

7-31-2021

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Recommended Citation

Naim, Nadia (2021) "Critical Examination of the Intellectual Property Regimes in the Gulf-Co-operation Council (GCC) States," *Indonesian Journal of International Law*. Vol. 18: No. 4, Article 4.

DOI: 10.17304/ijil.vol18.4.822

Available at: <https://scholarhub.ui.ac.id/ijil/vol18/iss4/4>

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CRITICAL EXAMINATION OF THE INTELLECTUAL PROPERTY REGIMES IN THE GULF CO-OPERATION COUNCIL (GCC) STATES

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Abstract

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 research is to analyse and examine the intellectual property provisions currently in existence within the states of the GCC. 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 research will show this is a key question for the GCC, its international partners and the wider trading communities of the WTO. The findings of the research are that the GCC does not have the capacity to take on TRIPS Plus provisions without compromising its sharia laws and value and that instead an integrated intellectual property protection model is needed.

Keywords :Intellectual Property, Islamic Finance and Islamic Law.

Submitted : 2 May 2020 | Revised : 3 March 2021 | Accepted : 6 July 2021

I. INTRODUCTION

The Co-operation Council for the Arab States of the Gulf (GCC), is a 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 threats¹. The GCC states are geographically placed in close proximity to each other and the entire GCC member states fall under

¹ Abdulrahman A. Hussein, So History Doesn't Forget: Alliances Behaviour in Foreign Policy of the Kingdom of Saudi Arabia, 1979-1990, (AuthorHouse 2012), 243; Neil Patrick, *The GCC: Gulf state integration or leadership cooperation? (Kuwait Programme on Development, Governance and Globalisation in the Gulf States*, London School of Economics (2011), 9.

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 state².

A. PURPOSE OF THE RESEARCH

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. Through intellectual property, the region is opening itself up to further foreign direct investment which can lead to a positive impact on the economy. The underlying theme behind the legislative changes that have taken place in the GCC, is the influence of sharia law³. 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 states⁴.

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 implement⁵.

B. RESEARCH QUESTIONS

There are three key research questions. Firstly, how can the GCC states satisfy international demands for better intellectual property protection without compromising their Islamic values and traditions? Secondly, do the GCC states have the necessary capacity both in their legal structure and internal institutions to increase their levels of intellectual property protection? Thirdly, 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

² Steven C. Caton, *Yemen (Middle East in Focus)*, (ABC-CLIO, 2013), 299.

³ David Price, "The Dynamics Of Intellectual Property Protection In The Arab Gulf States," *International Review of Business Research Papers* 3, no. 1 (2007): 149.

⁴ Nora El-Bialy and Moamen Gouda, "Can Shari'a be a Deterrent for Intellectual Property Piracy in Islamic Countries?" *The Journal of World Intellectual Property* 14, no. 6 (2011): 454.

doi: <https://doi.org/10.1111/j.1747-1796.2011.00428.x>.

⁵ Amir H. Houry, *Trademark Policy: The case of Arab Countries*, (Oxford University Press 2007), 299 and David Price, *The Development of Intellectual Property Regimes in the Arabian Gulf States* *Infidels at the Gates*, 6 (Wiley & Sons Limited, 2009). doi: 10.4324/9780203878941.

institutions, Islamic finance and both societal and religious views.

C. 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 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. 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:

“Do your very best with your full intellect to fairly represent the data and communicate what the data reveal given the purpose of the study⁶”.

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 properties⁷. 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)⁸ and Strauss and Corbin (2007)⁹.

D. 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.

⁶ Michael Patton, *Qualitative research and evaluation methods*, (Thousand Oaks, 2002), 432.

⁷ Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and procedures for developing Grounded Theory*, (Sage Publications, 2007), 16.

⁸ Christopher Hart, *Doing a Literature Search: A Comprehensive Guide for the Social Sciences*, (Sage Publications, 2001), 22.

⁹ Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and procedures for developing Grounded Theory*, (Sage Publications, 2007), 40. 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.

E. LITERATURE

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 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.

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 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.

II. 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 laws¹⁰. 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.

A. RAISING EXISTING TRIPS PROVISIONS

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 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 developments¹¹.

B. THE NEED FOR FOREIGN DIRECT INVESTMENT

Foreign direct investment is actively sought by the GCC states and forms part of the GCC unified economic agreement¹². 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 products¹³. This has

¹⁰ Price, *The Dynamics of Intellectual Property Protection in the Arab Gulf States*, 147.

¹¹ "OECD Benchmark Definition of Foreign Direct Investment – 4th Edition", OECD, <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>. Accessed 8th June 2021.

¹² "The Economic Agreement Between the GCC States", GCC, www.gcc-sg.org. Accessed 8th June 2021.

¹³ Carlos A. Primo Braga and Carsten Fink, "The Relationship Between Intellectual Property Rights and Foreign Direct Investment", *Duke Journal of Comparative and International Law* 9, (1998): 171.

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.¹⁴

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.

II. SHARIA AND INTELLECTUAL PROPERTY

A. IJAZA FOR KNOWLEDGE ACKNOWLEDGMENT

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 individual¹⁵. 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.

B. ISLAMIC PROTECTION OF INTELLECTUAL PROPERTY

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, informal tenets of intellectual property rights protection did exist. Poetry was highly regarded and copyright infringement of such works was heavily disapproved of¹⁶. 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

¹⁴ Beata S. Javorcik, "Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages", *The American Economic Review* 94, no. 3 (2004): 48.

¹⁵ Mohammed Al 'Afghani, *Islam in IP*, (Beaver Group, 2005),3.

¹⁶ Amir H. Khoury, "Ancient and Islamic Source of Intellectual Property protection in the Middle East: A focus on Trademarks", *The Journal of Law and Technology* (2003), 151-206.

and cited by many authors¹⁷. 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. Therefore, the answer to the first research question is that the GCC states cannot satisfy international demands for better intellectual property protection without compromising their Islamic values and traditions

IV. ECONOMIC VIEW ON INTERNATIONAL INTELLECTUAL PROPERTY

A. INCREASING TRADE FLOWS

Increasing and enhancing trade flows through liberalisation remains a priority for policymakers in developing countries¹⁸. A common view among economists assumes that trade liberalisation is an engine for economic development¹⁹. Empirical evidence to date highlights the importance of trade for economic growth in developing countries²⁰. However, states with political instability have struggled to enforce macroeconomic policies towards trade reform and the role of foreign investment is ambiguous²¹. Transparency in intellectual property development and legislation is also a contributing factor²². 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 countries²³. Therefore, consideration needs to be given to the economic impact

¹⁷ David Price, *The Development of Intellectual Property Regimes in the Arabian Gulf States, Infidels at the Gates*, (Routledge Research in Intellectual Property, 2012), 16-19.

¹⁸ Jomo K. Sundaram, "Economic liberalization and constraints to development in sub-Saharan Africa", *UN Department of Economic and Social Affairs (DESA) Working Papers* 67, (2008). Available at <https://ideas.repec.org/p/une/wpaper/67.html#download>, 17.

¹⁹ Anthony P. Thirwall, "Trade, Trade Liberalisation and Economic Growth: Theory and Evidence", *Economic Research Papers*, no. 63 (2003), 3.

²⁰ Hendrik Van den Berg, "International Trade and Economic Growth," (M E Sharpe Incorporated, 2007), 31-62.

²¹ International Institutions and Global Governance Program 2012, <https://www.cfr.org/programs/international-institutions-and-global-governance-program>. Accessed 6th May 2017.

²² 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.

²³ Peter Drahos, *When the Weak Bargain win the Strong: Negotiations in the World Trade Organization*,

of intellectual property to developing countries.

B. SCHOLARY WORK ON DEVELOPING COUNTRIES

There is scholarly work on intellectual property in developing countries, particularly on the economic impact of intellectual property and achieving TRIPS compliance²⁴. 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 time²⁵. The purpose of TRIPS is to 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 rules²⁶. TRIPS established minimum levels of intellectual property protection that each WTO Member State is required to provide in order to gain membership status²⁷.

The TRIPS agreement sets out a “*one size fits all*” approach to international intellectual property setting²⁸, 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 members²⁹.

C. INTERNATIONAL PRESSURE ON THE GCC

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 standards³⁰. 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

International Negotiation 8, No. 1 (2003), 79-109.

²⁴ Keith E. Maskus, *Intellectual Property Rights in the Global Economy*, (Institute for International Economics, US, 2000), 17.

²⁵ Ferris K. Nesheiwat, *The Compliance with Intellectual Property Laws and their Enforcement in Jordan, A post-WTO Review & Analysis*, doctoral theses, Durham University, 2012, available at <http://etheses.dur.ac.uk/3639/>, 110.

²⁶ Peter K. Yu, “The Objectives and Principles of the Trips Agreement,” *Houston Law Review* 46, no. 4 (2009): 984.

²⁷ The full TRIPS Agreement is available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

²⁸ Peter K. Yu, “The Objectives And Principles Of The TRIPS Agreement.” *Houston Law Review*, (2009):6.

²⁹ 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.

³⁰ David Price, *The Development of Intellectual Property Regimes in the Arabian Gulf States Infidels at the Gates*, (Routledge 2009), 187-197.

intellectual property protection and development as defined by minimum TRIPS standards³¹. 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 states³², but also where non GCC states are entering into trade agreements between themselves there is a consequential effect on GCC trade and services³³.

D. TRIPS PLUS IN TRADE AGREEMENTS

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 time³⁴. 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 countries³⁵. 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 countries³⁶.

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 action³⁷. For example, the statistical analysis of intellectual property infringement shows that the Gulf

³¹ Mohammed Hassanein, "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* 8, no. 2 (2008), 161-179.

³² 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.

³³ 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>.

³⁴ Matthew Turk, "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*, (2010), 981-1030.

³⁵ Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, (2002).

³⁶ Emmanuel Hassan, Ohid Yaqub and Stephanie Diepeveen, "Intellectual Property and Developing Countries, A review of the literature," https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR804.pdf, 5.

³⁷ Rafael Pastor, "The Impact of Free Trade Agreements on Intellectual Property Standards in a Post-TRIPS World," <http://www.bilaterals.org/?the-impact-of-free-trade>. 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.

states have improved their intellectual property enforcement in areas such as software piracy as the rates of infringement are falling³⁸. 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 improvements³⁹.

V. NOT A LEVEL PLAYING FIELD – DEVELOPED COUNTRIES VERSUS THE GCC

A. RESOURCES ISSUE

There is a stark contrast in the resources available to countries with developed intellectual property systems to those that are still at the development stage⁴⁰. 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 up⁴¹. The GCC states will want to draw on the technical expertise and experience of its international partners to advance its intellectual property agenda⁴². If the Gulf states can satisfy TRIPS plus obligations, the potential to open up new markets brings with them opportunities for economic growth⁴³. However TRIPS plus is

³⁸ 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.

³⁹ 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%.

⁴⁰ Assafa Endeshaw, Intellectual Property and the WIPO Development Agenda, Intellectual Property in Asian Emerging Economies, (Routledge, 2010), 2.

⁴¹ Carlos M. Correa, The Strengthening Of IPRS In Developing Countries And Complimentary Legislation, DFID, (2000), 4 and Ohid Yaqub, Intellectual Property and Developing Countries, A review of the literature, (RAND Cooperation, 2009), 65.

⁴² 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 Barry 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 2013). Ahmed Driouchi, “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*, (2008). Mehran Kamrava, et. al, “Knowledge Economies in the GCC States” in *The Political Economy of the Gulf Summary Report*, Center for International and Regional Studies Georgetown University School of Foreign Service, Qatar, 2011.

⁴³ Mohammed El-Said, “The European Trips Plus Model and the Arab World”, *Liverpool Law Review* 28, (2007). doi: <https://doi.org/10.1007/s10991-007-9015-4>, 53 and Matthew Turk, “Bargaining And Intellectual Property Treaties: The Case For A Pro-Development Interpretation of Trips But Not Trips Plus”,

case specific and its effect on bilateral agreements is not to the same uniform standard as standard TRIPS compliance⁴⁴.

B. TRIPS PLUS OBLIGATIONS SPECIFIC TO THE GCC

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 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 decisions⁴⁵. 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 infringement⁴⁶.

There is not 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 interpretation⁴⁷. 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. In relation to the second research question, currently the GCC states do not have the necessary capacity both in their legal structure and internal institutions to increase their levels of intellectual property protection.

VI. INTELLECTUAL PROPERTY AND SHARIA LAW

A. INTELLECTUAL PROPERTY CASE LAW

Journal of International Law & Politics 42, (2010), 981-1030.

⁴⁴ Yee K. Kim, “Appropriate Intellectual Property Protection and economic growth in countries at different levels of development”, *Research policy, Elsevier Science B V Amsterdam*, (2012), 358-375.

⁴⁵ Mohammed El-Said, The development of intellectual property protection in the Arab world, (Edwin Mellen Press, 2008), Chapter 3. Ruse-Khan, Henning. “The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?” *Journal of Intellectual Property Law* 18, no. 2, (2011): 2.

⁴⁶ Mohammed Naseer and Walid Muhaisen, “Share’a: Intellectual Theft or Intellectual Infringement?” *Journal of International Commercial Law and Technology* 4, no. 1 (2009):4.

⁴⁷ 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.

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. 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 sources⁴⁸. 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 property⁴⁹. The Islamic law principles governing contract law have been applied to intellectual property protection⁵⁰. 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 states⁵¹.

B. SHARIA LAW AND INTERNATIONAL BUSINESS

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. 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 a standalone right. Rather, there is a public interest responsibility to the community and for financial interests to be proportionate⁵².

Public acceptance of intellectual property law is the red herring the

⁴⁸ Ali Khan, "Islam as Intellectual Property 'My Lord! Increase Me In Knowledge'," *Cumberland Law Review* 31, (2001):31.

⁴⁹ 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. Islam allows a person to own property, possess and enjoy wealth which has been acquired through lawful means and effort.

⁵⁰ 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.

⁵¹ Nora El-Bialy and Moamen Gouda, "Enforcing IPR Through Informal Institutions: The Possible Role of Religion in Fighting Software Piracy, Joint Discussion Paper Series in Economics", Universities of Aachen, Gießen, Göttingen, Kassel, Marburg, and Siegen, 2011, 441-446.

⁵² Abdul G. Azmi, "Authorship and Islam in Malaysia: Issues in Perspective", *International Review of Intellectual Property and Competition Law*, (1997), 268-276.

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 GCC⁵³. 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.

VII. 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 Group⁵⁴. 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. This is why the third research question on what recommendations can be made to develop an integrated approach to intellectual property rights in the GCC, provides a solution to the earlier research questions that are currently not met. By utilising Islamic finance as the springboard to Islamic Intellectual Property Rights, Muslim states can have more ownership and authority on how intellectual property is protected and developed.

⁵³ Silvia Beltrametti, "The Legality of Intellectual Property Rights under Islamic Law" in *The Prague Yearbook of Comparative Law 2009*, T. Mach, et. al., eds. (Prague: 2010), 55-94.

⁵⁴ Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>.

VIII. ISLAMIC FINANCE 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 supervisory procedures and most importantly, engender greater public confidence in the intellectual property sector. By setting up intellectual property sharia boards as a branch of existing Islamic finance sharia boards, there is a golden opportunity here to steer the pathway for Islamic intellectual property rights.

VIII. CONCLUSION

The research questions set at the start of the paper were to examine the intellectual property regimes in the Gulf Co-operation Council (GCC) states. The main aims were to answer the key research questions of; 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 protection; and 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 first two research questions demonstrate there is a lack of Islamic influence and capacity within the GCC to successfully meet the requirements of balancing sharia law with intellectual property and having the necessary legal infrastructure. The first two research questions showing failures makes the case for why there is a need for an integrated intellectual property rights approach. It into account; the structure of the GCC states, international agreements and pressures, the international

institutions, Islamic finance and both societal and religious views.

The paper 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 and defining the relationship between intellectual property and sharia law . The paper 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. This is 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 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. There is a significant paucity of research in developing an Islamic law based integrated approach to intellectual property rights in the GCC and therefore one of the fundamental aims of this research is to act as a catalyst for further research in this area.

APPENDIX ONE

Intellectual Property Resources Table

	US	EU	Other
GCC		EU	
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 https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html	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	http://eur-lex.europa.eu	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	www.tradingeconomics.com
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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