Chapter 1

“Infidels at the Gates” –

Introduction and Context
1.1 Introduction and Context

The primary objective of this thesis is to examine the development of national legislative regimes for the protection of intellectual property rights in the six Arabian Gulf states (the GCC states) that constitute “The Cooperation Council for the Arab States of the Gulf”, otherwise known as the Gulf Cooperation Council (GCC),¹ namely:

- The Kingdom of Bahrain;
- The State of Kuwait;
- The Sultanate of Oman;
- The State of Qatar;
- The Kingdom of Saudi Arabia; and
- The United Arab Emirates (the UAE).

The thesis examines the extent to which these regimes both meet the states’ international treaty obligations and are congruent with their domestic policy objectives and needs.

As its title suggests, a particular focus of the thesis is upon the foreign forces which have shaped or influenced the character of the GCC states’ intellectual property legislative regimes. Hence, the thesis examines the performance of the states in protecting intellectual property rights in the

¹ The Gulf Cooperation Council came into existence on 26 May 1981, in part as a response to perceived threats from an Islamic fundamentalist Iran, an imperialistic Ba’athist Iraq, the state of civil war in Yemen, and the recent Soviet intervention in Afghanistan – all of which threatened to destabilise the ruling dynasties in the Gulf region and to involve their states in wider conflicts. The one remaining Gulf state that is not a member of the GCC is Yemen, which has been seeking entry to the GCC since 1996. Until October 1995, Yemen existed as two separate states engaged in separatist movements and civil war. Yemen’s application has been sponsored by Oman and Qatar, but has been vetoed by Saudi Arabia, the main obstacle being the difference between Yemen’s and the GCC members’ political and economic systems. In January 2002, Yemen was granted observer status at GCC affiliated non-political bodies and agencies, and in October 2002, Yemen and the GCC signed a protocol defining the relationship between the two sides - considered to be the first step towards Yemen’s full membership of the GCC.
context of their accession to World Trade Organisation (WTO) membership, the consequent compliance with the requirements of the WTO’s Agreement on the Trade-Related Aspects of Intellectual Property Rights (1994) (TRIPS) and the international conventions for the protection of intellectual property rights upon which the Agreement draws and builds, namely the Paris, Berne, and Rome Conventions and the Washington Treaty\(^2\). In brief, TRIPS serves as the benchmark for this study. Because of length limitations, the thesis does not attempt to offer a detailed commentary on the text of each law, but instead focuses on the salient features of each area of intellectual property protection and their particular idiosyncratic features.

The thesis examines the US strategy of using bilateral agreements to achieve standards of intellectual property protection that exceed those enshrined in TRIPS, and the impact of this strategy upon the GCC states’ intellectual property legislative regimes and their enforcement performance. The role of the Office of the United States Trade Representative (USTR) and the Special 301 provisions as a coercive tool in the US bilateral strategy receives particular attention.

A secondary objective is to establish a substantive record of the nature of the GCC states’ intellectual property laws and the history of their recent development, since, to the author’s knowledge, such a record has not been previously compiled. Previous studies on intellectual property rights protection that have concerned the Middle East region have tended to concentrate either on one type of law, notably copyright, trademarks or patents, or on one or two Gulf states. Selective studies on intellectual property protection in developing countries further afield have tended to pass over the countries in the Gulf region, with the occasional exception of Saudi

Arabia, in favour of a selection from a more active and industrially advanced group of developing countries. This thesis attempts to address that imbalance. While it focuses primarily upon patent, trademark, and copyright protection, since these are the key areas of intellectual property concern, interest and activity within the GCC states and the international community, it also encompasses the other significant areas of intellectual property in the GCC states, such as industrial designs, geographical indications, integrated circuits and undisclosed information (trade secrets), and new plant varieties. It also examines regional initiatives for the protection of traditional knowledge and cultural heritage, since these are areas to which the GCC states and the other developing countries are now giving increasing attention.

An appreciation of the enforcement and recognition of intellectual property rights in the Gulf is incomplete without an understanding of the religious, political and cultural forces deeply rooted in Middle East history, that shape the protection of intellectual property rights in the Middle East today. Accordingly, the position of Shariah law as a major influence upon the intellectual property rights protection and the constitutional and judicial framework in which it resides is reviewed, as background and context for the examination of the region’s intellectual property laws. The precedence of Islamic law, or the Shariah, as a legal imperative is unequivocal; its status has been described thus:

“Behind all secular law stands the Shariah law of Islam ... the Shariah runs like a golden thread through the legal systems of the Arab Middle East.”

The year 2005 has some significance in respect of the subject matter of this thesis. It represents the close of the 10th anniversary of the introduction of TRIPS, and the fifth anniversary for

---

Chapter 1

WTO’s developing country members (which includes the five GCC states who are also WTO members) to comply with its requirements. It is also the year in which Saudi Arabia finally succeeded in achieving membership of WTO after ten years of application (not including the three years preceding 1995 during which it sought membership of GATT). It is also the year in which the WTO, through its Ministerial meeting in Hong Kong, has attempted to restore some of its prestige after disastrous ministerial conferences in Seattle in 1999 and Cancun, Mexico in 2003. It is worth noting, although perhaps purely coincidental, that the WTO’s most successful Ministerial conference to date was held in Doha in 2001 under the hospitality of the Qatari Government!

1.2 The GCC States and the Development of Intellectual Property Laws

What makes a study of these six GCC member states of current-day relevance and interest is that the emergence of each as a modern state is a very recent occurrence, and yet they have assumed a not insignificant regional and global influence in present international affairs and trade. With the arguable exception of Saudi Arabia, the other five states have taken quantum leaps in their national development, to emerge from being quasi-feudal or disputative tribal regions under actual or effective foreign domination into stable and sophisticated independent sovereign states, in just two generations or less. Bahrain, Kuwait, Qatar and the seven sheikhdoms of the Trucial States (that later formed the UAE) were still part of the UK Persian Gulf interests until they gained independence in 1961 (Kuwait) and 1971 (Bahrain, Qatar and the seven sheikhdoms). Oman, although long an independent sovereign state was still under British influence prior to
1970, and deemed the most feudal and withdrawn of all the Arab Gulf countries; it did not start to emerge from this pseudo-feudal state until the present sultan overthrew his father in a British-backed palace coup in 1970. The consequence of this dominant British influence, at least in the eastern Gulf region, was that a system of British laws and justice prevailed throughout the Gulf region until 1971 (except for Gulf nationals on matters within the province of Shariah law), and this influence, modified and added to by other western influences, continued well after independence.

As part of their ongoing respective political, economic and social metamorphoses, the legal systems of the GCC states have undergone dramatic, radical and progressive change and development over the last thirty years or so, and that change is continuing. The major trend has been a greatly increased codification of law and administered regulation which has entailed increasing substitution of institutionalised procedures for the former informal, discretionary exercise of personal authority sometimes based on local interpretation of Shariah legal principles. With this movement toward codification of the law and the institutionalisation of the judiciary and government, there has emerged a growing tension between the protection of local and national interests and traditions and the governmental recognition of the need to embrace western-based legal and economic principles, practices and infrastructures.

The thesis argues that there exists a dichotomy between the formal expression of intellectual property protection through the GCC states’ laws, and their practical application through the

---

5 Oman has enjoyed independent status since it expelled the Portuguese in 1650. During the eighteenth century it established an empire encompassing Zanzibar, parts of East Africa and the southern Arabian Peninsula, and established effective trading control over parts of the Persian and Pakistani coasts. By the early nineteenth century, Oman was the most powerful state in Arabia and on the East Africa coast. In 1800 Great Britain entered into a Friendship Treaty which recognised Oman’s independence but which developed into Great Britain gaining effective control over Oman’s foreign relations, and over the affairs of non-Muslims in the Sultanate. Its regional influence and empire declined during the late nineteenth/early twentieth century, as it retreated into a period of sustained period of isolationism.

states’ respective enforcement strategies and efforts. The dichotomy arises as a consequence of the external pressures upon the states to adopt laws for which they have neither the resources, nor expertise, nor infrastructures to effectively execute to the level of satisfaction sought by the more demanding developed countries. The thesis speculates on the extent to which the legislative and operational responses of the states satisfy WTO/developed countries expectations, and what further changes might be sought in the future.

Since the late 1960s/early 1970s, when they either gained their independence or emerged from sustained periods of international isolationism, the GCC states have undertaken a transformation of their intellectual property legislative regimes at an extremely rapid rate – virtually in the timeframe of a single generation. The period of this transformation has been marked by three major, but very different, phases in the development of the regimes. Each phase has been characterised by significant degrees of foreign intervention which has directed or at least strongly influenced the construction of the states’ intellectual property laws. But this foreign intervention has not necessarily caused the creation of laws which have been congruent with the states’ needs or which have enabled the achievement of national objectives and international requirements in terms of their enforcement effectiveness.

The first of these phases, namely the pre-TRIPS period that continued through the mid 1990s, is notable for the dearth of *sui generis* intellectual property laws in place in the GCC states; the exceptions were few in number, and existed in the field of trademarks, patents and industrial designs, but even these laws were subject to foreign design. However, this dearth of *sui generis* laws does not mean that protection for certain types of intellectual property rights was not available; it existed in an overarching perspective in the divine laws of social and moral conduct laid down in the *Qu’ran* and the *Hadith* of the Prophet. In a more corporeal and secular sense,
and in the absence of any mainstream intellectual property framework, it also existed in the form of laws governing commercial activity and conduct. Protection in pre-TRIPS times was available for the benefit of the foreign merchant or the merchant's local agent, the trader and the consumer, instead of for the holder of an intellectual property right of foreign origin; but on occasion it coincided for the benefit of both groups. However, even these commercial laws were generally subject to foreign influence. In addition, the national frameworks for the control of publishing and public dissemination of printed material, which all states actively enforced, provided some limited protection for certain types of copyrightable material.

The second developmental phase is marked by the establishment of WTO, the consequent introduction of TRIPS, and a post-TRIPS flurry of legislative activity by the GCC states as they attempt to meet their statutory obligations to make their intellectual property laws TRIPS-compliant and their enforcement effective. TRIPS heralded a major shift in intellectual property by establishing unprecedented levels of protection to be enforced worldwide. However, the shift took shape by reference largely to the needs of the few leading industrialized nations (and to a lesser extent that of the other major developed countries). WIPO, which had already been a significance influence on the states' pre-TRIPS intellectual property laws, continued to play a crucial role in guiding the states in their compilation of their TRIPS-compliant laws and their enforcement, structural and administrative capacity-building. With fluctuating degrees of commitment, the states embarked on reshaping their intellectual property protection regimes.

Hardly have the GCC states come to terms with the enormity of the dimension of the transformation required to their respective intellectual property protection regimes required by the TRIPS and post-TRIPS phase, they are faced with a new round of imposed changes as they enter the third phase—the TRIPS-plus phase. The dominant driving factor shaping the character
of their laws during this period is the bilateral strategy pursued by the United States. This new round commenced with a series of bilateral trade and investment agreements from the late 1990's; more recently, the United States has concluded free trade agreements (FTAs) with Bahrain and Oman, both agreements incorporating extensive provisions on intellectual property. The provisions constitute much higher standards of protection than those set by TRIPS, and also remove and restrict the limited degree of manoeuvrability that TRIPS permitted developing and least developed countries. The bilateral agreements are reinforced by demands that the signatory states not only adopt higher standards enshrined in the FTAs themselves but also adopt and adhere to a range of multilateral treaties which represent TRIPS-plus standards. Both the FTAs and the multilateral treaties reduce and restrict the flexibilities and exceptions provisions that TRIPS allowed to signatory states to craft their laws to take account of their respective national needs and objectives.

The intellectual property laws of the GCC states reflect a common heritage. They contain many similarities with each other, indicating an ongoing process of mutual collaboration and borrowings. They have also drawn much from countries in the region which progressed through an earlier modernization/westernization process, notably Egypt, and other Arab states through their influence in regional groups such as the League of Arab States and the GCC itself. However, the major influence in the construction of their legislative regimes and the character of the intellectual property laws in undoubtedly the World Intellectual Property Organisation (WIPO) and the models it provides through its various draft laws.

Nevertheless, the states' intellectual property laws still contain their own particular idiosyncrasies, such as the status of Shariah law and its relationship to intellectual property, regional attitudes towards enforcement, protection of geographical indications, wines and spirits,
Chapter 1

moral rights and translations of copyright works, compulsory licencing, pharmaceuticals, and the Arab Boycott of Israel (for which statutory provision existed in earlier commercial legislation as well as earlier intellectual property laws, but which has now been removed).

1.3 TRIPS and the Globalisation of Intellectual Property Rights

1.3.1 The Global Pressures

A fundamental element of the emergence of the modern Gulf state is the move to gain membership of the WTO, and the consequent perceived benefits of being a member of the global trade community (or the negative impact of not attaining membership). One consequence of such membership, however, is that legislation relating to trade and services, and intellectual property in particular, must conform to the provisions of the international treaties in this area, notably, TRIPS, and the Paris, Berne and Madrid conventions and the Washington Treaty. TRIPS sets new international minimum standards of protection for each of the main categories of intellectual property, by building on these major conventions and adding a requirement for effective enforcement regimes.

Since its introduction in January 1995, TRIPS has generated considerable ongoing debate concerning the benefits and disadvantages that its standards of intellectual property protection bring to developed, developing and least developed countries. According to some commentators, there exists a powerful lobby representing developed countries who believe that
all intellectual property rights are good for business, benefit the public at large and act as catalysts for technical progress. The rights are necessary to stimulate economic growth which, in turn, contributes to poverty reduction; by stimulating invention and new technologies, they increase agricultural or industrial production, promote domestic and foreign investment, facilitate technology transfer and improve the availability of medicines necessary to protect public health. The developed country lobby consider that TRIPS is a useful tool with which to achieve their objectives, and they hold that there is no reason why a system that works for developed countries could not work in similar fashion in developing countries.

On the other side, there are those who believe that the protection of intellectual property rights according to the formula of the major industrialised countries are likely to cripple the development of local industry and technology in developing countries, will harm their local populations, and benefit none but the developed world. Intellectual property rights do little to stimulate invention in developing countries, where the necessary human and technical capacity is absent, and they are ineffective in stimulating research to benefit the poor because they will not be able to afford the products, even if developed. They limit the option of technological learning through imitation, and they allow foreign firms to drive out domestic competition by enabling the foreign firms to obtain protection to service the market through imports, rather than domestic manufacture. Very “high” standards of protection may be in the public interest in developed countries with highly sophisticated scientific and technological infrastructures, but this does not mean the same standards are appropriate in all developing countries.

---

8 Ibid.
9 Ibid.
10 Ibid.
The issue of harmonisation of intellectual property rights, whether as a regional or global initiative, is a contentious issue which still has much distance to travel. To its critics, harmonisation is the strategy devised by the leading developed nations to achieve and maintain global domination through control of international trade, and to protect their commercial interests in the developing and least developed countries. By that view, intellectual property rights are imposed by developed countries on the developing and least developed countries, as a non-negotiable total package, compliance with which is a prerequisite for membership of the international trade community of which WTO is the global representative. International intellectual property standard-setting has been dominated by western states and intellectual property owners, and the dominant mechanism of standard-setting has been economic coercion of which TRIPS has been the most potent multilateral expression. Some commentators argue that TRIPS principally benefits the developed countries, and the credibility of the WTO as an instrument to promote free trade in the interests of all countries is weakened:

“TRIPS does not involve mutual gain; rather, it positions the WTO primarily as a collector of intellectual property-related rents on behalf of multinational corporations (MNCs). This is a bad image for the WTO and in the view of many ... reflects the "capture" of the WTO by the MNCs.”

While there may have been some misgivings amongst the GCC states concerning the adoption of these new minimum international standards, it is suggested that in some quarters, the WTO was viewed as being largely irrelevant and hence its minimum standards obligations required by TRIPS would have little practical impact at the domestic level.

The GCC states saw that WTO membership would give them potential ability to exert some influence on international trade, whereas outside the WTO they would have no such ability. Yet the GCC states have had little choice but to join the international community which the WTO represents. The perceived significance to the GCC states of membership of the WTO and the requisite intellectual property legislative framework as a key national political and economic strategy is illustrated by Oman’s reaction to achieving WTO membership.\(^\text{14}\) Quoting senior Ministry sources, the local media reported that Oman’s accession to the WTO had great implications and importance for the country, and paved the way for globalisation of the Omani economy.\(^\text{15}\) Protectionism, which had been the catchword of yesteryear, would be a thing of the past and the indigenous business would be open to international competition. The options before the Sultanate were limited; it was, in effect, a game of do or die - either accede to the WTO or face global isolation. The report continued that, despite the opposition to the WTO and the vehement criticism of its policies in certain quarters, it was a well known fact that remaining outside the WTO would have lead to ostracism which would not be in the interests of any country, particularly a developing country.\(^\text{16}\)

In both the legal and commercial contexts, global harmonization is an intrusive process that demands an active re-examination by the state of its own laws and regulations. Arab countries are being driven by pressures from a variety of sources, such as the WTO and individual developed countries, to review and upgrade their laws governing a wide range of economic

---

\(^\text{14}\) In 2000, Oman became the fifth GCC state to join the WTO after Bahrain (1995), Kuwait (1995), Qatar (1996) and UAE (1996), but the first required to go through the WTO scrutiny process. Saudi Arabia has been in the process of seeking membership since 1993, firstly of GATT, and then WTO since 1995. It finally achieved membership in November 2005, and accordingly attended the WTO Ministerial Conference in Hong Kong in December 2005 as a full member.

\(^\text{15}\) *Oman Observer*, 10 October 2000, 1.

\(^\text{16}\) Ibid.
activity, and to introduce a widely embracing set of laws where none previously existed. Even the GCC itself has applied pressures for conformity in the intellectual property filed, albeit with limited success, in the drive for a regional cohesion.

1.3.2 The GCC States' Response to the Pressures

The question arises (which this thesis also considers) of the extent to which the GCC states have succumbed to this pressure, or whether they have managed to maintain their integrity and to some extent outmanouvre the developed countries in some instances. Some intellectual property issues that have become of increasing importance to the states, such as the protection of indigenous rights, traditional knowledge, and cultural heritage, have not yet been pursued with the same degree of aggression by the industrialised nations as they have moved to protect their rights and interest on copyright, patents and trade marks. In terms of its impact on the direction of standard-setting in global public health, the Doha Declaration, suggests Drahos, is a concrete success to which developing countries can point, although it remains to be seen whether it has generated an ongoing significant shift in the capacity of these countries to influence the global standard-setting process in intellectual property.

Critics of the performance of developing countries in displaying their commitment to the protection of intellectual property rights according to the standards set by TRIPS would argue that the GCC states, as developing countries, are paying lip service to the rightful demands of the developed countries for the effective protection of intellectual property rights. The states may be establishing the legislative regimes by adopting the intellectual property laws as required by

---

18 Drahos, above n 1, 781.
19 Carroll, above n 3, 594.
the consortia of the developed countries, but they appear unwilling, uncommitted or unable to act as expeditiously and as fully as required with an effective implementation strategy and execution. To substantiate their complaints, the critics point to the perceived delays in introducing the necessary implementing regulations to give practical effect to the laws, the lack of structural reforms in the states' judicial, infrastructural, and administrative areas, and enforcement actions which appear erratic and which do not conclude in successful judicial prosecutions and outcomes.20

The most challenging element of the TRIPS and TRIPS-plus phases, as perceived by both the GCC states themselves and the industrialized nations, is the regional enforcement of the states' intellectual property protection obligations consistent with the standards enshrined in TRIPS, the TRIPS-plus treaties and the bilateral agreements to which the states have made commitments. Notwithstanding the presence of comprehensive sets of laws and treaty commitments, there nevertheless exists a dichotomy between the principle of enforcement as enshrined in the various legislative regimes, and the practice as exemplified by the degree of effective action. In all states, the practical application of compliance obligations through effective enforcement has been, and continues to be, the most difficult area with which to contend.

The emergence of this dichotomy is also experienced by many other developing and least developed countries. Why and how this dichotomy emerges, and what are, and might continue to be, the consequences for each state can be demonstrated by:

20 These criticisms appear with regular frequency in the USTR's Annual Special 301 Reports. The Reports as they relate to the GCC states are discussed in greater detail in Chapter 6.3 following.
- the comprehensive nature of the legislative regimes in light of the TRIPS minimum benchmark and the dimension of institutional and structural reforms being progressively initiated;

when contrasted with:

- implementation actions, as evidenced by policing actions against illegal activities piracy and counterfeit goods; and

- the nature and frequency of judicial actions and the severity of penalties available and imposed.

One measure of the extent of this dichotomy can be seen in the responses of the developed countries, as evidenced by the United States through the application of its USTR annual Special 301 Reports, and the influence thereon of the powerful multinational industry lobby groups. For most GCC states, the principal barriers to the elimination of intellectual property infringements, which lie at the heart of this dichotomy, do not subsist so much in the substantive law, as in their practical application. The reasons for these barriers are many, which the thesis explores, and do not rest solely with the enforcement authorities or the judiciary; entrenched local societal, cultural and commercial attitudes are also major contributing factors.

In the cause of securing membership of the international community, the GCC states have had little option but to adhere to agendas set by the developed countries through WTO and the major international treaties which they sponsor. While the agendas may not necessarily have yet hampered the development of nationally appropriate intellectual property protection regimes, they are cementing in place conditions which will restrict the future freedom or discretion of the
states to develop in directions which best deal with national imperatives or opportunities. Since becoming part of the international community, the states face, and will continue to face, further direct pressure from some developed countries (notably the United States) to accept the imposition of further enhanced levels of intellectual property protection, again with the objective of protecting the particular interests of the developed countries.

Arab countries have been exhorted to play a more active role in the international arena by joining forces with like-minded countries. However, they are unlikely to be inclined to do so on their own volition unless there arises the necessity to develop national and regional agendas that pay particular attention and care to their development needs and priorities. The GCC states already have had in existence a regional structure that could serve as the logical springboard for launching a greater presence in international fora, namely the GCC. However, the GCC Council has its own internal dysfunctionality at present that militates against an effective presence on behalf of the Gulf states or in concert with the wider Middle East, the greater Arab world or a major consortium of developing and least-developed nations. The states, either collectively as a regional bloc or individually, have not attempted to make their presence felt in the affairs of the WTO or WIPO councils and committee. The lack of active participation reinforces the view expressed earlier that membership of these two bodies, although deemed necessary, was not positively viewed.

1.4 Multilateralism by the Backdoor - the Strategy of Bilateralism

While TRIPS has set the minimum international standards for intellectual property protection, the level of these standards and universal adherence to them has still created difficulties and challenges for the GCC states, other developing countries, and least developed countries. It has also generated a considerable degree of frustration and dissatisfaction for the major industrialised nations, particularly the United States. In some respects, TRIPS has become somewhat superseded by the emergence of the new round of intellectual property lawmaking in the post-TRIPS world. WTO has stumbled at its recent ministerial meetings on efforts to liberalise global trade, and to also inject a greater degree of equity and access into TRIPS. At the same time, WIPO has been confronted with its own self-examination debate over proposals and counter-proposals which have the potential to significantly change its position and role in the global intellectual property arena. The new “international standard” of intellectual property protection in practical terms is fast becoming that which is defined by the terms enshrined in the latest bilateral agreement which the United States may have concluded together with the prescriptions of the TRIPS-plus treaties, such as the WIPO Internet Treaties and conventions. The “highest international standards” have become very much a moving target.

While negotiations on intellectual property rights in WTO are virtually paralysed, and the launching of negotiations on investment finds strong opposition, developed countries, notably the United States, have turned to bilateral dealings to advance their industries' economic interests.

---

The WIPO Internet Treaties are the WIPO Copyright Treaty (1966) (WCT), and the WIPO Performances and Phonograms Treaty (1996) (WPPT); see Chapter 6.4 for further discussion on these treaties as TRIPS-plus treaties.
and obtain higher levels of commitment from developing countries. Powerful and influential multinational business interests actively push for progressively escalating standards, and carefully monitor the progress and performance of the US government in imposing TRIPS-plus standards on weaker countries. Hence bilateral trade and investment agreements, particularly FTAs, typically contain extensive intellectual property protection provisions which are used to establish TRIPS-plus standards, to remove or reduce the flexibilities provided for in TRIPS, and to establish protection in new areas of intellectual property rights which go beyond the parameters of TRIPS.

Bilateral trade and investment agreements are promoted by their advocates as being stepping stones towards full integration of the participants into a global free market economy, by ensuring governments implement the liberalisation, privatisation and deregulation measures of the globalisation agenda. However, they have also been described as part of an insidious fast-expanding and bewildering coercive web, popping up like hydra’s heads throughout the world, and constructing in patchwork fashion what the developed nations have not been able to impose through such international fora as the WTO, or through multilateral negotiations. They are seen as insidious because they are invariably conducted in unequal contest in closed session between unequal partners. With the stronger partner having an established objective to protect its own economic and trade interests, and having little or no interest in making allowance for the divergent or conflicting national and developmental interests of the weaker partner, the resultant agreement is both inevitable and predictable.

On intellectual property issues that really matter to it, the United States has utilised webs of coercion, and one of those webs is its strategy of establishing bilateral agreements which include the establishment of standards of intellectual property protection which may far exceed TRIPS standards and which extend beyond the scope of TRIPS. Developing countries operate within an intellectual property paradigm dominated by the United States, the European Union, and by international business; given the track record of the United States and the European Union, developing countries can expect very few concessions on intellectual property issues in either a bilateral or multilateral context. However, developing countries are prepared to enter into bilateral agreements containing provisions on intellectual property rights in order to gain access to US and EU markets or to avoid losing access to them.

Having introduced intellectual property laws of largely foreign origin to satisfy the requirements to comply with TRIPS, the GCC states are faced with the issues and challenges of their domestic implementation and enforcement. Even though the states have demonstrated a general willingness to address the complex and contentious issue of regional piracy – albeit with mixed success - they now face additional pressures from the United States to adopt TRIPS-plus standards of intellectual property protection. A crucial tool in the application of this pressure is the use of the USTR’s Special 301 Annual Reporting provisions, which identify countries which fail to provide adequate protection of US intellectual property rights or deny market access to US companies and which threaten possible US retaliatory trade actions. Furthermore, the TRIPS-plus treaties are being used to apply the higher standards on the grounds that these treaties represent the new consensus on higher international standards for intellectual property protection. The intellectual property areas which receive the greatest attention under these

---

27 Drahos, above n 11, 781-2.
28 Ibid, 788.
bilateral actions are those of economic concern to the United States, particularly protection in the broadest sense of patents, pharmaceutical patents, copyright and neighbouring rights in the digital environment. In contrast, little or no effort is being made within these bilateral agreements to introduce protection of the states’ traditional knowledge and cultural heritages, geographical indications of non-European origin, plant varieties and traditional agricultural practice.

The United States has declared its intention of establishing a Middle East Free Trade Area by 2013, as a crucial tool in giving effect to its Middle East Peace Initiative and its global war against terrorism. To achieve the Middle East Free Trade Area, the United States intends to enter into a FTA with each of the GCC states. The recent completion of FTAs with Bahrain and Oman will be the catalyst for further change in this regional situation. These FTAs require each state to make a number of significant concessions and commitments in the area of intellectual property protection which well exceed TRIPS standards, and which counter TRIPS flexibility provisions. The Bahrain FTA was based on the US model developed for Jordan; more significantly it was also the first of a number that the US is already negotiating with the other GCC states. The intellectual property provisions of the Bahrain FTA set a new TRIPS-plus benchmark in terms of intellectual property protection in the Gulf, while the Oman FTA raised it slightly higher. There is every possibility that regional FTA negotiations already in progress with the other states will raise it even further.

The thesis explores in some detail the intellectual property provisions of the bilateral trade and investment agreements, and particularly the free trade agreements (FTAs) that the United States has recently concluded with Bahrain and Oman. While the United States has stated that it is pleased with the strengthened protection of intellectual property rights in its most recent FTAs, it
has also stated that it will be seeking even higher levels of protection and enforcement standards in agreements under negotiation with the UAE, Kuwait and Qatar.  

1.5. The Structure of the Thesis

This chapter has introduced some background to the GCC states, and briefly explored the paradigm in which the states have been required to operate in the establishment of their intellectual property legislative regimes.

Chapter 2 of the thesis examines the regional and domestic moral fabric for intellectual property protection in the GCC states. It explores the idea of Shariah law as a “golden thread” that runs through the constitutional, legal and judicial structures of the GCC states, and the changing nature of its influence as the secular laws of the states have become increasingly codified. The thesis examines the extent to which the Shariah drives or influences the regional protection of intellectual property rights.

Chapter 3 addresses the pre-TRIPS period of this study. It examines the recent history of intellectual property rights protection within the Gulf and in each state. In so doing, it refers to examples of other laws which were outside a fledgling intellectual property framework, but which offered varying degrees of protection to some intellectual property rights by virtue of their common or overlapping objectives. The chapter also examines some of the foreign influences

---

that have been brought to bear, directly and indirectly, on the development of the states' intellectual property laws. It also questions the impetus behind the states decisions to join the international trade community, and discusses the external inputs into the preparation of their legislative regimes as a precursor to their acceding to WTO and to TRIPS.

Chapter 4 analyses the standards for intellectual property protection enshrined in TRIPS with the provisions of the GCC states' current laws in the major intellectual property areas prescribed by TRIPS. It examines the extent to which they comply with their obligations under TRIPS requirements and standards. It deals with each of the main areas of protection in turn, as presented in TRIPS, from copyright through to unfair competition, and then adds a brief commentary on protection of new plant varieties. The chapter focuses on the salient features of each area of intellectual property protection and their particular idiosyncratic features, rather than offering a detailed commentary on the text of each law.

Chapter 5 continues the review process from Chapter 4, and examines the performance of the GCC states against the enforcement standards and obligations required by TRIPS. It argues that, in the post-TRIPS environment, there exists a dichotomy between the principle (as enshrined in the legislation) and the practice (as measured by its enforcement). It questions whether that dichotomy is a reflection of the political and societal commitment to enforcement, of a political and commercial attitude to intellectual property rights that differs from that of the major industrialized countries, or of the imposition by the major industrialised nations of inappropriate requirements and standards that are beyond the capacity of the states to effectively implement. It offers some possible reasons for the dichotomy. In so doing, the thesis examines societal and cultural attitudes and obstacles, and the institutional and judicial capacity and limitations to enforcement within the respective states.
Chapter 6 examines the environment in which TRIPS-plus treaties and bilateral agreements are fast overtaking TRIPS as the new benchmark-setting standard for intellectual property protection. It suggests that the strategy adopted by the United States in pursuing bilateral trade and investment agreements with the individual GCC states bypasses the multilateral fora and agreements, and thereby constitutes “multilateralism by the backdoor”. It examines the role of the USTR and its use of the Special 301 provisions as a tool to pressure the GCC states to adopt standards of protection which are much higher than those required TRIPS, and which go beyond the parameters of TRIPS. Finally, it examines in detail the intellectual property provisions of the free trade agreements which the United States recently completed with Bahrain and Oman, and the implications of those provisions for the other GCC states.

Chapter 7 examines some “TRIPS-minus” areas of intellectual property rights protection. It discusses some activities by the GCC states in areas of intellectual property in which there has been little or no foreign interest in establishing standards of protection on behalf of the states or in the states themselves – notably traditional knowledge cultural heritage and the offshoots of traditional medicines and indigenous plant species. The states have for some years taken a particular interest in these areas and have taken the initiative in introducing some protection standards in these areas.

In conclusion, Chapter 8 suggests that intellectual property protection in the Gulf region is still, in essence, “work in progress”. It reviews the history of the development of the states’ intellectual property protection regimes, and reports on the current status of the national laws and accessions to the major international fora and international conventions on intellectual property protection. It suggests some possible future courses of action in both the domestic and
international contexts, and questions whether the GCC states, now that Saudi Arabia has finally achieved WTO membership, may nurture a regional bloc to influence within the new development agenda that is emerging in the international fora. In closing, the chapter comments on the nature the relations between the United States and the states in the context of the proposed Middle East Free Trade Area.

Finally, the Appendix lists the intellectual property laws and corresponding implementing regulations and ministerial orders that the GCC states have issued during the timeframe encompassed by this study. The list also includes laws which are associated in one form or another with intellectual property protection, such as civil, criminal and commercial codes, and laws controlling the press and publications. The list of laws is not complete, but is still impressive, and strikingly illustrates just how active the GCC states have been over the last generation or so with their law-making endeavours in the field of intellectual property protection.