating the potential increases in revenue the agreement will bring<sup>633</sup> and overlooking the impact on domestic sovereignty<sup>634</sup>. Specific to this research is the safeguarding of intellectual property rights and the inclusion of higher standard of commitments protection. Patents, trademarks, copyrights and trade secrets power the advanced economies of the United State and Europe with each working to improve trade secrets protections<sup>635</sup>. Through the TTIP, there is an opportunity to define the standards necessary to facilitate innovation and strike a balance with individual state sovereignty<sup>636</sup>.

### **6.9 The intellectual property chapter in the TTIP**

It is the need to define the standards necessary to facilitate innovation and strike a balance with individual state sovereignty where the intellectual property chapter in the TTIP comes into play as well as ISDS. The contentious dispute settlement in the TTIP is akin to existing agreements such as the Comprehensive Economic and Trade Agreement (CETA) between the EU and the Canadian and North American Free Trade Agreement (NAFTA). In terms of the opposition to the TTIP, there has been a steady gain in the momentum against the TTIP in the form of a petition calling for EU-US trade talks to be halted. The petition was rejected by the European Commission in September 2014, on the basis that the citizens' initiative was invalid because it fell outside of the Commission's powers<sup>637</sup>. The petition has now surpassed the one million signatures mark by European citizens and in accordance with EU rules, a citizens' initiative requires a formal response from

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<sup>633</sup> See Position Paper, TTIP – Too many untrustworthy promises and real risks, position paper adopted at the European Green Party Green Electoral Convention, 22 February 2014, Brussels and Bromund, T. (2013), Transatlantic Trade and Investment Partnership (TTIP): Pitfalls and Promises. Available at <http://www.heritage.org/research/reports/2013/12/transatlantic-trade-and-investment-partnership-ttip-pitfalls-and-promises>. Accessed on 05.03.2015. See also Friends of the Earth Europe, (2013), The risks of including investor-to-state dispute settlement in transatlantic trade talks. Available at [foeeurope.org/sites/default/files/foee\\_factsheet\\_isds\\_oct13.pdf](http://foeeurope.org/sites/default/files/foee_factsheet_isds_oct13.pdf). Accessed on 14.03.2015.

<sup>634</sup> See Friends of the Earth Europe, (2013), The risks of including investor-to-state dispute settlement in transatlantic trade talks. Available at [foeeurope.org/sites/default/files/foee\\_factsheet\\_isds\\_oct13.pdf](http://foeeurope.org/sites/default/files/foee_factsheet_isds_oct13.pdf). Accessed on 14.03.2015.

<sup>635</sup> Yeh, B. (2014), Protection of Trade Secrets: Overview of Current Law and Legislation, Congressional Research Service Report. Available at <http://fas.org/sgp/crs/secretcy/R43714.pdf>. Accessed on 20.05.2015.

<sup>636</sup> Moore, C. (2014), Manufacturers to Froman and Malmstrom: Make 2015 a Year of Action and Results on TTIP Available at <http://www.shopfloor.org/2014/12/manufacturers-to-froman-and-malmstrom-make-2015-a-year-of-action-and-results-on-ttip/32725#sthash.YkWoBvp5.dpuf>. Accessed on 11.03.2015.

<sup>637</sup> See <http://www.europeanvoice.com/article/eu-rejects-citizens-petition-against-us-trade-deal/>. Accessed on 21.03.2015.

the European Commission once it has reached the one million mark<sup>638</sup>. It has now been delivered to the EU Commission to hold a public hearing in the European Parliament<sup>639</sup>.

At the core of the criticisms against the TTIP is the lack of transparency regarding the negotiations surrounding the contents of the TTIP<sup>640</sup>. The EU commission has not ruled out the intellectual property chapter in the TTIP or ISDS, therefore the issue at stake is not whether the chapter should be included but how it should be included. The EU and US can negotiate and agree a number of risk mitigation strategies to sift potential ISDS claims and to safeguard states from frivolous litigation, ensuring that the system works effectively.

In a report carried out for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, the key findings were that the risks of ISDS were overrated and that a controlled application was required<sup>641</sup>. Although the report deals with Danish legislation and the impact of the dispute settlement system on the Netherlands, it has crossover value for other EU countries and the US. The recommendations deal with; access to arbitration, filtering frivolous and obviously unmeritorious claims and laying down certain mandatory steps before resorting to ISDS. The recommendations include carefully drafting definitions such as; who can be defined as an investor, what constitutes fair and equitable treatment, the remit of national treatment, direct and indirect expropriation, umbrella clauses and public policy exceptions.

### **6.10 The TTIP has a sister - the Trans-Pacific Partnership Agreement (TPP)**

The Trans-Pacific Partnership Agreement (TPP), also known as the Asia-Pacific agreement, is a free trade agreement currently being negotiated by nine countries. The US entered into negotiations for a regional trans-pacific trade agreement in March 2008 with; Singapore, Australia, Brunei, Chile, Malaysia, New Zealand, Peru and Vietnam. The TPP covers a wide range of issues and similar to the TTIP, includes a

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<sup>638</sup> The Stop TTIP coalition, comprising of 320 NGOs from different EU member states opposed to the TTIP, delivered a petition containing over a million signatures to Jean-Claude Juncker, the president of the European Commission, on 09.03.2015.

<sup>639</sup> See <http://newseurope.me/2014/12/04/million-sign-petition-eu-us-trade-talks/>. Accessed on 21.03.2015.

<sup>640</sup> Sparding, P. (2014), Germany's pivotal role on the way to TTIP, Europe Policy Paper 5/2014, Part 7, An Unexpected Obstacle: Investor-State Dispute Settlement Mechanisms. Sparding, in relation to ISDS, states "This instrument of international commercial law grants foreign investors the right to bring claims against a host government before a third-party arbitral tribunal, if the investor believes the host to be in breach of the rules of the agreement". Available at [http://www.gmfus.org/wp-content/blogs.dir/1/files/mf/1415910407Sparding\\_TTIPGermanyPivotalRole\\_Nov14\\_complete.pdf](http://www.gmfus.org/wp-content/blogs.dir/1/files/mf/1415910407Sparding_TTIPGermanyPivotalRole_Nov14_complete.pdf). Accessed on 20.03.2015.

<sup>641</sup> Tietje, C. (2014), The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Study prepared for: Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands. Available at <http://www.scribd.com/doc/239155935/The-Impact-of-Investor-State-Dispute-Settlement-ISDS-in-TTIP#scribd>. Accessed on 14.03.15.

chapter on intellectual property. There is a lack of transparency with the TPP which echoes the TTIP. The intellectual property chapter covers; more extensive protection and enforcement rules, incidental copying and licensing, digital rights management and limits on exceptions. By offering more extensive protection and enforcement, the TPP opens the door to ISDS and corporate sovereignty in the agreement. It enhances corporate power by creating a broader range of investment rules and rights. For example, special guarantees for a "minimum standard of treatment" broadens the protection offered to investors who are relocating firms, consequently undermining the abilities of governments to restrict the movement of capital<sup>642</sup>.

The TPP investment chapter is investor heavy and is written with the foreign investor in mind. The investment chapter at Article 12 has some very ambitious provisions such as; compensation for loss of expected future profits as a form of indirect or regulatory takings, the right to acquire land, natural resources and factories without governmental review<sup>643</sup>. It limits public welfare exceptions to rare circumstances and also challenges judicial processes by stating intangible property rights and indirect expropriation are to be determined on a case-by-case, fact-based inquiry.

Other provisions of the TPP include protecting incidental copies, which would increase the number of licensing agreements granted by the copyright owners to allow computers to make small copies needed in the process of moving data around, known as buffer copies. It would impact the small consumer in areas such as music streaming<sup>644</sup>. The TPP also aims to criminalise small-scale copyright infringement, music downloads would be criminalised allowing computers to be seized and evidence used in criminal proceedings. The TPP does not should include limitations and exceptions to copyright such as fair use or educational purposes. The draft currently has a placeholder where provisions can be added later. The TPP suffers from a disturbingly lack of transparency, there is an increased pressure on foreign governments to adopt laws that favour foreign investors without the necessary exceptions to protect public welfare. Therefore, as more international trade agreements finalise, there will be ramifications for developing countries and the GCC states. By re-evaluating the existing intellectual property regimes in the GCC, through an integrated

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<sup>642</sup> Communications Workers of America, (2014), The Trans-Pacific Partnership Undermining U.S. Sovereignty & Expanding Corporate Power. Available at [http://files.cwa-union.org/national/issues/PolicyIssues/Trade/TPP\\_Fact\\_Sheets\\_11\\_19\\_and\\_on/December-2014-fact-sheets/20141205tpp-us-sovereignty.pdf](http://files.cwa-union.org/national/issues/PolicyIssues/Trade/TPP_Fact_Sheets_11_19_and_on/December-2014-fact-sheets/20141205tpp-us-sovereignty.pdf). Accessed on 02.03.2015

<sup>643</sup> Strether, L. (2013), Trans-National Investor Sovereignty, Global Economic Intersection. Available at <http://econintersect.com/b2evolution/blog2.php/2013/11/14/the-tpp-if-passed-spells-the-end-of-popular-sovereignty-for-the-united-states>. Accessed on 18.03.2015.

<sup>644</sup> Rangath, R. (2012), What's actually in the TTP?, Public Knowledge. Available at <https://www.publicknowledge.org/news-blog/blogs/whats-actually-tpp>. Accessed on 15.03.2015.

intellectual property model, while taking into account the impact of international trade agreements on the GCC states, there is an opportunity to reinvent the intellectual property wheel<sup>645</sup>.

### **6.11 Intellectual Property and the GCC**

Intellectual property case law in the GCC is few and far between. This means doctrines such as the doctrine of legitimate expectations and minimum standard of treatment have not been put to the test. The GCC states are historically Islamic states and they have all incorporated sharia law into their constitutions<sup>646</sup>. There is no mention of intellectual property law in primary sharia law sources, there are however, relevant principles of sharia law that can be found in secondary sources<sup>647</sup>. The sharia principles on ownership of property, obligations on property right holders, remedies for property right holders and appropriation of property have been used to justify the same rights to exist in intellectual property<sup>648</sup>. The Islamic law principles governing contract law have been applied to intellectual property protection<sup>649</sup>. The exigencies of the international trade market are no longer from trading partners alone, corporations, investors and intermediaries are wanting a piece of the decision making pie. Other areas of sharia law that have been considered namely; public interest, moral rights, financial rights, business, trade and economic gain, all play a role in creating a legal space for intellectual property to exist and develop in the GCC states<sup>650</sup>. Further research in the field of national heritage in the GCC states and its potential impact on intellectual property protection will be an offshoot from the current research.

In terms of sharia references to international transactions and conducting business, the Quran has clear statements regarding honouring agreements and the need for certainty whilst forbidding riba and gharar. The clearest reference can be found in Surah Al Baqarah at Verse 275<sup>651</sup>. Therefore, international trade agreements with intellectual property chapters are sharia compliant provided there is no breach of the Islamic doctrines of riba and gharar. Further, sources of sharia have established intellectual property as more than

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<sup>645</sup> Chapter 7 will consider in detail Islamic finance and chapter 8 will focus on the integrated intellectual property model.

<sup>646</sup> See Chapter Two.

<sup>647</sup> See Khan, A. (2001), *Islam as Intellectual Property My Lord! Increase Me In Knowledge*, Cumberland Law Review, Volume 31, Part 3, pages 631-684. See Chapter Two.

<sup>648</sup> In relation to property law a quranic reference is made in the Surah An-Najm, Verse 39, linking Locke's labour theory to Islamic proprietary rights; "And that man hath only that for which he maketh effort", Quran at 53:39 Sahih International Translation available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015. Islam allows a person to own property, possess and enjoy wealth which has been acquired through lawful means and effort.

<sup>649</sup> Quranic references attributed to contract law include Surah Al-Mā'idah, Verse 1, "O you who have believed, fulfill [all] contracts". See the Quran at 5:1 Sahih International Translation available at [www.quran.com](http://www.quran.com). Accessed on 01.03.2015.

<sup>650</sup> El-Bialy, N. (2011), *Enforcing IPR Through Informal Institutions: The Possible Role of Religion in Fighting Software Piracy*, Joint Discussion Paper Series in Economics by the Universities of Aachen, Gießen, Göttingen, Kasel, Marburg and Siegen.

<sup>651</sup> For the full analysis of sharia law and intellectual property see chapter two.

a standalone right. Rather, there is a public interest responsibility to the community and for financial interests to be proportionate<sup>652</sup>.

Public acceptance of intellectual property law is the red herring the developed world has not managed to address. The speed with which the GCC adopted many new laws in the field of intellectual property could have created an unintentional side effect, the intellectual property laws can be seen as foreign and as a result seen as emasculating the GCC<sup>653</sup>. With the development of ISDS and corporate sovereignty, the GCC faces further challenges in upholding intellectual property rights without losing its identity. An integrated intellectual property approach that takes into account the public need for acceptance of the intellectual property protection rules and regulations, enforced at both a state and regional level in the GCC, will address the challenges the GCC states face in intellectual property rights without losing their individual and combined identity.

### **6.12 Impact of ISDS on intellectual property rights in the GCC**

The ISDS has at its core a rigid dichotomy between the critical view that investor state dispute clauses gives corporations and foreign investors corporate sovereignty against the business standpoint that the clauses are vital to protecting foreign investment, in countries where judicial systems are unpredictable<sup>654</sup>. The main fear of ISDS clauses is that it could lead to governments being held to ransom by wealthy corporations, as ISDS would allow firms to sue authorities for compensation over policies that adversely affect them<sup>655</sup>.

This has serious ramifications for domestic sovereignty and rule of law. In an international context, both for the contracting states and non-contracting states, the impact of ISDS on the ability of states to make laws challenges fundamental principles of constitutional law and democracy<sup>656</sup>. According to Friends of the Earth investigative research findings, 127 known ISDS cases have been brought against 20 EU member states

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<sup>652</sup> Azmi, I. (1997), Authorship and Islam in Malaysia: Issues in Perspective, International Review of Intellectual Property and Competition Law.

<sup>653</sup> Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law, pages 55 to 94.

<sup>654</sup> Khoury, M. (2013), TPPA countries exposed to risk of investor laws Manufacturers to Froman and Malmstrom: Make 2015 a Year of Action and Results on TTIP, Third World Economics. Available at <http://www.twinside.org.sg/title2/twe/2013/pdf/twe552.pdf>. See also United Nations Conference on Trade and Development, (2014), Investor-State Dispute Settlement UNCTAD Series on Issues in International Investment Agreements II. Available at [http://unctad.org/en/PublicationsLibrary/diaeia2013d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf). Accessed on 26.03.2015.

<sup>655</sup> Brinded, L. (04.12.2014), TTIP: One million protestors sign petition against controversial EU and US trade deal, International Business Times. Available at <http://www.ibtimes.co.uk/ttip-1m-protestors-sign-petition-against-controversial-eu-us-trade-deal-1477958>. Accessed on 26.03.2015.

<sup>656</sup> McKeagney, S. (06.06.2014), 30 Reasons why Greens oppose TTIP. Available at <http://www.ttip2014.eu/blog-detail/blog/id-30-reasons-why-greens-oppose-ttip.html>. Accessed on 20.12.2014.



since 1994. Details of the compensation sought by foreign investors were not publicly available for all reported cases, of the 127 cases, 62 were public and the compensation sought in the 62 public cases is in excess of €30 billion<sup>657</sup>. The root of all the fears against the TTIP is that the number of ISDS cases will rise further if the TTIP deal is concluded and consequently the threat to corporate sovereignty will increase. For example in the UK, one of the biggest criticisms has been the perceived impact of the TTIP on the NHS, specifically that there is a risk it will be sold off to foreign companies and subject to demands from pharmaceutical companies<sup>658</sup>.

The ripple effects of ISDS as a dispute settlement mechanism can be seen in the GCC as the first application for an ISDS course of action, by a GCC state, has been made by a Qatari based broadcaster known as Al Jazeera. They are relying on the investor to state dispute mechanism included in a 1999 investment treaty between Egypt and Qatar<sup>659</sup>. The arbitration case initiated by Al Jazeera Media Network against Egypt is based on the breach of their bilateral trade agreement by Egypt concerning the harassment and imprisonment of its journalists. This raises a key question on infrastructure limitations in the GCC. The success or failure for that matter of an ISDS process is contingent upon the expertise and experience of the judicial system that is making the decision. If there is a lack of expertise and or precedent, where is the solid foundation of knowledge from which to answer principle questions?

### **6.13 Lessons to be learnt from Eli Lilly v Canada**

In relation to intellectual property, lessons can be learnt from existing intellectual property based ISDS cases. Take for example Eli Lilly v Canada. In November 2012, Eli Lilly & Co started proceedings against the Canadian government's law on granting drug patents, claiming that the invalidation of a patent undermined

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<sup>657</sup> Geraghty, E. and Cingotti, N. (2014), The hidden cost of EU trade deals: Investor-state dispute settlement cases taken against EU member states, Friends of The Earth Europe. Available at [http://www.foeeurope.org/sites/default/files/publications/hidden\\_cost\\_of\\_eu\\_trade\\_deals.pdf](http://www.foeeurope.org/sites/default/files/publications/hidden_cost_of_eu_trade_deals.pdf). Accessed on 18.12.2014.

<sup>658</sup> The impact of the TTIP on other sectors such as the NHS in the UK is beyond the scope of this paper, however will be considered in future research. Newspaper coverage has shown growing concerns that the TTIP will lead to the privatisation of the NHS. See Armitage, J. (17.07.2014), David Cameron urged to exempt the NHS from TTIP deal after unions claim it is at risk from being sold to American corporations, The Independent. Available at <http://www.independent.co.uk/life-style/health-and-families/health-news/david-cameron-urged-to-exempt-the-nhs-from-ttip-deal-after-unions-claim-it-is-at-risk-from-being-sold-to-american-corporations-9613124.html>. Also, McCluskey, L. (17.07.2014), The NHS is being taken over by Wall Street. And Cameron won't stop it, The Guardian. Available at <http://www.theguardian.com/commentisfree/2014/jul/17/nhs-taken-over-wall-street-cameron-health-service-privatisation>. Accessed on 21.12.2014. The government's response on the People's NHS campaign, on 11<sup>th</sup> November 2014, was that the inclusion of health in the TTIP does not threaten the public nature of the NHS, but provides an opportunity for European businesses, including improving access to the US market for the UK's world-class pharmaceutical and medical devices sectors. Available at <https://www.gov.uk/government/news/response-to-the-peoples-nhs-campaign-about-ttip>. Accessed on 19.12.2014.

<sup>659</sup> Egypt - Qatar Bilateral Investment Treaty, (1999). Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1103>. Also see Donnan, S. (2014), Al Jazeera sues Egypt for \$150m after crackdown on journalists, Financial Times. Available at <http://www.ft.com/cms/s/0/7ff2210c-cec0-11e3-ac8d-00144feabdc0.html#axzz3CNLGmNPk>. Accessed on 26.03.2015.

the company's future profits and are asking for \$500 million in compensation<sup>660</sup>. While the resolution of this dispute is yet to be known, it highlights three key concerns for GCC states; lack of expertise and knowledge of how to deal with ISDS's, identifying Islamic sources through which ISDS can be sharia compliant and what impact it has on the states abilities to determine their own patent standards. Foreign corporations having the same level of power as governments through ISDS clauses in trade agreements is currently a hypothetical situation in the GCC however it is only a matter of time before the hypothetical risks of investor-state claims becomes a reality. How equipped are the GCC judiciaries to deal with an ISDS claim?

#### **6.14 Is ISDS sharia compliant?**

ISDS has an added layer of issues with the GCC states as a question arises as to whether ISDS is compatible with sharia law. The GCC states have accepted ISDS as an acceptable dispute settlement mechanism in existing agreements<sup>661</sup>. Investment carries with it risk, foreign investment would in turn carry higher risks as investors would be acting in markets with different political and legal structures. If the risk is too speculative then it potentially falls under the Islamic principle of gharar<sup>662</sup>. The outcome of the Al Jazeera and Egypt ISDS case will set new ground for international disputes in the region as both states have sharia as part of their constitution therefore how the arbitration process deals with principles of gharar and riba will be relevant to other countries in the Middle East region<sup>663</sup>.

#### **6.15 The trojan horse - corporate sovereignty impact on the GCC**

The GCC is a collection of rentier states. They have similar autocratic monarchies, political and cultural identities, which are historically rooted in Islamic beliefs<sup>664</sup>. Unlike other international bodies, the GCC is unique in that all its member states are Islamic states<sup>665</sup>. Each individual state has varying degrees of sharia law incorporated in their constitutions as discussed in Chapter One. The TTIP will have spill over effects for

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<sup>660</sup> Eli-Lilly highlights the debate around ISDS and affordable medicines especially the impact the TPP will have however although this is outside the scope of the current research, it will be a further research area.

<sup>661</sup> MENA-OECD Investment Programme, Assessing Investment Policies Of Member Countries Of The Gulf Cooperation Council Stocktaking analysis, page 57. Available at <http://www.oecd.org/mena/investment/Preliminary%20assessment%20GCC%20inv%20policies.pdf>. Accessed on 14.03.2015.

<sup>662</sup> Riba is the doctrine on the prohibition of interest payments, undue profits or excessive gain from a transaction and gharar deals with risk, speculative transactions, ambiguity or excessive uncertainty in contracts. See Wilson, R. (2009), The development of Islamic finance in the GCC Working Paper, Kuwait Programme on Development, Governance and Globalisation in the Gulf States at page 27.

<sup>663</sup> In relation to the impact of ISDS on the Al Jazeera case see French, A. (2014), Investor-State Dispute Settlement — A Cut Above the Courts? Supreme and Federal Courts Judges' Conference. Available at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>. Accessed on 20.05.2015. For further analysis of the Islamic principles of riba and gharar see chapter 3 at 3.9 and 3.10.

<sup>664</sup> Khalaf, A. and Luciani, G. (2006), Constitutional Reform and Political Participation, Gulf Research Center.

<sup>665</sup> Beblawi, H. and Luciani, G. (1987), The Rentier State, Croom Helm, page 1.

the GCC as it has yet to finalise the EU-GCC FTA and US-GCC framework agreement<sup>666</sup>. The power dynamics between the US and EU will be a deciding factor on the intellectual property chapter in the TTIP in terms of what the provisions for intellectual property will look like and what powers will be available to investors to bring ISDS claims against foreign countries.

According to Hill and Knowlton Strategies, the TTIP will become globally binding with the GCC states and it will have a significant impact on a number of sectors including financial services and the energy sector. Intellectual property rights would require a new regulatory environment of corporate governance, accountability and transparency<sup>667</sup>. The report highlighted that sovereign wealth funds which acquire EU and US assets will be impacted by the TTIP. These include Abu Dhabi Investment Authority, Saudi Arabia's SAMA Foreign Holdings and the Kuwait Investment Authority. This leaves the GCC in quite the conundrum. Neither of its FTA's with the US or EU have reached a conclusion, what negotiating power the GCC will have once the TTIP is finalised in relation to its own FTA's is something that requires the GCC states to be proactive and mitigate ahead of the deal.

The main issues with ISDS and subsequently the threat to corporate sovereignty are three fold. The first issue is the lack of clarity on arbitrator powers which in essence is because of the vague formulation of major treaty provisions. The lack of clarity on arbitrator powers has given arbitrators a Pandora's box to allow a wide range of interpretations. Following on from this is the arbitration process, many are in secret therefore the risk of inconsistencies in similar cases is heightened. There is an absence of effective review for appeal processes; there is an annulment committee procedure available for arbitrations conducted by the International Centre for the Settlement of Investment Disputes<sup>668</sup>. However this is limited to challenging the validity of an award and whether the challenge can lead to the annulment of the award<sup>669</sup>. Thirdly, as a result of how ISDS is incorporated into trade agreements and is dealt with by the arbitration process, there are

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<sup>666</sup> Pratap, J. (2013), Proposed US-EU trade deal may impact business in GCC: report. Available at <http://www.bilaterals.org/?proposed-us-eu-trade-deal-may#sthash.aXZVR17g.dpuf>. Accessed on 21.03.2015.

<sup>667</sup> John, P. (26.08.2013), Proposed US-EU trade deal may impact business in GCC: report. Available at <http://www.bilaterals.org/?proposed-us-eu-trade-deal-may#sthash.EYAUWxFW.dpuf>. Accessed on 21.03.2015.

<sup>668</sup> International Centre for the Settlement of Investment Disputes, (2012), Background Paper on Annulment For the Administrative Council of ICSID, World Bank. Available at [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment\\_English.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf). Accessed on 21.03.2015.

<sup>669</sup> See Documents of the Fifth Session Including the Report of the Commission to the General Assembly, [1953] 2 *Yearbook of the International Law Commission* 211, Article 30 of the Draft Convention on Arbitral Procedure and Broches, A. (1995), Observations on the Finality of ICSID Awards in Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law.

serious implications for national sovereignty within each GCC state, their democratic governance and the rule of law within national legal systems<sup>670</sup>.

It is not all doom and gloom, according to a study developed by Dubai Chamber of Commerce and Industry, Dubai could benefit from the potential change the TTIP will bring to the global trade structure by redirecting excess trade flows towards new, fast growing markets, namely Asia, Sub-Saharan Africa and North African markets, which may see drops in trade with the EU as a result of TTIP<sup>671</sup>. As such, there is scope for GCC states to diversify its trading partners further.

### **6.16 The GCC states and the need for better intellectual property protection**

Through improvements in intellectual property rights and international trade agreements, the region is opening itself up to further foreign investment from the EU and US that can have a positive impact on the economy. The TTIP will change the dynamics between financial market leaders, namely the US and EU, and emerging markets. The Gulf states are in an enviable position; the development of international trade and services via multilateral and bilateral trade agreements allows them to act as a hub between eastern and western markets<sup>672</sup>.

By completing trade agreements with the EU and US, the GCC states can increase trade with the Western markets while simultaneously increase trade with developing countries that can't meet the demands of trading under the TTIP. It is imperative that the GCC states develop the requisite knowledge and expertise in ISDS and intellectual property when dealing with developing countries where local courts and substantive rights may not meet widely accepted global standards. This means developing clear parameters for ISDS and corporate sovereignty, in relation to *riba* and *gharar*, as well as intellectual property.

### **6.17 Conclusion**

The key objectives were to analyse the benefits and pitfalls of the TTIP on intellectual property and international trade, the impact ISDS could have on intellectual property rights in the GCC given that all GCC states follow sharia law at a constitutional level and what corporate sovereignty means for the GCC

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<sup>670</sup> French, A. (2014), ISDS: A cut above the courts? Speech delivered by the Chief Justice of Australia on 9 July 2014 in Darwin at judges' conference. Available at <http://www.cla.asn.au/News/isds-a-cut-above-the-courts/>. Accessed on 20.03.2015.

<sup>671</sup> Bitar, Z. (26.12.2013), United States-European Union alliance could benefit Dubai trade: Dubai Chamber. Available at <http://gulfnews.com/business/economy/united-states-european-union-alliance-could-benefit-dubai-trade-dubai-chamber-1.1271122>. Accessed on 21.12.2014.

<sup>672</sup> Economist Intelligence Unit 2011 states 30 years ago the Organisation for Economic Co-operation and Development, (OECD), accounted for 85% of GCC trade, however with the influx of emerging markets, by 2009, 45% of GCC trade stems from emerging markets. Also see Habibi, N. (2011), Growth in economic relations of China and India with the GCC countries, Asian-Pacific Economic Literature, Volume 25, pages 52 to 67.

monarchies. There are both benefits and pitfalls of the TTIP as seen in this chapter. By strengthening the ties between the EU and the US, there are ramifications for third parties like the GCC. What remains to be seen is if following on from the TTIP, the EU and US make joint international agreements as off shoots of the TTIP. The issue remains on whether the GCC states have the capacity to abide by stricter intellectual property laws and ISDS clauses. This chapter has analysed the substantive provisions of the TTIP, ISDS and corporate sovereignty and the analysis will inform the main set of recommendations to be made to develop an integrated approach to intellectual property rights which takes into account; the structure of the GCC states, international agreements and pressures, the international institutions, Islamic finance and both societal and religious views.

An added dimension to the GCC states is they all share a common religious belief in Islam at a constitutional level. The research has shown that on the relationship between sharia law and intellectual property, the sharia sources of law and legislative decisions have favoured sharia approval for the existence and protection of intellectual property rights. However at the heart of intellectual property protection, is acceptance by the public at large of intellectual property as predicated with Islamic law and as has been seen in earlier chapters, this is a contentious issue for the GCC states<sup>673</sup>.

At present, laws exist without the necessary understanding or awareness for their existence. This leaves the relationship between sharia and intellectual property law at a developmental stage. The foundational stage has been met through the GCC states acceptance of the use of secondary sharia sources to permit intellectual property rights. However the development stage requires an integrated intellectual property approach to enforcement, which is a hybrid of clear and unambiguous sharia principles, international intellectual property laws and ISDS which currently do not exist in the GCC. As the financial settlements in ISDS cases can amount to millions of pounds, how the more stricter GCC states, such as Saudi Arabia, can justify ISDS clauses as sharia compliant with principles of *riba* and *gharar* will be addressed in the integrated framework for intellectual property rights in the GCC states. Therefore, the findings of this chapter will directly impact on how the GCC states can adhere to ISDS without violating principles of *riba* and *gharar*. Thus, the role of ISDS will be a component of the integrated intellectual property rights framework and will be taken into account along with the other research findings that include; the structure of the GCC states, international agreements and pressures, the international institutions and both societal and religious views.

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<sup>673</sup> See Khan, A. (2001), *Islam as Intellectual Property My Lord! Increase Me In Knowledge*, Cumberland Law Review, Volume 31, Part 3, pages 631-684.

The most concerning research finding from this chapter for the GCC states is the corporate sovereignty doctrine and how they plan to marry corporate sovereignty to their existing law making powers. Egypt is the first Middle Eastern country to have proceedings brought against it and developments in the case are slow. As more and more ISDS cases occur, the theoretical implication of corporate sovereignty may become a reality in the near future for the GCC states and steps need to be taken to clearly define ISDS and the implications of corporate sovereignty within an Islamic context. ISDS could undermine sovereignty by exposing the policy, legislative and decisional outputs to challenges by arbitrators for whom the main focus is investment obligations and not domestic governance. The challenges of ISDS, corporate sovereignty and international intellectual property pressures have the potential to be a modern day Pandora's box, sat at the centre of a mare's nest, for the GCC states.

The next chapter will complete the research findings and will meet the remaining research objectives from where the main research question of what recommendations can be made to develop an integrated approach to intellectual property rights in the GCC taking into account; the structure of the GCC states, international agreements and pressures, the relevant international institutions, Islamic finance and both societal and religious views. Chapter 7 deals with Islamic finance in detail and researches the main sharia compliant areas of; musharaka, mudaraba, murabaha, takaful, istisna, ijara, salam and sukuk to develop an understanding of sharia board governance, with particular reference to each GCC state. Further the research findings in the next chapter will identify how intellectual property development in the GCC can be enhanced through Islamic finance and propose a more sharia compliant model for intellectual property based on Islamic finance structures. The structures and frameworks in place in the Islamic finance sector will act as a vehicle to developing a full integrated intellectual property framework.

## **Chapter Seven: Islamic finance as a vehicle to promote improved intellectual property rights in the GCC**

### **7.1 Introduction**

The purpose of this chapter is to assess how Islamic finance can act as a vehicle to enhance the current intellectual property rights regime in the GCC. Islamic finance has developed within the constraints of sharia law and has been a growth sector for the GCC<sup>674</sup>. This chapter will identify the main principles of Islamic finance that contribute to the success of Islamic finance which can enhance intellectual property protection in the GCC. The main sharia compliant areas to be considered are; musharaka, mudaraba, murabaha, takaful, istisna, ijara, salam and sukuk.

The chapter will outline the founding principles of Islamic finance, the governance of sharia boards, development of Islamic finance in the individual GCC states, different frameworks of sharia-compliant investment products and the impact of intellectual property rights on the varying Islamic finance investment tools. Further, the chapter will discuss an integrated approach to intellectual property rights

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<sup>674</sup> Wilson, R. (2009), Kuwait Programme on Development, Governance and Globalisation in the Gulf States: The development of Islamic finance in the GCC, The Centre for the Study of Global Governance. Available at <http://eprints.lse.ac.uk/55281/1/Wilson-2009.pdf>. Accessed on 12.01.2015. KPMG, (2007), Growth and Diversification in Islamic Finance, Financial Series. Available at <http://us.kpmg.com/microsite/FSLibraryDotCom/docs/Growth%20and%20Diversification%20in%20Islamic%20Finance.pdf>. Accessed on 12.03.2015. Reeve, J. (2014), GCC Trade and Investment Flows, The Economist Intelligence Unit Limited. Available at <http://www.economistinsights.com/sites/default/files/GCC%20Trade%20and%20Investment%20flows.pdf>. Accessed on 12.03.2015.

which learns lessons from the Islamic finance sector in relation to infrastructure, regulation and sharia compliance. The lessons learnt from Islamic finance will inform the overall framework of recommendations for an Islamic based intellectual property model. The use of Islamic finance as a vehicle to promote better intellectual property rights in terms of defining a new intellectual property approach is novel. It is aimed at spearheading further research in this area and for the purpose of this thesis, it will form a part of the overall integrated approach proposals to intellectual property protection in the GCC.

## **7.2 The research objectives**

As an overview, the research objectives addressed in this chapter are:

- Clearly outline founding principles of Islamic finance and develop an understanding of sharia board governance, with particular reference to each GCC state.
- Identify how intellectual property development in the GCC can be enhanced through Islamic finance.
- Propose a more sharia complaint model for intellectual property based on Islamic finance structures.
- Make recommendations on how intellectual property rights can be better protected by learning from the mistakes in Islamic finance and avoiding the procedural flaws that exist within Islamic finance.

The research objectives will inform the main recommendations for an integrated approach to intellectual property rights in the GCC in four specific areas of development to; strengthen the intellectual property market structure, improve compliance in terms of systems and controls, address issues around the efficiency of supervisory boards and generate greater public confidence in the intellectual property sector.

## **7.3 Background to Islamic finance**

Islamic finance is very much enshrined in ethical guidelines that are deeply rooted in a religion that it must abide by<sup>675</sup>. In Islamic teachings, money is a measure of value as oppose to a commodity<sup>676</sup>.

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<sup>675</sup> Hayat, U. (2014), Islamic Finance: Ethics, Concepts, Practice (a summary), The Chartered Financial Analyst (CFA) Institute Research Foundation. Available at [http://www.cfainstitute.org/learning/foundation/research/Documents/islamic\\_finance\\_ethics\\_concepts\\_practice.pdf](http://www.cfainstitute.org/learning/foundation/research/Documents/islamic_finance_ethics_concepts_practice.pdf). Accessed on 15.03.2015.

<sup>676</sup> Ahmad, A. (2012), The Time Value of Money Concept in Islamic Finance, The American Journal of Islamic Social Sciences, pages 66 to 89. Available at <http://uaelaws.files.wordpress.com/2012/05/the-time-value-of-money-concept-in-islamic-finance.pdf>. Accessed on 15.03.2015.



Therefore, in line with Islamic teachings, the money should be put to practical use, invested to create wealth and not be a commodity of itself<sup>677</sup>. It is the earning of a passive return on capital, which is identified as the back bone to the definition on the prohibition of riba<sup>678</sup>. In its simplest terms, sharia expressly prohibits the making of money from money<sup>679</sup>. It requires the creation of real value for the participants of a transaction<sup>680</sup>. The same prohibition of interest applies to debt whereby the risk and responsibility in the debt is shared between all contractually obligated parties<sup>681</sup>.

Islamic finance is defined as sharia compliant financial transactions which can be used as an alternative to conventional western banking methods<sup>682</sup>. Islamic finance emerged in the early 1960s with the objective of providing alternative financial contracts in conformity with sharia principles as necessitated by primary and secondary sources of Islam<sup>683</sup>. Mit Ghamr Local Savings Bank in Egypt in 1963 is widely accepted as the first modern attempt at Islamic banking<sup>684</sup>. Following on from this, Dubai established the first Islamic Bank in 1975, known as the Dubai Islamic Bank<sup>685</sup>. Therefore, similar to the developments of intellectual property in the GCC, Islamic finance is also relatively new in the context of

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<sup>677</sup> Saeed, A. (2012), *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation*, Studies in Islamic Law and Society, Volume 2, Brill Academic Publishers.

<sup>678</sup> Elasrag, H. (2011), *Principals of the Islamic Finance: A Focus on Project Finance*, Munich Personal RePEc Archive. Available at [http://mpa.ub.uni-muenchen.de/30197/1/MPRA\\_paper\\_30197.pdf](http://mpa.ub.uni-muenchen.de/30197/1/MPRA_paper_30197.pdf). Accessed on 15.03.2015.

<sup>679</sup> Fisho-Oridedi, A. (2010), *The Prohibition Of Riba Under Islamic Law: What Are The Implications For International Contracts?* Centre for Energy, Petroleum and Mining Law and Policy.

<sup>680</sup> Elasrag, (2011), *Principals of the Islamic Finance: A Focus on Project Finance*, Munich Personal RePEc Archive. Available at [http://mpa.ub.uni-muenchen.de/30197/1/MPRA\\_paper\\_30197.pdf](http://mpa.ub.uni-muenchen.de/30197/1/MPRA_paper_30197.pdf). Accessed on 16.01.2015.

<sup>681</sup> Mirakhor, A. (2006), *Profit-and-loss sharing contracts in Islamic finance*, Handbook of Islamic banking. Available at <http://202.154.59.182/mfile/files/Economics/Handbook%20of%20Islamic%20Banking/Chapter%204%20Profit-and-loss%20sharing%20contracts%20in%20Islamic%20finance.pdf>. Accessed on 16.03.2015.

<sup>682</sup> Khalid, M. (2013), *Fundamental of Islamic Banking - Framework of Islamic Financial System and Historical Development of Islamic Banking and Finance in Malaysia*, Universiti Teknologi Mara. Beck, T. (2013), *Islamic vs. conventional banking: Business model, efficiency and stability*, Journal of Banking & Finance, Volume 37, Issue 2, February 2013, Pages 433–447. Available at [http://ac.els-cdn.com/S0378426612002920/1-s2.0-S0378426612002920-main.pdf?\\_tid=b6195f62-96c4-11e4-a4db-00000aacb361&acdnat=1420673414\\_a5be4510b722d8a1b52b95eed93067d7](http://ac.els-cdn.com/S0378426612002920/1-s2.0-S0378426612002920-main.pdf?_tid=b6195f62-96c4-11e4-a4db-00000aacb361&acdnat=1420673414_a5be4510b722d8a1b52b95eed93067d7). Accessed on 05.01.2015.

<sup>683</sup> Primary and secondary sources of Islam are discussed in chapter 3.

<sup>684</sup> Nisar, S. (2003), *The Practices of Islamic Banking and Finance: A Historical Perspective*. Available at [http://www.shariqnisar.com/images/My\\_writings/Islamic%20Finance%20History.pdf](http://www.shariqnisar.com/images/My_writings/Islamic%20Finance%20History.pdf). Accessed on 05.03.2015. Ariff, M. (1988), *Islamic Banking*, Asian-Pacific Economic Literature, Volume 2, Number 2, pages 46 to 62. Available at <http://www.nzibo.com/IB2/Islamic%20Banking%20-%20Mohammed%20Ariff.pdf>. Accessed on 05.01.2015. Asutay, M. (2013), *Reflecting on the Trajectory of Islamic Finance: From Mit Ghamr to the Globalisation of Islamic Finance*, Afro Eurasian Studies, Volume 2, Issues 1 & 2, Spring & Fall 2013, pages 5 to 14. Available at [http://www.afroeurasianstudies.net/dosyalar/site\\_resim/veri/0344147.pdf](http://www.afroeurasianstudies.net/dosyalar/site_resim/veri/0344147.pdf). Accessed on 04.03.2015.

<sup>685</sup> Wilson, R. (2009), *Kuwait Programme on Development, Governance and Globalisation in the Gulf States: The development of Islamic finance in the GCC*, The Centre for the Study of Global Governance. Available at <http://eprints.lse.ac.uk/55281/1/Wilson-2009.pdf>. Accessed on 05.01.2015. Presley, R. (2012), *Directory of Islamic Financial Institutions*, Routledge: Banking and Finance, Croom Helm Limited. Available at <https://books.google.co.uk/books?id=wEhLHpKpC9cC&pg=PA209&dq=dubai+islamic+finance+institutions&hl=en&sa=X&ei=ITy-VL-KPMfaaorRgrgM&ved=0CDoQ6AEwBA#v=onepage&q=dubai%20islamic%20finance%20institutions&f=false>. Accessed on 19.01.2015. Also see Dubai Bank at <http://dubanks.com/banks/dubai-islamic-bank>.

financial banking in the Gulf region<sup>686</sup>. The developments of Islamic finance in the GCC run parallel with the oil boom<sup>687</sup> and over the last three decades, the GCC states have heavily invested in developing sharia compliant banking<sup>688</sup>.

Islamic finance has developed through a series of fatwas that are passed by Islamic scholars and jurists. A fatwa is a result of human interpretation of the sharia. A fatwa can be passed based on the interpretation of texts and recordings from primary and secondary sharia sources. They are not viewed as the ordained word of Allah (SBTH) but rather a permissible method of analysing and or combining different sharia principles to come to a decision. Fatwas are issued by sharia boards to rule on whether a new Islamic finance product is sharia compliant or to amend an existing fatwa. Interestingly, there is no prescribed religious hierarchy in the Quran or Sunnah, for the field of Islamic scholars who interpret the different sources of sharia law. Therefore the decisions require enforcement by banks, legislation and financial institutions to make them binding.

As will be seen later below in the founding principles of Islamic finance, the GCC states have adopted far more sophisticated and rigorous infrastructures to developing an Islamic finance market than they have in regards to intellectual property. The central findings from the Islamic finance sector of how; the products are structured, the compliance mechanisms in place, the role of supervisory boards and public confidence, will be utilised to make recommendations for the intellectual property sector.

#### **7.4 Founding principles of Islamic finance**

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<sup>686</sup> PriceWaterHouseCoopers, (2009), Shariah-compliant funds: A whole new world of investment, PricewaterhouseCoopers Global Financial Services Islamic Finance programme. Available at [https://www.pwc.com/en\\_US/gx/financial-services/islamic-finance-programme/pdf/shariah-compliant-funds.pdf](https://www.pwc.com/en_US/gx/financial-services/islamic-finance-programme/pdf/shariah-compliant-funds.pdf). Accessed on 23.03.2015.

<sup>687</sup> World Finance, (2014), Oil boom in GCC region shifts economic landscape. Available at <http://www.worldfinance.com/banking/oil-boom-in-gcc-region-shifts-economic-landscape>. Accessed on 05.03.2015. Warde, I. (2000), Islamic Finance in the Global Economy, Edinburgh University Press, Redwood Books, Trowbridge, Wilts. Electronic version available at <http://www.iefpedia.com/english/wp-content/uploads/2011/03/2000-Ibrahim-Warde-Islamic-finance-in-the-global-economy-Edinburgh-University-Press1.pdf>. Accessed on 06.01.2015. Clement, M (2004), The Politics of Islamic Finance, Edinburgh University Press Limited, page 39. Grais, W. (2006), Corporate Governance and Shariah Compliance in Institutions Offering Islamic Financial Services, World Bank Policy Research Working Paper 4054. Available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4054>. Accessed on 07.03.2015.

<sup>688</sup> Khan, I. (2009), Islamic Banking, Global Islamic Finance. Available at <http://theislamicfinanceandbanking.wordpress.com/islamic-finance-iqbal-khan/>. Accessed on 05.03.2015. Also see Garbois, C. (2012), The Future of Islamic Banking, AT Kearney. Available at <http://www.atkearney.com/documents/10192/654853/Future+of+Islamic+Banking.pdf/27167edf-a96d-4465-b88a-83beb25ed4bd>. Accessed on 05.01.2015. Wilson, R. (2009), Kuwait Programme on Development, Governance and Globalisation in the Gulf States: The development of Islamic finance in the GCC, The Centre for the Study of Global Governance. Available at <http://eprints.lse.ac.uk/55281/1/Wilson-2009.pdf>. Accessed on 05.03.2015.

*"There is nothing prohibited except that which God prohibits ... to declare something permitted prohibited is like declaring something prohibited permitted<sup>689</sup>."*

Islamic finance, at its core, is an ethical and equitable mode of finance, the origins of which can be traced back to sharia principles found in the Quran and Sunnah<sup>690</sup>. The Quran, the highest source of Islamic law, unconditionally prohibits sinful (haram) activity<sup>691</sup> and riba<sup>692</sup> in financial transactions. However, although the Quran and Sunnah are unequivocally clear on what defines haram activity, there is no unanimity about the limitations or scope of the prohibition of riba<sup>693</sup>. This is largely due to the interpretation of the leading Quranic verse on riba found in Surah Baqarah at verse 275 and also at eight other verses<sup>694</sup>. Riba and gharar are at the heart of the connection between intellectual property and Islamic finance as both sectors prohibit transactions that involve riba and gharar.

Islamic finance is not a sector that is seamless in its governance nor is it exempt from conflict. The differences in interpretation of sharia raises issues on the harmonisation of Islamic finance products. Some divergence is unavoidable given that the cultural, political, economy and social beliefs in individual countries will differ from others<sup>695</sup>.

There are a number of sharia scholars who specialise in Islamic finance and derive the necessary Islamic jurisprudence known as fiqh<sup>696</sup>. Islamic jurisprudence is recognised in the Quran as a method of understanding the way of the Prophet Muhammed<sup>697</sup>. Based in Jeddah, Saudi Arabia, the Islamic

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<sup>689</sup> Majwood, S. (2007), *The Biography of Imam Iba Al Qayim*, Translated by Abdul Rafi-Adewala, Darussalam Publishers & Distributors. Also quoted in Thomas, A. (2004), *Interest in Islamic Economics: Understanding Riba*, Routledge Publishers, 2006, page 63.

<sup>690</sup> Usmani, T. (2004), *An Introduction to Islamic Finance*, Arham Shamsi. Available at <https://books.google.co.uk/books?id=0aDStX-qUAgC&printsec=frontcover#v=onepage&q&f=false>. Accessed on 12.03.2015.

<sup>691</sup> This includes direct or indirect investment with certain types of business areas that involve profit making from alcohol, pork products, betting and gambling. See Quran at 2:173, 2:219, 5:3, 5:90, 6:145 and 16:115. Available at [www.quran.com](http://www.quran.com). Accessed on 07.03.2015.

<sup>692</sup> See the Quran at 2:275. Available at [www.quran.com](http://www.quran.com). Accessed on 06.03.2015.

<sup>693</sup> Shafaat, A. (2005), *Islamic Perspectives*, Chapter One, Riba in the Quran. Available at <http://www.islamicperspectives.com/Riba1.htm>. Accessed on 06.03.2015. Thomas, A. (2004), *Interest in Islamic Economics: Understanding Riba*, Routledge Publishers. Ghias, S. (2009), *Contemporary Islamic Finance: Innovations, Applications and Best Practices*, Chapter 6, Edited by Ahmed, John Wiley & Sons. Available at <https://books.google.co.uk/books?id=jc6RXn8KzewC&pg=PT234&dq=islamic+finance+defined+by+leading+scholars&hl=en&sa=X&ei=ItuuVI6RO8vH7AaGvIGQAg&ved=0CDMQ6AEwAg#v=onepage&q=islamic%20finance%20defined%20by%20leading%20scholars&f=false>. Accessed on 06.03.2015. Warde, I. (2000), *Islamic Finance in the Global Economy*, Edinburgh University Press, Redwood Books, Trowbridge, Wilts. Electronic version available at <http://www.iefpedia.com/english/wp-content/uploads/2011/03/2000-Ibrahim-Warde-Islamic-finance-in-the-global-economy-Edinburh-University-Press1.pdf>. Accessed on 06.03.2015.

<sup>694</sup> See the Quran at 2:275-280, 3:130, 4:161 and 30:39. Available at [www.quran.com](http://www.quran.com). Accessed on 06.03.2015.

<sup>695</sup> Hussain, I. (2006), *Islamic Finance Industry: Positioned for Growth*, 2<sup>nd</sup> Pakistan Islamic Banking Conference held at Karachi on November 8, 2006.

<sup>696</sup> Fiqh is the consensus opinion of a group of scholars and exists in all aspects of sharia. For Islamic finance fiqh is concerned with consensus opinions pertinent to sharia compliant financial products.

<sup>697</sup> See the Quran at 2:129, 2:159, 2:231 and 62:2. Available at [www.quran.com](http://www.quran.com). Accessed on 07.03.2015.

Fiqh Academy comprises of leading scholars who make decisions on permissible Islamic finance products<sup>698</sup>. The International Fiqh Academy, Saudi Arabia, has played a pivotal role in the development of Islamic finance. The Dow Jones Islamic Index<sup>699</sup> and Islamic bonds, known as sukuks, are two key changes that have been synonymous to the expansion of Islamic financial markets. The Dow Jones Islamic Index sharia board has the five most eminent sharia scholars in modern day Islamic finance, Sheikh Nizam Yaquby, Dr. Mohammed Daud Bakar, Sheikh Dr. Mohamed A. Elgari, Shaykh Abdul Sattar Abu Ghuddah and Sheikh Yusuf Talal DeLorenzo. The scholars are all from different countries as a purposeful attempt to give the Dow Jones Islamic Index as wide a remit for investment as possible. Also, it needs to be noted that the scholars are from countries that are leaders in the Islamic finance market such as; Malaysia, Saudi Arabia and Bahrain<sup>700</sup>. The main Islamic finance products that are principal commodities in the sector are discussed below in order to then apply Islamic finance principles to developing an integrated approach to intellectual property rights in the GCC.

### **7.5 Islamic finance products**

There are a number of sharia compliant frameworks that are in existence across the Islamic finance market. In relation to its impact on intellectual property, there are a number of relevant sharia compliant practices that have overcome the inevitable dichotomy that arises when Islamic law principles are married to western concepts, something which the intellectual property sector in the GCC has not quite managed as discussed at chapter 5<sup>701</sup>.

In order to make recommendations on how Islamic finance can engender better compliance with intellectual property rights, the main Islamic finance products will be considered in terms of the rationale behind each product and the role of sharia boards in promulgating the sharia compliant frameworks<sup>702</sup>. Further, as the purpose behind analysing Islamic finance products is to identify the role Islamic finance can play in further developing intellectual property rights protection in the GCC, the areas of;

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<sup>698</sup> Schoon, N. (2010), *Islamic Banking and Finance*, chapter 14, page 144, Spiramus Press Limited. Available at <https://books.google.co.uk/books?id=SiNaZcPUu4IC&pg=PA144&dq=fiqh+of+islamic+finance&hl=en&sa=X&ei=3Ue0VOjpAY3B7Abz1YGQCg&ved=0CCAQ6AEwAA#v=onepage&q=fiqh%20of%20islamic%20finance&f=false>. Accessed on 12.03.2015.

<sup>699</sup> Dow Jones Islamic Market Indices. Available at <http://www.djindexes.com/islamicmarket/>. Accessed on 13.03.2015.

<sup>700</sup> Sharia Supervisory Board, The Dow Jones Islamic Index available at <http://www.djindexes.com/islamicmarket/>. Accessed on 20.03.2015.

<sup>701</sup> See chapter 5 at 5.5.

<sup>702</sup> There are a number of other sharia compliant frameworks such as Bai' al-Inah, known as a sale with a buy back agreement, however this is outside the scope of the research. The Various other types of Islamic finance products will provide the framework for further research and will include; safeguarding property for another known as wadia, a surety known as kafala and loan agreements known as qard hasssan.

musharaka, mudaraba, murabaha, sukuk and takaful will be analysed to propose potential application to intellectual property.

### **7.5.1 Musharaka – profit loss sharing of capital**

Musharaka is one of the most established sharia compliant products and is based on the basic tenets of Islamic finance that require the financing to operate on a profit loss sharing system as oppose to a lender borrower relationship<sup>703</sup>. There are different definitions of the profit loss sharing partnership, depending upon the contribution each partner is making<sup>704</sup>. The most common profit loss sharing relationship is known as musharaka where the proportion of profit to be distributed between the partners must be agreed upon when the contract is agreed. The defining feature of musharaka is that the ratio of profit for each partner must be determined in proportion to the actual profit accrued to the business, as oppose to the proportion of the capital invested by partners. Secondly, musharaka deals with the sharing of loss. Where there is a loss, musharaka stipulates a sharing of the loss in exact accordance with the capital invested by each partner. Therefore, where the profit is determined by the actual profit accrued to the business, the loss is calculated by the ratio of investment<sup>705</sup>.

Risk-sharing partnerships based on musharaka could be a natural fit for intellectual property investment with returns flowing in from hybrid musharaka and intellectual property based projects, licensing, royalties, subscriptions and sale of the intellectual property assets. There is a lack of understanding of intellectual property based financing among the Islamic financial fraternity, both within the GCC and beyond, to become involved in intellectual property innovation, to fill the financial gap between ideas and the ability to commercialise them into marketable products and services<sup>706</sup>. As musharaka is the profit and loss sharing of capital, the sharia compliant frameworks for musharaka can be extended to intellectual property based capital. The value of the Intellectual property asset can be the equivalent to intellectual capital invested and profit parameters can be based on agreed values.

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<sup>703</sup> Jobst, A. (2007), Monetary and Capital Markets Department - The Economics of Islamic Finance and Securitization, International Monetary Fund (IMF) Working Paper. Available at <https://www.imf.org/external/pubs/ft/wp/2007/wp07117.pdf>. Accessed on 27.03.2015.

<sup>704</sup> Ghias, S. (2009), Contemporary Islamic Finance: Innovations, Applications and Best Practices, Chapter 6, Edited by Ahmed, John Wiley & Sons. Available at <https://books.google.co.uk/books?id=hc6RXn8KzewC&pg=PT234&dq=islamic+finance+defined+by+leading+scholars&hl=en&sa=X&ei=ItuuVI6RO8vH7AaGvIGQAg&ved=OCDMQ6AEwAg#v=onepage&q=islamic%20finance%20defined%20by%20leading%20scholars&f=false>. Accessed on 27.03.2015.

<sup>705</sup> See Musharaka on Shariah Ruling, The institute of Islamic Banking and Insurance (IIBI). Available at [http://www.islamic-banking.com/Musharakah\\_sruling.aspx](http://www.islamic-banking.com/Musharakah_sruling.aspx). Accessed on 27.03.2015.

<sup>706</sup> Hamzah, Z. (2011), Shariah-compliant Intellectual Property based Financing, Talk by Zaid Hamzah at INCEIF. Available at <http://www.iefpedia.com/english/wp-content/uploads/2011/11/Shariah-compliant-IP-based-Financing-INCEIF-talk-9-Nov-2011.pdf>. Accessed on 27.03.2015.

### **7.5.2 Mudaraba – profit loss sharing of trade and capital**

Another form of a profit loss sharing relationship in Islamic finance that differentiates from musharaka due to its sharing of trade and capital is known as mudaraba, it varies from musharaka as not all partners have to provide capital. Mudarabah is a special kind of partnership where some partners can provide work in trade and others can provide the capital. The partner that works in trade is known as the “mudarib” and the partner that provides the capital is known as the “rabb ul-mal.”

There are three distinct differences between musharaka and mudaraba. Firstly, the investment is not the same in the two types of investment. In musharaka the investment comes from all the partners, whereas in mudaraba the investments come from the partner or partners that are investing the capital, the rabb-ul-mal. Therefore, the musharaka is a partnership where the profit and potential loss is capital, while mudaraba is a partnership in profit not in capital. Secondly the management of the mudaraba and musharaka vary. In musharakah, the partners can determine who participates in the management of the business and to what level as well as who can work for the business. In mudaraba, the mudarib participates in the management of the business and not the rabb-ul-mal<sup>707</sup>. Thirdly, the sharing of loss is not the same. As not both parties provide capital in mudaraba, the loss cannot be shared based on capital invested. Instead, the party that provides capital loses capital and the party that provides the trade loses their labour<sup>708</sup>.

From an intellectual property stance, mudaraba contracts aim to make profit by sharing trade and capital, therefore the capital need not only be in a tangible form but can also be intangible property based capital. As a mudaraba agreement is a contract in which certain property or stock is offered by the owner or to the other party to form a joint partnership<sup>709</sup>, there is the potential to develop intellectual property based mudaraba agreements.

### **7.5.3 Murabaha – contract of sale**

Murabaha is a contract of sale, also known as cost plus financing and is primarily concerned with Islamic financing<sup>710</sup>. There are specific features of murabaha where there is a set increment on the original

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<sup>707</sup> Amin, S. (1986), *Islamic Banking and Finance – The Experience of Iran*, Vahid Publications, page 33.

<sup>708</sup> Heck, G. (2006), *Charlemagne, Muhammad, and the Arab Roots of Capitalism*, Chapter 3, *Islamic “Free Market” Doctrine Paradigm Applied*, page 104, Walter De Gruyter GmbH and Co.

<sup>709</sup> Rahman, Z. (2007), *Accounting Treatment For Mudarabah Regarding Unrestricted Investment Deposits in Malaysian Islamic Banks*, Islamic Business Research Center. Available at <http://www.kantakji.com/media/3067/v114.pdf>. Accessed on 27.03.2015.

<sup>710</sup> See Murabaha on Shariah Ruling, The Institute of Islamic Banking and Insurance (IIBI). Available at [http://www.islamic-banking.com/murabaha\\_sruling.aspx](http://www.islamic-banking.com/murabaha_sruling.aspx). Accessed on 07.01.2015.

price, which is agreed upon by the parties from the onset. By agreeing the set increment on the original price in advance, the expected rate of return is predetermined<sup>711</sup>. The main purpose of this is to avoid gharar<sup>712</sup>. By making both the original price and profit to be made known to the buyer, the risks of usury in the dealings are limited. Along with the profit being known, all the expenses to be acquired by the seller in honouring the agreement, such as freight costs or custom duty, are included in the cost price. The mark up is then applied to the aggregate cost<sup>713</sup>.

Murabaha has a great deal of crossover potential to intellectual property as one of the founding tenets of intellectual property protection in sharia law is found in Islamic principles of contract law as discussed in chapter 3<sup>714</sup>. Intellectual property assets such as trademarks, patents and copyrights, can act as underlying assets of a murabaha contract. This is a novel approach to trademark protection in Islamic countries as it is applying risk-averse strategies that are found in Islamic finance to intellectual property rights protection and is an area of further research. For example, a murabaha mode of financing may be sought from an Islamic bank to purchase a trademark. The Islamic bank may purchase the trademark and sell it on the basis of a murabaha agreement with a mark-up price to be paid back over a an agreed time period. The Central Bank of Malaysia's sharia advisory board has considered intellectual property as the subject matter of a murabaha contract. The illustration it provides is; *"a customer seeks financing from an IFI to purchase a brand name of a distributor known as Fitforall valued at RM500,000 that will enable the customer to be part of the retail chain to sell the goods under the brand name. The brand provides product quality assurance to existing and potential brand-loyal customers, as well as an established international distribution network. The IFI may purchase the brand name and sell it to the customer at a mark-up price of RM750,000 to be paid over a period of 5 years"*<sup>715</sup>.

#### **7.5.4 Sukuk- Islamic bond**

A sukuk is an Islamic bond that defines the proportionate beneficial ownership of the asset to the investor, for a specific time period<sup>716</sup>. A sukuk is set up in such a way that despite the sukuk investor

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<sup>711</sup> Iqbal, Z. (2011), An Introduction to Islamic Finance: Theory and Practice, John Wiley & Sons.

<sup>712</sup> See chapter 3 at 3.9.

<sup>713</sup> Karim, R. (2013), Islamic Finance: The New Regulatory Challenge, Wiley Finance Series. Available at <https://books.google.co.uk/books?id=nWeEtWDqeEAC&pg=RA1PT201&dq=no+gharar+in+murabahaha&hl=en&sa=X&ei=ZpyyVKnZG9H7apugugH&ved=0CCIQ6AEwAA#v=onepage&q=no%20gharar%20in%20murabahaha&f=false>. Accessed on 08.01.2015.

<sup>714</sup> See chapter 3 at 3.9.

<sup>715</sup> Bank Negara Malaysia, (2010), Principles and Practices of Shariah in Islamic Finance, page 21. Available at [http://www.bnm.gov.my/guidelines/05\\_shariah/01\\_murabahah\\_02.pdf](http://www.bnm.gov.my/guidelines/05_shariah/01_murabahah_02.pdf). Accessed on 20.05.2015.

<sup>716</sup> Balala, M. (2010), Islamic Finance and Law: Theory and Practice in a Globalized World, chapter 3, page 29, IB Tauris Company Limited. Available at <https://books.google.co.uk/books?id=nloBAwAAQBAJ&pg=PA29&dq=A+sukuk+is+an+Islamic+bond+that+defines+the+pro>

having a common share in the ownership of the assets based investment; it does not represent a debt owed to the issuer of the bond<sup>717</sup>. Whereas in conventional bonds, the capital protection is achieved through a loan agreement, sukuk are able to distinguish their structure from conventional bonds by offering an alternative to the traditional loan agreement. Instead, there is a binding agreement by the issuer to repurchase certain assets over a specified time limit<sup>718</sup>.

Sukuk allow Islamic finance institutions to access short to long term financing against government backed bonds. For example, in Bahrain, the Central Bank of Bahrain will issue sukuk on behalf of the government<sup>719</sup>. Sukuk are a growing product in the Islamic finance world and cover a range of underlying assets such as; a partnership bond (mudarabah sukuk), a joint venture (musharaka sukuk), leasing (ijara sukuk), purchase orders (murabaha sukuk), project finance (istisna sukuk) or a combination of assets<sup>720</sup>. Sukuk issue a profit rate as oppose to an interest rate that would be found under a conventional bank<sup>721</sup>. The profit rate is deemed sharia compliant as it reflects the productivity of the asset<sup>722</sup>. Sukuk are growing at a fast pace, both within the GCC states and globally. Sukuk have been offered by the GCC and Malaysia, the traditional Islamic finance hubs, as well as Turkey, Pakistan and the United Kingdom. Most notable is the UK's bid to stamp its mark in the Islamic finance sector by issuing the first sovereign sukuk by a non-member of the Organisation of Islamic Co-

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[portionate+beneficial+ownership+of+the+asset+to+the+investor,+for+a+specific+time+period.&hl=en&sa=X&ei=y1i1VLLM GMTZaq70gig&ved=0CBkQ6AEwAQ#v=onepage&q=A%20sukuk%20is%20an%20Islamic%20bond%20that%20defines%20the%20proportionate%20beneficial%20ownership%20of%20the%20asset%20to%20the%20investor%2C%20for%20a%20specific%20time%20period.&f=false](https://books.google.co.uk/books?id=1a5aF9t8cZ4C&pg=PT204&dq=a+sukuk+structure+the+sukuk+holders+each+hold+a+n+undivided+beneficial+ownership+in+the+underlying+assets.&hl=en&sa=X&ei=0IW1VJyMA4iBUcamg4AH&ved=0CBkQ6AEwAQ#v=onepage&q=a%20sukuk%20structure%20the%20sukuk%20holders%20each%20hold%20an%20undivided%20beneficial%20ownership%20in%20the%20underlying%20assets.&f=false). Accessed on 13.01.2015.

<sup>717</sup> Eisenberg, D. (2012), Islamic Finance: Law and Practice, chapter 4 at 4.174, Oxford University Press. Available at <https://books.google.co.uk/books?id=1a5aF9t8cZ4C&pg=PT204&dq=a+sukuk+structure+the+sukuk+holders+each+hold+a+n+undivided+beneficial+ownership+in+the+underlying+assets.&hl=en&sa=X&ei=0IW1VJyMA4iBUcamg4AH&ved=0CBkQ6AEwAQ#v=onepage&q=a%20sukuk%20structure%20the%20sukuk%20holders%20each%20hold%20an%20undivided%20beneficial%20ownership%20in%20the%20underlying%20assets.&f=false>. Accessed on 13.01.2015.

<sup>718</sup> Godlewski, C. (2011), Do markets perceive sukuk and conventional bonds as different financing instruments? Bank of Finland, BOFIT Institute for Economies in Transition. Available at <http://www.suomenpankki.fi/pdf/168527.pdf>. Accessed on 13.01.2015.

<sup>719</sup> Ali Qayyum, M. (2008), New Horizon Global Perspective on Islamic Banking and Insurance, Institute of Islamic Banking and Insurance. Available at [http://www.islamic-banking.com/resources/7/NewHorizon%20Previous%20Issues/NewHorizon\\_JulySep08.pdf](http://www.islamic-banking.com/resources/7/NewHorizon%20Previous%20Issues/NewHorizon_JulySep08.pdf). Accessed on 15.01.2015.

<sup>720</sup> Garg, S. (2012), Sukuk and its Growth across Major Islamic Financial Markets, Infosys Limited. Available at <http://www.infosys.com/finacle/solutions/thought-papers/Documents/sukuk-and-its-growth.pdf>. Accessed on 15.01.2015.

<sup>721</sup> Afshar, T. (2013), Compare and Contrast Sukuk (Islamic Bonds) with Conventional Bonds, Are they Compatible? The Journal of Global Business Management, Volume 9, Number 1, pages 44-52. Available at <http://www.igbm.org/page/5%20Tahmoures%20A%20Afshar.pdf>. Accessed on 16.01.2015.

<sup>722</sup> Islamic Finance Resource, (2010), How Sukuk works: Introduction, structuring and application of Sukuk bonds. Available at <http://ifresource.com/2010/04/27/how-sukuk-works-introduction-structuring-and-application-of-sukuk-bonds/>. Accessed on 16.01.2015.



operation, (OIC)<sup>723</sup>. Other non-member countries are also considering sukuks, for example, Luxembourg, Tunisia, Kenya and South Africa<sup>724</sup>.

Sukuks are commonly offered under ijara based structures. Ijara translates to a lease agreement, operating as a contractual hiring agreement where a contract is entered in to where the consideration is the benefit received from an asset or a service in return for compensation. The contracting parties are defined as the lessor who is the owner of the asset and the lessee who is the beneficiary of the property. Ijara relates to the usufructs of assets and or services from the lesser to the lesee. Ijara is not a delayed sale as such as ownership remains with the lesser and the lesee has a right to the use of the asset<sup>725</sup>. Sukuks is an area of Islamic finance where the underlying asset of the ijara based structure is intangible property.

The link between intellectual property and Islamic finance is only just starting to emerge. The first ever sukuk with the underlying asset a form of intellectual property right was introduced by the German based finance company, FWU AG Group<sup>726</sup>. FWU AG Group issued a US \$55,000,000 sukuk in 2012, making it the first sukuk of its kind that has intellectual property rights as the underlying asset in the form of a computer software programme, developed under an ijara structure<sup>727</sup>. This is the first time a European country has issued an intellectual property based sukuk through the Dubai branch of its subsidiary FWU Dubai Services GmbH. The financing for the sukuk was provided by GCC-based investors<sup>728</sup>. Therefore it is a hybrid of Islamic finance and intellectual property rights within a sharia compliant framework that has developed under existing compliant products of sukuk and ijara.

### **7.5.5 Takaful – Islamic insurance**

Takaful is a sharia compliant form of insurance. Takaful, at its core, is founded on specific principles concerning the separation of shareholder operations from the funds. The ownership of the takaful

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<sup>723</sup> HM Treasury, (2014), Government issues first Islamic bond. Available at <https://www.gov.uk/government/news/government-issues-first-islamic-bond>. Accessed on 21.01.2015.

<sup>724</sup> Strohecker, K. (2014), After Western sukuk debuts, Islamic finance looks to emerging sovereigns, Thomson Reuters. Available at <http://www.reuters.com/article/2014/12/02/sukuk-emergingmarkets-sovereign-idUSL6N0TL3RF20141202>. Accessed on 21.01.2015.

<sup>725</sup> Ghuddah, A. (2007), Ijarah [Lease], Dallah Al-Barakah Group. Available at <http://www.albaraka.com/media/pdf/Research-Studies/RSIJ-200706201-EN.pdf>. Accessed on 21.01.2015.

<sup>726</sup> Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>. Accessed on 23.03.2015.

<sup>727</sup> Ali Qayyum, M. (2013), New Horizon Global Perspective on Islamic Banking and Insurance, Institute of Islamic Banking and Insurance. Available at <http://www.islamic-banking.com/NewHorizonDigital/IIBImarch2013/index-march2013.html>. Accessed on 23.03.2015.

<sup>728</sup> Rizvi, M. (2013), Islamic finance gains popularity across the globe, Khaleej Times. Available at [http://www.khaleejtimes.com/kt-article-display-1.asp?xfile=data/uaebusiness/2013/November/uaebusiness\\_November321.xml&section=uaebusiness](http://www.khaleejtimes.com/kt-article-display-1.asp?xfile=data/uaebusiness/2013/November/uaebusiness_November321.xml&section=uaebusiness). Accessed on 23.03.2015.

passes to the policyholder and is based on elements of shared responsibility, joint indemnity and common interest<sup>729</sup>. Takaful offers insurance by setting up a contract between participants who each contribute money into a pooling system in order to guarantee each other against loss or damage. Takaful, thus provides an alternative to commercial insurance which involve riba and gharar, while setting out responsibilities of each participant to cooperate and protect each other. Takaful is sharia compliant as it sets from the onset how profits from the investment are to be shared<sup>730</sup>.

In a takaful contract, each participant is expected to make a mutual contribution, known as tabarru, which aims to limit the risk of uncertainty that typically exists in conventional insurance agreements<sup>731</sup>. Takaful can be combined with existing Islamic finance products such as mudaraba or a hybrid of different products<sup>732</sup>. In relation to intellectual property, takaful can be vital leverage in the contractual agreement as it offers security and a contingency plan to investors.

#### **7.5.6 Other types of Islamic finance products**

Other types of Islamic finance products include istisna, ijara and salam. Istisna is a contract for sale that is concerned with deferred delivery<sup>733</sup>. Istisna is mainly used by banks and Islamic financial institutions in housing contracts, building constructions, large scale manufacturing of goods and equipment such as aircrafts, ships and machines. Alongside this, istisna has also been applied for export financing and to meet working capital needs<sup>734</sup>.

Salam also relates to a contract for sale however the difference in salam is that when the seller agrees to supply specific goods to the buyer at a future date, an exchange of an advanced price needs to be

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<sup>729</sup> Takaful Islamic Insurance, Institute of Islamic Banking and Insurance. Available at [http://www.islamic-banking.com/takaful\\_insurance.aspx](http://www.islamic-banking.com/takaful_insurance.aspx). Accessed on 23.03.2015.

<sup>730</sup> Htay, S. (2012), Accounting, Auditing and Governance for Takaful Operations, Wiley Limited. Ahmed, A, (2009), Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia, Universal Publishers.

<sup>731</sup> Anthony, D. (2011), Standard & Poor's Analysis Of Sharia-Compliant Cooperative And Takaful Insurers In The Middle East Focuses Primarily On Financial Strength, chapter 5, pages 36-49, Standard & Poor's Islamic Finance Outlook 2012. Available at [http://www.standardandpoors.com/spf/upload/Ratings\\_EMEA/2012-09-01\\_IslamicFinanceOutlook.pdf](http://www.standardandpoors.com/spf/upload/Ratings_EMEA/2012-09-01_IslamicFinanceOutlook.pdf). Accessed on 23.03.2015.

<sup>732</sup> Caprio, G. (2012), Handbook of Key Global Financial Markets, Institutions, and Infrastructure, chapter 42, page 469, Academic Press. Available at <https://books.google.co.uk/books?id=UUg8hxtaB5gC&pg=PA469&dq=types+of+takaful&hl=en&sa=X&ei=ojjCVM6rE4KxUaiTgKgl&ved=0CCEQ6AEwAg#v=onepage&q=types%20of%20takaful&f=false>. Accessed on 23.03.2015.

<sup>733</sup> Ramadan, H. (2006), Understanding Islamic Law: From Classical to Contemporary, page 101-2, Roman Altimira.

<sup>734</sup> Schoon, N. (2010), Islamic Banking and Finance, chapter 16, page 104, Spiramus Press Limited. Also see Elasrag, H. (2014), Islamic Finance: Basic concepts and Issues, chapter 2, page 49. Available at <https://books.google.co.uk/books?id=coXBAAQBAJ&pg=PA49&dq=types+of+istisna&hl=en&sa=X&ei=NDDAVIX5G-nX7QakgoHwDw&ved=0CDcQ6AEwBA#v=onepage&q=types%20of%20istisna&f=false>. Accessed on 27.03.2015.

paid at the time the contract commences. Salam, as a contract of sale, generates a moral obligation on the seller to deliver the goods as per the agreement as once the agreement has been reached, the contract cannot be unilaterally cancelled<sup>735</sup>.

What is most relevant to the development of intellectual property rights through Islamic finance is how Islamic finance is governed by the GCC states when considering the role of Islamic scholars, the structure of sharia boards and internal governance systems. Intellectual property has developed in the GCC along a very similar timeline to Islamic finance. Historically, principles of both date back to a pre colonisation era in the GCC, however in terms of its modernisation, both intellectual property and Islamic finance have developed over the last three decades. Therefore before Islamic finance principles can be applied to intellectual property, it is imperative to outline Islamic finance governance.

## **7.6 Islamic finance scholars and sharia boards**

Islamic scholars sit on sharia boards with the main role of acting as an independent body of specialised jurists to direct, review and supervise Islamic finance services<sup>736</sup>. The sharia board, in an Islamic financial institution (IFI), is an integral component of corporate governance<sup>737</sup>. The sharia board plays a key role in endorsing the overall work of the Islamic financial institution<sup>738</sup>. Appointment to a sharia board is made by the board of directors of individual financial institutions and consists of a chairman, secretary and sharia advisors<sup>739</sup>.

The sharia advisors are Islamic scholars however there is no centralised database of Islamic scholars. The world database for Islamic finance and banking<sup>740</sup> accounts for the most prominent scholars, but

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<sup>735</sup> Elasrag, H. (2014), *Islamic Finance: Basic concepts and Issues*, chapter 2, page 49. Available at <https://books.google.co.uk/books?id=-coXBAAQBAJ&pg=PA49&dq=types+of+istisna&hl=en&sa=X&ei=NDDAVIX5G-nX7QakgoHwDw&ved=0CDcQ6AEwBA#v=onepage&q=types%20of%20istisna&f=false>. Accessed on 27.03.2015.

<sup>736</sup> Malkawi, B. (2014), *A Bright Future: Towards an Enhanced Shari'ah Supervision in Islamic Finance*, *The European Financial Review*. Available at <http://www.europeanfinancialreview.com/?p=487>. Accessed on 27.03.2015.

<sup>737</sup> Malkawi, B. (2013), *Shari'ah Board in the Governance Structure of Islamic Financial Institutions*, *The American Society of Comparative Law, The American Journal of Comparative Law*.

<sup>738</sup> Jaffer, S. (2004), *Islamic Asset Management: Forming the Future for Shari'a-compliant Investment Strategies*, chapter 17, page 247, Euromoney Books. Available at <https://books.google.co.uk/books?id=cxYRVpP91I8C&pg=RA1-PA247&dq=structure+of+a+sharia+board&hl=en&sa=X&ei=c6u6VOWCGNHjaMyqgoAO&ved=0CFAQ6wEwCA#v=onepage&q=structure%20of%20a%20sharia%20board&f=false>. Accessed on 27.03.2015. Also see Htay, S. (2012), *Accounting, Auditing and Governance for Takaful Operations*, John Wiley and Sons Singapore Pte Limited. Available at <https://books.google.co.uk/books?id=s9fDavp4zqEC&pg=RA2-PT64&dq=structure+of+a+sharia+board&hl=en&sa=X&ei=c6u6VOWCGNHjaMyqgoAO&ved=0CFMQ6AEwCQ#v=onepage&q=structure%20of%20a%20sharia%20board&f=false>. Accessed on 27.03.2015.

<sup>739</sup> Malkawi, B. (2014), *A Bright Future: Towards an Enhanced Shari'ah Supervision in Islamic Finance*, *The European Financial Review*. Available at <http://www.europeanfinancialreview.com/?p=487>. Accessed on 27.03.2015. Also see Shari'ah Supervisory Board [Religious Board], *Institute of Islamic Banking and Insurance*. Available at [http://www.islamic-banking.com/shariah\\_supervisory\\_board.aspx](http://www.islamic-banking.com/shariah_supervisory_board.aspx). Accessed on 27.03.2015.

<sup>740</sup> Further details on the World Database of Islamic finance and banking is available at <http://www.wdibf.com/index.html>. Accessed on 27.03.2015.

there is no international system of ranking scholars or rating their expertise. The sharia boards are governed by national legislation, governance frameworks and audit requirements. Standard setting in the governance of sharia boards and sharia compliant products was introduced by the Malaysian Islamic Financial Services Board (IFSB). It was set up in 2002 to provide an international standard-setting body that regulates and supervises agencies that have a vested interest in the Islamic financial services sector<sup>741</sup>. The IFSB has members from all the GCC states along with Brunei, Bangladesh, Egypt, Indonesia, Iran, Jordan, Malaysia, Maldives, Mauritius, Nigeria, Pakistan, Singapore, South Africa, Sudan and Syria<sup>742</sup>. In relation to sharia board governance, there are five key uniform areas that all boards are required to abide by. These are; confidentiality, independence, competence, consistency and disclosure<sup>743</sup>.

As seen in chapter 3, Islamic jurisprudence falls under four main schools of thought, Hanbali, Shafii, Maliki, and Hanafi<sup>744</sup>. Therefore depending on which school of thought a particular country follows there can be some deviances in the opinions of the sharia boards. To counteract this, although sharia boards are set up by individual institutions across a number of countries, scholars from different countries, sit on several boards concurrently. Inadvertently this creates a power paradigm whereby a select number of scholars sit on all the main sharia boards. For example, Mufti Muhammad Taqi Usmani, as one of the most renowned Islamic finance scholars, he is in high demand and currently is chairman of eleven boards and a member of a further five boards<sup>745</sup>.

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<sup>741</sup> The full background to the Islamic Financial Services Board (IFSB) is available at <http://www.ifsb.org/background.php>. Accessed on 27.03.2015. The IFSB has over 184 members comprising of 59 regulatory and supervisory authorities, 8 international inter-governmental organisations, 112 financial institutions and 5 self-regulatory organisations operating in 44 jurisdictions.

<sup>742</sup> Islamic Financial Services Board, (2009), Guiding Principles On Shari`Ah Governance Systems For Institutions Offering Islamic Financial Services. Available at <http://www.ifsb.org/standard/IFSB-10%20Shariah%20Governance.pdf>. Accessed on 27.03.2015.

<sup>743</sup> Grais, W. (2006), Corporate Governance and Shariah Compliance in Institutions Offering Islamic Financial Services, World Bank Policy Research Working Paper 4054. Available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4054>. Accessed on 27.03.2015. Obid, S. (2014), Towards a comprehensive theoretical framework for sharia governance in Islamic financial institutions, Journal of Financial Services Marketing, pages 304 to 318, Palgrave McMillan.

<sup>744</sup> See Chapter 3 at 3.5.

<sup>745</sup> Mufti Muhammad Taqi Usmani is a chairman of the following sharia boards; Central Bank of Bahrain, Abu Dhabi Islamic Bank, U.A.E., Meezan Bank Ltd., Karachi, Pakistan, International Islamic Rating Agency, Bahrain, Pak-Kuwait Takaful, Karachi, Pak-Qatar Takaful, Karachi, JS Investments Islamic Fund, Karachi, JS Islamic Pension Savings Fund, President and Shaikul-Hadith, Centre for Islamic Economics, Pakistan, Jamia Darul Uloom Karachi, International Shariah Standard Council set up by the Accounting and Auditing Organization for Islamic Financial Institutions, Bahrain, Arif Habib Investments, Pakistan International Element Islamic Fund, Karachi. He is a member of the following shariah boards; Guidance Financial Group, USA, Arcapita Bank, Bahrain, Islamic Corporation for the Development of the Private Sector (ICD), an organ of IDB Jeddah, Islamic Fiqh Academy of Rabita-al-'Alam-e-Islami, Makkah and International Islamic Fiqh Academy, Jeddah. Available at [http://muftitaqiusmani.com/index.php?option=com\\_content&view=article&id=2&Itemid=5](http://muftitaqiusmani.com/index.php?option=com_content&view=article&id=2&Itemid=5). Accessed on 27.03.2015.

Another example is Sheikh Dr. Mohamed Ali Elgari who also sits on a number of boards<sup>746</sup>. What this has led to is a significant crossover of a select few scholars who are collectively a majority of the same board members with positions on many boards<sup>747</sup>. There is a very direct benefit of this in terms of harmonisation of decisions across the various boards and thus providing unanimity. However, from a practical point of view, there are strategic shortcomings in the selection of board members as there are no clear regulations or protocols in place as a vetting process<sup>748</sup>. Nor is there any framework in place to assess how much capacity, both in time and expertise, individual scholars have to serve on so many boards<sup>749</sup>. Also, there are limited structures in place to ensure scrutiny, accountability for decisions and checks and balances if the same members serve on boards in conflicting capacities<sup>750</sup>.

### **7.7 Main criticisms of sharia boards**

The main criticisms of sharia boards are in the lack of accountability of scholars, limited transparency in the decision making processes employed by scholars and a lack of clear guidance on the minimum level of expertise required from a scholar<sup>751</sup>. To address the criticism, most IFI's have set up internal

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<sup>746</sup> Executive Profile, Sheikh Mohamed Bin Ali Elgari PhD, Former President and Director, Wafa Insurance states he is connected to 85 board members in 10 different organisations across 10 different industries. Available at <http://investing.businessweek.com/research/stocks/people/person.asp?personId=26936030&ticker=SINDIAN:AB>. Accessed on 27.03.2015.

<sup>747</sup> Siddique, R. (2010), A Sharia scholar's place on the board, Gulf News. Available at <http://gulfnews.com/business/features/a-sharia-scholar-s-place-on-the-board-1.625445>. Accessed on 27.03.2015. Visser, H. (2013), Islamic Finance: Principles and Practice, Second Edition, chapter 5, page 123. Available at <https://books.google.co.uk/books?id=Y30tAgAAQBAJ&pg=PA123&dq=many+sharia+boards+have+same+members&hl=en&sa=X&ei=xw-zVOnJGJHgatPigsAO&ved=0CCAQ6AEwAA#v=onepage&q=many%20sharia%20boards%20have%20same%20members&f=false>. Accessed on 27.03.2015.

<sup>748</sup> Ali, A. (2014), Business Ethics in Islam, Edward Elgar Publishing Limited, chapter 6, The Ethics of Banking and Financial Services, page 109. Warde, I. (2010), Islamic Finance in the Global Economy, Chapter 12, Religious Issues and Challenges: Defining Islam and Interpreting the Sharia, page 235, Edinburgh University Press. Available at <https://books.google.co.uk/books?id=4jDMQd7yVX4C&pg=PA235&dq=many+sharia+boards+have+same+members&hl=en&sa=X&ei=xw-zVOnJGJHgatPigsAO&ved=0CFUQ6AEwCQ#v=onepage&q=many%20sharia%20boards%20have%20same%20members&f=false>. Accessed on 09.03.2015.

<sup>749</sup> Davies, A. (2012), Rock star scholars a risk for Islamic finance, Thomson Reuters, Edited by Torchia, A. Available at <http://www.reuters.com/article/2012/02/29/finance-islamic-scholars-idUSL5E8DG31N20120229>. Accessed on 19.01.2015.

<sup>750</sup> Gruening, H. (2008), Risk Analysis for Islamic Banks, Chapter 11, page 189, The International Bank for Reconstruction and Development, The World Bank. Available at <https://books.google.co.uk/books?id=EjI-sEs4yPMC&printsec=frontcover&dq=scrutiny+and+checks+and+balances+of+shariah+boards+islamic+finance&hl=en&sa=X&ei=6Rq0VMDjElMAU-vcg-gF&ved=0CDMQ6AEwAw#v=onepage&q&f=false>. Accessed on 09.03.2015. Warde, I. (2010), Islamic Finance in the Global Economy, Chapter 12, Religious Issues and Challenges: Defining Islam and Interpreting the Sharia, page 235, Edinburgh University Press. Available at <https://books.google.co.uk/books?id=4jDMQd7yVX4C&pg=PA235&dq=many+sharia+boards+have+same+members&hl=en&sa=X&ei=xw-zVOnJGJHgatPigsAO&ved=0CFUQ6AEwCQ#v=onepage&q=many%20sharia%20boards%20have%20same%20members&f=false>. Accessed on 09.03.2015.

<sup>751</sup> Alkhamees, A. (2013), The impact of Shari'ah governance practices on Shari'ah compliance in contemporary Islamic finance, Journal of Banking Regulation, Palgrave MacMillan. Obid, S. (2014), Towards a comprehensive theoretical framework for sharia governance in Islamic financial institutions, Journal of Financial Services Marketing, pages 304 to 318, Palgrave MacMillan.

auditing committees and other regulatory systems such as compliance, governance ethics, periodic reviews and assurances. Auditing is the most accepted form of review as it is sharia compliant. There are Quranic references that support the need for verification and authorisation in business. For example in Surah al-Insyiqaq, verses 6 to 9, indicate to an auditing process as well as Surah Al-Infithar, verses 10 to 12<sup>752</sup>.

Apart from the Islamic need for auditing and verification in the Islamic finance sector, there is a very practical and logistic need for more centralised and in depth regulation<sup>753</sup>. Each GCC state has adopted their own models for auditing and monitoring the Islamic finance sector and the respective sharia boards. Consideration will be given to the sharia board governance in each GCC state, as well as highlighting the flaws in the governance structures in each individual state as to better inform the recommendations for an integrated approach to intellectual property rights protection in the GCC<sup>754</sup>.

### **7.8 Sharia board governance in Bahrain**

Bahrain has taken a leading role in the GCC to develop regulatory frameworks by passing a number of financial based legislations<sup>755</sup> and setting up two key institutions; the Accounting and Auditing Organization for Islamic Financial Institution (AAOIFI)<sup>756</sup> and the International Islamic Financial Market (IIFM)<sup>757</sup>. The overarching regulatory authority is the Central Bank of Bahrain (CBB) with the sole responsibility of regulating the financial sector, thus giving Bahrain a centralised sharia governance structure<sup>758</sup>. The function of Bahrain's national sharia advisory board is to advise the Central Bank of Bahrain. The bank in turn implements improvements in the corporate governance framework of financial institutions, in terms of financial disclosure and transparency<sup>759</sup>.

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<sup>752</sup> See the Quran at 82:10-12 and 84:6-9. Available at [www.quran.com](http://www.quran.com). Accessed on 14.03.2015.

<sup>753</sup> Van Gruening, H. (2008), Risk Analysis for Islamic Banks, chapter 4, Key Stakeholders, The International Bank for Reconstruction and Development, World Bank Publications. Available at <https://books.google.co.uk/books?id=EjlsEs4yPMC&pg=PA51&lpg=PA51&dq=islamic+finance+institutions+internal+auditing+systems&source=bl&ots=b9STSI1yMw&sig=nPppBcYGPYKMWZjwH2mAw1CjYHI&hl=en&sa=X&ei=bES-VKnEJsHaUrXugfgJ&ved=0CEcQ6AEwCA#v=onepage&q=islamic%20finance%20institutions%20internal%20auditing%20systems&f=false>. Accessed on 20.03.2015.

<sup>754</sup> See chapter 7 from 7.18 to 7.21.

<sup>755</sup> Bahrain has five pieces of legislation regulating its financial sector; Central Bank of Bahrain and Financial Institutions Law 2006, the Bahrain Stock Exchange Law 1987, the Commercial Companies Law 2001, The Anti-Money Laundering Law 2001 and the Financial Trust Law 2006. Available at <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwebah.htm>. Accessed on 14.03.2015.

<sup>756</sup> Further information on the AAOIFI is available at <http://www.aaofi.com/>. Accessed on 14.03.2015.

<sup>757</sup> Further information on the IIFM is available at <http://www.iifm.net/>. Accessed on 14.03.2015.

<sup>758</sup> Hassan, R. (2010), A Comparative Analysis of Shari'ah Governance in Islamic Banking Institutions Across Jurisdictions, International Shari'ah Research Academy for Islamic Finance.

<sup>759</sup> Central Bank of Bahrain (2012), CBB seeking lasting solutions for banks, The Review. Available at <http://www.cbb.gov.bh/assets/The%20Review/The%20Review%20March%202012.pdf>. Accessed on 14.03.2015.

Bahrain's model of auditing Islamic finance, through the Accounting and Auditing Organization for Islamic Financial Institution and the International Islamic Financial Market, has allowed it to develop supervisory and control structures for; fatwa accountability, sharia compliance accountability, governance for sharia auditors and procedures for internal sharia audits<sup>760</sup>. Bahrain has 53 Islamic finance scholars; however it is a handful of scholars that are in high demand. Take for example, Sheikh Nizam Yaquby, he currently sits on 85 sharia boards and is highly renowned as one of the leading experts in the field<sup>761</sup>. However, a serious question arises as to how a scholar can fulfil duties on such a large number of boards<sup>762</sup>.

The lack of an overarching independent Islamic finance authority leaves the industry at risk of becoming a mare's nest. There is a significant difference between international intellectual property standard setting and Islamic finance in that Islamic finance lacks an umbrella organisation that sets minimal standards for all states that offer sharia compliant financial products. The governance system in Bahrain is limited to Bahrain, it can influence sharia board governance in other countries but cannot be binding. With growing criticism of international standard setting in Islamic finance, Bahrain are developing a central sharia board which will introduce new rules to strengthen the governance of sharia boards in the sector, both within Bahrain and beyond<sup>763</sup>. Bahrain has played an instrumental role in the development of sharia compliant financial services. It was the first GCC state to introduce a sharia compliant liquidity management service in the form of the liquidity management centre (LMC)<sup>764</sup>. The centre facilitates the structured investment of surplus funds of Islamic banks and Islamic financial institutions in accordance with Islamic law<sup>765</sup>.

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<sup>760</sup> Garas, S. (2010), Shari'a supervision of Islamic financial institutions, Journal of Financial Regulation and Compliance, Volume 18, Number 4, pages 386-407, Emerald Group Publishing Limited. Available at <http://www.kantakji.com/media/5510/1169.pdf>. Accessed on 14.03.2015.

<sup>761</sup> Islamic Finance Resource, Sharia Scholars, Sheikh Nizam Yaquby. Available at <http://ifresource.com/shariah-specialists-in-islamic-finance/>. Accessed on 16.03.2015.

<sup>762</sup> Alim, E. (2013), Global Leaders in Islamic Finance: Industry Milestones and Reflections, John Wiley & Sons Limited. Karim, A. (2011), Islamic Finance: The Regulatory Challenge, John Wiley & Sons Limited. Andreasyan, T. (2010), New Horizon Global Perspective on Islamic Banking and Insurance, The institute of Islamic Banking and Insurance. Available at [http://www.islamic-banking.com/resources/7/NewHorizon%20Previous%20Issues/NewHorizon\\_Apr-Jun-10.pdf](http://www.islamic-banking.com/resources/7/NewHorizon%20Previous%20Issues/NewHorizon_Apr-Jun-10.pdf). Accessed on 16.03.2015., Barreh, I. (2013), Scholar shortage threatens Islamic financing industry, Muslim Link. Available at <http://muslimlink.ca/biz-tech/islamic-finance/scholar-shortage-threatens-islamic-financing-industry>. Accessed on 16.01.2015. Pasha, S. (2010), Islamic finance relies on too few of its scholars, Thomson Reuters. Available at <http://in.reuters.com/article/2010/10/06/idINIndia-51979720101006>. Accessed on 16.03.2015.

<sup>763</sup> Vizcaino, B. (2014), Bahrain to develop central sharia board for Islamic banks, Thomson Reuters. Available at <http://www.reuters.com/article/2014/12/03/bahrain-islam-regulations-idUSL3N0TN1A020141203>. Accessed on 14.03.2015.

<sup>764</sup> Further details on the liquidity management centre are available at <http://www.lmbahrain.com/>. Accessed on 16.03.2015.

<sup>765</sup> Hasan, Z. (2010), Regulatory Framework of Shari'ah Governance System in Malaysia, GCC

## **7.9 Sharia board governance in Saudi Arabia**

Saudi Arabia was one of the last GCC states to formally introduce Islamic banking<sup>766</sup>. It does not have a centralised system for regulating Islamic finance institutions and reviewing the governance of sharia boards like Bahrain or UAE. Also, it does not have the same level of scrutiny in areas such as financial disclosures when compared to its peers<sup>767</sup>. Despite not having designated regulatory bodies to govern Islamic finance, Saudi Arabia has supervisory bodies in the form of the Saudi Arabia Monetary Agency (SAMA), the International Development Bank and the Ministry of Finance. The Saudi Arabia Monetary Agency performs the central banking role in Saudi Arabia and disseminates regulatory pronouncements from the Malaysia based Islamic Financial Services Board to the financial sector<sup>768</sup>. This therefore offers some level of international standard setting within the Saudi Arabian Islamic finance institutions, along with the Ministry of Finance.

Saudi Arabia lacks extensive Islamic finance legislation<sup>769</sup> and a uniform legislative committee for Islamic finance to set checks and balances and scrutinise sharia board decisions on whether a certain financial product is sharia compliant. Nevertheless, in spite of having weak standard setting systems, Saudi Arabia has the lion's share of the Islamic finance market as reported by the Dubai Chambers of Commerce<sup>770</sup>. Similar to Bahrain, although Saudi Arabia also has a large bank of scholars, it is still a

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Countries and the UK, Kyoto Bulletin of Islamic Area Studies, PAGES 82-115. Available at [http://www.asafas.kyoto-u.ac.jp/kias/1st\\_period/contents/pdf/kb3\\_2/07zulkifli.pdf](http://www.asafas.kyoto-u.ac.jp/kias/1st_period/contents/pdf/kb3_2/07zulkifli.pdf). Accessed on 16.03.2015.

<sup>766</sup> Al Rajhi Bank was the first modern Islamic financial institute in Saudi Arabia in 1987. Further details are available at <http://www.bankalbilad.com/SiteAssets/Pages/News/شركة-البلاد-المالية-تصدر-تقرير-عن-مصرف-الراجحي/Rajhi%20Bank%20report.pdf>. Accessed on 15.03.2015. Prior to this, Saudi Arabia opened the Islamic Development Bank in 1975, to bring international institutions together and give Islamic finance a platform for development. Further information on the Islamic Development Bank is available at <http://www.isdb.org/irj/portal/anonymous?NavigationTarget=navurl://3f9129a1cac0913519c318a53e8800da>. Accessed on 15.03.2015.

<sup>767</sup> Fleihan, T. (2013), Saudi Arabia is identified as one of the most developed Islamic finance countries, Thomson Reuters Zawya. Available at [http://www.zawya.com/story/Saudi\\_Arabia\\_is\\_identified\\_as\\_one\\_of\\_the\\_most\\_developed\\_Islamic\\_finance\\_countries-ZAWYA20131118115640/](http://www.zawya.com/story/Saudi_Arabia_is_identified_as_one_of_the_most_developed_Islamic_finance_countries-ZAWYA20131118115640/). Accessed on 15.03.2015.

<sup>768</sup> The Report, (2010), Saudi Arabia, Oxford Business Group. Available at [https://books.google.co.uk/books?id=z6d\\_3Nj-uUC&pg=PA102&dq=sharia+law+islamic+finance+saudi+arabia&hl=en&sa=X&ei=nhm7VJbhHoXxavTZgrgL&ved=0CDMQ6AEwAA#v=onepage&q=sharia%20law%20islamic%20finance%20saudi%20arabia&f=false](https://books.google.co.uk/books?id=z6d_3Nj-uUC&pg=PA102&dq=sharia+law+islamic+finance+saudi+arabia&hl=en&sa=X&ei=nhm7VJbhHoXxavTZgrgL&ved=0CDMQ6AEwAA#v=onepage&q=sharia%20law%20islamic%20finance%20saudi%20arabia&f=false). Accessed on 15.03.2015.

<sup>769</sup> Financial based legislation exists in Saudi Arabia and includes; Cooperative Insurance Companies Control Law, (2003), Royal Decree Number M/32, Electronic Transactions Law, (2007), Royal Decree Number M/8 and Law of Cooperative Associations, (2008), Royal Decree Number M/14. However, these laws are for conventional financial system and not specific to Islamic finance.

<sup>770</sup> Dubai Chambers of Commerce, (2014), Dubai Chamber report highlights growing popularity of Islamic finance over conventional sector. Available at <http://www.dubaichamber.com/en/news/dubai-chamber-report-highlights-growing-popularity-of-islamic-finance-over-conventional-sector>. Accessed on 15.03.2015.



select few Saudi Arabian scholars that have prominence. The main scholars in Saudi Arabia are Dr. Abdul Sattar Abu Ghuddah, Dr. Mohamed A. Elgari, Sheikh Al-Manea and Sheikh Al-Atram<sup>771</sup>.

Saudi Arabia applies a more strict interpretation of riba and gharar than other states, which is in line with its overall level of sharia compliance in all aspects of governance<sup>772</sup>. For example, Malaysian scholars approved an Islamic credit card based on a transaction known as baya al-ina, however Arab scholars rejected the credit card as it was deemed too similar to interest-based lending<sup>773</sup>. The limits of Islamic finance are highlighted by the disagreement of different scholars, be it nationally or internationally, as there is no higher authority to appeal to when disagreements occur<sup>774</sup>. The sector lacks legally binding precedent and principles, which if enacted at a legislative level, would facilitate certainty, clarity and unequivocal rules that would add credence to decisions on sharia compliant products.

#### **7.10 Sharia board governance in the UAE**

The UAE has pioneered Islamic finance development in the GCC region with its first Islamic bank, the Dubai Islamic Bank, opening in 1975. The UAE have a body of law regulating its banking and financial business<sup>775</sup> as well as strategic institutions to supervise sharia developments in Islamic finance<sup>776</sup>. The UAE Islamic banking operations are supervised by an independent shariah supervisory committee<sup>777</sup>. Again, the word “independent” may be treated with a pinch of salt as the three main scholars of the UAE sharia supervisory committee are the leading scholars in all the GCC states and a number of other countries, namely, Dr. Abdul Sattar Abu Ghuddah, Sheikh Nizam Yaqubi and Dr. Mohamed Ali Elgari. The UAE sharia supervisory committee derive its powers from the UAE Islamic banking legislation. The

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<sup>771</sup> Islamic Finance Resource, Sharia Scholars, Dr. Abdul Sattar Abu Ghuddah, Dr. Mohamed A. Elgari, Sheikh Al-Manea and Sheikh Al-Atram. Available at <http://ifresource.com/shariah-specialists-in-islamic-finance/>. Accessed on 16.03.2015.

<sup>772</sup> See chapter 1 at 1.3.3.

<sup>773</sup> The Economist, (2014), Big interest, no interest - The market for Islamic financial products is growing fast, Islamic finance, The Economist Newspaper Limited. Available at <http://www.economist.com/news/finance-and-economics/21617014-market-islamic-financial-products-growing-fast-big-interest-no-interest>. Accessed on 15.03.2015.

<sup>774</sup> McBain, S. (2012), Islamic Finance's 'Scholar Problem': Why Are Shariah Scholars Paid So Much? Spears Wealth Management. Available at <http://www.spearswms.com/news/islamic-finances-scholar-problem-why-are-shariah-scholars-paid-so-much>. Accessed on 19.03.2015.

<sup>775</sup> Federal laws include; UAE Federal Law No. 5 of 1985 Concerning Civil Transactions, Federal Law No. 18 of 1993 concerning the Commercial Transaction Law, Federal Law No. 6 of 1985 concerning Islamic Banks and Financial Institutions, Federal Law No. 8 of 1984 concerning Commercial Companies, Federal Law No. 10 of 1980 concerning the Central Bank, The Monetary System and Organization of Banking and Dubai Law No 9 of 2004 concerning the Law Establishing the Dubai International Financial Centre.

<sup>776</sup> Al Tamimi & Company, (2009), Islamic Finance A UAE Legal Perspective. Available at <http://web.dubaichamber.ae/LibPublic/Islamic%20finance%20a%20UAE%20legal%20perspective.pdf>. Accessed on 16.03.2015.

<sup>777</sup> Details of the sharia supervisory committee are available at <https://www.sc.com/ae/islamic/shariah-supervisory-committee.html>. Accessed on 16.03.2015.

UAE has a devolved system of sharia governance whereby in accordance with Article 6 of the UAE Islamic banking law, individual Islamic financial institutions and banks must establish their own sharia supervisory committees<sup>778</sup>.

Islamic banks are regulated under two separate entities, emirate Islamic banks are regulated by the Central Bank of the UAE<sup>779</sup> and Islamic banks that fall within the Dubai International Financial Centre (DIFC)<sup>780</sup> are supervised by the Dubai Financial Services Authority (DFSA)<sup>781</sup>. In an attempt to streamline sharia governance, the UAE has been developing a number of strategies for Islamic finance services. The UAE has set up a higher sharia authority under the Ministry of Justice and through the emirates banking association, the Islamic banking committee. The purpose of the higher sharia authority and Islamic banking committee is to review the various sharia governance models and propose a standardised sharia model<sup>782</sup>. The UAE are following in Malaysia's footsteps by working towards a central sharia board that can impose decisions across the various sharia boards of the nation's Islamic finance institutions<sup>783</sup>.

Further, Dubai has set up a number of research and development based institutions in the field of Islamic finance. The centre for the development of Islamic economics was inaugurated in 2013 with the aim of promoting awareness of economic activities, both the concepts and practices of financial services with Islamic law<sup>784</sup>. The GCC states as a whole are keen to be the Islamic finance hub in an international context. Dubai is a driving force behind the desire to lead on Islamic finance with its sights on being the global capital in the Islamic financial sector<sup>785</sup>.

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<sup>778</sup> Article 6, Federal Law No.6 of 1985 concerning Islamic Banks and Financial Institutions. Available at <http://www.centralbank.ae/pdf/LawNo6-1985-IslaminBanks.pdf>. Accessed on 19.03.2015.

<sup>779</sup> Further details on the Central Bank of the UAE is available at <http://www.centralbank.ae/en/index.php>. Accessed on 16.03.2015.

<sup>780</sup> Further details on the Dubai International Financial Centre are available at <http://www.difc.ae/>. Accessed on 16.03.2015.

<sup>781</sup> Further details on the Dubai Financial Services Authority are available at <http://www.dfsa.ae/Pages/default.aspx>. Accessed on 16.03.2015.

<sup>782</sup> Nazir, M. (2012), Sharia governance at the Central Bank of the UAE, International Financial Law Review, Euromoney Institutional Investor PLC Investor. Available at <http://www.iflr.com/Article/3110470/Shariah-governance-at-the-Central-Bank-of-UAE.html>. Accessed on 19.01.2015. The Report, Dubai, (2013), Oxford Business Group. Available at <https://books.google.co.uk/books?id=pX3emdScFHkC&pg=PA82&dq=THE+REPORT:+DUBAI+SHARIA+BOARDS+2010&hl=en&sa=X&ei=3VO9VLGENIWp7AaNrICYDw&ved=0CDYQ6AEwAQ#v=onepage&q=THE%20REPORT%3A%20DUBAI%20SHARIA%20BOARDS%202010&f=false>. Accessed on 19.03.2015.

<sup>783</sup> Vizcaino, B. (2013), UAE plans Islamic finance authority backed by legislation, Thomson Reuters. Available at <http://uk.reuters.com/article/2013/10/30/islamic-finance-emirates-idUKL5N0IK3YY20131030>. Accessed on 19.03.2015.

<sup>784</sup> Further details on the Dubai centre for the development of Islamic economics is available at <http://www.iedcdubai.ae/>. Accessed on 19.03.2015.

<sup>785</sup> Al Awar, A. (2013), Dubai as the world's capital of Islamic Economy: The roadmap ahead, Islamic finance news, Dubai Islamic Economic Roundtable, Dubai International Finance Center. Available at <http://islamicfinancenews.com/roundtables/201405/Dubai.pdf>. Accessed on 19.03.2015.

### **7.11 Sharia board governance in Kuwait**

Kuwait is similar to Bahrain in that it has specific provisions on what constitutes a sharia advisory board and that sharia boards are answerable to the Central Bank of Kuwait as predicated by legislation<sup>786</sup>. However, there is no higher sharia advisory authority at the Central Bank of Kuwait nor does Kuwait have specific primary legislation on the governance of Islamic finance sharia boards. As there is no specific legislation on sharia board governance, there is no limitation on the number of sharia boards a scholar can sit on.

Given Kuwait has 2 Islamic banks and 31 Islamic finance institutions, it is a given that there will at times be a difference of opinion between institutions. Although it is not compulsory, where such a conflict arises amongst sharia advisors, there is recourse for the board of directors of the designated institutions. They can refer the matter to the Ministry of Awqaf and Islamic Affairs fatwa board<sup>787</sup>. The Fatwa Board sits as an external entity to the Central Bank of Kuwait in order to maintain independence and has the authority to make a final decision on a given matter. Nevertheless, there is no legal restriction on a sharia advisor that sits on the fatwa board to not have a board seat on a number of other Islamic financial institutions.

Therefore, questions arise as to how fit for purpose a fatwa board can be when its members may very well come from the same institutional boards for whom the decision is being made. This is a common theme among fatwa boards and is not confined only to Kuwait. To increase transparency and levels of scrutiny and accountability, fatwa board members need to be expressly prohibited from taking advisory positions as board members of other Islamic finance institutions where there is a potential for conflict of interests as this defeats the very objective the sharia boards were set up to address.

### **7.12 Sharia board governance in Oman**

Oman has been a relatively late comer to Islamic finance<sup>788</sup>. It has two main pieces of legislation that make provisions for Islamic finance within its existing banking system; the Central Bank of Oman

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<sup>786</sup> Central Bank of Kuwait Law 32/1968, Chapter 3, Islamic Banking, Section 10, Articles 86-100. The legislation provides for the self-regulation of Islamic financial institutions and requires each Islamic financial institution to have its own sharia supervisory board. Available at <http://new.cbk.gov.kw/en/legislation-and-regulation/cbk-law/chapter-three.jsp>. Accessed on 20.03.2015.

<sup>787</sup> Further details on the Ministry of Awqaf and Islamic Affairs fatwa board can be found at <http://islam.gov.kw/Pages/en/NewsDetails.aspx?newsid=533>. Accessed on 20.03.2015.

<sup>788</sup> Basher, S. (2009), Islamic finance lacks government support in some GCC countries, Business and Banking, Gulf News. Available at <http://gulfnews.com/business/banking/islamic-finance-lacks-government-support-in-some-gcc-countries-1.499863>. Accessed on 21.01.2015. Hancock, M. (2013), Oman hopes to open Islamic finance floodgates, The Banker, Financial Times Limited. Available at <http://www.thebanker.com/Comment/Viewpoint/Oman-hopes-to-open-Islamic-finance-floodgates?ct=true>. Accessed on 21.01.2015.

Banking Law promulgated by Royal Decree 55/90 and Money Laundering Law promulgated by Royal Decree 34/2002<sup>789</sup>. Up until 2012, conventional banking had Islamic units as there were no designated standalone Islamic banks. From a royal decree in 2012, that amending the banking law in Oman, two new Islamic banks were launched, Bank Nizwa<sup>790</sup> and Al Izz Islamic Bank<sup>791</sup>. Given its late start to taking the Islamic finance market seriously, Oman has been very proactive in evolving its Islamic finance sector. For example, in 2014, the Sultanate of Oman announced a centralised system for sharia board governance, in the form of a Central bank of Oman sharia supervisory board<sup>792</sup>. Further, unlike the other GCC states, Oman has sought to implement rigorous standards for regulating sharia boards and Islamic finance scholars. It is currently the only GCC state that has imposed limitations on sharia board and scholar activity in the form of an Islamic finance regulatory framework that deals with; maximum lengths of service, minimum level of qualifications required, mandatory years of experience required, maximum number of Islamic finance institutions a scholar can serve on, performance reviews and a minimum of 75% attendance for board meetings<sup>793</sup>.

Oman has in effect addressed a number of criticisms pertaining to sharia boards. The most crucial of these has to be the restriction on scholars from serving on two competing Islamic financial institutions, thus removing the likelihood of a conflict of interest and making the role of sharia scholars more fit for purpose<sup>794</sup>. Nonetheless, Oman has considerable work to do in ensuring the workings of the Islamic finance institutions and banks are both transparent and demonstrating the requisite level of disclosure<sup>795</sup>.

### **7.13 Sharia board governance in Qatar**

Similar to Kuwait and Bahrain, Qatar also has a self-regulation model for sharia boards whereby Islamic financial institutions appoint their own sharia boards. Another similarity, to the other GCC states, is that there is no limit on the number of boards a scholar can be a member of. The central bank of Qatar does

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<sup>789</sup> Legislation available at the World Law Guide, Legislation Oman. Available at <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxweoma.htm>. Accessed on 21.01.2015.

<sup>790</sup> Further details on Bank Nizwa are available at <http://www.banknizwa.om/>. Accessed on 21.01.2015.

<sup>791</sup> Further details on Al Izz Bank are available at <http://alizzislamic.com/Home>. Accessed on 21.01.2015.

<sup>792</sup> Reuters, (2014), Oman sets up sharia board to boost Islamic finance, Trade Arabia, Middle East Association. Available at <http://the-mea.co.uk/news/oman-sets-sharia-board-boost-islamic-finance>. Accessed on 21.01.2015.

<sup>793</sup> Central Bank of Oman, (2014), Islamic Banking Regulatory Framework. Available at <http://www.cbo-oman.org/>. Accessed on 21.01.2015.

<sup>794</sup> Hussain, A. (2012), Oman adopts strict Islamic banking rules, Global Islamic Finance. Available at <http://www.global-islamic-finance.com/2012/12/oman-adopts-strict-islamic-banking-rules.html>. Accessed on 21.01.2015.

<sup>795</sup> Oman Islamic Finance Report, (2015), Building On A Strong Start, Islamic Finance Country Report: Oman. Available at <http://www.irti.org/English/Research/Documents/Report-6.pdf>. Accessed on 21.03.2015.

not have a higher sharia authority, instead the central bank of Qatar appoint scholars on a case by case basis<sup>796</sup>. Also, the Ministry of Awqaf has a national shariah board known as the Supreme Council<sup>797</sup>.

Qatar has 4 Islamic banks that specialise in sharia compliant financing. The first Islamic bank, Qatar Islamic Bank, opened in 1982. From 2011, Qatar brought an end to Islamic units in the conventional banking system<sup>798</sup>, making a clear distinction between conventional banking and Islamic banking<sup>799</sup>. Qatar has adopted practises from Malaysia by separating its Islamic banking from conventional banking<sup>800</sup>. It has also kept abreast of innovation and development through three key institutions coming together to enhance Qatar's risk stratification framework, namely; Qatar Central Bank, the Qatar Financial Markets Authority and the Qatar Financial Centre Regulatory Authority<sup>801</sup>.

#### **7.14 International standard setting in Islamic finance**

Despite the various anomalies in the level of sharia compliance by each GCC state and in the interpretation of Islamic finance by different Islamic finance institutions, Islamic finance is a growing industry in the GCC<sup>802</sup>. All the states have varying levels of sharia compliance as seen above, yet

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<sup>796</sup> The Report, Qatar, (2012), Oxford Business Group, page 56. Available at <https://books.google.co.uk/books?id=1JsAZouLOVQC&pg=PA56&dq=Qatar++sharia+authority+awqaf+ministry&hl=en&sa=X&ei=3sqVOTwPIbY7AblooH4BQ&ved=0CCcQ6AEwAQ#v=onepage&q=Qatar%20%20sharia%20authority%20awqaf%20ministry&f=false>. Accessed on 21.03.2015.

<sup>797</sup> Hassan, K. (2011), Islamic Capital Markets: Products and Strategies, chapter 15, page 324, John Wiley & Sons Limited. Available at <https://books.google.co.uk/books?id=Yeyo3tE-2NMC&pg=PT352&dq=central+bank+of+Qatar+does+not+have+a+higher+sharia+authority+awqaf+ministry&hl=en&sa=X&ei=i8e-VPjMEqWt7gbb-YDABw&ved=0CC4Q6AEwAA#v=onepage&q=central%20bank%20of%20Qatar%20does%20not%20have%20a%20higher%20sharia%20authority%20awqaf%20ministry&f=false>. Accessed on 20.03.2015.

<sup>798</sup> Anani, A. (2014), How Greater Regulation Will Lead to Islamic Finance Growth in Qatar, Latham and Watkins. Available at <http://www.al-mirsal.com/2014/01/29/how-greater-regulation-will-lead-to-islamic-finance-growth-in-qatar/>. Accessed on 21.03.2015.

<sup>799</sup> The Report, (2012), Qatar, Islamic Financial Services Overview, page 100, Oxford Business Group. Available at <https://books.google.co.uk/books?id=BT1gleuQq6wC&pg=PA100&dq=qatar+has+4+islamic+banks&hl=en&sa=X&ei=QX6VJ7NJDuaM2PgfG&ved=0CDkQ6AEwAQ#v=onepage&q=qatar%20has%204%20islamic%20banks&f=false>. Accessed on 21.03.2015.

<sup>800</sup> Wigglesworth, R. (2011), Islamic directive shocks Qatari banks, The Financial Times Limited. Available at <http://www.ft.com/cms/s/0/0ab164e0-3858-11e0-8257-00144feabdc0.html#axzz3PSjdVoSy>. Accessed on 21.01.2015.

Mejia, A. (2014), Regulation and Supervision of Islamic Banks, International Monetary Fund (IMF) Working Paper, International Monetary Fund states Malaysian Islamic banking system has isolated sharia compliant banking to Islamic banks only. Available at <http://www.imf.org/external/pubs/ft/wp/2014/wp14219.pdf>. Accessed on 21.03.2015.

<sup>801</sup> Anani, A. (2014), How Greater Regulation Will Lead to Islamic Finance Growth in Qatar, Latham and Watkins. Available at <http://www.al-mirsal.com/2014/01/29/how-greater-regulation-will-lead-to-islamic-finance-growth-in-qatar/>. Accessed on 20.03.2015.

<sup>802</sup> Anderson, S. (2014), GCC Islamic finance prospects bright in spite of growth hiccups, Saudi Gazette. Available at <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20141012220943>. Accessed on 22.01.2014.

Kassem, M. (2014), GCC to lead growth in sukuk market, The National. Available at <http://www.thenational.ae/business/banking/gcc-to-lead-growth-in-sukuk-market>. Accessed on 22.03.2015. Colombo, S. (2014), Bridging the Gulf: EU-GCC Relations at a Crossroads, chapter 7, page 270, Edizioni Nuova Cultura. Available at <https://books.google.co.uk/books?id=n9qrAwAAQBAJ&pg=PA270&dq=islamic+finance+growing+industry+gcc&hl=en&sa=X>

despite this; they are able to offer a range of products that are accepted by the public. This is a key feature of the success of Islamic finance that the intellectual property sector has not managed to address. If Islamic finance can continue to grow within the GCC and despite the varying levels of sharia compliance in each individual state, then there are grounds for developing similar Islamic based intellectual property structures that can be adopted across the GCC states.

The crux of the success of Islamic finance is in its sharia boards, prominent scholars who are well respected and the decisions of whom are accepted. Although serving on several sharia boards consecutively has been criticised as discussed earlier in this chapter, it can also be said to be a vital lever for success in the industry. By having sharia scholar from different states serve together on a given board, it gives the decisions unilateral appeal and as a result, more weight. This is mainly due to the fact that the decision is consequently not seen as the decision of one nation or one particular school of thought, but rather as a sharia compliant decision that appears to transcend cultural and political differences.

The intellectual property sector in the GCC does not have the same level of emphasis on sharia boards and this is where both developed countries and Islamic countries as a whole are missing an opportunity in gaining public acceptance of the intellectual property sector.

Further Islamic finance is constantly evolving and adopting practises in order to offer some level of co-ordination between various sharia based finance institutions. Most recently, attempts have been made to rank the efforts of the main countries offering Islamic finance products to regionalise the regulatory frameworks of the Islamic finance industry. The Islamic Centre for the Development of the Private Sector (ICD) and Thomson Reuters have attempted to rank countries that operate Islamic Banking. ICD and Thomson Reuters have developed a composite weighting index to measure overall performance of Islamic Finance by an aggregate assessment of quantitative development, knowledge, governance awareness and corporate social responsibility<sup>803</sup>. The first report was published in 2013 and Bahrain has been the best performing GCC state in both 2013 and 2014<sup>804</sup>.

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[X&ei=UnHBVMSNOore7Abp\\_oCoBw&ved=0CEcQ6AEwBQ#v=onepage&q=islamic%20finance%20growing%20industry%20g](http://www.tkbb.org.tr/documents/arastirmaveraporlar/islamic_finance_development_report_2014.pdf)  
[cc&f=false](http://www.tkbb.org.tr/documents/arastirmaveraporlar/islamic_finance_development_report_2014.pdf). Accessed on 22.03.2015.

<sup>803</sup> Islamic Centre for the Development of the Private Sector (ICD) and Thomson Reuters, (2013), Mapping Global Islamic Finance Development, Islamic Finance Development Report. Available at <http://auscifwp.files.wordpress.com/2013/12/icd-islamic-finance-development-report-2013.pdf>. Accessed on 06.01.2015.

<sup>804</sup> The 2013 report is available at <http://auscifwp.files.wordpress.com/2013/12/icd-islamic-finance-development-report-2013.pdf>. Accessed on 07.01.2015. The 2014 report is available at [http://www.tkbb.org.tr/documents/arastirmaveraporlar/islamic\\_finance\\_development\\_report\\_2014.pdf](http://www.tkbb.org.tr/documents/arastirmaveraporlar/islamic_finance_development_report_2014.pdf). Accessed on 07.01.2015.

### **7.15 The role of Islamic finance in intellectual property**

The potential role of Islamic finance in the development of an integrated approach to intellectual property protection in the GCC has not yet been fully considered. The first ever intellectual property based sukuk within an ijara structure was introduced by the German based finance company, FWU AG Group<sup>805</sup>. The intellectual property based sukuk introduced by FWU AG Group demonstrates how intellectual property based assets can be a viable option in Islamic finance services and structures. Consequently Islamic intellectual property financing will not only protect the intellectual property rights in the underlying asset, but promote intellectual property rights as sharia compliant and therefore stemming from Islamic, rather than western roots.

The link between Islamic finance and intellectual property is only just starting to emerge with the global Islamic finance market closely following FWU's intellectual property based sukuk. Many other countries are now developing Islamic finance based products and it is only a matter of time before intellectual property as an asset permeates the Islamic finance sector. Hence why, an integrated approach to intellectual property rights through the medium of Islamic finance will prove crucial to not only the GCC states, but across all international regions.

### **7.16 Islamic finance as a vehicle to drive intellectual property in the GCC**

Overall, there are four main components of Islamic finance regulation that need to be re-enforced in intellectual property protection. All the GCC states have; developed some form of a financial market infrastructure, they have improved consumer and investor protection, promoted regulatory cooperation, have built and continue to build human capital. Therefore, rather than treating intellectual property as standalone rights, the systems and regulations in Islamic finance can be applied to intellectual property protection.

By placing emphasis on more effective co-ordination between the GCC states, there is an opportunity to improve enforcement and public acceptance of intellectual property law. Intellectual property protection needs to be developed under five main strands; consistent regulation of intellectual property rights demonstrating consistency with sharia law, strengthen the intellectual property market structure, improve compliance in terms of systems and controls, address issues around the efficiency of

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<sup>805</sup> Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>. Accessed on 23.01.2015.

supervisory procedures and most importantly, engender greater public confidence in the intellectual property sector.

### **7.17 Intellectual property based sharia boards**

The first area of Islamic finance that would make a significant change to the governance of intellectual property in the GCC is an intellectual property rights equivalent to Islamic finance sharia boards. As seen in chapter 3, although there is a general acceptance of intellectual property rights in the GCC and each GCC state is TRIPS compliant<sup>806</sup>, internal frameworks for exhibiting a level of sharia compliance that is both transparent and publicly accepted are not quite there. The first recommendation, from the analysis of Islamic finance, is to address the shortfall in the somewhat minimalistic approach to intellectual property protection through the introduction of intellectual property based sharia boards.

**The recommendation is twofold, firstly to adopt the successful principles of Islamic finance and secondly to overcome the shortcomings in Islamic finance from the onset<sup>807</sup>.**

Each GCC state has a dedicated institution to intellectual property protection as seen in chapter 2<sup>808</sup>. As can be seen from the research, these institutions are heavily influenced by international pressures to conform to higher standards of TRIPS without addressing the reasons behind why the GCC are struggling to maintain TRIPS compliance, let alone accelerating to TRIPS Plus. Therefore, there are two levels of intellectual property sharia boards that are required.

An overarching regional board that is represented by each GCC state and comprises a GCC state level intellectual property board would act as a higher authority for internal disputes and appeals. The regional board would have clear criteria for what constitutes an Islamic intellectual property scholar. Oman, as the latecomer to Islamic finance had an opportunity to not only reinvent the wheel with Islamic finance in the GCC, it reflected on the shortcomings of the sharia boards in other states to give Islamic finance the best start possible. It is the same logic that needs to be applied to intellectual property, as this is an opportunity for the GCC to mitigate ahead of the changes in the international market, namely the TTIP and TTP as discussed in chapter 6<sup>809</sup>. The overarching GCC intellectual property board can

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<sup>806</sup> See chapter 3 at 3.7.2.

<sup>807</sup> A detailed analysis of the shortcomings in Islamic finance and recommendations to better regulate the Islamic finance sector will be a further research interest area that will be an off shoot of the current research. The further research will deal specifically with the criticisms of sharia boards and propose changes to further enhance the regulation of the Islamic finance sector.

<sup>808</sup> See chapter 2.

<sup>809</sup> See chapter 6 from 6.6 to 6.10.



set limitations on how many boards an Islamic intellectual property advisor can be a member of, the maximum tenures, the level of commitment needed from each board member and their key duties.

The intellectual property system in the GCC is missing an “Islamisation” of the rights that the GCC states are obliged to protect, both from national legislative commitments and international agreements. By Islamisation, the meaning behind this is to add a bridge between international standards on intellectual property and national laws. By investing in intellectual property sharia boards which are composed of well-respected scholars who can create sharia compliant frameworks that specify how intellectual property rights are compliant, the GCC states can develop from a TRIPS compliance level to an integrated approach to potential higher standards. It requires taking a step back from the current approach to intellectual property and re-evaluating the approach through a different lense, through Islamic finance. The regional Islamic intellectual property sharia board can act as a higher authority and the sharia scholars that sit on the regional board should not sit at a national level board to avoid potential conflict of interests.

National level intellectual property based sharia boards will add an extra tier to the integration of intellectual property in the GCC as from chapter 3, it is clear that not all the GCC states adhere to sharia law at the same constitutional level<sup>810</sup>. By creating national level boards, each GCC state can safeguard its autonomy and create a stronger and more efficient sharia compliance framework for intellectual property in line with its own legislation and governance. As discussed earlier in this chapter, not all the Islamic finance sharia boards follow a centralised system, however they are able to govern Islamic finance successfully.

Therefore the practices national Islamic intellectual property based sharia boards can adopt from Islamic finance sharia boards are: to set standards for what qualifications an Islamic intellectual property sharia scholar should have, minimum and maximum terms of appointment, minimum attendance requirements and sub divisions based on individual areas of expertise in intellectual property.

### **7.18 Strengthen the intellectual property market structure**

The intellectual property market structure in the GCC as researched in earlier chapters highlights pertinent structural and operational flaws in the current intellectual property system<sup>811</sup>. As a synopsis, the structure of intellectual property protection in the GCC is regionally led through the GCC patent

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<sup>810</sup> See chapter at 2.4 and Table 2 and chapter 3 at 3.1.

<sup>811</sup> See chapter 4 from 4.9 to 4.10, chapter 5 from 5.5 to 5.8 and 5.12 to 5.14. Also see chapter 6 from 6.11 to 6.16.

office, as well as national provisions such as domestic patent offices and intellectual property rights protection and enforcement institutions<sup>812</sup>. The GCC patent office is ill equipped to cope with the sheer number of patents filed with the number of applications in progress in excess of 15,000<sup>813</sup>.

Therefore in order to strengthen the intellectual property market structure, lessons can be learnt from Islamic finance. **The three main recommendations are; to adopt regulation and auditing frameworks for Islamic finance sharia boards, have a sharia compliant structure in place for each type of intellectual property right and develop intellectual property based assets within an Islamic finance structure<sup>814</sup>.**

Islamic finance sharia boards are subject to scrutiny and review, there are national level issues as not all GCC states adopt a centralised model nor do they impose limitations on sharia scholar commitments, however each GCC state offers structural parameters which are not so apparent in intellectual property. By implementing national and regional level structures there is more co-ordination of intellectual property as a holistic approach to development as currently there are ad hoc powers delegated to state institutions without the necessary harmonisation of structural frameworks.

Fundamental to the success of Islamic finance is that it has created sharia compliant alternatives to conventional financial products. The intellectual property field has not done this and as a result intellectual property rights have failed to shake off their “foreigner rights” image<sup>815</sup>. There is legislation and rules in place to prohibit riba and gharar in intellectual property, however Islamic finance has gone one step further and developed an Islamic version of conventional financial products. To succeed in developing an integrated approach to intellectual property, the GCC states need to develop alternative sharia compliant structures to existing intellectual property concepts.

Thirdly, the GCC states, in their bid to be market leaders for Islamic finance, need to invest in research and development structures that build on the work of FWU AG group and incorporate intellectual property based assets in existing Islamic finance products. By developing intellectual property based assets through Islamic finance, the assets are better protected as in the eyes of the public they have a seal of approval by sharia scholars.

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<sup>812</sup> See chapter 2 from 2.5 to 2.11.

<sup>813</sup> See chapter 6 at 6.3.

<sup>814</sup> See chapter 7 at 7.6 and 7.16.

<sup>815</sup> See chapter 4 at 4.6 and chapter 5 at 5.6.1.

The identified shortcomings in the Islamic finance structure which should be addressed in the integrated approach to intellectual property rights are; the lack of a centralised database of scholars, continued professional development of scholars, adopting a fit for purpose approach and addressing transparency issues.

### **7.19 Improve compliance in terms of systems and controls**

Systems and controls already exist in intellectual property protection in the GCC. Chapter 4 analysed compliance measures and to date, the customs authorities have been the most prominent in restricting trade in counterfeit and pirated goods<sup>816</sup>. This epitomises the GCC approach to intellectual property compliance as it is a very top heavy approach. As seen in chapter 5<sup>817</sup>, the GCC states do not have access to the level of resources available to countries with developed intellectual property systems, in terms of; infrastructure, legislation, case law, technical expertise and independent reports<sup>818</sup>. Therefore, there are specific development needs in relation to the systems and controls that are currently in operation.

In order to improve existing systems and controls in intellectual property, the GCC states need to take a step back from the front line issue and reassess their compliance procedures to be able to take a holistic approach to intellectual property rights protection. **A potential avenue through which to improve existing systems and controls in intellectual property is to learn from the shortcomings in Islamic finance in this regard namely by; setting up internal auditing committees, introducing governance ethics, initiating periodic reviews and assurances for intellectual property rights.**

### **7.20 Address issues around the efficiency of supervisory procedures**

There are practices from Islamic finance that can have a positive influence on how the GCC states supervisory procedures operate in the field of intellectual property. There are issues around transparency and disclosures in intellectual property law which could be addressed by setting up case specific supervisory boards. There is no accessible database or bank of information on case law or

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<sup>816</sup> See chapter 4 at 4.6.

<sup>817</sup> See chapter 5 at 5.12.

<sup>818</sup> Endeshaw, A. (2006), Intellectual Property and the WIPO Development Agenda, Maur, E. (2011), The Influence of PTAs- on the implementation of intellectual property rights in developing countries, International Centre for Trade and Sustainable Development (ICTSD) and Rizk, N. and Shaver, L. (2010), Access to Knowledge: Economic, Global and Local Perspectives.

judicial decisions. Further, there is a lack of access to cases that have been settled out of court, to information on judicial experience or expertise or alternative dispute settle mechanisms<sup>819</sup>. Therefore, taking heed from Islamic finance, more transparency is required at government and regional levels to integrate intellectual property as a sharia compliant industry<sup>820</sup>.

### **7.21 Greater public confidence in the intellectual property sector**

Islamic finance has secured public confidence in its established products. There is conflict between different scholars on the Islamic legalities of a product and this is a flaw within the Islamic finance sector that needs to be addressed as the public will accept a principle that is a unanimous decision but will be less receptive to a product that has scholars at loggerheads. Intellectual property has never truly won the Islamic world. From research by El Bialy and Gouda, their empirical research showed Islamic developing countries had a high level of IPR piracy as well as a high level of religiosity to Islam<sup>821</sup>. In contrast, Islamic finance is not only well received; it is an industry that is growing despite almost a decade of global financial woes.

Public confidence is difficult to quantify as it is very subjective. Lessons need to be learnt from the Islamic finance sector in the GCC states as how Islamic finance has been introduced, the indexes and financial institutions set up and the regulatory frameworks all demonstrate a level of ownership of Islamic finance. The GCC states need to similarly demonstrate ownership of the intellectual property rights they seek to protect, be they as they may from predominantly foreign investors.

### **7.22 Conclusion**

Islamic finance has achieved success as a sharia compliant alternative to conventional banking. The industry is growing, with the market expanding beyond the Organisation of Islamic Co-operation and non-member countries weighing in with their own Islamic finance products and services. The approach taken by the GCC in developing Islamic finance is not uniform across all the GCC states, a similarity it shares with intellectual property development. Another similarity is that there is no overarching supervisory body that acts as a higher authority, where the decision would bind ratified states, at a regional level in the GCC. The timeframe in which Islamic finance has developed also runs parallel with intellectual property development amongst the GCC states.

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<sup>819</sup> Alternative dispute mechanisms have been considered at chapter 6 at 6.12.

<sup>820</sup> See chapter 7 at 7.7, 7.8 and 7.18.

<sup>821</sup> See chapter 3 at 3.15.

However the purpose of this chapter was to identify the sharia compliant structures that exist within the GCC states and identify how the successes of Islamic finance can be a vehicle for promoting better intellectual property rights protection in the GCC. There are five key recommendations from the analysis of Islamic finance which have been outlined in this chapter that can be applied to an integrated Islamic based intellectually property based model. The recommendations are; Islamic based intellectual property sharia boards, strengthened intellectual property market structures, improved compliance to increase transparency through systems and controls, increased efficiency of supervisory procedures and greater public confidence in the intellectual property sector.

The findings from Islamic finance and its sharia compliant models are a springboard to creating a successful sharia compliant intellectual property rights protection approach. The next chapter will build on the findings of this chapter and earlier chapters and incorporate the research findings on the structure of the GCC states, international agreements and pressures, the international institutions and sharia law to propose a series of recommendations to develop an integrated approach to intellectual property rights protection.

## **Chapter Eight: Recommendations to develop an integrated approach to intellectual property**

### **8.1 Introduction**

The research question set at the start of the thesis was to examine the intellectual property regimes in the Gulf Co-operation Council (GCC) states. The main aim was to answer the key research question of

what recommendations could be made to develop an integrated approach to intellectual property rights protection in the GCC and its potential impact on intellectual property protection in the region. The integrated intellectual property rights approach has taken into account; the structure of the GCC states, international agreements and pressures, the international institutions, Islamic finance and both societal and religious views.

The thesis examined current intellectual property laws in the GCC states and considered the protection of intellectual property from two perspectives, international demand for higher standards of intellectual property protection in the GCC states<sup>822</sup> and defining the relationship between intellectual property and sharia law<sup>823</sup>. The thesis has contributed to the existing research in the field as previous research has investigated intellectual property development under one of the two perspectives but not both. Thirdly, the theoretical analysis of Islamic finance structures as a vehicle for promoting better intellectual property rights is a novel contribution to the field and will lead on to further research.

The GCC share certain commonalities which make developments in the region relevant to many other countries who share similarities in religious influence, societal and cultural norms, economic progression and development. The thesis has contributed to an important area of study as the developing GCC states are struggling with meeting international standards and a successful integrated framework will impact not on how the GCC states move forward with intellectual property rights protection within their constitutional religious obligations. Further, the proposed integrated approach to intellectual property rights protection will impact on other Islamic states and as a result lead to more informed negotiation in trade agreements with developed states. Also it will meet the overall objective

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<sup>822</sup> Hassanein, M. (2008), Bilateral WTO-Plus Free Trade Agreements In The Middle East: A Case Study Of OFTA In The Post-Trips Era, Wake Forest Intellectual Property Law Journal, Volume 8, pages 161-197, Said, E. (2007), The European Trips Plus Model and the Arab World, Liverpool Law Review, Said, E. (2005), The Road from TRIPS-Minus, to TRIPS, to TRIPS-Plus Implications of IPRs for the Arab World, Tamimi, E. (1999), Current U.A.E. Copyright Law and how it Compares and Contrasts with WTO's Trips-Agreement and the Berne Convention, The Journal of World Intellectual Property, Volume 2, pages 371-391, Price, D. (2011). Politics, Piracy and Punishment: Copyright Protection in the Arabian Gulf, Journal of World IP Volume 14, Numbers 3-4, pages 276-300 and Deere, C. (2009), The implementation game: the TRIPS agreement and the global politics of intellectual property reform in developing countries.

<sup>823</sup> Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law, Capital University Law Review, Khoury A. (2003), *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, The Journal of Law and Technology at 153 and 154, Raslan H. (2009), Shari'a And The Protection Of Intellectual Property—The Example Of Egypt, The Intellectual Property Law Review 47 (4), pages 497-559, Mahafzah Q. (2009), The Perspective of Moral and Financial Rights of Intellectual Property in Islam, Arab Law Quarterly, Volume 23, Issue 4, pages 457-468, Loutfi, M. (2003), The Protection of Intellectual Property Rights: The views of the Pharos, Islamic Jurisprudence and Masters of Poetry and Literature, pages 232–233, Cullen, C. (2010), Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law? Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law. The Prague Yearbook of Comparative Law, pages 55-94.

of developing a framework within which Islamic states can improve the level of intellectual property rights protection offered without alienating their own distinct sharia based constitutional obligations.

The research has argued that there are systematic flaws in the GCC states adopting intellectual property laws which have been nothing short of a complete overhaul of domestic laws, modified to reflect foreign laws from colonial occupation or laws taken from donor countries. As can be seen from the research, each GCC state has differing levels of national sharia compliance, intellectual property laws and international agreements. There is a strong dichotomy that exists between the religious characteristics of each GCC state, the intellectual property laws that exist under western legal principles and therefore the foreign laws, as they stand, are unsuitable for the GCC states and require modification. There is a significant paucity of research in developing an integrated approach to intellectual property rights in the GCC and therefore the one of the fundamental aims of this research is to act as a catalyst for further research in this area.

### **8.2 The research questions**

The integrated intellectual property rights protection framework addresses the following key research questions:

- How can the GCC states satisfy international demands for better intellectual property protection without compromising their Islamic values and traditions?
- Do the GCC states have the necessary capacity both in their legal structure and internal institutions to increase their levels of intellectual property rights protection?
- What recommendations can be made to develop an Islamic law based integrated approach to intellectual property rights in the GCC taking into account; the structure of the GCC states, international agreements and pressures, the relevant international institutions, Islamic finance and both societal and religious views.

**The recommendations for an integrated approach to intellectual property rights protection in the GCC are three fold; firstly they centre on embedding existing sharia principles of property law, contract law, ijaza and public interest to intellectual property laws, secondly they are focussed at a GCC level and at a national level with specific recommendations for each GCC state and thirdly they assess the impact of Islamic law, the US and the EU, TRIPS standards, international trade and Islamic finance.**

### **8.3 First area of recommendations: embedding sharia principles to intellectual property law**

### **8.3.1 Embedding sharia principles of property law**

#### **Key recommendations:**

- **balance the rights of the inventor in line with how sharia law protects the rights of property right holders against the prohibition of excessive wealth;**
- **quantify the non-tangible asset and the consequential loss and**
- **create sharia compliant punishments for intellectual property infringement.**

Proprietary rights have been established by Quranic verses that make specific references to proprietary interests<sup>824</sup>. Therefore, there is a strong foundational base of proprietary rights based knowledge within the primary sources of sharia law that can be embedded into an integrated intellectual property framework in order to create a stronger link to Islamic law<sup>825</sup>. There needs to be an intellectual property doctrine that reflects the proprietary principle of Istikhlaf as discussed in chapter 3<sup>826</sup>.

Established practices in the GCC states accept that all property belongs to God, allowing the exercise of a right to ownership subject to the public interest of society. Where the interpretation of Islamic proprietary rights to intellectual property rights has fallen short in the past is in the quantification of the asset. Under sharia law, property law dictates on; the ownership of property, the right to possess and enjoy wealth through lawful means<sup>827</sup>, theft of property<sup>828</sup> and the doctrine of mutual consent<sup>829</sup>. For an integrated intellectual property framework to have an impact on intellectual property protection, the quantification of the asset and the consequential loss necessitates compliance within set parameters similar to how Islamic finance has sought to limit speculative loss, intellectual property law can develop sharia compliant remedies which can implement control measures that would allow intellectual property rights protection to be more fit for purpose in the GCC.

Theft of property is also referenced in the Quran<sup>830</sup> and punishments are set in line with Islamic teaching however there is no crossover principle to intellectual property theft in the primary sharia sources of the

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<sup>824</sup> See the Quran for example at; 2:188, 2:220, 2:275, 2:278-279, 4:2, 4:5-6, 4:95, 4:161, 6:152, 9:41, 9:88, 49:15 and 61:11. Available at [www.quran.com](http://www.quran.com). Accessed on 30.01.2015.

<sup>825</sup> See the Quran 3:77. Available at [www.quran.com](http://www.quran.com). Accessed on 30.01.2015.

<sup>826</sup> See chapter 3 at 3.8.

<sup>827</sup> See the Quran at 2:195, 2:254, 2:267 and 9:103. Available at [www.quran.com](http://www.quran.com). Accessed on 30.01.2015.

<sup>828</sup> See chapter 3 at 3.8.5. Also see the Quran at 4:29. Available at [www.quran.com](http://www.quran.com). Accessed on 30.01.2015.

<sup>829</sup> Adam, M. (2005), Remarks about the TRIPS Agreement with Particular Reference to Compulsory Licensing. Available at <http://www.dradamiprgroup.com/forms/Remarks.pdf> Accessed on 30.01.2015.

<sup>830</sup> See the Quran at 59:7. Available at [www.quran.com](http://www.quran.com). Accessed on 30.01.2015. See Usmani, M. (2009), Present Financial Crisis Causes And Remedies From Islamic Perspective. Available at [http://www.muftitaqiusmani.com/index.php?option=com\\_content&view=article&id=41:present-financial-crisis-causes-and-remedies-from-islamic-perspective-&catid=12:economics&Itemid=15](http://www.muftitaqiusmani.com/index.php?option=com_content&view=article&id=41:present-financial-crisis-causes-and-remedies-from-islamic-perspective-&catid=12:economics&Itemid=15) Accessed at 30.01.2015. Also see Chaudhry, M.



Quran or the Sunnah. The Quran is very detailed on criminal law and the application of tangible property theft to intangible assets requires a formal analysis of intellectual property theft and corresponding Islamic principles of theft.

The recommendation is to balance the rights of the inventor, in line with how sharia law protects the rights of tangible asset holders, against the prohibition of excessive wealth and to create sharia compliant punishments for intellectual property infringement. The main counterarguments to this recommendation are two fold in that; how can sharia compliant punishments for intellectual property infringement be aligned with the one size fits all TRIPS approach to intellectual property rights protection and secondly as profit is based on market value, how can a prohibition apply when markets are inherently uncertain.

In response to the one size fits all TRIPS approach, the GCC states need to consider a modified approach to TRIPS and especially TRIPS Plus whereby they can be granted some level of flexibility to develop an intellectual property model which addresses the lack of certainty in profit driven markets as this will satisfy the doctrines of riba and gharar while providing safeguards for intellectual property right holders<sup>831</sup>. Further, there is a lack of legislative reform to resolve the issue of economic free riders in the GCC states. This can be addressed through the implementation of an Islamic doctrine in establishing an Islamic based principle to deal with economic free riders<sup>832</sup>.

### **8.3.2 Embedding sharia principles of contract law**

#### **Key recommendations:**

- **develop intellectual property rights through incorporating sharia compliant doctrines of contract law;**
- **incorporate principles of mutual consent and gainful exchange to the protection of knowledge based assets and**
- **promulgate Islamic based contractual law ethics to intellectual property rights protection.**

Islamic principles of contract law can be integrated into intellectual property rights protection by developing recognised sharia compliant doctrines of contract law to create more sophisticated Islamic

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Islam And Other Economic Systems, Chapter 20. Available at [http://www.muslimtents.com/shaufi/b16/b16\\_20.htm#3.Monopoly](http://www.muslimtents.com/shaufi/b16/b16_20.htm#3.Monopoly) Accessed at 30.01.2015.

<sup>831</sup> For an analysis on riba and gharar see chapter 3 at 3.9 and 3.10.

<sup>832</sup> See chapter 3 at 3.8.4.

based intellectual property rights<sup>833</sup>. Mutual consent and gainful exchange are two key doctrines of contract law that are evident in the Quran at Surah An-Nisā', Verse 4<sup>834</sup>. These principles of contract law need to be applied beyond a justification for intellectual property rights and develop elements of Islamic law based theory of intellectual property rights protection. It puts emphasis on the role of sharia scholars to evolve from reaching a consensus on whether intellectual property rights are compliant with sharia law, to developing sharia compliant intellectual property rules and regulations. Islamic approval of intellectual property rights protection is not a contentious issue, it is how Islamic law can uphold the doctrines of intellectual property law and develop sharia compliant frameworks for improved levels of intellectual property protection.

The recommendation is to apply contract law principles at two levels. First, to incorporate contract law principles that are underpinned by sharia law in existing GCC practices of regulating contractual agreements and for providing sharia compliant remedies for where agreements have been breached. The Islamic doctrines of contract law are needed to strengthen the argument for an Islamic based approach to intellectual property rights protection as contractual agreements to license the use of assets can spearhead Islamic doctrines for granting knowledge based asset owners monopoly rights for a given time period.

Second, the GCC states would benefit from applying primary sharia references in respect to international transactions<sup>835</sup>, economic gain<sup>836</sup>, moral rights<sup>837</sup>, financial rights and conducting ethical contractual law based business to intellectual property rights protection<sup>838</sup>. The Quran and Sunnah have clear statements regarding honouring international agreements, economic gain and the rights of each party while balancing the need for certainty against the prohibition of riba and gharar<sup>839</sup>. Therefore these statements can be utilised to develop an integrated Islamic based intellectual property framework without violating the doctrines of riba and gharar.

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<sup>833</sup> See chapter 3 at 3.9.

<sup>834</sup> See the Quran at 4:29. Available at [www.quran.com](http://www.quran.com). Accessed on 29.01.2015.

<sup>835</sup> See the Quran at 9:1, 9:4, 9:7, 9:8, 9:10, 9:12 and 13:20. Also see Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law. The Prague Yearbook of Comparative Law, pages 55 to 94.

<sup>836</sup> Olwan, R. (2013), Intellectual Property and Development: Theory and Practice, Springer Publishing. See Quran at 11:15. Available at [www.quran.com](http://www.quran.com). Accessed on 30.01.2015.

<sup>837</sup> The Book of Virtue, Good Manners and Joining of the Ties of Relationship (Kitab Al-Birr was-Salat-I-wa'l-Adab) Translation of Sahih Muslim, Book 32 at Chapter 27.

<sup>838</sup> See chapter 3 at 3.10. Drahos, P. (2003), When the Weak Bargain win the Strong, Kluwer Law, pages 79 to 109. Penubarti, M. and Maskus, K. (1995), How trade-related are intellectual property rights? Journal of International Economics, Volume 39, Issue 3, pages 227 to 248.

<sup>839</sup> See the Quran at 2:275, 3:130, 4:29, 4:161, 5:1, 5:62, 5:90, 9:4-12, 13:20 and 30:39. Accessed on 30.05.2015.

### **8.3.3 Embedding sharia principles of ijaza**

#### **Key recommendations:**

- **develop the doctrine of ijaza to offer a sharia compliant authentication process for intellectual property rights protection;**
- **utilise the doctrine of ijaza to highlight the protection of moral rights from an Islamic perspective and**
- **apply Islamic law based protection for intellectual property rights as an acknowledgment for the time, labour and efforts of the inventor.**

The sharia principle of ijaza, as discussed in chapters 3 and 7, is a principle that needs to be brought to the forefront of intellectual property protection. In ancient Islamic customs there was a system of knowledge acknowledgement by way of a certificate, known as ijaza<sup>840</sup>. The doctrine of ijaza protects the moral rights of an author to a certain degree as it is believed that the knowledge itself belongs to God, not to any individual. By applying inferential reasoning, if the moral rights of the author are protected, within limitations, then as a result, ijaza can be interpreted and developed by sharia scholars to offer an authentication process for intellectual property rights protection.

The developmental stage of intellectual property rights protection in the GCC requires more than legislative changes, it requires an Islamic law based protection process for intellectual property rights as an acknowledgment for the time, labour and efforts of the inventor as established in the doctrine of ijaza. This will have a positive impact on public acceptance of intellectual property rights as if the protection of the time, labour and efforts of the inventor are seen to have a connection to Islamic principles, then intellectual property rights are less likely to be considered "foreigner right".

### **8.3.4 Embedding sharia principles of public interest**

#### **Key recommendations:**

- **modify intellectual property rights protection to have a greater appreciation of ethical business;**
- **give more weight to the doctrine of public interest when balancing the rights of the inventor against the potential harm to public welfare and**

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<sup>840</sup> See chapter 3 at 3.14.

- **develop from identifying the primary sharia sources on public interest that can justify intellectual property rights protection to a more stringent and rigorous application of public interest.**

The impact of public interest in the development of intellectual property rights protection is interwoven in to all aspects of sharia law. There are primary source sharia references which state the need for a moral and ethical code to be adopted in conducting daily tasks and activities<sup>841</sup>. The Sunnah references identified in chapter 3 have been found to specifically weigh the importance of moral and financial rights, placing the development of intellectual property protection within the ambit of ethical business<sup>842</sup>. Public interest in sharia law aims to protect and progress the legitimate interests of the community within the recognised sources primary and secondary sharia sources in order to secure public welfare through promoting the benefits of a rule or protecting against harm<sup>843</sup>.

Intellectual property development in the GCC states has overlooked the importance of public interest principles as it requires a modification of western laws as opposed to directly adopting western laws into domestic legal structures. Intellectual property legislation in all the GCC states accounts for prohibitions on haram activity, riba and gharar. However, what the research highlights is that the level of protection offered to prevent breaching sharia law are just scratching the surface of sharia law and by delving deeper into existing Islamic doctrines, intellectual property protection can exist under more stringent and rigorous sharia principles.

The counter argument to broadening the public interest doctrine is that there is a potential negative impact on the level of protection available to inventors while narrowing the public interest could have a detrimental effect on public welfare<sup>844</sup>. The role of public interest in the protection of intellectual property rights on the GCC and neighbouring states will be an area of further research as from the proposals in TRIPS plus it is evident that the public interest doctrine is being straight-jacketed and with the development of investor to state dispute mechanisms and corporate sovereignty, grounds for public interest are facing further restrictions.

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<sup>841</sup> See the Quran at 16:90 states; *“Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded.”* Available at [www.quran.com](http://www.quran.com). Accessed on 27.03.2015.

<sup>842</sup> The Book of Virtue, Good Manners and Joining of the Ties of Relationship (Kitab Al-Birr was-Salat-I-wa'l-Adab) Translation of Sahih Muslim, Book 32 at Chapter 27. See chapter 3 from 3.9 to 3.12.

<sup>843</sup> Kamali, M. (1989), *Principles of Islamic Jurisprudence*, 1-2 Pelanduk Publications and Raslan, H. (2007), *Shari'a and the Protection of Intellectual Property: The Example of Egypt*, *The Intellectual property Law Review*, page 497.

<sup>844</sup> See chapter 3 at 3.11.

## **8.4 Second area of recommendations: proposals for the GCC and each individual GCC state**

### **8.4.1 Assessing the capacity of the GCC states to increase intellectual property rights protection**

As outlined in the research, the GCC states not only place differing levels of importance on sharia law at a constitutional level, they also differ on the level of intellectual property rights protection available domestically<sup>845</sup>. In order to assess the capacity of the GCC states, both in their legal structure and internal institutions, to increase their levels of intellectual property rights protection, international intellectual property rights standard setting was considered.

The research was concerned with; national intellectual property structures within the GCC states, the viewpoints of the US and the EU on international intellectual property rights standard setting, the impact international trade, TRIPS agreement and pending trade agreements had on the GCC states, as well as the influence of corporate sovereignty, ISDS and non GCC trade agreements such as the TTIP and TTP.

### **8.4.2 The current intellectual property structures in the GCC**

- **Each GCC state has its own set of domestic intellectual property legislation and institutions with an overarching GCC patent office based in Saudi Arabia;**
- **All the GCC states abide by minimum TRIPS standards and display a set of intellectual property laws that are largely compliant with TRIPS and**
- **The GCC states have intellectual property legislation which legislates on both criminal prosecutions and civil sanctions.**

Each GCC state has its own set of domestic intellectual property legislation and institutions set up to regulate intellectual property rights protection with an overall regional patent office based in Saudi Arabia. The GCC patent office has the authority to grant a regional community patent that is valid in all of the GCC states<sup>846</sup>. The Gulf states all abide by minimum TRIPS standards and display a set of intellectual property laws that are largely compliant with TRIPS. The GCC states have intellectual property legislation which legislates on both criminal prosecutions and civil sanctions available to intellectual property right holders where their rights have been infringed. The capacity of the GCC states to raise existing levels of TRIPS compliance to TRIPS Plus standards has been a key research question.

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<sup>845</sup> See chapter 2 at 2.4 to 2.9.

<sup>846</sup> See chapter 2 at 2.2.

In order to assess whether the GCC states have enough scope in their current laws to comply with TRIPS plus provisions, each GCC state has been considered in turn to outline how effective their current measures are and what recommendations can be made to improve the current model of intellectual property rights protection by the GCC states. Thus, each GCC state is summarised individually to examine their current intellectual property rights protection and signpost areas for improvement.

### **8.5 Improving intellectual property rights development in Saudi Arabia**

#### **Key recommendations:**

- **lead on integrating intellectual property rights with sharia principles at both a regional and national level with representation from sharia scholars who have expertise in sharia law and intellectual property law;**
- **modify its approach to intellectual property rights protection by instigating an intellectual property rights system which does more than comply with sharia law; it can prompt the development of sharia compliant intellectual property frameworks and**
- **develop an integrated intellectual property rights approach that can offer uniform guidance on how sharia compliant intellectual property rights can be identified and implemented.**

Saudi Arabia remains an absolute monarchy with Article 1 of its Basic Law of Government stating the Holy Quran is the constitution and state governance must abide by sharia law<sup>847</sup>. From the research it was found that Saudi Arabia operates a judicial system that is the most reliant on sharia principles<sup>848</sup>. Sharia law has formed the basis of all decision making in the criminal and civil courts and is given a higher level of importance in the law making process as compared to the other GCC states.

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<sup>847</sup> The Basic Law of Government, (1992), Saudi Arabia, Article 1. Available at [http://www.saudiembassy.net/about/country-information/laws/The\\_Basic\\_Law\\_Of\\_Governance.aspx](http://www.saudiembassy.net/about/country-information/laws/The_Basic_Law_Of_Governance.aspx). Accessed on 30.01.2015.

<sup>848</sup> Khan, A. (2000-2001), Islam as Intellectual Property My Lord! Increase Me in Knowledge, Cumberland Law Review Volume 31, pages 1-46, Gattje, H. (1997), The Qur'an and its exegesis, [English trans. & ed. Alford T. Welch], Oxford Oneworld and Price, D. (2012), The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates, Routledge.

Saudi Arabia has a number of laws pertaining to intellectual property rights protection with a total of 21 pieces of legislation<sup>849</sup>. Internationally, Saudi Arabia is a signatory to four international agreements<sup>850</sup>. Intellectual property rights protection is administered by the Saudi patent office in the King Abdulaziz City for Science and Technology (KACST). For intellectual property violations, the Saudi patent office prefers to deal with matters mainly by arbitration and not the court process<sup>851</sup>. Saudi Arabia is the only GCC state that does not follow a two track approach to intellectual property infringement in that whether the infringement is seen as criminal or civil, Saudi Arabia handles all piracy and counterfeiting from both criminal and civil perspectives<sup>852</sup>. The power lies with the Board of Grievances who can apply a broad range of punishments if intellectual property violations are found.

The Ministry of Culture and Information (MCI) is responsible for punishing copyright violations and follows the Saudi copyright system when imposing sanctions. The Ministry of Culture and Information established the Violation Review Committee (VRC) on copyrights in order to review copyright infringement cases and it is a requirement that one member of the committee be a sharia advisor<sup>853</sup>. Therefore rather than set up independent sharia boards for intellectual property rights protection, Saudi Arabia has sought to include sharia advisors to existing intellectual property related committees and boards.

Thus, Saudi Arabia has the necessary legislation to protect intellectual property rights and provide remedies for when infringement takes place. From an internal institution perspective, Saudi Arabia has

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<sup>849</sup> Legislation includes; Law Of Trade Names (2010), Law of Patents, Layout-Designs of Integrated Circuits, Plant Varieties, and Industrial Designs (2004), Copyright Law (2003), Law of Trademarks (2002), Commercial Register Law and its Explanatory Memorandum and Implementing Regulations (2011), Electronic Transactions Protection Law (2007), Regime of E-Transactions (2007), GCC Common Law on Anti-dumping and Countervailing Measures and Safeguards (2006), Retail Business Regime (2005), Competition Law (2004), Law Against Dissimulations (2004), Law of Commercial Data (2002), Law on Trade in Agricultural Fertilizers (2002), Law on Private Laboratories (2002), Law of Criminal Procedure (2001), Telecommunication Law (2001), Printing and Publishing Law (2000), Chartered Accountants Law (1991), Law against Commercial Fraud (1984), Arbitration Law (1983) and Saudi Arabia's Regime of commercial agencies (1962)

<sup>850</sup> Saudi Arabia became a member of the Berne Convention and Paris Convention in 2004, WIPO in 1982 and the Patent Co-operation Treaty in 2013. Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=SA>. Accessed on 30.01.2015.

<sup>851</sup> WatiZuallcoble, R. (2012), Study on Specialized Intellectual Property Courts, joint project between the International Intellectual Property Institute (IIPi) and the United States Patent and Trademark Office (USPTO). Available at <http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf>. Accessed at 14.03.2015.

<sup>852</sup> See chapter 5 at 5.6. Also see World Trade Review, (2011), Saudi Arabia, Contributing firm United Trademark & Patent Services in association with Dr Hasan Al Mulla Law Office, Page 191. Available at <http://www.worldtrademarkreview.com/issues/article.aspx?g=1ac1ba27-2a48-48bf-8839-722f21f53cfa>. Accessed on 02.02.2015.

<sup>853</sup> The full powers of the Violations Review Committee are stated in the Saudi Arabia Copyright Law (2003) at Article 25 which states at least one member shall be a Sharia advisor. See Article 25: Violation Review Committee (1) *A Committee to review the violation shall be formed by the Minister's decision, with a minimum of three members, provided that one of them is a legal advisor and the other a Shari'ah advisor.* (2) *Decisions of the Committee shall be made by majority vote, which shall be endorsed by the Minister.* Available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=129516](http://www.wipo.int/wipolex/en/text.jsp?file_id=129516). Accessed on 30.03.2015.

boards and committees set up to review and regulate intellectual property rights protection. This has been most apparent when consideration was given to Saudi Arabia's intellectual property enforcement through more stringent border measures<sup>854</sup>.

To better integrate intellectual property rights in to the Saudi Arabian legal system, the existing infrastructure needs enhancement by way of independent sharia boards. Saudi Arabia has taken a lead within the GCC union and is also the most sharia compliant of the GCC states. As the regional patent office is in Saudi Arabia, it can lead on integrating intellectual property rights with sharia principles at both a regional and national level. A regional intellectual sharia board can be set up with representation from sharia scholars who have expertise in sharia law and intellectual property law. In conjunction with a regional sharia board, Saudi Arabia can take a lead in proposing national level intellectual property based sharia boards.

By modifying its approach to intellectual property rights protection, Saudi Arabia can instigate an intellectual property rights system which does more than comply with sharia law; it can prompt the development of sharia compliant intellectual property frameworks. There are further ramifications of such an approach on the international intellectual property standards setting arena. By developing an integrated intellectual property rights approach that can offer uniform guidance on how sharia compliant intellectual property rights can be identified and implemented, there are crossover benefits of such an approach to other Islamic countries and the relationship between developed western states and Islamic states.

### **8.5.2 Improving intellectual property rights development in Bahrain**

#### **Key recommendations:**

- **given Bahrain already accedes to TRIPS Plus clauses in their free trade agreement with the US, it is recommended Bahrain take a lead on developing sharia compliant frameworks for intellectual property;**
- **address the lack of a positive correlation between extensive legislative measures and enforcement and**
- **replicate the progress it has made in the Islamic finance industry for a modified approach that further incorporates Islamic law with the intellectual property sector.**

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<sup>854</sup> See chapter 5 at 5.6.3.



Bahrain has a hereditary constitutional monarchy with a bicameral parliament<sup>855</sup>. The legal system of Bahrain is based on several sources, including customary law, Islamic law and civil law<sup>856</sup>. Sharia law is a principal source of legislation<sup>857</sup>. In terms of intellectual property legislation, Bahrain is the most progressive of the GCC states with 16 national laws<sup>858</sup> and 11 international treaties<sup>859</sup>, most notably it was the first of the GCC states to agree a bilateral trade agreement with the US<sup>860</sup>. The bilateral agreement with the US enforced TRIPS Plus measures such as investor to state dispute settlement mechanisms, ratification to further international treaties and longer durations for patent terms<sup>861</sup>. However, Bahrain has not had to deal with an investor to state dispute proceeding or breach of TRIPS Plus measures, therefore the impact of TRIPS Plus has not yet transpired into court proceedings. Bahrain does not have the same level of oil reserves as its neighbours<sup>862</sup> and as such has developed in other areas, with intellectual property being one of them. Bahrain has been the most proactive of all

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<sup>855</sup> Chapter 1, Article 1 (b), Constitution of the Kingdom of Bahrain (2002).

<sup>856</sup> Constitution of Bahrain, WIPO Lex. Available at <http://www.wipo.int/wipolex/en/details.jsp?id=7264>. Accessed on 18.03.2015.

<sup>857</sup> Constitution of the Kingdom of Bahrain, Part One, Article 2 states *“The Islamic Sharia is a principle source for legislation”*.

<sup>858</sup> Law No. 6 of 2014 Approving the Law (System) of Trade Marks of the GCC (Gulf Cooperation Council) Countries (2014), Act No. 22 of the Year 2006 Relating to the Protection of Copyright and Neighbouring Rights (2006), Law No. 12 of 2006 Amending some Provisions of Law No. 7 of 2003 Pertaining to Trade Secrets (2006), Law No. 14 of 2006 Amending some Provisions of Law No. 1 of 2004 in Respect of Patents and Utility Models (2006), Legislative Decree No. 11 of 2006 in Respect of Trade Marks (2006), Law No. 5 of 2006 on Designs of Integrated Circuits (2006), Law No. 6 of 2006 on Industrial Designs and Models (2006), Law No. 16 of 2006 Amending Law No. 16 of 2004 on the Protection of Geographical Indications (2006), Law No. 35 of 2005 Pertaining Amendment of Article No. 5 of Law No. 7 of 2003 on Trade Secrets (2005), Law No. 16 of the Year 2004 Relating to the Protection of Geographical Indications (2004), Law No. 1 of 2004 on Patents and Utility Models (2004), Ministerial Decree No. 1 of 2010 Issuing the Executive Regulations for the Law of Industrial Designs and Models No. 6 of 2006 (2010), Decree-Law No. 47 of 2002 on the Organisation of the Press, Printing and Publishing (2002), Decree-Law No. 21 of 2001 Promulgating Commercial Companies Law (2001), Legislative Decree No. 10 of June 7, 1993 in Respect of Copyright Law (1993) and Law No. 7 of 2003 on Trade Secrets (2003). Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=BH>. Accessed on 03.02.2015.

<sup>859</sup> Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (November 20, 2012), Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (May 1, 2007), Patent Cooperation Treaty (March 18, 2007), Trademark Law Treaty (March 18, 2007), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (January 18, 2006), Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (December 15, 2005), Patent Law Treaty (December 15, 2005), Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (December 15, 2005), WIPO Copyright Treaty (December 15, 2005), WIPO Performances and Phonograms Treaty (December 15, 2005), Paris Convention for the Protection of Industrial Property (October 29, 1997), Berne Convention for the Protection of Literary and Artistic Works (March 2, 1997) and Convention Establishing the World Intellectual Property Organization (June 22, 1995). Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=BH>. Accessed on 03.02.2015.

<sup>860</sup> Agreement between the Government of the United Kingdom of Bahrain and the Government of the United States of America on the Establishment of a Free Trade Area (January 11, 2006) and Treaty between the Government of the United States of America and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investment (May 31, 2001). Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=BH>. Accessed on 03.02.2015.

<sup>861</sup> Bahrain and the US Free Trade Agreement, (2006), Chapter Fourteen, Intellectual Property Rights. Available at [https://ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset\\_upload\\_file211\\_6293.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file211_6293.pdf). Accessed on 03.02.2015.

<sup>862</sup> Power, G. (2012), The difficult development of parliamentary politics in the Gulf - Parliaments and the process of managed reform in Kuwait, Bahrain and Oman.

the GCC states in relation to its intellectual property based legislative reforms, however this does not equate to Bahrain being the most successful at protecting intellectual property rights. The Business Software Alliance study places Bahrain second highest out of the GCC states on piracy rates, only offering better protection than Kuwait<sup>863</sup>. Also the WIPO commissioned global innovation index also ranks Bahrain as second to the bottom of the GCC states for its innovation trends in increasing human capital and infrastructure for research and education<sup>864</sup>. This further supports the need for an integrated approach to intellectual property rights protection both in Bahrain and in the GCC collectively. It may be well and good to satisfy international agreement obligations by acceding to higher standards of intellectual property law, however, in order to see the obligations through, more needs to be done.

As Bahrain is one of only two GCC states to have TRIPS Plus clauses in their FTA's with the US, the recommendation is for Bahrain to take a lead on developing sharia compliant frameworks for intellectual property within its extensive intellectual property law provisions. Bahrain, can replicate the progress it has made in the Islamic finance industry for developing its intellectual property sector. As a latecomer to Islamic finance, Bahrain has made the most significant improvements in the field as will be summarised later in this chapter at 8.11 and it needs to invest a similar level of commitment to the intellectual property sector. Further, by taking a lead in developing sharia compliant intellectual property rights while taking into account international agreements and pressures, Bahrain can demonstrate how sharia law can be utilised to create Islamic based intellectual property rights. This in turn will impact on the agreements being negotiated by the GCC Union with other countries and unions as well as the international agreements being considered by the other GCC states individually.

### **8.5.3 Improving intellectual property rights development in the UAE**

#### **Key recommendations:**

- **to focus the intellectual property research in the UAE to incorporate Islamic law principles into developing improved intellectual property systems;**
- **the UAE has invested in innovation and human capital and this can be an avenue through which to reassess the role of Islamic law in creating intellectual property rights that are more balanced in terms of traditional western rights and sharia principles.**

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<sup>863</sup> See chapter 5 at 5.5 and specifically Table 5. Also see Business Software Alliance, Global Software Piracy Study 2011. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 03.02.2015.

<sup>864</sup> Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 03.02.2015.

The UAE stands out for its commitment to improving intellectual property rights development. It has a body of national legislation in many areas of intellectual property including; copyright<sup>865</sup>, trademarks<sup>866</sup>, industrial designs<sup>867</sup> and other areas<sup>868</sup>. The UAE patent system has been operating under two systems; the Patent Cooperation Treaty (PCT) system for domestic patents and the GCC Patent system for regional patent applications<sup>869</sup>. As seen in chapter 2<sup>870</sup>, the UAE is signatory to several international treaties which has put it on par with Qatar's international obligations but below Oman and Bahrain<sup>871</sup>. Dubai has made the most progress in intellectual property enforcement through its customs intellectual property rights units<sup>872</sup>. Further through the Dubai Declaration to set new standards for developing intellectual property based civil and criminal proceedings at national and regional levels, Dubai has introduced more effective remedies in intellectual property rights protection<sup>873</sup>. Also the global innovation index 2014 found the UAE to be the most innovative of the GCC states giving it a world ranking of 36<sup>874</sup>. However, on the one hand the UAE can be seen to be progressive in developing its knowledge based economy, however on the other, the western pressure to satisfy higher standards of intellectual property rights protection is at odds with the development. The recommendation by the International Intellectual Property Alliance (IIPA) in 2014 to place the UAE back on the special 301 watch list<sup>875</sup> highlights the need for an integrated approach to intellectual property rights protection. The efforts by the UAE to develop western compliant intellectual property frameworks are not meeting the desired outcome of reducing intellectual property protection.

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<sup>865</sup> Federal Law No. 7 of the Year 2002 Concerning Copyrights and Neighbouring Rights (2002).

<sup>866</sup> Federal Law No. 37 of 1992 on Trademarks amended by Law No. 19 of 2000 and Law No. 8 of 2002 (1992).

<sup>867</sup> Federal Law No. 31 for the Year 2006 Pertaining to the Industrial Regulation and Protection of Patents, Industrial Drawings, and Designs (2002).

<sup>868</sup> Federal Law No. 17 of 2009 on the Protection of New Plant Varieties (2010), Federal Law No. 6 of 2008 on establishing a national council for tourism and Antiquities (2008), Federal Decree No.85 of 2007 on The Common Customs Law for the Arab States of the Gulf (2007), Federal Law No. 24 of 2006 Concerning Consumer Protection (2006), Law No. 1 Of 1992 Of the Emirate of Sharjah On Antiquities (1992), Federal Law No. 15 of 1980 on the Press and Publication (1980), Federal Law No. 8 of 1980, on Regulation of Labour Relation (1980) and Law No. 5 of 1973 on Commercial Register (1973).

<sup>869</sup> Latham and Watkins LLP, (2013), Doing Business in the United Arab Emirates, Middle East and Africa Technology, IP and Sourcing Focus.

<sup>870</sup> See chapter 2 at 2.3, Table One.

<sup>871</sup> See chapter 2 at 2.3, Table One.

<sup>872</sup> See Dubai Customs at <http://www.dubaicustoms.gov.ae/en/NewsCenter/Pages/NewsDetail.aspx?NewsID=334>. Accessed at 02.02.2015.

<sup>873</sup> See Fourth Global Congress on Combating Counterfeiting and Piracy Dubai Declaration, held in Dubai, U.A.E, 3-5 February 2008. Available at <http://www.wcoomd.org/en/about-us/legal-instruments/~media/8B70762244B74C3BB2CB40F2BBA0668D.ashx> Accessed at 02.02.2015.

<sup>874</sup> Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 05.02.2015.

<sup>875</sup> United Arab Emirates, International Intellectual Property Alliance (IIPA), 2014 Special 301 Report On Copyright Protection And Enforcement. Available at <http://www.iipa.com/rbc/2014/2014SPEC301UAE.PDF>. Accessed on 05.02.2015.

The UAE, along with the remaining GCC states has been stagnant in its ability to further reduce piracy rates as seen in chapter 5<sup>876</sup>. Thus, by initiating an integrated approach to intellectual property rights protection in the UAE, the Emirate state can capitalise on its investment in innovation by committing to a modified approach to intellectual property law. An approach which incorporates the human capital into intellectual property research and development through an amalgamation of sharia law principles, western laws, international agreements and international intellectual property law standard settings, will have a more significant impact on intellectual property protection than simply, albeit with some success, trying to follow western laws.

#### **8.5.4 Improving intellectual property rights development in Qatar**

##### **Key recommendations:**

- **Qatar, as the least sharia compliant state, does not have the most successful intellectual property protection system in the GCC therefore the argument is that deviating away from sharia law is not the answer to improving intellectual property protection;**
- **Stronger national infrastructure as to issue its own patents and**
- **Make a concerted effort to bring Islamic based intellectual property research on par with its TRIPS plus commitments.**

Qatar, as a legislative authority, has developed towards a more semi-democratic model with sharia law as a main source of law<sup>877</sup>. Consequently, Qatar places the least importance on sharia law as a source of law when compared to the other GCC states. This indirectly supports the recommendation for a more sharia compliant intellectual property framework as if Qatar was the best performing GCC state in intellectual property rights protection then there would be a strong counterargument against embedding sharia compliant frameworks into intellectual property rights protection. Qatar does not have the lowest piracy rates in the GCC<sup>878</sup>, nor is it the most innovative according to the global innovation index 2014<sup>879</sup>. Therefore, Qatar is further evidence that deviating away from sharia law is not the key to better intellectual property rights as legislative changes alone can only make improvements to a certain point

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<sup>876</sup> See chapter 5 at 5.5 at Table 5 and also see Business Software Alliance, Global Software Piracy Study 2011. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 03.02.2015.

<sup>877</sup> See chapter 2 at 2.9 and also see the Constitution of Qatar, (2004), Part One, Article One.

<sup>878</sup> See chapter 5 at 5.5 at Table 5 and also see Business Software Alliance, Global Software Piracy Study 2011. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 03.02.2015.

<sup>879</sup> Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 05.02.2015.

as seen in the marginal improvement by Qatar in piracy rates from 2006 to 2010 when compared to earlier, more substantial, improvements from 2000 to 2006<sup>880</sup>.

Qatar has been very active in developing its intellectual property law in line with TRIPS and international agreements. Qatar has set up internal infrastructures to regulate intellectual property rights protection through the Centre for the Protection of Intellectual Property Rights. Also, Qatar's intellectual property laws are controlled by the Ministry of Justice with the justice minister having the authority to appoint independent experts to help the centre carry out its functions<sup>881</sup>.

Chapter 2<sup>882</sup> highlighted how the Qatari intellectual property legislation is the most comprehensive of all the GCC states as Qatari laws protect a vast array of intellectual property rights<sup>883</sup>. Further the analysis of Qatar's legislative developments showed that Qatar has enacted TRIPS plus provisions despite the fact that the minimum requirement is TRIPS compliance and not TRIPS plus. TRIPS plus provisions have been evident in Qatar's 2011 Law on Intellectual Property Rights Border Measures as discussed in chapter 5<sup>884</sup>, where Qatar has gone beyond the minimum standard of protecting trademark and copyright counterfeiting, as specified in the TRIPS standards at Part III, Section 4 of TRIPS, to protecting any intellectual property rights<sup>885</sup>.

As Qatar does not issue its own patents, an integrated sharia compliant intellectual property approach would require a regional sharia board which can streamline the approach to intellectual property rights protection to be more fit for purpose by setting up accountability and scrutiny measures as well as checks and balances. The recommendation of a regional office is based on the lessons learnt from the Islamic finance industry where the lack of an overarching higher authority was identified as a shortcoming in the sector and can be avoided in an integrated approach to intellectual property rights protection. The lessons learnt from the Islamic finance sector will be discussed in more detail further in this chapter at 8.11.

### **8.5.5 Improving intellectual property rights development in Oman**

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<sup>880</sup> See chapter 5 at 5.5 at Table 5 and also see Business Software Alliance, Global Software Piracy Study 2011. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 03.02.2015.

<sup>881</sup> The Report Qatar 2012, Oxford Business Group, page 42, Oxford Business Group.

<sup>882</sup> See chapter 2 at 2.9.

<sup>883</sup> See chapter 1 at 1.7.

<sup>884</sup> See chapter 5 at 5.8 and also see Drahos, P. (2013), Emerging Markets and the World Patent Order, Edward Elgar Publishing, page 338.

<sup>885</sup> See Law No. (17) of 2011, Article 3 which states: "*a right holder can lodge an application with the Customs Department to stop the clearance process and request suspension of the release into free circulation of the imported goods which involve an infringement of the right holder's rights.*".

### Key recommendations:

- **Oman needs to take advantage of on its position of adhering to TRIPS plus standards and having sharia law as its constitution to draw the two divergent areas together for an integrated approach and**
- **to improve innovation by introducing effective measures that can strike a balance between enforcement mechanisms and sharia law.**

Oman is the second of the GCC states to have a bilateral agreement with the US. The Oman and US FTA which entered into force in 2009, it built on previous ties to promote economic reform and similar to Bahrain, included an intellectual property chapter to increase the existing levels of intellectual property rights protection and enforcement<sup>886</sup>. Therefore, as a result of bilateral treaties, Bahrain and Oman have both acceded to TRIPS Plus intellectual property provisions and agreed to ratify further international treaties<sup>887</sup>.

Further, similar to Bahrain, Oman's intellectual property based legislative progress does not run parallel with placing Oman at the pinnacle of intellectual property success. It has one of the highest software piracy rates, second only to Kuwait,<sup>888</sup> while also ranking at the lower end of the global innovation index<sup>889</sup>. Thus, the lack of effective measures to further reduce software piracy rates in Oman highlights a common theme in intellectual property rights protection in the GCC states. The common theme reflected by Oman is that the initial improvements made from the advent of TRIPS are barely maintainable by the GCC states and a modified approach is needed to make a positive impact on intellectual property regimes.

Oman is quite the anomaly state as it is the only GCC state to share its importance to sharia law as a source of law with the most compliant of the GCC states with sharia law, Saudi Arabia, whilst also sharing its level of intellectual property law compliance with Qatar, the least sharia compliant state at a constitutional level. It is similar to Saudi Arabia, in that it states in its constitution very clearly that the

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<sup>886</sup> US-Oman FTA, (2009), Chapter Fifteen, Intellectual Property Rights. Available at [https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset\\_upload\\_file715\\_8809.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file715_8809.pdf). Accessed at 05.02.2015.

<sup>887</sup> US-Oman FTA, (2009), Chapter Fifteen, Intellectual Property Rights. Available at [https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset\\_upload\\_file715\\_8809.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file715_8809.pdf). Accessed at 05.02.2015.

<sup>888</sup> See chapter 5 at 5.5 at Table 5 and also see Business Software Alliance, Global Software Piracy Study 2011. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 05.02.2015.

<sup>889</sup> Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 05.02.2015.

basis of law is sharia law at Article 2 of the Omani constitution<sup>890</sup>. However Oman has developed its intellectual property laws more in line with Qatar than Saudi Arabia with a number of Acts enacted in intellectual property law<sup>891</sup>.

Thus, Oman could play an important role in the development of an integrated approach to intellectual property rights protection as it can act as a bridge from Saudi Arabia, the most compliant state to sharia law to Qatar which is the least. Oman shares its religiosity with Saudi Arabia and intellectual property law progress with Qatar and could play a key role in developing sharia compliant frameworks that strike a balance between sharia law and international intellectual property rights standards settings. To date, the intellectual property system in the GCC states has developed with minimal sharia law involvement with sharia law acting only as a conduit to justifying intellectual property rights protection. What an integrated intellectual property rights approach can achieve is more conducive harmonisation between sharia law and intellectual property law.

#### **8.5.6 Improving intellectual property rights development in Kuwait**

##### **Key recommendations:**

- **address inadequacies in its intellectual property laws mainly; its lack of progress on enforcement efforts against piracy and counterfeiting, failure of the judiciary to enforce penalties severe enough penalties to act as a deterrent to intellectual property infringement and the lack of legislative reform in Kuwaiti copyright law;**
- **improve its intellectual property rights protection to a level that would bring it on par with the remaining GCC states and**
- **take advantage of the freedom it has to develop sharia compliant intellectual property based frameworks and enact legislation in accordance with an integrated model structure, given its lack of intellectual property legislative reform.**

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<sup>890</sup> Omani Constitution Article 2 reads, "*The State's religion is Islam and Islamic Sharia is the basis for legislation*".

<sup>891</sup> See Omani Royal Decree No. 65/2008 promulgating the Law on Copyright and Related Rights (2008), Omani Industrial Property Rights and their Enforcement for the Sultanate of Oman (Royal Decree No. 67/2008) (2008), Omani Royal Decree No. 49/2009 promulgating the Law on the Protection of Breeders' Rights in New Varieties of Plants (2010), Omani Royal Decree No. 81/2002 promulgating the Law on Consumer Protection (2002), Omani Royal Decree No.29/2002 promulgating the Law on Civil and commercial procedure (2002) and Omani Royal Decree No. 6/80 promulgating the Law on the Protection of National Heritage (1980).

Kuwait is a fully sovereign state with sharia as a main source of legislation<sup>892</sup>. It was the first of the GCC states to have a constitution<sup>893</sup> and formed a precedent for other Gulf states<sup>894</sup>. It seeks to have a partly democratic composition in Parliament, similar to Qatar, as its Parliament consists of elected representatives and members appointed by the Emir<sup>895</sup>. The Kuwait legal system is based on civil law jurisdiction<sup>896</sup> and does not refer to intellectual property in its constitution<sup>897</sup>. The research has shown that intellectual property development in Kuwait lags behind the other GCC states with Kuwait currently having four statutes dealing with intellectual property<sup>898</sup>.

Kuwait is the only GCC state that remains on the US Special 301 Report Watch List for its lack of progress on enforcement efforts against piracy and counterfeiting, failure of the judiciary to enforce penalties severe enough penalties to act as a deterrent to intellectual property infringement and the lack of legislative reform in Kuwaiti copyright law<sup>899</sup>. Kuwait ranks the lowest of all the GCC states in its ability to protect intellectual property rights and innovation. The Business Software Alliance found Kuwait had the highest software piracy rates of all the GCC states<sup>900</sup>, likewise, the global innovation index placed Kuwait as the least innovative when compared to the other GCC states<sup>901</sup>.

Kuwait has not managed to improve its intellectual property rights protection to a level that would bring it on par with the remaining GCC states. However, Kuwait can take heed from states such as Bahrain and Oman who have legislated extensively in the intellectual property field yet still have hit a glass ceiling in their attempts to further improve. Given that Kuwait has minimal intellectual property

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<sup>892</sup> Kuwaiti Constitution, Part 1, Article 2 states *"The religion of the State is Islam, and the Islamic Shari'a shall be a main source of legislation"*.

<sup>893</sup> Kuwait gained independence from Britain in 1961 and approved its first constitution in 1962.

<sup>894</sup> Price, D. (2012), *The Development of Intellectual Property Regimes in the Arabian Gulf States* Infidels at the Gates, Chapter 2, page 30.

<sup>895</sup> Power, G. (2012), *The difficult development of parliamentary politics in the Gulf - Parliaments and the process of managed reform in Kuwait, Bahrain and Oman. The Kuwait Programme on Development, Governance and Globalisation in the Gulf States.*

<sup>896</sup> <http://www.wipo.int/wipolex/en/details.jsp?id=6148>. Accessed at 15.03.2015.

<sup>897</sup> Kuwaiti Constitution, Part II, Article 18, Private Property, Inheritance states *"private property is inviolable. No one shall be prevented from disposing of his property except within the limits of the law. No property shall be expropriated except for the public benefit under the circumstances and in the manner specified by law, and on condition that just compensation is paid"*.

<sup>898</sup> Decree-Law No. 68 of 1980 on Trademarks, as amended by Decree-Law No. 10 of 1987 and Law No. 1 of 2001 (2001), Law No. 4 of 1962 relating to Patents, Designs and Industrial Models as amended by Law No. 3 of 2001 (2001), Law No. 64 of 1999 concerning Intellectual Property Rights including Explanatory Memorandum (1999) and Law No. 56 of 1996 promulgating the Industrial Law (1996).

<sup>899</sup> <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>. Accessed at 14.04.2014.

<sup>900</sup> See chapter 5 at 5.5 at Table 5 and also see Business Software Alliance, *Global Software Piracy Study 2011*. Available at <http://globalstudy.bsa.org/2011/>. Accessed on 05.02.2015.

<sup>901</sup> Global Innovation Index, (2014). Available at <http://www.globalinnovationindex.org/content.aspx?page=data-analysis>. Accessed on 05.02.2015.



legislation, it has more room for manoeuvre in developing an integrated approach to intellectual property rights protection.

Whereas other GCC states will need to reassess their existing agreements and legislations, Kuwait has more freedom to develop sharia compliant intellectual property based frameworks and enact legislation in accordance with an integrated model structure. Thus before concluding on the mechanics of an integrated intellectual property rights based model, the western standards on intellectual property rights will be summarised next.

## **8.6 Third area of recommendations: assess the impact of Islamic law, the US and the EU, TRIPS standards, international trade and Islamic finance**

### **8.6.1 Improved intellectual property protection in the GCC through Islamic law**

The GCC states can satisfy international demands for better intellectual property protection without compromising their Islamic values and traditions by reassessing the role sharia law can play in intellectual property rights protection. In areas such as; ijaza, property law, contract law and public interest, where primary sharia law sources have been interpreted to develop more established and sophisticated legal structures in the GCC, similar infrastructures are needed for intellectual property rights protection. Therefore the main recommendations on how the GCC states can improve the level of intellectual property rights protection through sharia law are and advance the GCC states from a foundational stage of intellectual property protection to a development stage are:

- **Develop intellectual property focussed sharia law principles that can embed existing sharia law principles in; ijaza, property law, contract law and public interest to intellectual property rights protection.**
- **Create Islamic law based doctrines that derive authenticity from primary and secondary sources of Islamic law to establish sharia compliant intellectual property products. Therefore rather than adopting international rules and regulations on intellectual property products, derive Islamic equivalents to the products which can then be better protected and relied upon by inventors and companies as they enshrine sharia law.**
- **Develop clear and transparent sharia compliant frameworks for intellectual property rights protection that balance the rights of the intellectual property right holder whilst safeguarding prohibitions on established principles of; riba (interest), gharar (speculative risk) and forbidden activity (haram activity).**

## **8.7 Intellectual property and Islamic law**

The Quran and the Sunnah, as primary sources of sharia law make; no direct reference to intellectual property rights, no provisions as to how intangible assets should be protected or any guidelines regarding remedial action for infringement of intangible assets. Therefore no Islamic law based legal provisions exists, at a primary source level, in how intellectual property law should be regulated by Islamic states. As a result, intellectual property has developed as a new area of law, derived from secondary sources of sharia law. There is an inherent weakness in producing new laws in areas where there are no Quranic or Sunnah references and this weakness has been the stumbling block for improvements in intellectual property protection<sup>902</sup>.

Secondary sources of sharia law have been interpreted to provide justification for the protection of intellectual property rights. As the number of extensive legal references in the Quran and the Sunnah are limited, secondary sources of sharia law are accepted as an interpretive tool where the primary sources are silent or ambiguous. The secondary sources, qiyas and ijma, follow strict guidelines on how new principles can be founded as discussed in chapter 3<sup>903</sup>. Secondary sources of sharia law have been applied to infer Islamic reasoning from existing areas such as; property law, contract law and public interest. Secondary sources have formed the basis of sharia approval for intellectual property protection<sup>904</sup>. However whereas the Islamic law systems in relation to protecting rights and providing remedies against infringement for property law, contract law and public interest are well established, intellectual property law protection has not managed to cement its foundations in Islamic law<sup>905</sup>.

The research has shown that although the GCC states have enacted a number of intellectual property related laws, the acceptance by the general GCC public of intellectual property laws having an Islamic foundation has not transpired across the vertical axis of institutions of state and individual. This was quantitatively analysed in a religious loyalty index by El Bialy and Gouda where their empirical research found that Muslim citizens of developing Islamic countries have a high level of both intellectual property

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<sup>902</sup> See chapter 3 at 3.15. Also see Abu-Ghazaleh, T. (2001), Challenges to Arab Industries in Acquiring and Selling Appropriate Technologies, Beltrametti, S. (2009), The Legality of Intellectual Property Rights under Islamic Law. In: The Prague Yearbook of Comparative Law and Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law, Capital University Law Review, Carroll, J. (2001), Intellectual Property Rights in the Middle East: A Cultural Perspective, Fordham Intellectual Property, Media and Entertainment Law Journal Volume 11, Issue 3 and Cullen, C. (2010), Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law?

<sup>903</sup> See chapter 3 at 3.4 to 3.5.

<sup>904</sup> Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law. Capital University Law Review and Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law. The Prague Yearbook of Comparative Law, pages 55-94.

<sup>905</sup> See chapter 3 at 3.8.

piracy as well as a high level of religiosity to Islam<sup>906</sup>. What this highlights is that intellectual property protection has not truly solemnised its union with Islamic law as the research has shown that there is Islamic jurisprudence which supports the existence of intellectual property rights however it falls short of setting parameters within which intellectual property rights can develop from an Islamic law perspective<sup>907</sup>. Legislative success in reaching minimal international intellectual property standards is not the same as having the necessary understanding of informal moral beliefs, cultural norms and ethical structures.

### **8.8 The Islamic law based approach to an integrated intellectual property model**

#### **Key recommendations:**

- **develop intellectual property focussed sharia law principles through the established areas of; ijaza, property law, contract law and public interest to do develop the protection of intellectual property rights further from a justification that intellectual property rights exist in Islam;**
- **propose an integrated intellectual property rights approach with the aim of reducing intellectual property infringement and promote an approach that is a hybrid of clear and unambiguous sharia principles and international intellectual property laws and**
- **through an Islamic based approach shake off the foreign rights connotations attached to intellectual property rights as well as stimulating intellectual property growth in the region.**

The Islamic law based approach has informed the development of an integrated approach to intellectual property rights by making recommendations to spotlight what influence sharia law can have for the betterment of intellectual property protection<sup>908</sup>. The examination of Islamic law sources and their application to intellectual property law highlighted that at a foundational level, the GCC states have accepted intellectual property rights protection as sharia compliant through the use of secondary sharia sources to permit intellectual property rights protection.

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<sup>906</sup> See chapter 3 and El-Bialy, N. and Gouda, M. (2011), Enforcing IPR Through Informal Institutions: The Possible Role of Religion in Fighting Software Piracy, Joint Discussion Paper Series in Economics, by the Universities of Aachen, Gießen, Göttingen, Kassel, Marburg and Siegen.

<sup>907</sup> See chapter 3 at 3.14.

<sup>908</sup> Price, D. (2009), The Development of Intellectual Property Regimes in the Arabian Gulf States Infidels at the Gates, Wiley & Sons Limited.

However in the development stage of intellectual property rights, sharia law was silent and all the GCC states adopted minimum TRIPS standards in their legislative institutions. In order to propose an integrated intellectual property rights approach to essentially reduce intellectual property infringement and promote an approach that is a hybrid of clear and unambiguous sharia principles and international intellectual property laws. Clear and unambiguous principles of sharia law that directly justify the tenets of intellectual property law will have a profound impact on improvement measures in the GCC as it will help shake off the foreign rights connotations attached to intellectual property rights and also has the potential to stimulate intellectual property growth in the region<sup>909</sup>.

This can be achieved by developing sharia compliant intellectual property rights, therefore the GCC states need to do more than simply accept intellectual property rights as designed by western states and demonstrate how sharia compliant intellectual property rights are. Therefore the recommendation is to develop intellectual property focussed sharia law principles through the established areas of; ijaza, property law, contract law and public interest. Overarching the Islamic law presence on developing an integrated intellectual property protection framework is that the supreme source of sharia law is God, as stated in the Quran; "Legislation is not but for Allah"<sup>910</sup>.

### **8.9 The US and the EU on international intellectual property rights protection**

#### **Key recommendations:**

- **to share knowledge and expertise to improve the intellectual property law development in the GCC states with the overall aim of protecting international intellectual property rights;**
- **for the US and the EU to reassess its bilateral and free trade agreements to allow the GCC states to develop an integrated approach to intellectual property protection without risking trade sanctions and**
- **a willingness from both the western states setting the international intellectual property agenda and the GCC states to want to modify the intellectual property systems.**

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<sup>909</sup> See chapter 3 from 3.3 onwards for an analysis of primary and secondary sharia sources relevant to intellectual property protection.

<sup>910</sup> See the Quran at 12:40. The full translation of the verse is; "You worship not besides Him except [mere] names you have named them, you and your fathers, for which Allah has sent down no authority. Legislation is not but for Allah. He has commanded that you worship not except Him. That is the correct religion, but most of the people do not know". Available at <http://quran.com/12>. Accessed on 29.01.2015.

The US and the EU have sought to protect intellectual property rights internationally for their inventors in the form of international agreements<sup>911</sup> and treaty memberships<sup>912</sup>. Over the years the US, in its trade agreements, has incorporated a number of intellectual property provisions with many countries<sup>913</sup>. In respect of bilateral investment treaties, the US has thirty nine agreements in force<sup>914</sup>. The US has bilateral agreements in force with Bahrain and Oman. It is in trade talks with the remaining GCC states and the GCC Union<sup>915</sup>. The main benefit of the bilateral agreements is the enforcement of intellectual property rights as it has proven to be a more effective method of raising international intellectual property standards than pursuing intellectual property rights as a standalone agreement.

The US international intellectual property strategy has been to safeguard intellectual property rights of international US corporations through the special 301 program, which allows the USTR to monitor a watch-list of countries that are violating intellectual property rights. The main power of the USTR is to assess the violations of intellectual property rights and where necessary impose trade sanctions against countries with high levels of infringement.

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<sup>911</sup> The US has many bilateral agreements in place with several countries around the globe including; Jamaica, Mongolia, Panama, Columbia, Korea, Peru, Oman, Uruguay, Bahrain, Morocco, Mozambique, Australia, Singapore, Chile, Jordan, Vietnam, Lithuania, Azerbaijan, Croatia, Bolivia, Korea, Bulgaria, Grenada, Cameroon, Bangladesh, Zaire, Poland, Congo, Ukraine, Trinidad and Tobago, Czech, Slovakia, Argentina, Hungary, Cambodia, Turkey, Sri Lanka, Albania, Ecuador, Kyrgyzstan, Tunisia, Kazakhstan, Armenia, Egypt, and Senegal. Each agreement can be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=US>. Accessed on 14.03.2015.

<sup>912</sup> Patent Law Treaty, Beijing Treaty on Audio-visual Performances, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, Singapore Treaty on the Law of Trademarks, Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, WIPO Performances and Phonograms Treaty, WIPO Copyright Treaty, Trademark Law Treaty, Berne Convention for the Protection of Literary and Artistic Works, Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedures, Patent Cooperation Treaty, Strasbourg Agreement Concerning the International Patent Classification, Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, Convention Establishing the World Intellectual Property Organization and Paris Convention for the Protection of Industrial Property. Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=US>. Accessed on 14.03.2015.

<sup>913</sup> Kaminski, M. (2014), The Capture Of International Intellectual Property Law Through The U.S. Trade Regime, Southern California Law Review.

<sup>914</sup> See [http://tcc.export.gov/Trade\\_Agreements/Bilateral\\_Investment\\_Treaties/index.asp](http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp) for each individual bilateral investment treaty. Accessed on 30.03.2015.

<sup>915</sup> US-Oman FTA Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text> Accessed on 16.01.2014 and US-Bahrain FTA available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text>. Accessed on 16.03.2015.

The EU does not have an equivalent to the USTR although it does have very robust infrastructures and designated departments tasked with intellectual property regulations in; copyright and related rights<sup>916</sup>, protection of inventions<sup>917</sup>, trademark law<sup>918</sup>, community design and other intellectual property areas<sup>919</sup>. The EU is still negotiating its FTA with the GCC. The EU has a strong focus on intellectual property enforcement regimes both within the EU<sup>920</sup> and with improving the protection and enforcement of intellectual property rights in third countries<sup>921</sup>. Both the EU and the US have free trade agreements that are in negotiation with the GCC and an integral part of the agreements are to share knowledge and expertise to bring the GCC states a step closer to western based standard setting and intellectual property law development and protection.

Therefore, the GCC states require a meeting of minds with the EU and the US whereby the knowledge and expertise of western based standard setting can be utilised for the development of an integrated approach to intellectual property rights protection which also takes into account the idiosyncrasies of the GCC states. Further it requires a willingness from both the western states setting the international

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<sup>916</sup> EU legislation on copyright covers; copyright in the knowledge economy, management of copyright and related rights in the internal market, copyright and related rights: term of protection, resale right for the benefit of the author of an original work of art, rental right and lending right, orphan works, copyright and related rights: satellite broadcasting and cable retransmission, legal protection of databases, legal protection of services based on, or consisting of, conditional access, legal protection of computer programs, copyright and related rights in the information society and management of online rights in musical works. Available at [http://europa.eu/legislation\\_summaries/internal\\_market/businesses/intellectual\\_property/index\\_en.htm](http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/index_en.htm). Accessed on 04.03.2015.

<sup>917</sup> Key areas for EU inventions covers; the European patent system, Community patent, establishment of the Community Patent Court, legal protection of biotechnological inventions and genetic engineering and legal protection of topographies of semiconductor products. [http://europa.eu/legislation\\_summaries/internal\\_market/businesses/intellectual\\_property/index\\_en.htm](http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/index_en.htm). Accessed on 04.03.2015.

<sup>918</sup> The Trademark law covers; The European trademark law, community trademark regulation and trademark directive. Available at [http://ec.europa.eu/internal\\_market/indprop/tm/index\\_en.htm#maincontentSec1](http://ec.europa.eu/internal_market/indprop/tm/index_en.htm#maincontentSec1) Accessed on 04.01.2014.

<sup>919</sup> Other areas include; counterfeit goods and piracy, European anti-counterfeiting and anti-piracy plan, industrial property rights strategy, enforcement of intellectual property rights, combating counterfeiting and piracy in the single market, customs response to latest trends in counterfeiting and piracy, goods infringing intellectual property rights, technology transfer agreements, defence-related products: rules on transfer within the EU, geographical Indications and Designations of Origin and traditional specialities.

<sup>920</sup> The EU has extensive resources and policies governing intellectual property within the EU such as; the European Patent Office (EPO), European Commission Internal Market and services and the Office for Harmonization in the Internal Market (OHIM). Also the EU has a strong presence in intellectual property business initiatives, namely, React the Anti Counterfeiting Network and Business Action to Stop Counterfeiting and Piracy (BASCAP). All available at <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/> Accessed on 08.03.2015.

<sup>921</sup> The EU has pioneered and steered many international rules in intellectual property. For example, in 2004, a Strategy for the Enforcement of Intellectual Property Rights in Third Countries was set up by the EU and it set out an enforcement framework dealing with intellectual property infringement outside the of the EU. Other enforcement regimes are developed by the EU through bilateral activities. These include; bilateral agreements, intellectual property dialogues, intellectual property and working groups. The bilateral agreements contain extensive intellectual property rights chapters. The chapters aim to offer similar levels of protection as is in the EU, while taking into account where a particular country or union of countries is at within the global market and its level of development. All available at <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/> Accessed on 08.03.2015.

intellectual property agenda and the GCC states to want to modify the intellectual property systems currently in place to foster innovation and protect investor rights from a different approach.

### **8.10 Impact of international trade on the GCC**

#### **Key recommendations:**

- **assess the potential impact of the TTIP on international trade relationships the GCC has and pre-empt the ramifications by putting in place preventative measures to protect and safeguard intellectual property rights in the GCC;**
- **for the GCC to take a step back and reassess its intellectual property agenda and**
- **to develop the requisite knowledge and expertise in ISDS and corporate sovereignty by setting clear parameters for both in respect to riba and gharar, challenges to fundamental principles of constitutional law and domestic sovereignty.**

International trade between the GCC and both the EU and US has taken place relatively independently. However, the TTIP is poses an opportunity for the GCC to reassess its relationship with both the EU and GCC. Where the EU and US can agree, there will be a harmonisation of regulations. This therefore has repercussions for the GCC as the EU and US aim to harmonise their intellectual property rights through an intellectual property rights chapter that deals specifically with enhancing protection and recognition for; geographical indications, build on TRIPS and patentability<sup>922</sup>.

According to Hill and Knowlton Strategies, the TTIP will become globally binding and will impact certain business sectors of the GCC states in particular to intellectual property rights, it would require a new regulatory environment of; corporate governance, accountability and transparency<sup>923</sup>. Therefore, given that the GCC states have not concluded either of their FTA's with the EU or the US, rather than steamroll ahead with TRIPS Plus provisions in their international agreements, the GCC can take a step back and reassess its intellectual property agenda. Through improvements in intellectual property rights and international trade agreements, the GCC states are opening their markets up to an increase in foreign investment from the EU and US that can have a positive impact on the economy.

International trade agreements have brought into play investor to state dispute settlement mechanisms (ISDS) and corporate sovereignty. The GCC states need to develop the requisite knowledge and

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<sup>922</sup> Council of the European Union, (2014), Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America. Available at <http://www.salzburg24.at/2014/10/TTIP.pdf>. Accessed on 10.03.2015.

<sup>923</sup> John, P. (26.08.2013), Proposed US-EU trade deal may impact business in GCC: report. Available at <http://www.bilaterals.org/?proposed-us-eu-trade-deal-may#sthash.EYAUWxFW.dpuf>. Accessed on 21.12.2014.

expertise in ISDS and corporate sovereignty by developing clear parameters for both in respect to riba and gharar. ISDS has serious ramifications for domestic sovereignty and rule of law as it impacts on the ability of states to make laws challenging fundamental principles of constitutional law and democracy. To date, the GCC states have not had to deal with ISDS proceeding from the EU or the US.

Nonetheless, the GCC states will struggle to justify the compensatory remedies of ISDS proceedings as compliant with sharia law as there are no frameworks or internal infrastructures in place to control the level of damages that can be sought. The first application of ISDS by a GCC state has been discussed in chapter 6<sup>924</sup> and has been made by the Qatari based broadcaster, Al Jazeera. Qatar are relying on the ISDS included in their 1999 investment treaty between Egypt and Qatar<sup>925</sup>. Qatar is arguing Egypt has breached their bilateral trade agreement and the outcome of the proceedings will be relevant to the remaining GCC states and the international application of ISDS. What the case spotlights is that there are issues with judicial expertise, arbitration court structures and transparency in ISDS proceedings in the GCC and neighbouring states such as Egypt where new areas of law are being developed. The remainder of this chapter will consider the impact of TRIPS Plus and will be dedicated to the two differing intellectual property standard setting models, the western standard setting approach to intellectual property rights and the novel integrated Islamic based model.

### **8.11 Impact of TRIPS plus on the GCC**

#### **Key recommendations:**

- **to not rush to implementing TRIPS plus standards of extending the duration of patent protection, narrowing the scope of compulsory licensing and parallel imports and more stringent enforcement mechanisms;**
- **the detrimental effect of patent term extensions on the sharia principle of public interest;**
- **to not blindly narrow the scope of compulsory licensing without taking into account public interest and**
- **to approach the demands for higher standards of enforcement through an integrated approach to intellectual property rights protection.**

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<sup>924</sup> See chapter 6 at 6.7.

<sup>925</sup> Egypt - Qatar Bilateral Investment Treaty, (1999). Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1103>. Also see Donnan, S. (2014), Al Jazeera sues Egypt for \$150m after crackdown on journalists, Financial Times. Available at <http://www.ft.com/cms/s/0/7ff2210c-cec0-11e3-ac8d-00144feabdc0.html#axzz3CNLGmNPk>.



The GCC states are TRIPS compliant and their international trade agreements are imposing TRIPS plus provisions as discussed in chapters 5 and 6. The three main TRIPS plus provisions that will impact on the GCC are; extending the duration of patent protection, narrowing the scope of compulsory licensing and parallel imports and more stringent enforcement mechanisms<sup>926</sup>. The GCC states can demonstrate TRIPS compliant patent protection<sup>927</sup>, however TRIPS plus calls for the time period of patent protection to be above twenty years. As Oman already has TRIPS plus in its FTA with the US in relation to extending the patent term in pharmaceutical based patents<sup>928</sup>, the issue arises as to the detrimental effect of such an extension on the sharia principle of public interest.

The second main TRIPS plus provision which increases the level of compliance from the TRIPS agreement, is in the changes to compulsory licensing. The scope for compulsory licensing and parallel importing is much narrower in TRIPS plus as the new provisions limit the circumstances in which parties can use the measures<sup>929</sup>. Therefore there is a risk posed to the GCC from restrictions on compulsory licensing in pharmaceutical products<sup>930</sup>. Again the issue arises as to how sharia compliant the restrictions of TRIPS plus are as by limiting compulsory licensing there is a risk of conflicting with the sharia principles on public interest. Public interest aims to protect the legitimate interests of the community within the sources of Islamic law and is interpreted to find a balance between public interest and a competing area of law. Imposing further limitations on compulsory licensing in intellectual property protection requires careful consideration as creating sharia compliant intellectual property frameworks that take into account public interest will have more longevity than passing legislation which circumvents the public interest doctrine<sup>931</sup>.

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<sup>926</sup> See chapter 6 at 6.3.

<sup>927</sup> Patent Regulation of the Cooperation Council for the Arab States of the Gulf, Article 15. Available at <http://www.gccpo.org/conven/PatentRegulation.pdf>. Accessed on 10.03.2015.

<sup>928</sup> US-Oman FTA, Article 15.8, 6(b) states “with respect to patents covering pharmaceutical products or their method of use:(i) each Party shall make available an adjustment of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term”. Available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset\\_upload\\_file715\\_8809.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file715_8809.pdf). Accessed on 18.03.2015.

<sup>929</sup> Kerry, V. (2007), TRIPS, the Doha declaration and paragraph 6 decision: what are the remaining steps for protecting access to medicines?, *Globalization and Health*. Available at <http://www.globalizationandhealth.com/content/3/1/3>.

Accessed on 06.11.2014. Castro, S. (2009), *Compulsory Licensing and Public Health: TRIPS-Plus Standards in Investment Agreements*, Social Science Research Network. Available at <http://ssrn.com/abstract=2101574>. Accessed on 06.03.2015.

<sup>930</sup> Compulsory licensing and pharmaceutical products will be a further area of research as further analysis is outside the scope of the current research.

<sup>931</sup> See more at chapter 3 at 3.11.

The third area of TRIPS plus is the escalation of enforcement measures. TRIPS plus demands stronger enforcement for; criminal sanctions, higher damages, mandatory injunctions, and transitional liability. The criticism of increasing enforcement measures is that it is not the solution to deterring intellectual property infringement. TRIPS allows flexibility in developing enforcement measures which the GCC states need in order to develop technical expertise, stronger institutional infrastructures, research and development. The GCC states need to develop anti-competitive practices and approach the demands for higher standards of enforcement through an integrated approach to intellectual property rights protection.

There is a real risk that the GCC states are widening the gulf between their intellectual property laws and the public acceptance of the new regimes. Rather than simply accept the provisions on TRIPS plus, the GCC states can aim to understand the progress and expansion of successful initiatives such as sharia compliant banking and apply the methodology of Islamic finance development to intellectual property rights protection. Islamic finance is considered next.

#### **8.12 Islamic finance as a catalyst for a modified intellectual property rights approach**

##### **Key recommendations:**

- **to not rush ahead with TRIPS plus provisions without analysing alternative methods to improving intellectual property rights protection, similar to how Islamic finance provides an alternative to western banking;**
- **develop intellectual property focussed independent sharia boards;**
- **improve consumer and investor protection through mirroring ethical banking principles to intellectual property;**
- **promote regulatory cooperation through setting up internal auditing committees, introducing governance ethics, initiating periodic reviews and assurances for intellectual property rights and**
- **build human capital by investing in research and development.**

Islamic finance has coincidentally developed over the same time period as intellectual property however there are significant differences in how the two sectors have evolved over three decades. Islamic finance is an area where the GCC states have made significant progress in the evolution of the industry and lead on the initiation of a number of sharia compliant financial products. The GCC states have not been as dominant in the intellectual property field, choosing to apply sharia law solely for the purposes

of justifying intellectual property law within the ambit of Islamic jurisprudence. The integrated intellectual property rights approach recommends a modified approach to intellectual property rights protection. The recommendation is to not rush ahead with TRIPS plus provisions without considering alternative methods to improving intellectual property rights protection.

Chapter 7 identified the main principles of Islamic finance and applied lessons learnt from Islamic finance success to intellectual property rights protection. The main Islamic finance principles identified were; the founding principles of Islamic finance, the governance of sharia boards, the development of Islamic finance in the individual GCC states, different frameworks of sharia-compliant investment products and the impact of intellectual property rights on the varying Islamic finance investment tools. Islamic finance has achieved success as a financial institution with ethical guidelines that abide by Islamic law and consequently operate without contravening the doctrines of riba and gharar<sup>932</sup>. Islamic finance products have been established through fatwas that are passed by Islamic scholars that sit on sharia boards to rule on whether a new Islamic finance product is sharia compliant or not. Where the Islamic finance sector and intellectual property differ is that Islamic finance can trace its roots back to primary sources of sharia law as the Quran and the Sunnah prohibit sinful (haram) activity<sup>933</sup> and riba<sup>934</sup>. It is the financial sources of sharia law that have been used to infer sharia compliance of intellectual property rights but Islamic finance has not been utilised to develop an integrated intellectual property rights protection framework.

Islamic finance has managed to grow as an industry despite not all Islamic countries adhering to sharia at the same constitutional level. Applying this to the GCC states, each state has its own Islamic finance institutions with Islamic scholars that sit on sharia boards with the main role of acting as an independent body of specialised jurists to direct, review and supervise Islamic finance products<sup>935</sup>. The GCC states are paving the way forward with recognizing the relationship between Islamic finance and intellectual property rights. The first ever sukuk with intellectual property rights as the underlying asset was

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<sup>932</sup> Hayat, U. (2014), Islamic Finance: Ethics, Concepts, Practice (a summary), The Chartered Financial Analyst (CFA) Institute Research Foundation. Available at [http://www.cfainstitute.org/learning/foundation/research/Documents/islamic\\_finance\\_ethics\\_concepts\\_practice.pdf](http://www.cfainstitute.org/learning/foundation/research/Documents/islamic_finance_ethics_concepts_practice.pdf). Accessed on 15.01.2015.

<sup>933</sup> This includes direct or indirect investment with certain types of business areas that involve profit making from alcohol, pork products, betting and gambling. See Quran at 2:173, 2:219, 5:3, 5:90, 6:145 and 16:115. Available at [www.quran.com](http://www.quran.com). Accessed on 07.01.2015.

<sup>934</sup> See the Quran at 2:275. Available at [www.quran.com](http://www.quran.com). Accessed on 06.01.2015.

<sup>935</sup> Malkawi, B. (2014), A Bright Future: Towards an Enhanced Shariah Supervision in Islamic Finance, The European Financial Review. Available at <http://www.europeanfinancialreview.com/?p=487>. Accessed on 09.01.2015.

introduced in the form of a computer software programme by the German based finance company, FWU AG Group<sup>936</sup>, developed under an ijara structure<sup>937</sup> and financed through the Dubai branch of FWU AG Group.

There are four main Islamic finance structures that can be translated to an integrated intellectual property rights protection approach. These are to; develop sharia board based market infrastructures, improve consumer and investor protection, promote regulatory cooperation and build human capital<sup>938</sup>. By developing intellectual property based sharia board based market infrastructures, the GCC will start to take control over the intellectual property sector and promote fit for purpose control mechanisms through; setting up internal auditing committees, introducing governance ethics, initiating periodic reviews and assurances for intellectual property rights.

The premise behind adopting Islamic finance structures to promote better intellectual property rights protection is twofold; it is based on learning the role of sharia law in taking ownership of the Islamic finance sector and secondly addressing the shortcomings in Islamic finance in order to overcome these in the integrated intellectual property rights approach. There are aspects of Islamic finance products that can form the basis of an intellectual property framework such as risk-sharing partnerships known as a musharaka and could be translated to intellectual property investment with returns flowing in from hybrid musharaka and intellectual property based projects, licensing, royalties, subscriptions and sale of the intellectual property assets<sup>939</sup>.

Islamic finance is not without its faults, however rather than reject Islamic finance because of its shortcomings such as; lack of transparency, the level of independence observed by sharia boards and accountability measures, the GCC have an opportunity to learn from both the strengths and weaknesses of the Islamic finance sector to pioneer an integrated approach to intellectual property rights for Muslim countries.

### **8.13 Further Research**

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<sup>936</sup> Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>. Accessed on 23.01.2015.

<sup>937</sup> Ali Qayyum, M. (2013), New Horizon Global Perspective on Islamic Banking and Insurance, Institute of Islamic Banking and Insurance. Available at <http://www.islamic-banking.com/NewHorizonDigital/IIBImarch2013/index-march2013.html>. Accessed on 23.01.2015.

<sup>938</sup> See chapter 7 for an in depth analysis on Islamic finance.

<sup>939</sup> Full analysis of Islamic finance products and the potential application to intellectual property rights is covered in detail in chapter 7.

The work of the thesis is foundational in nature, with the aim of laying down the fundamentals of an Islamic based intellectual property model that incorporates the key research objectives to act as a springboard for further research in this area. Although the thesis is non-empirical, there was a clear intention from the onset to further develop the findings through empirical research. Further research is crucial to the implementation of a more effective intellectual property framework and the following areas are at the forefront;

- intellectual property law and Islamic law,
- entrenching higher standards in TRIPS plus and international agreements for minimum intellectual property standards,
- analysing the potential risks attached to investor to state dispute settlement mechanisms and corporate sovereignty,
- implications of protecting national heritage and folklore expressions to provide fit for purpose intellectual property protection,
- the role Islamic finance and sharia compliant frameworks can play in intellectual property protection in Islamic states and
- the impact of intermediary vehicles for intellectual property rights protection in the GCC such as public interest, moral rights and Islamic finance from a sharia perspective.

## **Appendix One**

### **Intellectual Property Resources Table**

GCC	US	EU	Other
GCC Charter	USTR – United States Trade Representative	EU Commission	WIPO and WTO
GCC Patent Office	USTR Special 301 Report	European Free Trade Association (EFTA)	World Investment Reports
Saudi Embassy	Business Action To Stop Counterfeiting And Piracy	EU Patent Office	Business Software Alliance, Global Software Piracy Studies
Ministry of Information, Sultanate of Oman	United States Patent and Trademark Office	Universal Patent Court	www.bilaterals.org
Arab Human Development Reports	The World Fact Book <a href="https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html">https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html</a>	Office for Harmonization in the Internal Market (Trademarks and designs)	United Nations Conference On Trade And Development, World Investment Reports
Saudi Arabia Constitution	International Religious Freedom Reports, United States Department of State	<a href="http://eur-lex.europa.eu">http://eur-lex.europa.eu</a>	MENA-OECD Investment Programmes
Oman Constitution	US legislation and case law	UK Trade and Investment	World Bank Organisation
Kuwait Constitution	Bilateral Trade Agreements	Oxford Business Group Reports	BP Statistical Review of World Energy
Kuwait Programme on Development, Governance and Globalisation in the Gulf States	US International Trade Commission	EU legislation and case law	<a href="http://www.tradingeconomics.com">www.tradingeconomics.com</a>

Political Economy of the Gulf Reports	Global Innovation Indexes	Free Trade Agreements	www.heritage.org
Bahrain Constitution	US Agency for International Development	EU-GCC Invest Reports	United Nations Development Programme Reports
Bahrain Economic Development Board	Trans-Pacific Partnership (TPP)	International Centre for Trade and Sustainable Development	Organization of the Petroleum Exporting Countries Reports
UAE Constitution		Sharaka project implemented by a consortium led by Istituto Affari Internazionali (IAI)	International Monetary Fund
Qatar Constitution		European Parliament Anti-Counterfeiting Trade Agreement (ACTA)	International Intellectual Property Alliance
Gulf Research Center		ICTSD Programme on IPRs and Sustainable Development	World Economic Forum, Global Competitiveness Report
Legislation/Policies/Proposals		EU Economic Partnership Agreements	International Institutions and Global Governance Programs
The Emirates Center for Strategic Studies and Research		European Patent Convention (EPC)	International Religious Freedom Reports
		Centre for European Policy Studies	International Chambers of Commerce

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