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# Transatlantic Trade and Investment Partnership (TTIP) and the spill over effects on the Gulf – Cooperation Council

## Abstract

*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>1</sup>. The TTIP will have spill over effects on the MENA region, the GCC, Australia and the Asian sub-continent as it raises key questions for intellectual property and international trade agreements<sup>2</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 this be compatible with the religious laws followed? 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>3</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 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>4</sup>.*

## Research Purpose

For the purpose of this paper, the key objectives are to analyse:

- The benefits/pitfalls of the TTIP on intellectual property and international trade
- What impact ISDS could have on intellectual property rights in the GCC given that all GCC states follow sharia law at a constitutional level

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<sup>1</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 20.04.2015.

<sup>2</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 21.04.2015.

<sup>3</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 10.04.2015.

<sup>4</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 13.04.2015.

- What corporate sovereignty means for the GCC monarchies given they all follow different political structures

#### Methodology – Intellectual Property Data

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 in relation to the three research objectives as set out above. The literature is the population and this could prove problematic. Different databases have been used to cover all sources where data can be found. 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. Literature on intellectual property law development can be placed in a timeframe from 1970 to present.

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 and relevant theory. The data will be analysed through the grounded theory method whereby data collected will be analysed to assess the impact of the TTIP, corporate sovereignty and ISDS in relation to Islamic law and intellectual property law (Strauss and Corbin 1998<sup>5</sup>).

#### Methodology – Islamic 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, employing Qiyas only as a last resort. The Shafii school of thought is more widely accepted as it allows the application of qiyas to make legitimate analogies. 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 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. The sources cited below are for Sunni Muslims as none of the GCC states follow Shia jurisprudence.

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<sup>5</sup> Strauss, A & Corbin, J. (1998), Basics of qualitative research: Grounded theory procedures and techniques, Thousand Oaks, CA: Sage.

a) Quran

The main resource for the Quran is [www.quran.com](http://www.quran.com). Data sources for the website include Tanzil, QuranComplex, Zekr and Online Qur'an 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 are 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. The stylistic and syntactic properties of the Quran are language-specific. As a result, scholars can consider translations from authors that have been approved by Saudi Arabia however the most widely accepted translations to date comes from Sahih International and Muhsin Khan.

i. Sahih International

The Quran: Arabic Text with Corresponding English Meanings (Sahih International) Almunatada Alislami, Abul Qasim Publishing House (1997). Sahih International is an approved translation by Saudi Arabia and is available at the King Fahad National Library in Saudi Arabia.

ii. Muhsin Khan

The Noble Quran in the English Language (Muhsin Khan) King Fahd Printing Complex, Madinah, Saudi Arabia (1996). Muhsin Khan - the most widely disseminated Qur'an 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.

iii. Pickthall

The Meaning of the Glorious Koran (Mohammed Marmaduke Pickthall) Reprinted by Plume (1997). First published 1930.

iv. Yusuf Ali

The Holy Quran: Translation and Commentary (Yusuf Ali) Reprinted by Islamic Vision (2001). First published in 1934, Abdullah Yusuf 'Ali (1872-1952). In 1989, Saudi Arabia's Ar-Rajhi banking company financed the U.S.-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.

v. Shakir

The Holy Quran translated by M. H. Shakir and published by Tahrike Tarsile Quran (1999).

vi. 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 the translation. While working at King 'Abdul- 'Azeez University, Ghâlf, along with a committee of another twelve professors, was assigned to revise the most prominent translations of the Quran into English.

b) Sunnah

Sahih Al Bukhari is the approved author of Sunnah sources. Certificates of approval are 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 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. The book of hadith is available online and the link is at [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).

#### Existing literature in the field

Prior to World Trade Organisation ascension and achieving trade related intellectual property rights (TRIPS) compliance, the Gulf states offered limited legal recourse for intellectual property right holders (Abou El Fadl 2001, Braga 1998, Carrol 2001, Maskus 1995, Ballantyne 1986 and Price 2009). The sub-continent as a whole was an agrarian economy, lacking intellectual property legislation and protection. 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>6</sup>. Intellectual property protection in the Arab world is not a Western phenomenon and existed pre-colonialism. Poetry was highly regarded and copyright infringement of such works was heavily disapproved of<sup>7</sup>.

Price (2009) highlighted the rapid growth of intellectual property laws in the GCC states and pressure from developed countries to conform to pro-west standards<sup>8</sup>. Price's work focuses on how the Gulf states have undergone dramatic intellectual property development in a short span of a few decades. Beltrametti (2010) raised important questions on the effectiveness of intellectual property laws that are made by Islamic states and this is crucial to producing valid research<sup>9</sup>.

In terms of the economic value of intellectual property, a common accepted view among economists is that trade liberalisation is an engine for economic development<sup>10</sup>. Empirical evidence to date highlights the importance of trade for economic growth in developing countries<sup>11</sup>. However, states with political instability have struggled to enforce macroeconomic policies towards trade reform and the role of foreign investment is ambiguous<sup>12</sup>. Transparency in intellectual property development and legislation is also a contributing factor<sup>13</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

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<sup>6</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 on 30.04.2015.

<sup>7</sup>Khoury, A. (2003), *Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks*, IDEA: 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, pages 497-559, Mahafzah Q. (2009), The Perspective of Moral and Financial Rights of Intellectual Property in Islam, Arab Law Quarterly, Volume 23, Issue Number 4, pages 457-468, Mohamed, H. (2003), The Protection of Intellectual Property Rights: The views of the Pharos, Islamic Jurisprudence and Masters of Poetry and Literature, pages 232–233 and Beltrametti, S. (2010), The Legality of Intellectual Property Rights under Islamic Law, The Prague Yearbook of Comparative Law 2009, pages 55-94 and Jamar, S.(1992), The Protection of Intellectual Property under Islamic Law, Capital University Law Review.

<sup>8</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>9</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 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>10</sup> Thirwall, A. (2000), Trade, Trade Liberalisation and Economic Growth: Theory and Evidence, Economic Research Papers.

<sup>11</sup> Berg and Lewer, (2007), "International trade and economic growth", M E Sharpe Incorporated

<sup>12</sup> International Institutions and Global Governance Program 2012, <http://www.cfr.org/us-strategy-and-politics/global-finance-regime/p20177>. Accessed on 24.04.2015.

<sup>13</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.

countries<sup>14</sup>.

There is scholarly work on the economic impact of intellectual property and how the level of intellectual property protection a state can demonstrate influences the amount of foreign investment made<sup>15</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>16</sup>. In relation to the TTIP, the research is concentrating on the proposed intellectual property chapter as up until October 2014, all negotiations on the TTIP were classified<sup>17</sup>. Questions have arisen on the transparency of the TTIP and that it is undemocratic<sup>18</sup>. The US and EU existing trade relationship is already the biggest in the world and therefore what additional benefits the TTIP aims to bring need to be understood. In regard to the GCC states, this paper analyses the TTIP agreement, intellectual property and ISDS provisions and highlights a need for the GCC states and other developing Islamic countries to assess the impact of the TTIP and ISDS on their rule of law and governance.

#### TTIP on intellectual property and international trade

As the EU-US TTIP is aiming to conclude by end of 2014/ early 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

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<sup>14</sup> Drahos, P. (2003), *When the Weak Bargain win the Strong*, Kluwer Law.

<sup>15</sup> Maskus, K. (2000), *Intellectual Property Rights in the Global Economy*, Patents in Complex Contexts: Incentives and Effectiveness, Weil and Snapper (eds.), *Owning Scientific and Technical Information*. New Brunswick, NJ Rutgers University Press, Braga, C. (1995), *Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and its Economic Implications*, Chapter 12, pages 381-412, W. Martin and L.A. Winters, *The Uruguay Round and Developing Economies*, DC World Bank, Discussion Paper 307.

<sup>16</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 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>17</sup> <http://www.euractiv.com/sections/trade-industry/ttip-negotiating-mandate-finally-declassified-309073>. Accessed on 10.04.2015.

<sup>18</sup> Bermingham, F. (2014), *TTIP: Opponents Attack Negotiations as Undemocratic and Lacking Transparency*, *International Business Times*. Available at <http://www.ibtimes.co.uk/ttip-opponents-attack-negotiations-undemocratic-lacking-transparency-1449406>. Accessed on 26.04.2015. See also <http://www.euractiv.com/sections/trade-industry/eu-ombudsman-demands-more-ttip-transparency-303831>. Accessed on 26.04.2015.

further analysed in this paper. The TTIP has three main aims; to increase trade and investment through market access, increase employment and competitiveness and create a harmonised approach to global trade<sup>19</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>20</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 entitled “What Role for Intellectual Property Rights in the TTIP? On 15<sup>th</sup> May 2013. 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<sup>21</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>22</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>23</sup> whereas others argue it will do very little by way of advancing public interest and the overall good of the economy<sup>24</sup>.

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<sup>19</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 14.04.2015.

<sup>20</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 10.04.2015.

<sup>21</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 03.05.2015.

<sup>22</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 11.11.2014.

<sup>23</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 23.04.2015. 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 20.04.2015.

<sup>24</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



## The benefits/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. 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 or amend existing regulations. Cutting costs in the trade tariffs or eliminating them between the two entities 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>25</sup>. Cecilia Malmström, the newly appointed EU Commissioner of Trade has called for a modified version of the investment chapter in the TTIP<sup>26</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>27</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>28</sup>. A study by the Bertelsmann Foundation in collaboration with the IFO Institute 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>29</sup>.

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[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 11.04.2015.

<sup>25</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 04.05.2015.

<sup>26</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>27</sup> <http://www.vieuws.eu/foreign-affairs/5-toughest-questions-faced-by-cecilia-malmstrom-trade-hearings-of-juncker-commission/>. Accessed on 22.04.2015.

<sup>28</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 06.05.2015.

<sup>29</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 05.05.2015. Also see

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>30</sup> and overlooking the impact on domestic sovereignty<sup>31</sup>. Specific to this paper is the safeguarding 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. Each are working to improve trade secrets protections. Through the TTIP, there is an opportunity to define the standards necessary to facilitate innovation and strike a balance with individual state sovereignty<sup>32</sup>.

This is 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, this has gained momentum. A petition calling for EU-US trade talks to be halted 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>33</sup>. The petition has since surpassed the one million signatures mark by European citizens. In accordance with EU rules, a citizens' initiative requires a formal response from the European Commission once it has reached the one million mark<sup>34</sup> and has now been delivered to the EU

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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 n 07.05.2015.

<sup>30</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 05.11.2014. 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 14.04.2015.

<sup>31</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 14.12.2014.

<sup>32</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 11.04.2015.

<sup>33</sup> <http://www.europeanvoice.com/article/eu-rejects-citizens-petition-against-us-trade-deal/>. Accessed on 21.04.2015.

<sup>34</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 09.04.2015.

Commission to hold a public hearing in the European Parliament<sup>35</sup>. At the core of the criticisms is the lack of transparency regarding the negotiations surrounding TTIP<sup>36</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 risk of ISDS were overrated and that a controlled application was required<sup>37</sup>. The report, although deals with Danish legislation and impact on the Netherlands of the dispute mechanism, it has crossover value for other EU countries and the US. The recommendations to limiting which claims proceed to arbitration through rules of access to arbitration, filtering frivolous and obviously unmeritorious claims, and laying down certain mandatory steps before resorting to ISDS can be applied uniformly. These 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. 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. The influence of sharia law principles is not ubiquitous among all six of the GCC States. Within the GCC states, sharia and the Quran as a source of law are weighted differently. Saudi Arabia has sharia as the source of law<sup>38</sup>, for

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<sup>35</sup> <http://newseurope.me/2014/12/04/million-sign-petition-eu-us-trade-talks/>. Accessed on 21.04.2015.

<sup>36</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 20.04.2015.

<sup>37</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 14.04.15.

<sup>38</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 10.04.2015.

Oman it is the basis of legislation<sup>39</sup> and for Qatar, UAE and Kuwait it is a main source of law<sup>40</sup>. Lastly it leaves Bahrain with sharia as a principle source of law<sup>41</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>42</sup>.

Although there are no primary sharia law sources to justify intellectual property law, there are relevant principles of sharia law that can be found in secondary sources<sup>43</sup>. The sharia principles on ownership of property, obligations on property right holders, remedies for property right holders and appropriation of property can justify the same rights to exist in intellectual property<sup>44</sup>. The Islamic concept of contract law strengthens the argument for intellectual property protection through contractual agreements licensing the use of knowledge based assets and granting monopolies for a given time period<sup>45</sup>. 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<sup>46</sup>.

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; "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

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<sup>39</sup> Oman has sharia as the basis for legislation at Omani Constitution Article 2.

<sup>40</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>41</sup> Bahrain has sharia as a principal source of law at Constitution of the Kingdom of Bahrain, Part One, Article 2.

<sup>42</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>43</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.

<sup>44</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 accessed at Quran.com at 27.07.2014. Islam allows a person to own property, possess and enjoy wealth which has been acquired through lawful means and effort.

<sup>45</sup> Quranic references attributed to contract law include Surah Al-Mā'idah, Verse 1, "O you who have believed, fulfill [all] contracts". See Quran at 5:1 Sahih International Translation accessed at Quran.com at 01.08.2014.

<sup>46</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.

will abide eternally therein". 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. Stronger intellectual property protection has its obvious advantages as through providing a legal remedy for intellectual property infringement, there is more willingness by developed countries to expand their markets into new territories. 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.

#### 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>47</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>48</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>49</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>47</sup> Khory, M. (2013), TPPA countries exposed to risk of investor lawsuits Manufacturers to Froman and Malmstrom: Make 2015 a Year of Action and Results on TTIP - See more 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>, Third World Economics. Available at <http://www.twinside.org.sg/title2/twe/2013/pdf/twe552.pdf>. Accessed on 08.05.2015. 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 08.05.2015.

<sup>48</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>.

<sup>49</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 20.04.2015.

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. The compensation sought in the 62 public cases is in excess of €30 billion<sup>50</sup>. The crux of the fears is that the number of ISDS cases will rise further if the TTIP deal is concluded. 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>51</sup>.

2012 saw the highest number of treaty-based investor state disputes with 58 new cases initiated, highlighting how foreign investors are increasingly relying on ISDS mechanisms against countries<sup>52</sup>. Similarly, in 2013, 57 new cases were initiated. By the end of 2013, 98 states have been respondents in a total of 568 known treaty-based claims. What is most striking is that three quarters of the cases have been brought against EU countries and the US<sup>53</sup>. How ISDS works essentially is to hold states to account based on ISDS clauses in bilateral trade agreements. The first application of ISDS by a GCC state has been made by the Qatari based broadcaster, Al Jazeera. It has lodged a \$150m claim for compensation against Egypt, turning to an international investor arbitration tribunal. Al Jazeera is seeking compensation under the investor/state dispute mechanism included in a 1999 investment treaty between Egypt and Qatar<sup>54</sup>.

In relation to intellectual property, lessons can be learnt from existing intellectual property based ISDS cases.

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<sup>50</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 18.04.2015.

<sup>51</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 21.04.2015. 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 19.04.2015.

<sup>52</sup> United Nations Conference on Trade and Development, (2013), IIA Issue Note. Available at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf). Accessed on 19.04.2015.

Information about claims has been compiled on the basis of public sources, including specialized reporting services such as the Investment Arbitration Reporter and Global Arbitration Review.

<sup>53</sup> United Nations Conference on Trade and Development, (2014), IIA Issue Note. Available at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf). Accessed on 19.04.2015.

<sup>54</sup> Egypt - Qatar Bilateral Investment Treaty, (1999). Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1103>. Accessed on 19.04.2015.

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 19.04.2015.

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 the company's future profits and are asking for \$500 million in compensation<sup>55</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?

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>56</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>57</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 the GCC.

### 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>58</sup>. Unlike other international bodies, the GCC is

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<sup>55</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>56</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 14.04.2015.

<sup>57</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>58</sup> Khalaf, A. and Luciani, G. (2006), Constitutional Reform and Political Participation, Gulf Research Center.

unique in that all its member states are Islamic states<sup>59</sup>. Each individual state has varying degrees of Sharia law incorporated in their constitutions as discussed above.

There are other unique features associated with the Gulf states, for example they are essentially small populations with large oil reserves<sup>60</sup>. Thus the GCC states are often referred to as rentier states given 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>61</sup>.

Each of the rentier states have undergone significant development since the early 1980's and continue to develop<sup>62</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 takes to reach a decision can be linked to the constitutional significance of sharia law. Further, how the GCC states will marry corporate sovereignty with their individual sovereignty and rule of law has not been examined.

Take for example Saudi Arabia, it is an absolute monarchy. It is ruled by King Abdullah bin Abdul Aziz Al Saud. Al Saud is the head of state and Prime Minister of Saudi Arabia<sup>63</sup>. Article 1 of its Basic Law of Government states the Holy Qur'an is the constitution<sup>64</sup> while governance is according to Islamic law<sup>65</sup>. Out of all the GCC states, Saudi Arabia's judicial system is the most reliant on Sharia principles<sup>66</sup> in

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<sup>59</sup> Beblawi, H. and Luciani, G. (1987), *The Rentier State*, Croom Helm, page 1.

<sup>60</sup> Commins, P. (2012), *The Gulf States – A modern history*, I.B. Tauris, page 103.

<sup>61</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>62</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>63</sup> [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 02.05.2015.

<sup>64</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>65</sup> [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 at 25.04.2015.

<sup>66</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.



relation to decision making in its criminal and civil courts, as compared to other GCC states<sup>67</sup>. Saudi Arabia has a dual court system; the Sharia Courts and the Board of Grievances. Under the Basic Law of Governance in Saudi Arabia, the King has ultimate authority over all branches of the State<sup>68</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>69</sup>.

Oman on the other hand, has a civil law system, heavily influenced by Egyptian and French law<sup>70</sup>. The legislative branch of the Omani Government consists of a bicameral body<sup>71</sup> and is composed of two chambers. The upper house has 70 members appointed by the monarch and has advisory powers only<sup>72</sup>. The lower chamber of 84 members is elected by popular vote<sup>73</sup>. Bahrain, given the historical presence of Britain, has a legal system that reflects traditional English law principles<sup>74</sup>. Bahrain 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>75</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>76</sup>. In the UAE, the

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<sup>67</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 – 134. Available at <http://www.saudiembassy.net/about/country-information/laws/CriminalProcedures2001-2of3.aspx> Accessed on 10.04.2015.

<sup>68</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.nyulawglobal.org/globalex/saudi\\_arabia.htm#](http://www.nyulawglobal.org/globalex/saudi_arabia.htm#) Accessed on 10.04.2015.

<sup>69</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html> Accessed at 24.04.2015.

<sup>70</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 161-197.

<sup>71</sup> Referred to as “the Majlis Oman”.

<sup>72</sup> Referred to as “Majlis al-Dawla”.

<sup>73</sup> Referred to as “Majlis al-Shura”.

<sup>74</sup> Price, D. (2012), The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates, Chapter 2, page 14.

<sup>75</sup> Peck, M. (2008), The A to Z of the Gulf Arab States, Scarecrow Press Incorporated, Page 40.

<sup>76</sup> The committee, named the Permanent Constitution Drafting Committee, was formed, with a membership of a chairman, a deputy chairman and 30 members.

system of governance is monarchic with the exception that there is a federal head<sup>77</sup>. Finally, Kuwait is a hereditary Emirate, with all rulers chosen from the Al Sabah family.

The TTIP will have spill over effects for the GCC as it has yet to finalise the EU-GCC FTA and US-GCC framework agreement<sup>78</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>79</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>80</sup>. However this is limited to challenging the validity of an award and whether the challenge can lead to the annulment of

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<sup>77</sup> <http://www.wipo.int/wipolex/en/details.jsp?id=10673> Accessed 14.04.2015.

<sup>78</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 21.04.2015.

<sup>79</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 21.04.2015.

<sup>80</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 21.04.2015.

the award<sup>81</sup>. Thirdly, as a result of how ISDS is incorporated into trade agreements and is dealt with by the arbitration process, there are serious implications for national sovereignty within each GCC state, their democratic governance and the rule of law within national legal systems<sup>82</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>83</sup>. As such, there is scope for GCC states to diversify its trading partners further. 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>84</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, in relation to *riba* and *gharar*, as well as intellectual property.

## Conclusion

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<sup>81</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.

<sup>82</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 20.04.2015.

<sup>83</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 21.04.2015.

<sup>84</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*, 25: 52–67.

The key objectives were to analyse the benefits/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 monarchies. There will be both benefits and pitfalls of the TTIP. By strengthening ties between the EU and 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.

An added dimension to the GCC states is their common religious beliefs at a constitutional level. 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>85</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 as discussed in this paper. 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*? GCC states require an integrated approach to ISDS and intellectual property rights which takes into account; the structure of the GCC states, international agreements and pressures, the international institutions and both societal and religious views.

The most concerning issue for the GCC states is corporate sovereignty 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

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<sup>85</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.

for the GCC states and steps need to be taken to clearly define ISDS and the implications on sovereignty.

