Chapter 4

TRIPS and the Nature of Intellectual Property

Compliance by the GCC States
4.1 Introduction - The Context of TRIPS and its Conventions

TRIPS was created not with the view of establishing an entirely new regulation, but with the aim of supplementing and developing some sense of cohesion to the then existing major international conventions on intellectual property protection, namely the Berne, Paris and Rome Conventions, and the Washington Treaty. TRIPS is based upon and supplements these conventions by providing additional obligations and a higher level of protection. The supplemented provisions become compulsory, even for WTO member countries that have not ratified the above conventions (except for the Rome Convention which only continues to be binding on states that have joined it), by virtue of their WTO membership. However, nothing in TRIPS may derogate from any existing obligations that members may have to each other under the Paris, Berne, or Rome Conventions or the Washington Treaty.1

The general goals of TRIPS, as enunciated in its Preamble, include the reduction of distortions and impediments to international trade, the promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. Although the Preamble recognises that intellectual property rights are private rights, the underlying public policy objectives of national systems for the protection of intellectual property, including

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1 Specifically, members are obliged to comply with:
- Articles 1–12 and 19 of the Paris Convention, generally in respect of TRIPS Parts II, III and IV and specifically in respect of TRIPS’ provisions on trademarks, geographical indications, and undisclosed information;
- Articles 1–21 (except Article 6bis) of the Berne Convention and its Appendix in respect of TRIPS Part II, Section I, copyright and related rights;
- Articles 1–6, 10, 12–15 and 19 of the Rome Convention in respect of permitted exceptions to the rights of performers, producers and broadcast organisations;
- Articles 2–7 (other than Article 6.3), Article 12 and Article 16 of the Washington Treaty.
developmental and technological objectives, are also recognised. The Preamble also acknowledges that least-developed countries require maximum flexibility in the domestic implementation of their laws and regulations in order to enable them to create a sound and viable technological base.

The Agreement's public policy objectives are further enunciated in Part I by a declaration on the fundamental objective of TRIPS, and on the equally fundamental principles by which members should be guided formulating their laws relating to the Agreement. Article 7 Objectives provides that:

"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and in a manner that is conducive to social and economic welfare, and to a balance of rights and obligations."

Article 8 Principles recognizes that members have the right to adopt measures necessary for the protection of public health and other public interest reasons in sectors of vital importance to their socio-economic and technological development. However, such measures must still be consistent with TRIPS' provisions.

TRIPS Part I (Articles 1 – 8) also sets out further general provisions and basic principles governing the protection of intellectual property rights. It establishes minimum standards to be applied by all WTO members, these same standards also being the maximum standards that members are obliged to adopt. However members are not constrained from adopting more extensive protection than that required by TRIPS, provided that such protection does not contravene the TRIPS provisions. Members are also free to determine the appropriate method of
implementing the TRIPS provisions within their own legal systems and practices. Articles 3-5 stipulate the fundamental obligations on national and most-favoured-nation (MFN) treatment of foreign nationals, which are common to all categories of intellectual property covered by the Agreement. These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in the Agreement.

TRIPS Part II (Articles 9 – 40) addresses each intellectual property right in succession, and sets out the minimum standards of protection to be provided by each member. Each of the main elements of protection is defined, namely the scope of the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, any particular special provisions (such as the reversal of burden of proof in respect of process patents), and the minimum duration of protection. TRIPS sets these standards by requiring compliance with the substantive obligations of the major pre-existing conventions, and by adding a number of additional obligations on matters where the pre-existing conventions are silent or where they are seen by their proponents as being inadequate.

Part III (Articles 41 – 61) requires members to have in place enforcement procedures which permit effective action against infringements, with remedies that constitute an effective deterrent to further infringements. The procedures apply equally to all fields of intellectual property covered in Part III. The procedures must be equitable and fair, and must not be unnecessarily

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2 TRIPS Part II, Standards Concerning the Availability, Scope and Use of Intellectual Property Rights, addresses the seven intellectual property rights of Copyright and Related Rights (Articles 9 – 14), Trademarks (Articles 15 – 21), Geographical Indications (Articles 22 – 24), Industrial Designs (Articles 25 – 26), Patents (Articles 27 – 34), Layout Designs of Integrated Circuits (Articles 35 – 38), Undisclosed Information (Article 39), and Anti-competitive Practices in Contractual Licences (Article 40). These individual requirements as prescribed by TRIPS, the Berne, Paris and Rome Conventions and the Washington Treaty are discussed in detail in the following sections on each respective area of intellectual property (Sections 4.3 to 4.9 following).
complicated, costly or involve unreasonable time-limits or unwarranted delays, but their application must not create a barrier to legitimate trade. However, a member is not obliged to put in place a special judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it require a member to make a preferential allocation of resources to intellectual property enforcement at the expense of the law in general.

Part IV (Article 62) addresses the acquisition and maintenance of intellectual property rights and related inter partes procedures. Members may require compliance with certain procedures as a condition of enjoying intellectual property rights within that member’s national boundaries, but such procedures and formalities must be reasonable and must not create an unwarranted curtailment of the period of protection of a right. Final administrative decisions in any of these procedures must be subject to review by a judicial or quasi-judicial authority.

Part V (Articles 63 and 64) provides for the establishment of a multilateral mechanism for the settlement of disputes between members, in accordance with the provisions of Articles XXII and XXIII of GATT (1994) as elaborated and applied by WTO’s Dispute Settlement Understanding (DSU) – a provision sought in particular by developing countries to counter the perceived likelihood of unilateral action by developed countries in respect of enforced adherence to TRIPS or greater standards. Retaliatory action by one member against another may only be taken after the existence of a violation or non-compliance has been established by the WTO’s Dispute Settlement Body. This mechanism is aimed at preventing unilateral actions, such as those undertaken by the United States under Section 301 of its Trade and Tariffs Act.\(^4\)

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\(^3\) Carlos Correa, “Implementing the TRIPS Agreement in the Patent Field – Options for Developing Countries”, (1998) 1 Journal of World Intellectual Property, 16

\(^4\) Ibid, 3.
Part VI (Article 65-67) establishes transitional arrangements for the implementation of the obligations of TRIPS. Developed countries are granted a one year period to bring their legislation and practices into conformity with TRIPS. Developing countries and countries in the process of transformation from a centrally-planned into a market economy are granted a five-year transition period, and least-developed countries are granted 11 years (except for obligations concerning national and most-favoured-nation treatment, to which the standard one year transition applied). In addition, a further transitional period of five years is allowed for countries which are bound to introduce product patent protection in areas of technology not so protected in their territory on the general date of application of TRIPS for those countries. However, in the case of pharmaceutical and agricultural chemical products, they must accept the filing of patent applications from the very beginning of the transition period. Although granting of the patent could be deferred until the end of this period, the novelty of the invention is preserved as of the date of filing the application. If authorization for the marketing of the relevant pharmaceutical or agricultural chemical product is obtained during the transitional period, the developing country concerned is required to offer an exclusive marketing right for the product for five years, or until a product patent is granted, whichever is the lesser period.

The final provisions and institutional arrangements, as described in Part VII (Articles 68 – 73), includes provision for the establishment of a Council for TRIPS to monitor the operation of TRIPS and, in particular, members' compliance with their TRIPS obligations. The Council was specifically directed to act in cooperation with WIPO. The Council was also required to review the implementation of TRIPS after the expiry of the five year transitional period granted to developing countries and again at subsequent two year intervals.
4.2 The Performance of the GCC States on TRIPS

Compliance

All states have adopted TRIPS by virtue of their WTO membership. Kuwait became a contracting party to GATT in 1963, just two years after it gained its independence. Thirty years later, Bahrain, Qatar and the UAE became contracting parties to GATT, WTO's predecessor organization, just prior to the introduction of WTO. As such they became foundation members of WTO and signatories to TRIPS, and any scrutiny of their intellectual property regimes by other WTO members was notional. Oman and Saudi Arabia were treated differently, since both were required to undergo a full scrutiny of their intellectual property protection regimes as part of their WTO accession processes. Oman's accession process took just four years to complete, from 1996 to 2000. Saudi Arabia, on the other hand, required over twelve years of political and diplomatic wrangling before its bid for accession was successful. Saudi Arabia was finally admitted to WTO membership in November 2005, just in time to fully participate in the sixth WTO Ministerial Conference in Hong Kong in December 2005.\(^5\)

4.2.1 National Treatment and Most-Favoured-Nation Treatment

The national treatment provision of TRIPS forbids discrimination between a member's own nationals and the nationals of other members, and requires the member to accord treatment no

\(^5\) See WTO Press Release Press/420 of 11 November 2005, available at www.wto.org/news_e/pres05_e/pr420_e.htm. The press release reports that Saudi Arabia has completed its package of documents presenting the Kingdom's terms of accession at the WTO Accession Working Party meeting on 28 October 2005. The legal texts, which run to some 600 pages, were formally accepted by the 148 member states at the Special General Council on 11 November 2005. Dr Hashim A. Yamani, Saudi Minister of Industry and Commerce, signed the Protocol of Accession with full powers, thus accepting the Protocol on behalf of the Kingdom. Saudi Arabia became the 149th Member of the WTO thirty days later, on 11 December 2005. Saudi Arabia's accession is further discussed in Chapter 8.3.
less favourable than that accorded to the member’s own nationals. The MFN treatment obligation forbids discrimination between the nationals of other members by requiring that any advantage a member grants to the nationals of another member must be extended immediately and unconditionally to the nationals of all other members, even if such treatment is more favourable than that which the member gives to its own nationals.  

The national treatment and MFN provisions in the GCC states’ intellectual property laws are referred to in each of the following sections on the individual intellectual property fields. However, in summary, full compliance with both the national treatment and MFN treatment obligations of TRIPS Articles 3-5 would appear to be the exception rather than the rule amongst the states’ laws, with only a handful of laws making full provision for national treatment and even fewer providing for MFN treatment. Further, the application of the requisite provisions is inconsistent across each area of intellectual property and across the laws of a particular state. Where such provision does exist, it is national treatment that receives attention. Commonly applied is the principle of reciprocal treatment, whereby the rights or protection enshrined in a particular law are extended to encompass nationals of a country which accords reciprocal treatment to nationals of the GCC state.

In the area of copyright protection, by way of example, Bahrain’s pre-TRIPS copyright law of 1993 and Kuwait’s post-TRIPS copyright law of 1999 limits the provision of protection of their respective laws only to works of their national authors published in or outside the state for the first time, works of foreign authors published in the state for the first time, and works of Arab authors who are nationals of states that have ratified the 1985 Arab Convention for the

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6 Some exceptions are permitted in respect of national treatment to the extent that these already exist under the Berne, Paris, or Rome Conventions or Washington Treaty respectively, while allowance is made for certain limited exceptions to the MFN obligation as permitted by the Berne and Rome Conventions.
Protection of Author’s Rights, and whose works are published for the first time in any of the signatory states. Kuwait’s copyright law adds works published for the first time in any of the WTO member states by authors who are nationals of a WTO member. Kuwait’s patents, designs and industrial models amendment law of 2001 does not impact upon the national treatment provisions from the original 1962 law, which restricts the right to submit patent applications to foreigners residing in Kuwait, and nationals or residents of countries which accorded Kuwait reciprocal treatment. It stops short of making any mention of MFN treatment.

Oman does not make any reference to national or MFN treatment in any of its intellectual property laws, except for its trademark law and (curiously) its plant variety law, each of which makes a simple provision for reciprocal treatment. Qatar extends the protection of its copyright law to include works protected by international agreement to which Qatar is a party, but specifically limits the protection of its trademarks law to reciprocal treatment notwithstanding any international bilateral or multilateral agreement to which it may be party.

Saudi Arabia’s 2002 trademark law extends the protection provided under the law to nationals of any country which treats the Kingdom on a reciprocal basis, as well as to a country which is a signatory to an international agreement to which the Kingdom is also a signatory. Its later copyright law extends protection to works copyrighted under international agreements to which the Kingdom is a party. Yet its most recent law of 2004, encompassing patents, layout designs of integrated circuits, plant varieties and industrial models, does not make any reference to either national treatment or MFN treatment.

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7. Bahrain, Legislative Decree No. 10 of 1993 art 43; Kuwait, Law No. 64 of 1999, art 43.
8. Kuwait, Law No. 64 of 1999, art 43.
The UAE's trademark law makes provision for reciprocal treatment; the patents law provides for reciprocal treatment and for application of international treaties to which the state is a signatory; the copyright law makes no reference to either national treatment or MFN treatment.

Those GCC states whose laws do not make reference to either national or MFN treatment would argue, as Oman has done before the WTO, that the absence of any specific provision in their laws does not necessarily preclude the enjoyment of national treatment or MFN treatment. Since the laws do not impose any nationality conditions or limitations in respect of rights holders to whom the protection of the laws might be extended, national or MFN treatment may be assumed; accordingly, they comply with their obligations under TRIPS Articles 3-5 to accord both national and MFN treatment. Nevertheless, the absence of any specific provisions will undoubtedly generate pressure for subsequent amendment to the inadequate laws to ensure the inclusion of strengthened national treatment and MFN treatment in the future.

4.3 Trademarks

4.3.1 TRIPS Provisions and Requirements (Articles 15-21)

The fundamental principle of trademark protection provided by TRIPS is that any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings, must be eligible for registration as a trademark, provided that it is visually perceptible. Such signs may take the form of particular words, including personal

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names, letters, numerals, figurative elements and combinations of colours as well as any combination thereof. Where signs are not inherently capable of distinguishing the relevant goods or services, members are allowed to require, as an additional condition for eligibility for registration as a trademark, that distinctiveness be acquired through use. Members are free to determine whether to allow the registration of signs that are not visually perceptible, such as sounds or smells. Certain limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, may be permitted, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

The owner of a registered trademark must be granted the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered, where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion must be presumed.

TRIPS takes the provisions of Article 6bis of the Paris Convention in respect of prohibiting the registration or use of a mark which is confusingly similar to a well known mark that is either already registered or in use for identical or similar goods, and extends them, mutatis mutandis, to marks in respect of services. It further takes the provisions of Article 6bis and applies them to marks for goods and services which are not similar to goods and services for which a well-known trademark is used or registered if their use would indicate a connection between those goods or services and those of the owner of the well known mark, to the detriment of the owner's interests.
Initial registration, and each subsequent renewal, of a trademark shall be for a term of not less than seven years.\textsuperscript{11} Registration shall be renewable indefinitely. Where use is required as a condition of registration, cancellation on the grounds of non-use can only occur after three years of uninterrupted non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner.\textsuperscript{12} Use of a trademark by another person, when subject to the control of its owner, must be recognized as use of the trademark for the purpose of maintaining registration status.

TRIPS further requires that use of a trademark in the course of trade must not be unjustifiably encumbered by special requirements, such as use with another mark, use in a special form, or use in a manner detrimental to its capability to distinguish the goods or services.

**4.3.2 Regional Trademark laws**

Trademark laws are the longest standing intellectual property protection laws in the GCC states. They have had the opportunity to face scrutiny from both regional and international sources, and to consequently be subject to review processes which have given them the best opportunity of all intellectual property laws in the GCC states to reach TRIPS-compliance. The fact that they also address an area of commercial endeavour which has been longstanding, locally active and financially lucrative for local traders and businesses, means that they have also had the opportunity to be tested in respect of their efficacy and practicability.

\textsuperscript{11} TRIPS, art 18.
\textsuperscript{12} Ibid, art 19.
All GCC states except Bahrain have upgraded or entirely replaced their early trademark laws since the introduction of TRIPS. Most of the enhancements have been carried since the expiration in 2000 of the TRIPS-permitted transitional period for developing countries, and have thereby brought them generally into compliance with TRIPS requirements. Oman replaced its earlier law in 2000 as part of its WTO accession process, while Qatar and Saudi Arabia likewise replaced their laws in 2001 and 2002. Kuwait and the UAE were content to retain their laws, but introduced a range of amendments – sweeping amendments in the case of the UAE - in 2001 and 2002 respectively.

Bahrain, on the other hand, continues to rely on what is now the longest-standing and therefore the most conservative trademark law in the region, with its pre-TRIPS law of 1991. This law was created by the excision of the trademark provisions from the original pre-independence omnibus regulation of 1955, as amended in 1977 into a new and specific trademark law. Consequently the law still contains some minor elements from the 1955 and the 1977 amendments. More importantly, it is still deficient in respect of crucial elements such as protection for well-known marks. This law is due to be replaced by new legislation reportedly in the final stages of approval – although this new law reportedly has been in those final stages for some years. The issuance of a brand new law, instead of even further amendments, will provide the opportunity to redress a number of the inconsistencies and contradictions which arose from the past incomplete restructurings of the original 1955 legislation.

Kuwait, originally a regional leader in the codification of its commercial laws in the 1960’s has since trailed behind the other GCC states in the state of all its intellectual property laws, including its trademark law. It still incorporates its trademark protection in a dedicated chapter

of its commercial code originally enacted in 1961. The trademark provisions of the commercial code have been amended a number of times, the most recent of any substance being in 1999, although further minor changes were subsequently introduced in 2001. But no changes were made to the nature of infringements, nor increases introduced to the level of penalties that existed in the original law. This situation has caused Kuwait to attract critical attention from within WTO, and from the United States in particular, for the perceived inadequacy, laxity and non-deterrent character of its trademark protection.\textsuperscript{14}

Table 3: Current Trademark Laws and Conventions in the GCC States

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
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<tbody>
<tr>
<td>Bahrain</td>
<td>Legislative Decree No. 10 of 1991 with respect to Trade Marks. Legislative Decree No. 31 of 1996 ratifying the Paris Convention for the Protection of Industrial Property. Legislative Decree No. 18 of 2005 ratifying Bahrain’s Accession to the Protocol Relating to the Madrid Agreement for the International Registration of Marks. Legislative Decree No. 17 of 2005 ratifying Bahrain’s Accession to the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks.</td>
</tr>
<tr>
<td>Qatar</td>
<td>Law No. 9 of 2002 in respect of Trade Marks, Business Names and Data, Industrial Designs and Geographical Indications. Decree No. 31 of 2001 in respect of Qatar’s accession to the Paris Convention for the Protection of Industrial Property.</td>
</tr>
</tbody>
</table>

Source: compiled by the author

\textsuperscript{14} The USTR Annual Special 301 Reports on the status of intellectual property protection and its effective enforcement in the GCC states are discussed at further length in Chapter 6.3.
In the last few years, some of the GCC states have also shown increasing willingness to commit to or at least follow some of the WIPO-administered international agreements that complement the TRIPS trademark provisions. Hence, all states except Kuwait have now acceded to the Paris Convention, the UAE being the first to do so in March 1996, and Saudi Arabia being the most recent when it joined in September 2003. By the same token, most of the states have either formally acceded to the Nice Agreement Concerning the International Classification of Goods and Services, or declared that they adhere to the Nice Agreement without going through the accession process, or at least generally use its classifications for the purpose of categorizing goods and services for their domestic trademark registrations. The advantage of the adoption of the two latter options is that the states can retain the flexibility to ignore or prohibit certain classification categories, as discussed further below. Bahrain has been the most active GCC state in this regard, formally acceding to the Berne Convention, the Nice Agreement and the Protocol Relating to the Madrid Agreement for the International Registration of Marks, although accession to the latter two agreements have been as a direct consequence of its obligations under its recent free trade agreement with the United States.

**4.3.3 Scope of Protection for Trademarks**

Areas in which the original and pre-TRIPS trademark laws of the GCC states generally fell well short of the minimum standards required by TRIPS included:

- protection for well-known marks, particular foreign marks;
- protection for geographical indications;
- clarification of licencing and transfer provisions;
- expansion of remedies and relief, and sanctions of a deterrent nature;
- appeal provisions to independent judicial bodies on administrative decisions.

In particular, the laws of the 1990’s lacked provision for protecting well-known marks; a well-known mark could be refused registration and protection if the same or similar mark was already under application. The post-TRIPS laws have gone a long way in addressing these shortcomings. Except for the widely divergent degrees of severity of their respective penalties for infringements, the texts of the latest laws show remarkable similarities in addressing these shortcomings, an indication of the degree of reliance upon the same source for the construction of the laws, and the degree of interaction and consultation between the states on the general thrust of the laws. In respect of the nature of protectable subject matter, the descriptions of each state are generally consistent with the minimum requirements of registrable matter outlined by TRIPS Article 15.

The definition of a trademark in all the recent laws generally include at least the following provisions as espoused in the Omani trademark law:

"...any visible form capable of being distinguished and consisting of words, signatures, personal names, letters, numbers, logos, symbols, addresses seals, engravings, combinations of colours, figurative elements or any other sign or combination of such elements, if used or intended to be used to distinguish goods, products or services as those of the owner of such mark by reason of their manufacture, choice, sale or offering for sale."

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15 Oman, Royal Decree No. 38/2000, art 1.
Qatar adds to the above list “vignettes, three dimensional figures .... a single nonfunctional colour, a sound, a smell ...” provided they can still distinguish the products or services. The Qatari law appears to contain a contradiction in respect of what may constitute a trademark, on the one hand defining both trademarks and service marks as “any visible sign”, yet subsequently allowing both sound and smell to be registrable as marks especially when having a distinctive form. The subsequent reference in the Qatari law does not require that a sound or smell can only be registrable if used in conjunction with other, visible, elements. Colour, sound and/or smell in combination as elements of a trademark, may be registered in Bahrain and Kuwait, but only if presented with that particular mark, while the UAE allows sounds to be registrable under the same condition, but not smells. Since the above-quoted Omani law and the Saudi law specifically require trademarks to take a “visible form capable of being distinguished” or to be “recognized by sight” and omit smells and sounds from their trademark prescriptions, neither law allows for smells nor sounds to comprise, or be elements of, a registrable mark.

TRIPS Article 17 permits limited exceptions from registration or registrability provided that a balance is maintained between the legitimate interests of the trade mark owner and those of third parties, without providing further guidance as to the nature or limits of those limitations. All GCC states affirm that any sign which is offensive to or a violation of public morals, or is contrary to public order, shall not be considered to be a mark and may not be registered as a trademark. Other grounds for exclusion of a sign from recognition as a trademark or from registrability generally include the following:

- marks devoid of any distinctive feature, or which consists of merely generic names or ordinary images on goods, products or services;

17 Ibid, arts 1 and 6.
- marks identical or confusingly similar to the public emblems, flags and other symbols related to the State, Arab or international organizations or any institutions thereof, or any foreign country;
- symbols of the Red Crescent or the Red Cross and other similar symbols as well as any confusingly similar forms of those symbols;
- marks which are identical or similar to symbols of a purely religious nature;
- geographical names and indications where the use thereof may be misleading as to the origin of the goods, products or services;
- names, photographs or emblems of a third party, unless with prior consent;
- degrees or awards to which an applicant cannot prove he is lawfully entitled;
- marks which may mislead the public or which contain false data as to the origin of products or services, or their other characteristics, as well as marks containing an imaginary, imitated or forged trade name;
- marks owned by natural or legal persons, dealing with whom is forbidden;
- a mark, the registration of which for some classes of goods or services may decrease the value of other goods or services distinguished by such mark;
- marks containing the words or phrases: "Privilege", "Privileged", "Registered", "Registered drawings", "Copyright" or "Imitation is forgery" or similar words and phrases;
- national and foreign decorations, as well as coins and bank notes of currencies;
- a mark which is the translation of a well-known trademark or other prior, registered mark if this will cause public confusion as to identical or similar goods covered by the mark.18

18 As prescribed by UAE, Law No. 8 of 2002, art 3.
The exclusion from registration of “marks owned by natural or legal persons, dealing with whom is forbidden” applies in particular to marks owned by Israelis or Israeli companies, as part of the Boycott of Israel adopted and implemented by members of the League of Arab States as a by-product of the support of the Arab states for Palestine in the Israel-Palestine conflict. The Bahraini and Saudi current trademark laws still include a similar exclusion, but the adherence now exists more in the principle than the practice.

4.3.4 Well-Known Marks

Insufficient or total lack of protection in the GCC states for well-known marks and signs of foreign origin has been an area of particular contention and concern for the developed countries, and the provisions in the GCC states until recently fell far short of the protection required by TRIPS. Article 16 of TRIPS requires countries to provide a level of protection that prevents third parties from taking commercial advantage of the goodwill associated with well-known marks, irrespective of whether those marks are registered or in use locally. The recently updated laws have paid particular attention to this area, and the protection of well-known marks and signs, particularly foreign signs, has now been strengthened. However, Bahrain with its older

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19 Of which the six GCC member states are also members. The earlier trade mark laws of Kuwait and Qatar specifically excluded from registration “marks which the Boycott of Israel Office decides that it is identical or similar to an Israeli, mark, symbol or emblem”, while those of Oman included an exclusion similar to that above. The three states have since removed from their current trademark laws any reference to the non-registration of trademarks in the context of prohibited persons or countries or the Boycott of Israel. The Boycott, which is still officially in force, operates on three levels:
- primary level, which prohibits direct business dealings with Israel;
- secondary level, which prohibits dealing with blacklisted firms which do business with Israel, which may include registering a trademark in Israel;
- tertiary level, which prohibits dealing with firms who deal with blacklisted firms.
In 1994, the GCC states decided to end the secondary and tertiary levels of the boycott, while notionally continuing with the primary level. The United States continues to pressure the GCC states, particularly Saudi Arabia, to end the boycott. The pressure upon Saudi Arabia has been effective, since Saudi Arabia has recently agreed to end its participation in the Boycott as part of the package of conditions imposed upon it by the United States in return for US approval of Saudi Arabia’s accession to the WTO.
law does not make any provision for the protection of well-known marks per se. With the exception of Bahraini law, as a general rule, the trademark laws provide that a mark or sign may not be registered if:

- it is identical with, or confusingly similar to, or constitutes a translation of, a mark or trade name which is well known in the country for identical or similar goods or services of another enterprise; or

- it is not identical with or similar to a well-known mark, but its use would indicate a connection between those goods or services and the owner of the well-known mark and the interests of the owner of the well-known mark would likely be damaged by such use. 20

A well-known mark does not need to be registered to gain this protection; but it must be well-known outside its country of origin, that is internationally or at least regionally. TRIPS Article 16.2 requires members to take account of knowledge of the trade mark in their own country, including knowledge obtained as a result of promotion of the trade mark, even if in advance of actual use. The GCC states which offer protection to well-known marks stop short of making any stipulation on the nature or degree of a well-known foreign mark’s local status or even requiring the application of TRIPS Article 16.2, thus leaving this point unstated and removing a qualification which could limit the conditions for protection. It is not yet clear what standards of evidence the respective courts in the different GCC states will require or accept in adjudicating on whether a trademark is well known locally, but in any case this common provision places significant discretion in the hands of the judiciary to influence or control the introduction of

marginal foreign marks. At present, it would appear that a consistent and widespread judicial position on the treatment of well known marks has yet to make itself manifest, even in the UAE courts, which probably see more cases dealing with trademark infringements than any of the other GCC states. However, the UAE and Dubai courts, in particular, have shown an increasing willingness in recent years to provide protection for internationally known marks.

Some further advantage is given to marks deemed to be well-known by the provision in some of the trademark laws of a right of applicants to claim priority on the basis of an earlier application for registration filed either with a member state of WTO or the Paris Convention (Oman), a co-signatory to another international agreement (Saudi Arabia), or to countries which grant national treatment on a reciprocal basis (Qatar, again Saudi Arabia). The trademark laws of Bahrain, Kuwait, and the UAE do not make any specific provision for either national treatment or MFN treatment in respect of trademarks.

### 4.3.5 Rights of Ownership

According to the Qatari, Saudi, and Emirati laws, the basic right to be protected by the registration of a trademark, is the exclusive right of the trademark owner to use the mark and to prevent other parties without consent from using the trademark, in accordance with the obligations required by TRIPS Article 16.1. The owner of the registered trademark can also

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21 Some trademark infringement cases that have appeared before the UAE courts are also discussed in Chapter 3.4 (earlier cases) and Chapter 5.3 following.
prevent others from using identical or similar marks on similar, identical or related products and services if such use may confusion by the public. The Bahraini, Kuwait and Omani laws do not include any similar or equivalent statement on rights conferred by registration. Accordingly, such rights must therefore be inferred by the nature of marks excluded from registration, such as a mark similar to one already registered, or by the prescribed acts which attract a punishment under the law, such as use of a counterfeit mark.

All GCC states provide that the person who registers the mark is deemed to be the owner of the mark, unless there is proof to the contrary. However, any claim of ownership cannot be disputed if the owner of the registered mark has used it continuously for five years since registration, and no claim has been made against the validity of the original registration during this period. For the purposes of this provision, continuous use includes use by a licensee or assignee.

Saudi Arabia’s early trademark law of 1984 established the precedent for a period of protection of ten years (albeit, according to the Hajri or Islamic calendar) for a registered trademark, and the other GCC states have since followed suit (but, according to the Gregorian calendar). All accommodate unrestricted renewal, commonly for recurring ten year periods - thus exceeding by some margin the minimum period of seven years specified in TRIPS Article 18. However, since TRIPS requires, and all states provide, indefinite renewal, the distinction is largely academic.

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The Arabic or Hajri calendar is based on lunar months, rather than the western Gregorian calendar, and is marginally shorter. Hence, ten Hajri years is approximately equivalent to nine years and eight months according to the Gregorian calendar. Saudi Arabia has removed reference to the Hajri calendar in its current trademark law.
Arising from concerns expressed in WIPO and WTO in respect of the inadequacy or absence of licencing and transfer provisions in the earlier trademark laws of the GCC states, provisions addressing licencing and transfers have been strengthened and are now extant across the states' laws. In general terms, the owner of a mark may grant a licence to any natural person or legal entity in respect of some or all of the products or services for which the mark is registered. A licence is non-exclusive, and non-assignable; the licencing agreement must be in writing, must specify the terms, conditions and duration of the licence, and must be registered with the responsible Ministry, to have any legal effect. The duration of the licence cannot exceed the period of registration of the mark (which raises a question on the licencing of well-known marks which may be protected, but might not be registered). None of the states permit compulsory licencing of trademarks, in accordance with the exclusion stipulated by TRIPS Article 21. The ownership of a registered trademark may be transferred or assigned with or without the goodwill of the commercial business. Where the marks are deemed to have an established relationship with the business, the transfer of ownership of a commercial business is deemed to include the transfer of the trademarks registered in the name of the transferor, unless specifically agreed otherwise. If the ownership of the business is transferred without the trademark, the transferor may continue to use the mark in connection with the products or services in respect of which the mark was originally registered.

30 Bahrain, Legislative Decree No. 10 of 1991, art 28; Kuwait, Law No. 2 of 1961 as amended by Law No. 6 of 1980, and Law No. 3 of 1999, art 83; Oman, Royal Decree No. 38/2000, art 22; Qatar Law No. 9 of 2002, art 21;
4.3.6 Classifications System for Goods and Services

Only Bahrain amongst the GCC states is a signatory to the Nice Agreement on the International Classification of Marks for Goods and Services, having adopted the eighth edition of the Agreement in February 2005. The other states either generally follow the Nice Agreement classifications or at least refer to them, as the starting point for categorizing goods and services for domestic trademark registrations. The advantage of this strategy is that they can retain the flexibility to ignore or prohibit certain classification categories, as suits their domestic needs and prerogatives, even though the Paris Convention Article 6 quinquies allows signatory states to deny registration to marks that are deemed to be contrary to public order or morality and the Nice Agreement Article 2 permits signatory states to reserve the right to use the Nice Classification merely as a subsidiary system.

All states conform to a lesser or greater extent with the Agreement’s classification system. The majority provide for the registration of marks for both goods and services in classes in accordance with an “international classification” system (without specifying the Agreement) as well as in accordance with their respective implementing regulations, thereby allowing some discretion at the ministerial level, on the exclusion or otherwise of certain classes of goods or services. Classes commonly subject to possible exclusion are notably Class 32 (beer and stout, as well as mineral and carbonated waters, other non-alcoholic beverages, syrups and other products used to make non-alcoholic beverages) and Class 33 (wines and spirits). Oman specifies in the trademark law itself without qualification that the registration of marks shall be “according to the International Classification system”.31 The laws of Bahrain, Kuwait, Saudi

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Arabia and the UAE do not place any restriction on class of registration in the laws themselves, but make additional allowance for ministerial discretion as to the classes in which marks may or may not be registered. Each stipulates that a trademark may be registered for one or more classes of goods or services as prescribed by their respective responsible Ministers in the corresponding implementing regulations.32 The Bahraini implementing regulations allow that applications for the registration of marks shall be submitted in accordance with the international classification of goods and services, including classes 32 and 33, without qualification.33 The Kuwaiti and Saudi regulations both exclude class 33 in its entirety, and restrict class 32 to “mineral and aerated water and other non-alcoholic beverages – syrup and other preparations for making drinks”, thereby deleting any reference to beers, spirits or alcoholic beverages. Qatar does not make reference to any established classification system, and it remains to be seen whether the as-yet-to-be-issued implementing regulations for its current law will provide any guidance and clarification. However, the existing regulations, which actually pertain to the superseded 1978 law, allow only 23 of the 42 classes within the international classification system to be granted in their entirety, with classes 32 and 33 and classes 35 – 42 concerning service marks amongst those excluded.34

However, what may appear to be allowed, or at least not disallowed, in one place, may be prohibited in another. Since the consumption of alcohol is generally prohibited in the Qur’an, it follows that the registration of related marks related to alcohol would be contrary to public

32 Some commentators claim that the Qatari and Saudi trademark laws themselves prohibit the registration of marks for goods or services relating to alcoholic beverages; see Abu Ghazali Intellectual Property, Intellectual Property Handbook 2005, Country entries for Qatar and Saudi Arabia, available at www.agip.com/AGIP_Handbook.pdf, last accessed 20 January 2006; see also Amir Khoury. “The Development of Modern Trademark Legislation and Protection in the Arab Countries of the Middle East”, 16 The Transnational Lawyer, 278. This is not quite accurate, since the prohibition lies in the interpretation and application of the public order and public morals provision of the trademark law, rather than an express prohibition in the law itself.

33 The UAE implementing regulations referred to above relate to the original trademark law issued in 1992, since there have been no amendments to implementing regulations corresponding to the comprehensive trademark law amendments issued in 2002.

34 Qatar, Implementing Regulations for Amiri Law No. 3 of 1978, art 3, Appendix 1.
morals. Accordingly, the position commonly espoused both by the respective responsible ministries and by regional trademark registration agents alike, is that trademarks in Class 32 and Class 33, as well as class 29 (meat products) in respect of pork-based products, are not registrable in any of the GCC states on the grounds that they are contrary to the teaching of Islam, to Shariah law, and to the respective states’ trademark laws. Saudi Arabia, when recently lodging its instrument of accession to the Paris Convention, expressed its objection to and concern with the stipulation of Article 7 of the Convention that “the nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark”, on the grounds that some goods such as alcoholic and pork-based products were prohibited under Islamic law. On an issue of such fundamental religious and social significance to Saudi Arabia, reliance alone on the generality of public order and morality provisions of the Paris and TRIPS Conventions to prohibit the registration of offending marks was clearly inadequate.


Kuwait reported to the WTO's Council of TRIPS, in response to questions on its intellectual property regime that, “since acquiring, marketing or importing wines and spirits is prohibited, protection of such marks may be rejected for resulting in a breach of morality and public order”, WTO Document IP/Q4/KWT/1 (01-6322), 13 December 2001, 15. Saudi Arabia also reportedly prohibits registrations in class 28 for “Christmas trees and related products” (reported by Saba & Co Group, above).

36 The rules of the GCC Customs Union, which entered into force on 1 January 2003, recognise and categorise pork, alcoholic products, and tobacco products as “special goods”, and further recognise that the GCC states may import or prohibit them at their own discretion.

4.3.7 Infringements

Some GCC states draw a clear distinction between acts of infringement against the private rights of the trademark owner, and those against the public rights in respect of representation of the status of a mark. Kuwait, Qatar, Saudi Arabia, and the UAE deem infringements against the private rights of the trademark owner, and thereby potentially or actually causing commercial loss, to be the more serious offences. Hence such acts as counterfeiting a registered mark, fraudulently using another person’s registered mark, or knowingly and misleadingly imitating a registered mark may attract the severest penalties. On the other hand, use of an unregistered mark or mark excluded from registrability (except for those marks excluded solely for want of distinctive features), or falsely claiming or indicating that a mark has been registered, may be punishable by penalties that are a fraction of those which can be applied to the former type of infringements. The Saudi law, for example, provides for the imposition of penalties of up to one year’s imprisonment and a fine of up to 1,000,000 Saudi riyals, or both, for infringements against the trademark owners rights, while penalties against the public representational rights may attract penalties that are a quarter of the former. At the other end of the scale, Kuwait, which recognizes a similar distinction in the nature of infringements, provides for a maximum fine of only 600 Kuwaiti dinars and an unspecified term of imprisonment for similar offences.

In contrast, the Bahraini and Omani laws provide for a simple undifferentiated list of infringing acts, which include the following:

- counterfeiting or imitating a registered mark in a manner likely to mislead the public;

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37 Saudi Arabia, Royal Decree No. M/21 of 1423 AH (2002), arts 43-4. The nature of the sanctions in all the intellectual property laws of the GCC states are discussed in further detail in Chapter 5.2.5. following.
38 Kuwait, Law No. 2 of 1961 as amended by Law No. 6 of 1980, and Law No. 3 of 1999, art 92.
- using a forged or imitated mark in bad faith;
- using a trademark owned by another party in bad faith;
- knowingly offering for sale or possesses goods bearing a mark which is counterfeited, imitated, or unlawfully affixed, or using such mark in connection with services;
- using an unregistered trademark, or unlawfully indicating on a mark or commercial document that such mark is registered. 39

Both states view the above infringements with equal gravity, therefore do not differentiate between the levels of sanctions that may be applied.

All GCC states make provision for the order of precautionary measures in instances of threatened or actual infringements. 40

4.4 Patents

4.4.1 TRIPS Provisions and Obligations (Articles 27-34)

TRIPS Article 27 requires member states to make patents available for any invention, whether for a product or process, in all fields of technology without discrimination, provided that the invention is new, involves an inventive step, and is capable of industrial application. It also requires that patents be available and patent rights be enjoyable without discrimination as to the

39 Bahrain, Law No. 10 of 1991, art 27; Oman Royal Decree No. 38/2000, art 35.
40 The precautionary measures available in each GCC state are discussed in Chapter 5.2.2, following.
place of invention, or whether products are imported or locally produced. Three exceptions are permitted to this basic rule on patentability, namely:

- inventions contrary to ordre public or morality, including inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment;
- diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
- plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any member excluding plant varieties from protection under patent provisions must provide an effective sui generis system of protection.

The use of the ordre public exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of ordre public or morality.

The exclusive rights that must be conferred by a product patent are those of making, using, offering for sale, selling, and importing for these purposes, while process patent protection must extend rights not only over use of the process but also over products obtained directly by the process. Patent owners shall also have the right to licence, assign or transfer the patent. The term of protection available shall extend for a period of 20 years from the filing date.

Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art.

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41 TRIPS, art 27.3
42 Ibid, art 27.2.
44 Ibid, art 33.
and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date of the application or, where priority is claimed, at the priority date of the application.45

Limited exceptions to the exclusive rights conferred by a patent may be allowed, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, and take account of the legitimate interests of third parties. Member states may allow compulsory licensing and government use without the authorization of the right holder, provided the latter’s interests are still protected.46 Compulsory licencing may only be permitted where the right holder has already refused to grant a voluntary licence on reasonable terms and within a reasonable period of time, although this requirement can be dispensed with in times of national or other extreme urgency or in cases of public non-commercial use.47 Use of a compulsory licence provision should also be limited to the supply of the domestic market, although this requirement and the above condition on use may be waived to remedy anti-competitive practices.

TRIPS Article 34 provides for the reversal of the burden of proof in civil cases involving process patents, whereby the defendant may be required to prove that the process used to obtain an identical product is different from the patented process. Members are obliged to apply this presumption in either of the following circumstances:

- when the product obtained by the patented process is “new”; or

46 The term “compulsory licence” does not appear in TRIPS, although it is used in the Paris Convention. The term used is “other use without authorisation;”
47 TRIPS, art 31.
- when there is a “substantial likelihood that an identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.”

4.4.2 The GCC States’ Patent Laws

As with copyright, the development of a formal patent protection regime within the GCC is a fairly recent event. Except for Bahrain and Kuwait, who both introduced patent legislation in 1955 and 1961,\(^{48}\) patent protection laws did not appear amongst the GCC states until the late 1980s/early 1990s. The concern of the GCC states for a strong patent protection regime has not been particularly strong, simply because the environment to foster local invention and technology transfer has never really been established. Hence there has been neither the generation of patent applications of local origin of any dimension, nor the opportunity for, or the existence of, a thriving patent infringement industry (as exists in the case of copyright). The issue of standards of patent protection performance in the GCC region has not generated any great concern from the developed countries, except from those governments and industry lobby groups representing the interests of the international pharmaceutical conglomerates.\(^{49}\) The relatively few patents which have originated from within the GCC states in recent times have mostly come from the oil and mining industries in Saudi Arabia and Kuwait, have been lodged

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\(^{48}\) See Chapter 3.3 for a detailed discussion of these early Bahraini and Kuwaiti laws.

\(^{49}\) The report of the USTR on the 2005 National Trade Estimate Report on Foreign Trade Barriers made little comment on the state (parlous or otherwise) patent protection in its GCC states. The only remarks expressing concern of any substance were directed towards Saudi Arabia. However, the concern was not in respect of patent infringements but over perceived undue delays by Saudi Arabia in setting up and managing its patent office. The report complained that the current inadequate patent application process resulted in a large backlog of patent applications and prevented US patent holders from obtaining adequate protection. See USTR, 2005 National Trade Estimates on Foreign Trade Barriers, 187-190, available at www.ustr.gov/Document_Library/Reports_Publications/2005/2005_NTE_Report/Section_Index.html, last accessed 20 January 2006.
by expatriate residents rather than GCC state nationals, have been invariably owned by a foreign company and have included a claim for priority based on an earlier foreign patent application.\textsuperscript{50}

While the principles enshrined in the various laws follow very similar themes and principles, and display a high degree of regional common ground, the laws differ quite significantly in terms of their breadth and attention to detail. The UAE current patent law is the most comprehensive and extensive, extending to some seventy articles, most of which address matters of substance. The Omani patent law, on the other hand, consists of only 24 clauses, and defers to the subordinate implementing regulations to add some substance and to provide explanation of a number of meanings and definitions. However, it should be noted that the UAE law also encompasses industrial designs and models, for which Oman has a separate law.

Bahrain was the first GCC state to introduce a patent law with its pre-independence law of 1955 encompassing patents, trademarks and industrial designs. This law, amended in 1977, was replaced in its entirety in January 2004 with Law No. 1 of 2004. Kuwait issued its original patent law in 1962, and upgraded it in 1999 and again in 2001, but the necessary implementing regulations for this latest amending law have still yet to be issued. In essence, Kuwait is still operating under legislation which still includes elements of the 1962 Law, and its associated implementing regulations. Kuwait has declared (but has not yet decreed) that the GCC Unified Patent Regulations of 1992 as amended in 2000 are also in force in Kuwait.

\textsuperscript{50} See United States Patent and Trademark Office Statistical Report, “Patents By Country, State, and Year - All Patent Types, Granted: 01/01/1977 - 12/31/2004”, available at www.uspto.gov/web/offices/ac/ido/ocip/taf/cst_all.htm, last accessed 20 January 2006. The report displays the number of US patents distributed by state and country of origin. The origin of a patent is determined by the place of residence (as distinct from country of nationality) of the first-named inventor. The report counts documents of the following type(s): utility patents (i.e., “patents for invention”), design patents, plant patents, reissue patents, statutory invention registrations, and defensive publications. On the assumption that any patent for which protection was sought beyond a country would, as a first priority, seek protection in the United States, the report is an accurate indication of the extent of patent activity in the Gulf region. The Report indicates that, over the twenty seven years from 1977 to 2004, patents were granted to residents in the GCC states as follows: Bahrain – 5; Kuwait – 78; Oman – 1; Qatar – 1; Saudi Arabia – 212; UAE – 42.
Oman issued its first and current patent legislation in 2000, previously having preferred to adopt and adhere to the GCC Unified Patent Regulations. Notwithstanding the existence of its own patent law, Oman continues to recognize the validity of the GCC Unified Patent Regulation. Qatar still does not have its own patent law. Instead it declares that it is party to and bound by the provisions of the GCC Unified Patent Regulations. It should be noted, however, that the GCC Unified Patent Regulations is essentially a registration statute, and includes very little by way of enforcement provisions, notably in respect of infringements, precautionary measures and sanctions. The GCC regulation defers these matters to each GCC state to establish within their own domestic laws. Accordingly, Qatar will need to introduce its own patent laws, to address these areas in particular, in the near future.

Saudi Arabia issued its original patent law in 1989, but replaced it in September 2004 with a new law which also encompasses layout designs of integrated circuits, plant varieties and industrial models.

In 2002, the UAE repealed its original 1992 law to both better reflect the changed commercial environment in the UAE since the promulgation of that law and to also address the large number of TRIPS obligations in which the original law was deficient. However, the subordinate implementing regulations still need to be issued before the law comes into effective use. The UAE was also the first GCC state to accede to the Patent Cooperation Treaty (PCT), becoming party to the Treaty in March 1999; Oman followed suit in October 2001. No other GCC states

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51 The 1992 patent law suffered from a number of shortcomings, not least of which being the exclusion of pharmaceutical products from protection, although pharmaceutical processes were still protected.
have yet joined them, although Bahrain will be required to accede to the PCT as part of its obligations under its recent free trade agreement with the United States.\textsuperscript{52}

Table 4: Current Patent Laws and Conventions in the GCC States

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<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td><strong>Bahrain:</strong></td>
<td>Legislative Decree No. 1 of 2004 in respect of Patents and Utility Models.</td>
</tr>
<tr>
<td></td>
<td>Legislative Decree No. 31 of 1996 ratifying Bahrain’s accession to the Paris Convention for the Protection of Industrial Property.</td>
</tr>
<tr>
<td></td>
<td>Legislative Decree No. 12 of 2004, adopting the GCC Unified Patent Regulations in Bahrain.</td>
</tr>
<tr>
<td><strong>Kuwait:</strong></td>
<td>Law No. 4 of 1962 concerning Patents, Designs and Industrial Models, as amended by Law No. 4 of 1999 and Law No. 3 of 2001.</td>
</tr>
<tr>
<td><strong>Oman:</strong></td>
<td>Royal Decree No. 82/2000, promulgating the Patent Law.</td>
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<tr>
<td></td>
<td>Royal Decree No.63/1998 promulgating the Sultanate’s accession to the Paris Convention for the Protection of Industrial Property.</td>
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<td>Royal Decree No. 37/2001 ratifying the Sultanate’s accession to the Patent Cooperation Treaty (PCT).</td>
</tr>
<tr>
<td><strong>Qatar:</strong></td>
<td>Ministerial Decree No. 31 of 2001 in respect of Qatar’s accession to the Paris Convention for the Protection of Industrial Property.</td>
</tr>
<tr>
<td><strong>UAE:</strong></td>
<td>Federal Law No. 17 of 2002 for the Industrial Regulation and Protection of Patents, Industrial Drawings and Designs.</td>
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<tr>
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<td>Federal Decree No. 20 of 1996, concerning the UAE’s accession to the Paris Convention for the Protection of Industrial Property.</td>
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<tr>
<td></td>
<td>Federal Decree No. 84 of 1998, concerning the UAE’s accession to the Patent Cooperation Treaty (PCT).</td>
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Source: compiled by the author

The Supreme Council of the GCC issued its Unified Patent Regulations, and statute establishing the GCC Patent Office in Riyadh, Saudi Arabia, in December 1992. These were subsequently

\textsuperscript{52} The intellectual property provisions of the US–Bahrain and the draft US–Oman free trade agreements are discussed in greater detail in Chapter 6.5.
amended in late 1999 and re-issued in April 2000. The GCC Unified Patent Regulations allows a member state to obtain protection across all GCC member states by the lodgement of a single patent application with the GCC Patent Office.  

4.4.3 Patentability Scope and Criteria

In accordance with the requirements of TRIPS Article 27, the laws of the GCC states and the GCC regulation provide that a patent may be granted for any new invention that is the result of a new idea or an innovative improvement on an invention which may be already patented, in any area of technology. The invention must be scientifically based and useful in industry, whether this entails new industrial products, the development of new industrial techniques, methods or processes, or new ways of applying well-known industrial techniques, methods or processes. An invention can be considered as industrially applicable if it can be used in any kind of industry in the broadest sense of the word – which variously includes agriculture, fishing, handicraft or services. Hence Saudi Arabia, with the most recent patent law amongst the GCC states, provides the latest prescription on what may be “new”, “inventive” and “industrially applicable”

53 Under the 1992 GCC Regulations, duplication of application or registration with the GCC Patent Office and with any GCC state national patent office was not permitted. The GCC Patent Office would not accept any patent application if a separate application had already been lodged or a patent granted in a member state, unless the applicant undertook to first relinquish this other application or patent or as soon as a patent was provisionally granted by the GCC Patent Office (GCC Unified Patent Regulations, art 29; Patent Office Guidelines, para. 11). The force of this cumbersome restriction was never effectively tested, since none of the member states issued a patent in its own right and originating from their own nationals (as distinct from an international patent) by the time this restriction was deleted by the year 2000 amendments. In any case, the GCC Patent Office did not issue its first patent until after the 2000 amendments to the GCC Unified Patent Regulation removed this exclusivity restriction, applying it retrospectively to all applications already lodged.

54 Bahrain, Legislative Decree No. 1 of 2004, art 1; Kuwait, Law No. 4 of 1962 as amended by Law No. 4 of 1999, art 1; Oman, Royal Decree No. 82/2000, art 2; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 43; UAE, Federal Law No. 17 of 2002, art 4.

55 Bahrain, Legislative Decree No. 1 of 2004, art 1; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 43.
"(a) An invention is novel if it is not anticipated by prior state of technology. In this respect, prior state of technology means all that is disclosed to the public anywhere by means of written or oral disclosure, by use, or by any other way through which knowledge of the invention is realized. This has to be prior to the filing date of the patent application, or the priority application is submitted. The disclosure of the invention to the public shall not count if it takes place during the priority period. The Regulations shall specify other cases of invention disclosure which do not fall within the meaning of prior technology and the provisions governing temporary protection of inventions.

(b) An invention is deemed to involve an inventive step if, with regard to prior technology related to the patent application, it is not obvious to a person with ordinary skills in the profession.

(c) An invention is deemed industrially applicable if it can be manufactured or used in any type of industry or agriculture, including handicrafts, fishing and services." 56

Bahrain, Kuwait and the UAE have also adopted a definition of a utility model as an invention which is not sufficiently inventive or creative to obtain a patent but which otherwise meets the requirements of the patent law in terms of being new and of practical application in industry. 57 Oman and Saudi Arabia, do not make any distinction between patents and utility models, omitting from their respective laws any reference to the latter. However, it has been reported locally that Saudi government is considering the introduction of a new industrial designs which may include utility models, and that the responsible ministry will therefore be accepting applications for registration in anticipating of the proposed law eventually appearing. 58 It is worth noting that, while TRIPS does not make any reference to utility models, protection afforded to utility models by Articles 1(2), 4 and 5 of the Paris Convention is still binding on WTO members. Article 1(2) of the Convention stipulates that the protection of industrial property includes utility models.
Commonly excluded from patentability is any invention (or the exploitation thereof) which may represent a violation of public order or morality, or which may be harmful to the environment. Oman, Saudi Arabia and the GCC regulation add a further condition which specifically excludes from patentability any invention which may conflict with the principles of Islamic Shariah or which affects national security. The UAE recognises that inventions which may have national security implications may still be protected but directs that they will be dealt with in accordance with special procedures to be stipulated in the implementing regulations. Besides these possible exclusions, the common exclusions from patentability reflect the limitations as prescribed by TRIPS Article 27.3, namely:

- diagnostic, therapeutic and surgical methods for the treatment of animals or humans (but not the products used in these methods);
- plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals, (other than non-biological and microbiological processes);
- discoveries, scientific theories and principles, mathematical and business methods, computer programs, pure mental activities and game playing.

Adequate protection for patented pharmaceutical and agricultural chemical products in the GCC states has been, and continues to be, a matter for concern for the major multinational pharmaceutical companies, and has caused their national governments to scrutinize the patent laws of the GCC states. The GCC states which had pre-TRIPS patent laws in existence, namely Bahrain, Kuwait, Saudi Arabia and the UAE, specifically excluded from their earlier

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59 Oman, Royal Decree No. 82/2000, art 2; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 4(a);
61 See USTR Annual 301 Reports discussed in Chapter 6.3.
laws patent protection for chemical inventions relating to foodstuffs, medicines or pharmaceutical formulae. However, the GCC states would argue that pharmaceutical and agrochemical products now receive full patent protection by virtue of their non-inclusion in the above statement of exclusions from patentability. Kuwait, Saudi Arabia and the UAE, for example, each originally excluded from protection:

“Chemical inventions relating to foodstuffs, medical drugs or pharmaceuticals unless those products are manufactured in special chemical methods. In this case, the protection shall be for the methods of manufacture not the products themselves.”

but have removed this particular reference in their current laws to bring their lists of exclusions into line with TRIPS Article 27.3.

The UAE has also taken steps that go further than any of the other GCC states towards meeting the requirements of TRIPS Articles 65 and 70 in respect of providing transitional arrangements leading to longer term protection and short term marketing advantage. While TRIPS Article 65 encompasses all new technologies not currently protected in a member state, its major focus is on pharmaceutical and agrochemical products. Articles 70 and 71 of the UAE patent law acknowledge that, at the time the law was issued, the UAE was not yet in a position to ensure effective protection immediately, but provide that inventions dealing with the chemistry of drugs or pharmaceutical compounds would be protected by letters patents or utility certificates if they met the conditions provided for in the law and its implementing regulations as of 1 January 2005. In the meantime, the UAE would continue to accept, register and examine patent applications in respect of pharmaceutical products, and to grant the product exclusive marketing rights for a period of five years or until the patent was granted or refused, whichever came first.

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62 Kuwait, Law No. 4 of 1962, art 2(2); UAE, Federal Law No. 44 of 1992, art 6(ii).
4.4.4 Rights Conferred by a Registered Patent

The patent laws of the GCC states generally provide that the owner of a patent has the exclusive right to exploit the invention by manufacturing, using such invention and importing what is manufactured thereof, selling and offering it for sale, irrespective of whether the subject of the patent is a product or a process. The owner is also protected against the importation and offering for sale of a patented invention by a third party. Where the patent has been granted for a process, the owner enjoys the right in respect of the process and in respect of any product directly obtained by means of that process. Kuwait’s law simply states that “the patent owner shall have the exclusive right of utilizing the patent in every way.”

Consistent with the requirements of TRIPS Article 33, all GCC laws provide patent protection for a period of twenty years. While the Bahrain, Kuwait, Saudi, UAE laws and the GCC regulation (and hence Qatar) grant protection from the date of filing, Oman’s law stipulates that protection is granted from the date of obtaining the patent, but adds that an application enjoys the same level of protection as that provided for a patent until such time as the patent is granted. Of those states that recognise utility models, namely Bahrain, Kuwait and the UAE, Bahrain and the UAE provide for a period of protection of ten years from date of filing; Kuwait’s “patents for models of use”, may receive protection for only seven years from date of application, with no provision for renewal.

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63 Bahrain, Legislative Decree No. 1 of 2004, art 11.2; Oman, Royal Decree No. 82/2000, art 9; UAE, Federal Law No. 17 of 2002, art 15.
64 Kuwait, Law No. 4 of 1962, art 10.
66 Kuwait, Law No. 4 of 1999, art 34bis (a).
All GCC states allow for claims of priority under certain conditions in respect of a patent application first lodged in another country. Generally, claims of priority are allowed if the original application is lodged in a country which is a WTO member or is party to an international agreement or treaty to which the GCC state has also acceded. By virtue of their Patent Cooperation Treaty (PCT) accession, Oman and the UAE further provide for claims of priority on the basis an application first submitted in any of the other 128 (as at 15 October 2005) PCT member countries. The period of time for claiming priority is twelve months from date of first filing (except for Bahrain, which permits a priority period of only three months).67

4.4.5 Process Patents: Reversal of Burden of Proof

Saudi Arabia alone of the GCC states makes provision for the reversal of the burden of proof in respect of process patents, to the extent required by TRIPS Article 34; namely when the product obtained by the patented process is “new”, or when there is a “substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used”.68

Bahrain acknowledges the need to include such provision, but only in respect of the second of the two conditions stipulated in TRIPS Article 34.1; that is, where there is a substantial likelihood that the identical product was made by the patented process and the patent owner has been unable through reasonable efforts to determine the process actually used.69

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67 Bahrain, Legislative Decree No. 1 of 2004, art 6.
69 Bahrain, Legislative Decree No. 1 of 2004, art 12.
The fact that provision for the reversal of the burden of proof has been considered by some of the other states would seem to indicate that the issue has been put to one side rather than forgotten. Oman indicated to the Council of TRIPS during the Council’s review of its intellectual property legislative regime, that the issue of reversal of burden of proof in respect of process patents would be included in a possible comprehensive enforcement law incorporating all intellectual property, which was currently under consideration. The UAE had considered the inclusion of an appropriate clause at a late stage in the drafting process for its 2002 law, but for some unexplained reason, did not include any such provision in the final promulgated version. Such omission by the GCC states may not be entirely accidental or unintentional. Retention of the burden of proof upon the complainant, being the right holder of the patent and thus most likely of foreign origin, would work in favour of local industry and against the likelihood of successful “strategic litigation” by the foreign right holder.

4.4.6 Compulsory Licencing

All GCC states and the GCC itself take advantage of provision for compulsory licencing as permitted by TRIPS Article 31. Generally, the states’ laws provide that a compulsory licence

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70 However, such a law has not been produced, and is unlikely to appear. Despite having stated to the Council of TRIPS on more than one occasion that it is examining the introduction of a comprehensive enforcement law, Oman has never been in favour of the idea. The idea has been actively pursued by the United States as a solution to what it perceived as grossly inadequate sanctions which lacked any deterrent capacity. By achieving Oman’s agreement to significantly increase sanctions in just one area of intellectual property, the United States would be able to have them applied across the full spectrum of intellectual property protection in one fell swoop. However, Oman believes that it has gone some considerable way in attempting to meet some of the US concerns by intending to adhere to a consistent package of sanctions across all its intellectual property laws; interview conducted by the author with officials in the Oman Ministry of Commerce and Industry, December 2004.

71 In June 2002, the UAE reported to the Council of TRIPS, in a response to questions from members, that the draft amendments to its patent law provided that, “in the case of litigation concerning process patents, the court shall have the authority to order a defendant to prove the manufacturing process which he has used is different from the process protected by the Patent.” However, this provision does not appear in the settled law, which appeared later that same year. See WTO Document IP/C/W/291/Add.2 (02-1093), 5 March 2002, 3.

may be granted in circumstances where the patent or utility certificate has not been utilised actively and seriously within three years from being awarded, or where the patent holder's refusal to grant a license to utilize it may impact upon the establishment or development of industrial or commercial activities within the state concerned. Bahrain and Saudi Arabia require utilisation of the patent or utility certificate to occur within four years from date of application or three years from grant, whichever is the longer period. The party seeking the award of a compulsory licence must be able to demonstrate that efforts were made to obtain a licence from the patent holder for a reasonable price and under reasonable commercial conditions, and that the applicant has the means and capacity to sufficiently exploit the invention. Conditions attached to the issuance of a compulsory licence, which largely reflect those stipulated by TRIPS, require that:

- the patent or utility certificate holder is entitled to receive fair compensation;
- the compulsory licence is non-transferable, except where the ownership of the establishment of the licensor or the part thereof utilizing the patent has been assigned;
- the issuance of the compulsory licence is intended to satisfy the needs of the local market only (the assumption being that local market means national market);
- while the exploitation rights of the licencor extend to manufacture, usage or sale of a product, or use of a process, it does not extend to the right to import the product (Bahrain, Oman, and UAE only);

- the compulsory licence is non-exclusive, and the right holder may still exploit the patent or licence others to do so.

In the case of semi-conductor technology, Bahrain, Saudi Arabia and the UAE provide that the compulsory license may be granted only for public, non-commercial use, or to remedy a practice determined after judicial or administrative process to be anti-competitive or an act of unlawful competition.76

Notwithstanding the requirements of TRIPS Article 27.1 that “patents shall be available and patent rights enjoyable without discrimination as to the place of invention...and whether products are imported or locally made”, Bahrain, Oman and the UAE stipulate that importation is not deemed to be “working” a patent and therefore does not constitute justification for precluding the granting of a compulsory licence to another party.77 This would appear to be in direct contradiction of TRIPS Article 27.1, and the GCC Unified Patent Regulations Articles 12.1 and 12.2, all of which recognise importation as working the patent, and thereby a ground for precluding the issuance of a compulsory licence. It would also appear to be discriminating against patents on the grounds of origin, again contrary to TRIPS Article 27.1, but it is a discrimination that works in favour of the GCC states.

Both Oman and the UAE have separately confirmed that “import of the product shall not be deemed a legitimate reason to prevent the issue of the obligatory authorisation” (compulsory

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77 Bahrain. Law No. 1 of 2004, art 24; Oman, Royal Decree No. 82/2000, art 15(c); UAE, Federal Law No. 17 of 2000, art 24. The Bahraini law stipulates that “using” a patent in the context of avoiding the invocation of the compulsory licencing provisions is limited to production or use in the State of Bahrain; hence importation does not satisfy the use requirement. When Bahrain was questioned on this point in the Council of TRIPS, it advised that the then draft patents law to which it referred in its response did not include this narrow “use” definition (or possibly, Bahrain was selective in its quotation of Article 24, when giving its response). Oman and the UAE both stipulate unequivocally that importation is not deemed to be not working the patent.
In response to questioning from WTO’s Council of TRIPS on this apparent contradiction, Oman has offered the following explanation of its position:

"... it has become clear that Article 27/1 of TRIPS do [sic] not contradict with Article 15/c of the Patent law as Article 27/1 deals with the Patent Law and the patentable materials in general while the Article 15/c of the patent law deals with obtaining the compulsory licence in exploiting the patent and the importation is not considered as legal reason to grant the compulsory licence."

The Omani response would appear to simply add to the contradiction, or at least to confuse the issue; in any case, the response was not pursued further within the Council of TRIPS. The UAE has similarly confirmed before the Council that importation does not satisfy the requirements of working a patent, but again, like Bahrain and Oman, has also clouded the issue. More importantly, these three laws represent the most recent position on working a patent, and could well be followed as precedents by the other GCC states in their future patent law upgrades. In any case, the WTO developed member states have seen little point in lodging a dispute against (or “seeking consultations with”) any of the three GCC states under the WTO’s Dispute Settlement procedures over the states’ respective stances on patent working.


79 The UAE, WTO Council for Trade-Related Aspects of Intellectual Property Rights, Review of Legislation: the United Arab Emirates, Document IP/C/W/291 (01-3419), 10 July 2001, 5. The UAE has also clouded the issue on importation in similar fashion to Bahrain. It originally advised the Council of TRIPS that “in defending his position, the owner of the patent cannot introduce imported product as a valid ground. It does not present a legitimate reason for avoiding compulsory licensing if one or more of the reasons referred to in the above-mentioned Article 23 of the Patent Law are met.” When the UAE was further questioned on this point, it advised that “the approved amendment of the Article 23 of the Patent and Designs Law doesn’t stipulate any more that the importation of the product is not considered legal justification for the owner to avoid compulsory licence. Therefore, the Patent law related provisions are now in conformity with Article 27 and 31 of the TRIPS Agreement.” (WTO Document IP/C/W/291/Add. 3 (02-3461), 24 June 2002, 24 June 2002). However, when the amended Patent law was issued a few months later, it retained the provision in the earlier law which excluded importation as working the patent.


82 There would have been little point in the United States bringing such a dispute, since it had already “covered the ground” on this issue. In May 2000 it brought a dispute (DS199 of 30 May 2000) to the WTO’s Dispute Settlement Body (DSB) against Brazil in respect of the provisions on the local working of a patent contained in
The Bahrain, Oman, and Saudi laws confer authority for granting and revoking compulsory licences upon the responsible minister (or minister-equivalent in the case of Saudi Arabia). The UAE law, on the other hand, requires such decisions to remain in the jurisdiction of the courts, although the responsible Minister may grant the compulsory licence where the exploitation of the patent is deemed to be in the national interest. The Kuwaiti law goes to the other extreme and still leaves the authority with government officials – a lingering influence of the law’s original 1962 provisions that have not been updated or excised. In any case, the Bahraini, Omani and UAE ministerial decisions are still subject to judicial appeal.

While the GCC regulation provides prescription in respect of the grounds for issuing compulsory licences, it generally defers to state laws in respect of provision for compulsory licensing. However, the GCC Patent Office may still grant a compulsory licence to a government agency of a GCC state to exploit a patent, albeit still subject to the conditions that prevail in the state legislation. The GCC Patents Office claims (although it is not specified in the Regulations or subordinate Bylaws) that the prior consent of all six GCC states must be given for the Office to

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Article 68 of Brazil’s industrial property law (Law No. 9,279 of 14 May 1996). The position already taken by Brazil was very similar to that adopted by Bahrain, Oman and the UAE. In what was more or less a face-saving win for either side, the US agreed to withdraw the dispute and settle its differences with Brazil outside the formal WTO DSIB forum. It also acknowledged that its dispute related to the potential use by Brazil of its Article 68 rather than any actual application. In return, Brazil, while asserting that its patent law did not contravene TRIPS Article 27, agreed to hold prior consultation with the US if it ever decided to impose a compulsory licence on a US held patent in Brazil. Brazil also agreed to withdraw its own complaint to the WTO DSIB against the US over patent rights in respect of inventions made with US federal assistance (DS224 of 31 January 2001). See WTO Dispute Settlement: Dispute DS199: Brazil – Measure Affecting Patent Protection, and WTO Dispute Settlement: Dispute DS224: United States – US Patent Code, Documents WT/DS199/1 and 3 (01-0093 and 01-3506), both available at www.wto.org/english/tratop_e/dispu_e/

Saudi Arabia’s King Abdul Aziz City of Science and Technology (KACST), is the national centre responsible for patents, and all other industrial property, policy and administration. The City is essentially a specialist ministry, and its President holds ministerial status within the Saudi Council of Ministers. Appeals against a determination by the President of the KACST may be made to a Commission appointed by the President of KACST and approved by the Saudi Council of Ministers. The Commission is responsible for hearing all disputes and appeals against decisions handed down in industrial property matters. It also makes determinations in respect of minor infringements of and non-compliance with the patent law and its subordinate regulations. See Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 27, 28.


Kuwait, Law No. 4 of 1962 as amended by Law No. 4 of 1999, art 29.

Bahrain, Legislative Decree No. 1 of 2004, art 36; Oman, Royal Decree No. 82/2000, art 20; UAE, Federal Law No. 17 of 2002, art 29.2.

GCC Unified Patent Regulations as amended 2000, art 20.3
issue a compulsory licence, which constitutes an additional guarantee against any abuse in compulsory licencing by a member state. In practice however, the granting of compulsory licensing has never been exercised by the GCC Patent Office, in order to test this requirement.

4.4.7 Infringements

The patent laws of the GCC states reveal a high degree of consistency in their descriptions of the nature of the infringement of patent rights, although the remedies and sanctions available differ markedly. The laws are also rather succinct, perhaps overly so, when compared with the infringement descriptions contained in the corresponding copyright laws. The laws offer only the broadest definition of acts which may constitute an infringement, as generally being “any act of exploitation of rights provided for in the provisions governing each of the patented subject matters ... without the written consent of the registered patentee...”.

Acts of exploitation in essence include the making, importing, offering for sale, or storing for such purposes, in respect of goods the subject of a patent or goods produced directly by a process the subject of a patent. Oman and the UAE, in almost identical terms, both add the act of providing false information or documents to obtain a patent or utility certificate as an infringing act.

The Bahrain and Kuwait laws, again in virtually identical language, stipulate that a person who knowingly and unlawfully commits any of the following acts infringes against the rights of the patent owner:

- imitates an invention or utility model for which a patent was granted pursuant to the law;

88 As stipulated by Saudi Royal Decree No. M/27 of 1425 AH (2004), art 34.
labels products, advertisements, marks, packaging or wrapping materials, or the like in a manner indicating that he has obtained a patent or utility model patent;

- produces, sells, displays for sale or distribution, imports, or obtains for trading purposes a product protected by a patent in the state.\(^9\)

As occurs in respect of trademark protection, all GCC states make provision for precautionary measures to be sought in instances of threatened or actual infringements.

### 4.5 Copyright and Neighbouring Rights

#### 4.5.1 TRIPS Copyright Provisions and Obligations (Articles 9-14)

TRIPS utilises and adds to the substantive provisions as enshrined in the Berne Convention, as the foundation for its copyright protection standards. TRIPS does not fully elucidate on the nature of literary or artistic works to which are entitled protection, but instead obliges members to comply with Articles 1 through 21, except Article 6bis, and the Appendix of the Berne Convention, which address issues of protectable subject-matter, minimum terms of protection, rights to be conferred, and permissible limitations to those rights.\(^9\) The Berne Convention

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9. TRIPS art 9.1. Article 2 of the Berne convention lists the main group of artistic and literary works which are entitled to receive protection. They include the following:
   "(1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."
Appendix allows developing countries, under certain conditions, to make some limitations to the author’s rights in respect of the translation and reproduction copyright works. The provisions for the protection of moral rights as enshrined in Article 6bis of the Berne Convention, are specifically excluded from TRIPS, and therefore receive neither acknowledgement nor protection. However, TRIPS Article 2.2 and Article 9.1 still require members to comply with other Berne Convention provisions which address some moral rights elements, namely, Article 10 (3) (right of the author to be mentioned in quotations of the author’s work), Article 11bis (2) (the moral rights of the author in broadcasting and public communication), and Appendix Article IV (3) (the obligation to indicate the name of an author in the case of translations or reproductions produced under licence).

TRIPS Article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention, and hence only those limitations that apply to literary works may be applied to computer programs. Databases and other compilations of data or other material, whether in machine readable or other form, are similarly protected under copyright, provided that they constitute intellectual creations by reason of the selection or arrangement of their contents. Such protection does not extend to the data or material itself, and is without prejudice to any copyright otherwise subsisting in the data or material.

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

92 TRIPS, art 10.1.
93 Ibid, art 10.2.
TRIPS Article 11 establishes the existence of rental rights for computer programs, and of cinematographic works in certain circumstances. Authors shall be provided with the right to authorize or to prohibit the commercial rental of originals or copies of their copyright works. In the case of cinematographic works, the exclusive rental right is subject to the so-called impairment test: a member is excepted from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred on authors. In the case of computer programs, the obligation to provide rental rights where the program itself is not the essential object of the rental.

The related rights pertaining to performers, producers of phonograms and broadcasting organizations, are stipulated in TRIPS Article 14. Rather than simply cross-reference, as it has done to the Berne convention in respect of literary and artistic works, TRIPS reproduces the substantive rights recognized by the Rome Convention, albeit in a simplified form. Performers shall have the possibility of preventing the unauthorized fixation of their live performance, the reproduction of such fixation, and the unauthorized broadcasting and the communication to the public of their live performance, although the fixation right covers only aural, and not audiovisual fixations. Producers of phonograms are entitled to an exclusive reproduction right and an exclusive rental right, while broadcasting organizations shall have the right to prohibit the unauthorized fixation, reproduction, and rebroadcasting of broadcasts, as well as any other the public communication of their television broadcasts.

TRIPS addresses the question of terms of protection by again making reference back to the Berne Convention or by reproducing the provisions of the Rome Convention. In the case of an artistic or literary work, photograph or work of applied art, TRIPS defers to the Berne

94 Ibid. art 14.1.
95 Ibid. art 14.2 3.
Convention provisions.\(^96\) TRIPS also provides that, except for a photographic work or a work of applied art, where a minimum term is calculated on a basis other than the life of a natural person, the term shall be not less than fifty years from the end of the calendar year in which the work was published or otherwise made.\(^97\) However, TRIPS restates the terms of protection stipulated in Article 14 of the Rome Convention for performances, phonograms and broadcasts, and extends them to fifty years for works by performers and producers of phonograms, and 20 years for broadcasting organizations, calculated from the end of the year in which the performance, recording or broadcast took place.\(^98\)

Where members permit limitations or exceptions to exclusive rights, they are required to confine them to certain special cases which do not conflict with a normal commercial exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.\(^99\) In any case, any such limitations or exceptions must still remain within the extent permitted by the Berne Convention, or the Rome Convention in the case of performers, producers of phonograms and broadcast organizations.

### 4.5.2 Current Regional Copyright Legislation

Although the GCC states generally have long provided some limited degree of protection to a narrow range of published artistic, literary and scientific works through laws dealing with proper commercial practice and the control of publications and publishing houses, the introduction of regional copyright protection legislation has been a very recent phenomenon. The catalyst for

\(^96\) Article 7 of the Berne Convention, Article provides that a literary work shall be protected for the life of the author plus fifty years, while the minimum term of protection for a photograph or work of applied art shall be 25 years.

\(^97\) TRIPS, art 12.

\(^98\) Ibid, art 14.5.

\(^99\) Ibid, art 13.
the introduction of specific copyright laws arose more from external pressures from developed countries for frameworks to protect their copyrightable works in the region, rather than a proactive local appreciation of the imperatives for comprehensive copyright protection. As earlier discussed\(^{100}\), not all GCC states had copyright laws in force by the time of the introduction of TRIPS, and those laws that were in existence fell some way short of the minimum protection standards required by TRIPS.\(^{101}\) Hence, most states have been required to re-visit their copyright laws with a view to bringing them at least up to the standard of TRIPS and the other major international conventions, and somewhat closer to the standards of protection being demanded by foreign governments.

Copyright protection in Bahrain relies on the pre-TRIPS copyright law that dates from 1993, and which therefore falls somewhat short of the TRIPS standard; amongst a number of other shortcomings, it does not include any substantive provision for MFN treatment or for the protection of neighbouring rights, and provides penalties that are second only to those of Kuwait in terms of their leniency. A new law, which will address these shortcomings and which Bahrain asserts will generally be TRIPS compliant, is reportedly in the final stages before promulgation.\(^{102}\) However, this law has been in “final stages” since 2001, and is rumoured to be awaiting further necessary changes arising from the recent US-Bahrain FTA.\(^{103}\) Kuwait’s post-TRIPS copyright law follows fairly closely the Bahraini law, in terms of structure objectives and approach, but has taken the opportunity to address some of Bahrain’s TRIPS shortcomings and thereby achieve a large measure of compliance with TRIPS. In particular, it includes a large measure of detail on both rights in collective works and

\(^{100}\) See Chapter 3.2.3 and 3.5.3 for earlier discussion on pre-TRIPS copyright protection standards in the GCC states.

\(^{101}\) By 1995, and the introduction of TRIPS, only Bahrain (1993), Saudi Arabia (1989) and the UAE (1992) had copyright laws in place. Kuwait was the last of the GCC states to introduce a copyright law, with its 1999 decree.

\(^{102}\) WTO Document IP/N/6/BHR/1 (01-1-3100), 21 June 2001, 2.

\(^{103}\) Interview conducted by the author with officials in the Bahrain Ministry of Cabinet Affairs and Information, December 2004.
neighbouring rights. However, it still has the lightest penalties of any of the GCC copyright laws, a situation that has caused it to attract considerable criticism from the United States and from the international copyright industry lobby groups.\textsuperscript{104}

Oman, Qatar, Saudi Arabia and the UAE have all undergone the process of initially enacting copyright laws and subsequently substantially amending or replacing them, in each case since 2000. Oman underwent this process as part of its WTO accession process, introducing its first copyright law in 1996 at the time of its initial application, but subsequently replaced it as a consequence of WTO legislation examination process, just prior to acceding to the WTO Protocol in October 2000. The Saudi law has been through similar scrutiny. The UAE’s law retains levels of protection previously provided by its copyright law of a decade earlier, but strengthens the nature of the protection for computer programmes, and redefines the rights of performers, producers of sound recordings and broadcast organisations. The law reflects a dramatic shift in attitudes towards the protection of all copyrightable material within the UAE government, business, and community environments since the original law was implemented.

Most GCC states have now acceded to the Berne Convention, although this does not necessarily greatly enhance the level of copyright protection they provide; with the exception of the protection of an author’s moral rights, the standards of the Berne Convention have already been largely incorporated into TRIPS. More recently, some of the states have also acceded to the WIPO “internet treaties”, namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty of 1996 (WPPT), both of which aim at providing enhanced levels of protection for technological and internet-based copyright material.\textsuperscript{105}

\textsuperscript{104} See Chapter 5.2.5, and 5.3.2 and Chapter 5.3 for further discussion on Kuwait’s copyright law, its level of penalties, and its enforcement.

\textsuperscript{105} These two treaties are discussed further in Chapter 6.4.
Table 5: Current Copyright Laws and International Conventions in the GCC States

<table>
<thead>
<tr>
<th>Country</th>
<th>Laws and Conventions</th>
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<tr>
<td>Bahrain:</td>
<td>Legislative Decree No. 10 of 1993 with respect to the Protection of Copyright.</td>
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<td></td>
<td>Legislative Decree No. 19 of 2005 ratifying Bahrain’s accession to the WIPO</td>
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<td>Performances and Phonograms Treaty and the WIPO Copyright Treaty.</td>
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<td></td>
<td>Legislative Decree No. 30 of 1996 ratifying the Bahrain’s accession to the Berne</td>
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<td></td>
<td>Convention for the Protection of Literary and Artistic works.</td>
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<tr>
<td>Kuwait:</td>
<td>Law No. 64 of 1999, governing Copyrights and Neighbouring Rights (issued as Law No.</td>
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<td>5 of 1999 during the period of dissolution of Parliament. Reissued by the new</td>
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<td>Parliament as Law No. 64 of 1999).</td>
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<td>Law No. 16 of 1986, according to the Arab Agreement for the Protection of Author’s</td>
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<td>Rights.</td>
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<td>Oman:</td>
<td>Royal Decree No. 37/2000, the Law on the Protection of Copyrights and Neighbouring</td>
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<tr>
<td></td>
<td>Rights.</td>
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<td></td>
<td>Royal Decree No. 53/2005 ratifying Oman’s accession to the WIPO Performances and</td>
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<td></td>
<td>Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).</td>
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<td></td>
<td>Royal Decree No. 63/1998 ratifying Oman’s accession to the Berne Convention for the</td>
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<td></td>
<td>Protection of Literary and Artistic works and the Paris Convention for the</td>
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<td></td>
<td>Protection of Industrial Property.</td>
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<tr>
<td>Qatar:</td>
<td>Law No. 7 of 2002 in respect of Copyrights and Neighbouring Rights.</td>
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<td></td>
<td>Law of July 2005 ratifying Qatar’s accession to the WIPO Performances and Phonograms</td>
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<td>Treaty (WPPT) and the WIPO Copyright Treaty (WCT).</td>
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<td></td>
<td>Law No. 31 of 2001 in respect of Qatar’s accession to the Berne Convention for the</td>
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<td></td>
<td>Protection of Literary and Artistic works.</td>
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<td>Law No. 50 of 1986 in respect of the accession of Qatar to the League of Arab States</td>
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<td>Agreement for the Protection of Author’s Rights.</td>
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<td>Royal Decree No. M/48 of 1424 AH (2003) ratifying Saudi Arabia’s accession to the</td>
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<td>Berne Convention for the Protection of Literary and Artistic works and the Paris</td>
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<td>Convention for the Protection of Industrial Property.</td>
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<td>Royal Decree No. M/12 of 1414 AH (1994), assenting to the Universal Copyright</td>
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<td>Convention.</td>
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<td>UAE:</td>
<td>Federal Law No. 7 of 2002 concerning Copyright and Neighbouring Rights.</td>
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<td>Federal Law No. 10 of 2005, ratifying the UAE’s accession to the WIPO Performances</td>
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<td></td>
<td>and Phonograms Treaty (WPPT).</td>
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<td>Federal Law of October 2004 ratifying the UAE’s accession to the International</td>
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<td></td>
<td>Convention for the Protection of Performers, Producers of Phonograms and</td>
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<td>Broadcasting Organizations (Rome Convention).</td>
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<td></td>
<td>Federal Law of April 2004 ratifying the UAE’s accession to the WIPO Copyright</td>
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<td>Treaty (WCT).</td>
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</tbody>
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Source: compiled by the Author
4.5.3 The Nature of Copyright Protection

Amongst the copyright laws of the GCC states, an author is variously defined as:

“a person who produces or invents a work in the fields of literature, science, articles or who writes any written work or produces any creative work relating to any kind of knowledge, in which case such intellectual work is attributed to him by way of clearly displaying his name on it or with the use of a pen-name or by any other method unless there is proof to the contrary.”

Or:

“except as proved otherwise, any person who publishes a work and claims authorship either by stating his name on the work or by using any other means to claim authorship of the work.”

And elsewhere, quite simply as:

“the natural person who created the work.”

The declared purpose common to all the copyright laws is to protect the authors of creative works which are of a literary, scientific, artistic and cultural nature in general regardless of the nature of such works, or the type thereof, or the method of expression used therein, or the purpose of writing or creation. The states’ laws generally replicate the range of protectable works as listed in the Berne Convention Article 2, including derived works with creative
elements and translated works. However, they also generally make provision for the protection to be extended to folklore or works of national culture, which are not mentioned in either TRIPS or the Berne Convention.

Similarly, the copyright laws GCC states replicate the Berne Convention’s list of works to which protection is commonly not extended, such as legislation, court judgments and administrative determinations, international agreements and treaties, official documents and their translations, or news which is published, broadcast or otherwise placed in the public domain.

Except for Kuwait, the GCC states provide an added measure of protection for software, with specific attention given to infringements, and penalties in particular being increased in respect of technology-related offences. In respect of the requirement of TRIPS Article 10, computer programs and software are generally included in those works to which protection extended, and described in sufficiently broad terms - along the lines of Oman’s “a set of expressions and instructions expressed in any language, code or scheme, for direct or indirect use in computers with the aim to achieve specific results” - to give some degree of flexibility to allow for technological advances. Databases are also protected if they are creative in the arrangement and selection of their subject matter. The extent of the exception to this provision is very limited –

110 The Berne Convention’s range encompasses:
- Books, brochures, research works and all printed materials;
- Speeches, seminars, and literary, scientific and artistic lectures;
- Dramatic and dramatico-musical works;
- Songs, musical compositions and tunes of songs;
- Paintings, sculpture, decorative works, and engraving and photography;
- Photographs, maps, geographical charts, engineering and architectural plans and designs;
- Plastic art works and works relating to topography, architecture and sciences;
- Choreographic works and pantomime presentations;
- Cinematographic, broadcasting and television works;
- Computer software, including data bases;
- Works of applied art and abstract article

111 The provisions which the GCC states make for the protection of folklore or works of national heritage are discussed in greater detail in Chapter 7.2

112 Kuwait, by Law No. 64 of 1999, art 2, still recognises computer works including software and databases, or computer programmes as entitled to protection, but does not take the additional steps of the other GCC states.

113 Oman, Royal Decree No. 37/2000, art 1.
such as Saudi Arabia’s provision for the production of “one reserve copy of computer programmes ... for the purpose of protecting the original, whilst keeping the original with the user, to show upon request.”\textsuperscript{114} The UAE law covers even more ground than the other states by allowing for further discretion to be granted to the responsible Minister to determine what may constitute computer programmes and applications, databases and works analogous to them, to which protection may be later extended as further technological advances may require.\textsuperscript{115}

In accordance with the exception provision of TRIPS Article 13, the states’ copyright laws allow for a limited range of circumstances and situations in which protected works may be used without the permission of the author or right holder. The exceptions, which are consistent across all laws, apply in respect of author’s rights and performers’, producers’ and broadcasters’ rights. They generally include limited reasonable use by libraries and educational institutions, use for teaching and research, use in news or current affairs in print or broadcast media, and personal use.

The GCC states generally adhere to the requirements of TRIPS Articles 12 and 14.5, and the Berne Convention, Articles 7 and 7\textit{bis} in respect of minimum terms of protection granted to copyrightable works, with provision commonly existing as follows:

- for the works of a sole author, the lifetime of the author plus 50 years;
- in respect of the works of joint authors, the lifetime of the last surviving author plus 50 years;
- for works published under a pseudonym, anonymously (unless the identity of the author becomes known), or posthumously, 50 years from first publication;

\textsuperscript{114} Saudi Arabia, Royal Decree No. M/41 1424 AH (2003), art 15(12).
\textsuperscript{115} UAE Law No. 7 of 2002, art 2(2).
- for cinematographic works, works of applied articles and photographic works, 50 years from first publication;
- in respect of the works of performers, 50 years from the first recording of the performance, or, if no recording was made, from the first performance;
- in respect of the works of producers of sound recordings, 50 years from the first production, publication or fixation (if not published) of the sound recording;
- for works whose ownership is vested in a legal entity, 50 years from the first publication or production;
- in respect of broadcasts, 20 years from the date of first broadcast.

The period of protection is generally calculated from the beginning of the year following the year in which the death of the author, or the first publication, production, recording, fixation or broadcast took place, although some exceptions do exist.

A glaring omission from the Bahraini copyright law is any reference to a term of protection for works of performers, producers and broadcast organizations, even though the law earlier stipulates at some length the nature of their respective rights in respect of individual works and of joint and collective works. The Saudi law distinguishes between the main corpus of artistic works and photographs and works of applied arts. It extends to photographs and applied arts within the purview of the copyright law a period of protection of only of twenty five years, which is actually consistent with the standards set by TRIPS Article 12 and Berne Convention Article 7(4). The other states do not bother to make the Saudi or TRIPS/Berne distinction between these and other literary or artistic works, extending to both protection for fifty years and

thereby neatly avoiding the necessity of otherwise defining works of applied articles and distinguishing them from other works.

4.5.4 Moral Rights and Economic Rights

Although TRIPS specifically excludes any provision for the protection of an author’s moral rights _per se_, they receive attention in the Berne Convention, and are addressed in the copyright laws of all GCC states – including Bahrain’s pre-TRIPS 1993 law. The GCC laws all draw a distinction between an author’s moral rights and economic rights and, in some cases, between those of the performer. The laws generally provide that the author’s moral rights include the right to decide whether his work should be published and the manner of its publication, while the economic rights encompass the right to utilise his work commercially or to authorise others to do so.\(^{117}\) The scope of the author’s moral rights includes the right to:

- have his/her name or pseudonym indicated on his/her;
- object to any alteration, deformation or any modification of his/her work;
- object to any distortion and to prohibit any other use of the work which would be prejudicial to the author’s honour or reputation;
- withdraw the work from publication, under certain circumstances.\(^{118}\)

\(^{117}\) As stipulated by Kuwait Law No. 64 of 1999, art 5.

\(^{118}\) Bahrain, Legislative Decree No. 10 of 1993, art 5; Kuwait, Law No. 64 of 1999, art 1, 2; Oman, Royal Decree No. 37/2000, art 5(n); Qatar Law No. 7 of 2002, art 10-14; Saudi Arabia, Royal Decree No. M/41 of 1424 AH (2003), art 8; UAE, Federal Law No.7 of 2002, art 5.
Moral rights cannot be disposed of or taken away from an author. Economic rights include the exclusive right of the author to commercially exploit the work by carrying out, or authorising others to carry out, any of the following acts:

- reproduction of the work;
- translation of the work;
- making excerpts, musical arrangement or other transformation of the work;
- distribution to the public of the work through sale;
- rental to the public of audiovisual works or computer programs.
- public performance of the work;
- communication of the work to the public.\(^\text{119}\)

An author can transfer economic rights to other parties, but such transfer must be in writing and specify each disposal right, be registered and lodged with the relevant ministry, for the transfer to be valid and have legal standing.\(^\text{120}\) An author’s rights are also transferable wholly or in part by inheritance or by legal action. The Qatari and Saudi laws also stipulate that, where an author dies intestate, the rights devolve to the person entitled to receive them, according to the provisions of Shariah law in respect of inheritance.\(^\text{121}\)

The notion of providing for the protection of neighbouring rights was largely unknown in the Gulf and was therefore conspicuously absent from the GCC copyright laws, until first

\(^{119}\) Bahrain, Legislative Decree No. 10 of 1993, art 5; Kuwait, Law No. 64 of 1999, art 5; Oman, Royal Decree No. 37/2000, art 5(b); Qatar Law No. 7 of 2002, art 7-9; Saudi Arabia, Royal Decree No. M/41 of 1424 AH (2003), art 9; UAE, Federal Law No. 7 of 2002, art 7-8.

\(^{120}\) Bahrain, Legislative Decree No. 10 of 1993, art 15; Kuwait, Law No. 64 of 1999, art 30; Oman, Royal Decree No. 37/2000, art 10; Qatar Law No. 7 of 2002, art 10; Saudi Arabia, Royal Decree No. M/41 of 1424 AH (2003), art 11; UAE, Federal Law No. 7 of 2002, art 9.

\(^{121}\) Qatar Law No. 7 of 2002, art 29; Saudi Arabia Royal Decree No. M/11 of 1410, art 17.
incorporated by Oman into its copyright law of 2000. The current laws now generally provide an enhanced level of protection for performers, producers of sound recordings and broadcasting organizations. They differentiate between the respective rights of the performer, producer and broadcaster, bringing the laws more into line with the requirements of TRIPS Article 14. The states provide that performers have the moral right to be identified with respect to their performances, and to object to any distortion, mutilation or any modification of their performances. They also enjoy economic rights to:

- fix or record their unfixed performance;
- broadcast or communicate to the public their unfixed performance;
- reproduce sound recordings containing an unauthorized fixation of their performances;
- rent sound recordings containing their performances
- make recordings of their performances available to the public.

Producers of sound recordings, on the other hand only enjoy economic rights, such rights being the exclusive right to carry out or authorise (and by implication thereby, prohibit) the direct or indirect reproduction of their recordings in any form, and the rental or sale to the public of copies of the recording. Broadcasting organisations also enjoy only economic rights, namely the exclusive right to carry out or authorise the fixation or recording of their broadcasts, and their rebroadcast or reproduction.

What still remains unclear in these laws is the interrelationship between, and any precedence of, the conflicting rights of authors, performers, producers and broadcasters in respect of recorded performances.

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122 Alastair Hirst, (2002) 1 Middle East Executive Reports, 17.
123 Qatar Law No. 7 of 2002, art 40; Oman Royal Decree No. 37/2000, art 16(b).
125 Qatar, Law No. 7 of 2002, art 42; Oman, Royal Decree No. 37/2000, art 20.
or broadcast performances. There arises, for example, unresolved potential conflict between the rights of the performer to record and make his performance available to the public, the producer to record and authorise or otherwise the recording, and the broadcaster to broadcast a performance. There also arises the issue of ownership of a recording as distinct from the content of that recording. Some guidance on the establishment of relative ownership of rights is provided elsewhere in the context of joint works in situations where it is possible to draw distinctions between the respective contributions, but the resolution of these differing claims may well fall within the jurisdiction of the civil courts to determine.

None of the states really address to any degree the question of rental rights at least in respect of computer programmes and cinematographic works, as required by TRIPS Articles 11 and 14. Oman, Qatar and the UAE at least stipulate that the economic rights of the author and performer include the right of commercial exploitation including rental of the work or performance.\(^{126}\) The UAE and Qatar further extend this rental right to include producers; Qatar restricts the rental right of performers and producers to sound recordings only, while the UAE extends the rental right of performers to audiovisual works.\(^{127}\) The UAE also requires that the rental rights in respect of computer programmes do not apply unless the programme itself is the original object of the rental.\(^{128}\)

The distinction between the respective rights of the various contributors to joint and collective works receives somewhat more attention than that devoted to rights of performers, producers and broadcasters. Where the respective contributions in respect of joint works can be identified and separated, each contributor enjoys his moral and economic rights in respect of his part separately

\(^{126}\) Oman, Royal Decree No. 37/2000, art 5(b)(iv); Qatar Law No. 7 of 2002, art 2; UAE, Federal Law No. 7 of 2002, art 17.

\(^{127}\) Qatar Law No. 7 of 2002, art 40(2); UAE, Federal Law No. 7 of 2002, art 17.

\(^{128}\) UAE, Federal Law No. 7 of 2002, art 8.
to the other contributors, and may exploit his own part provided that this does not prejudice the exploitation of the jointly owned work. But where the respective contributions cannot be separated, all are considered equal partners in the ownership of the whole work, unless they have otherwise agreed, and no partner may solely exercise any rights without the agreement of the other partners.

The Bahrain, Kuwait, Qatar, Saudi and the UAE laws all elaborate to a lesser or greater extent on the nature of particular types of joint collaborations, and in so doing, throw some light on the aforementioned problem of the respective rights of collaborating authors, performers, producers or broadcasters, while Oman’s law is conspicuously silent, notwithstanding the precedents available from the earlier Bahraini and Kuwaiti laws. 129 In the case of a joint musical composition, the composer retains the exclusive right to the public performance, execution, publication or copying of the whole work, but without prejudice to the right of the lyricist to separately publish that part which he created. 130 Where the joint musical production involves choreography which have special predominance or elements, such as opera or ballet, the choreographer may utilise a public performance of the whole work, while the composer may utilize the musical element provided that he does not use it as a basis for another musical work, unless otherwise agreed 131.

In the case of a joint work for cinema, radio, television or other broadcast, contributing partnership includes the scenarist or author, the scriptwriter, the editor or adaptor, the composer, the director, and the original author if the joint work is an adaptation or extraction from another

130 Bahrain, Legislative Decree No. 10 of 1993, art 20; Kuwait, Law No. 64 of 1999, art 20; Qatar, Law No. 7 of 2002, art 35.
131 Bahrain, Legislative Decree No. 10 of 1993, art 21; Kuwait, Law No. 64 of 1999, art 21.
prior work. The scenarist, scriptwriter, editor, and director are jointly entitled to produce the adapted work, notwithstanding any objections from the author of the original work or musical composer but without prejudice to the rights of these two resulting from their participation in the joint composition. The author and composer are still entitled to publish their respective particles of the work in any other manner, unless otherwise agreed.

With respect to a collective work where the respective contributions cannot be distinguished, and the work was created under the direction of a natural person or legal entity who also undertakes responsibility for publication, that person or legal entity is entitled to enjoy both the moral and the economic rights involved in creating the collective work. Where the author is identifiable or the various contributions are attributable, the moral right of attribution remains with the author or contributors and the directing party retains the economic rights.

4.5.5 Translated Works and Compulsory Licencing

All GCC states take advantage of the provision in respect of the translation of foreign works, as allowed by TRIPS by virtue of Article II of the Appendix to the Berne Convention. Article II provides *inter alia* that a member may grant to one of its nationals a licence to translate and publish a foreign language work that has not been translated and published in that member within three years of the original publication of the work. This provision, which amounts to a

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132 Bahrain, Legislative Decree No. 10 of 1993, art 22; Kuwait, Law No. 64 of 1999, art 22; Qatar, Law No. 7 of 2002, art 36; Saudi Arabia, Royal Decree No. M/41 of 1424 AH (2003), art 5; UAE Federal Law No. 7 of 2002, art 27.
133 Bahrain, Legislative Decree No. 10 of 1993, art 23; Kuwait, Law No. 64 of 1999; art 23, Qatar, Law No. 7 of 2002, art 38.
135 Bahrain, Legislative Decree No. 10 of 1993, art 27, Kuwait, Law No. 64 of 1999, art 26.
form of compulsory licencing, continues to meet with opposition from some developed countries and particularly the copyright exporting countries, which see it as a form of potential encroachment on the monopolistic nature of their copyright rights and a potential loss of income-generation. It is an area which has been discussed in the United States free trade agreements with both Bahrain and Oman.  

While all GCC states acknowledge an author's right to translate his/her work (or to authorize others to do so), all states except Kuwait and Oman also make provision for the exercise of ministerial discretion at the expense of foreign authors or publishing houses for the domestic translation, publication and dissemination of foreign language works. The responsible minister may grant a non-exclusive and non-assignable licence for the translation into Arabic and/or the domestic publication of an Arabic translation of a foreign language work if the author of the original work fails to exercise translation right within a specified period of time (between three to five years) after its original publication. As a general principle, the ministerial authority is restricted to foreign works which may be desirable or necessary for educational or research purposes, but it may also exercised where it would be in the public interest to do so. Saudi Arabia extends this right to works that have already been translated and published in Arabic in the Kingdom, but which have gone out of print and the author or translator has failed to authorize further publication.

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136 See Chapter 6.5 for further discussion on these two free trade agreements.  
137 Neither Kuwait nor Oman make any equivalent or similar provisions for translating works into Arabic and printing foreign works for local publication under licence.  
139 Saudi Arabia, Royal Decree No. M/41 of 1424 AH (2003), art 16.
4.5.6 Management of Collective Rights

The principle of collective rights management and practice of creating of copyright collection and protection societies goes beyond TRIPS and the Berne Convention. Although the principle and practice is now common in developed countries, it has not yet gained acceptance or even recognition in the GCC states. The UAE, alone of the states, has taken some steps towards copyright protection management by including provision in its copyright law for the collective administration of copyright and the neighboring rights. It gives specialised collection societies legal status and enables the holders of copyright and the neighbouring rights to assign their economic rights to them to commercially exploit and administer on the right holders behalf.\(^{140}\)

The societies are forbidden to discriminate among the right holders with whom they enter into management contracts. They must keep registers including the names of their members, their positions and the jobs they contracted, indicating the type of job, duration and the agreed licencing fees. The societies must be registered and annually licenced by the responsible ministry, and must inform the ministry of any change in these registers.

One likely impact of this UAE provision is that collective management organisations already established in developed countries may well be encouraged to establish operations or set up local associations in the UAE. Such activity would not only improve the enforcement of domestic copyright and neighbouring rights protection, but would also spearhead the spread of collective management societies to the other GCC states. Such activity would also benefit the right holders, and serve as another effective mechanism for the control of unauthorised and counterfeit copyrightable works of all descriptions.

\(^{140}\) UAE, Federal Law No. 7 of 2002, arts 30-33.
4.5.7 Infringements

The nature of copyright infringement provisions in the earlier copyright laws of the GCC states dealt mainly with the traditional form of unauthorised reproduction of print material. In the more recent laws, there has emerged a pattern of increasing complexity in the nature of the infringing acts, accompanied by a shift in emphasis away from the more conservative or conventional forms of infringement involving print-based or hard copy material towards infringing acts within an electronic/digital context.

All GCC states still recognize the traditional or conventional infringements against a right holder’s moral rights. They also recognize infringements against economic rights, such as unlawful alteration, publication, reproduction, translation, performance and broadcast, and other utilization, and importation or promotion of any imitated or forged works. The older laws of Bahrain (1993) and Kuwait (1999) do not go any further.

Reflecting the changing nature of infringing activity away from traditional print-based acts to electronic and broadcast-based acts of an increasingly technical sophistication, the more recent laws now take cognisance of acts which facilitate or enable the commission of infringements relating to the manufacture or import of electronic deactivation devices, satellite decoding devices, or the illegal modification or removal of such devices of broadcast rights in particular. These new clauses are directly aimed at confronting the burgeoning industries concerned with the production of counterfeit computer software including games, pirated music and video DVD’s CD’s and tapes, and more recently internet-based material, counterfeit smart cards and decoder descramblers for the multitudinous satellite TV channels for which the Gulf region in general is squarely placed within their transmission footprints.
The laws of Oman, Qatar, Saudi Arabia and the UAE recognize as an infringing activity the "illicit removal or alteration of any technical protection intended to regulate or limit public access to the work, performance, broadcast or recording, or distribution, or importation for distribution purposes, broadcasting or making available to the public any of the above...".  

The Qatari, Saudi and the UAE laws then provide considerably more detail to the nature of a technological-based infringing activity, by adding the following to their range of illegal acts:

- manufacture or import of any devices or instruments with an intention of using them through sale, rental or other means, if they were designed or meant to deactivate any devices or instruments preventing or limiting the reproduction of a work, sound recording, or a broadcast, or if meant to undermine the quality of the work;
- manufacture or import of any devices or instruments with the intention of using them through sale, rental or other means, if they can enable the reception of codified programs broadcast or communicated to the public in any other way, including programs communicated through satellite, or if they facilitate such transmissions to persons not entitled to receive such programs;
- remove or modify any electronic data relating to copyright administration, without authorization;
- distribution of works, performances, sound recordings or broadcasts, or import such works for distribution, transmission or communication to the public, or provide them to the public without authorization, knowing that that electronic data relating to copyright administration were removed or modified without authorization.

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141 Oman, Royal Decree No. 37/2000, art 23.
142 Qatar, Law No. 7 of 2002, art 51.
All four laws also draw a distinction between the scale of penalties that may be imposed in respect of for infringing acts, with provision for the more severe penalties to be applied to the infringements in the technological environment.  

4.6 Geographical Indications

4.6.1 TRIPS Provisions and Obligations (Articles 22-24)

TRIPS Section 3 on the protection of geographical indications is different to the rest of TRIPS; it contains in equal parts obligations for protection and exceptions to protection, whereas the rest of TRIPS is weighted heavily in favour of protection of the holder of the intellectual property right. The TRIPS articles on the protection of geographical indications represent a delicate balance between conflicting European interests seeking high levels of protection, particularly for wines and spirits, and North American interests which are more interested in limiting protection than extending it.

TRIPS defines a geographical indication as an indication which identifies a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical

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143 The nature of sanctions across all intellectual property laws of the GCC states are discussed in greater detail in Chapter 5.2.4 and 5.2.5 following.
145 Ibid.
origin. Thus, the quality, reputation or other characteristics of a good can each be a sufficient basis for eligibility as a geographical indication, where they are essentially attributable to the geographical origin of the good. Members are required to provide interested parties with the legal means to prevent use of any designation or presentation which may mislead the public as to the geographical origin of a good, and use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention. Members are also required to refuse or invalidate the registration of a trademark which uses a geographical indication for goods not originating in the territory indicated, if the indication is used in such a manner that it may mislead the public as to the true place of origin of the goods.

TRIPS Article 23 requires members to provide an additional level of protection to wines and spirits, and in particular to provide the legal means for preventing use of a geographical indication identifying wines or spirits not originating in the place indicated by that geographical indication, even where the true indication of origin is indicated, where the indication is given in a translated form, or where it is qualified. Accordingly, unlike the status in respect of other geographical indications, those for wines and spirits are to be protected even where use by a

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146 TRIPS, art 22.1. TRIPS does not make any reference to the WIPO-administered Lisbon Agreement for the Protection of Appellations of Origin. The Agreement aims to provide for the protection of appellations of origin, and includes provision for a system for their registration. The Agreement was concluded in 1958, revised in 1967 and amended in 1979. At the end of 2002, 20 States were party to the Agreement (including France and Italy, but not the GCC states, the United States nor Australia). 844 appellations of origin had been recorded in the International Register, of which 774 were still current.

147 Article 10bis of the Paris Convention states in respect of Unfair Competition:

"(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
(3) The following in particular shall be prohibited:
   (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
   (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
   (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods;"

third party would not mislead the public and unfair competition would not exist. While a multilateral system of notification and registrations of geographical indications, albeit for wines only, is mooted, members are obliged to enter into negotiations on such a system, but are not committed to the outcomes.\(^\text{149}\)

Limits are established to the extent of the obligations for wholesale protection.\(^\text{150}\) As described by one commentator, these limits represent the other half of the delicate balancing act of conflicting interests, in favour of those with “acquired rights” or “sins of the past”, by allowing for a number of exceptions to protection.\(^\text{151}\) Members availing themselves of the use of these exceptions are, again, obliged to at least enter into negotiations aimed at increasing the protection for wines and spirits, but are not committed to any outcomes. However, the exceptions cannot be used to diminish the protection of geographical indications that existed prior to TRIPS’ entry into force. Members may permit the ongoing use of geographical indications already in use for 10 years prior to the introduction of TRIPS or which have become generic within the territory of the member.

### 4.6.2 Geographical Indications Protection in the GCC States

As occurs with the other “lesser” areas\(^\text{152}\) of intellectual property protection, the attention given to geographical indications by the GCC states is slight, and mainly as a corollary to trademarks. The prevailing position in respect of their protection is to provide only passing reference within

\(^\text{149}\) TRIPS, art 23(4).
\(^\text{150}\) TRIPS, art 24.
\(^\text{151}\) Keon, above n 145, 176.
\(^\text{152}\) That is, layout-designs of integrated circuits, industrial designs, undisclosed information and trade secrets, and protection of new plant varieties. However, this should not necessarily be construed as meaning that TRIPS or the developed countries necessarily give them second class or “lesser” status.
the scope of the states’ respective trademark laws, and make them subject to the application of the general trademark provisions. Kuwait, Saudi Arabia and the UAE have adopted this approach while Qatar adds some further limited provisions relating specifically to geographical indications. However, this approach gives geographical indications only the most limited measure of protection, since it excludes from registration as a trademark only those marks, symbols or names, including geographical names or marks, which may mislead the public or which contain false data on the real origin or other characteristics of a product or service. It does not necessarily prevent the use, or misuse, of a geographical indication outside the trademark registration context, nor in the context envisaged by TRIPS Article 23, that is, where there is no misleading use or unfair competition.

Bahrain and Oman, on the other hand, have each introduced a specific law for the protection of geographical indications. They continue to offer some complementary protection by retaining in their respective trademark laws the above exclusion from registrability as a trademark, along very similar lines to the provisions within the trademark laws of the other GCC states. Oman’s geographical indications law follows the same style as its law for the protection of layout-designs of integrated circuits. In fact it appears that both laws were constructed using the one template, with subject-specific text substituted where appropriate. Oman’s geographical indications law, like its integrated circuits counterpart, comprises a mere 11 brief articles, while Bahrain’s law is hardly much longer, adding a few administrative and procedural clauses conspicuously absent from the Omani law. In both cases, the texts at times simply paraphrase the relevant TRIPS text. In both cases, the laws appear more for display, rather than providing a

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153 Qatar, Law No. 9 of 2002, art 38. See also the earlier discussion in Section 4.3 above on the registrability of trademarks.
legal framework for the protection of geographical indications which includes both legislative rigour and substance.

The following table includes those intellectual property laws which include some provision or reference to the protection of geographical indications.

**Table 6: Current Geographical Indications Protection in the GCC States**

<table>
<thead>
<tr>
<th>Country</th>
<th>Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bahrain</td>
<td>Legislative Decree No. 16 of 2004 with respect to Geographical Indications. Legislative Decree No. 10 of 1991 in respect of Trademarks.</td>
</tr>
<tr>
<td>Kuwait</td>
<td>---</td>
</tr>
<tr>
<td>Qatar</td>
<td>Law No. 9 of 2002 in respect of Trade Marks, Business Names and Data, Industrial Designs and Geographical Indications.</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>---</td>
</tr>
<tr>
<td>UAE</td>
<td>---</td>
</tr>
</tbody>
</table>

*Source: compiled by the author*

### 4.6.3 Nature and Scope of a Geographical Indication

For those states whose laws provide a definition of a geographical indication, namely Bahrain, Oman, and Qatar, the definitions generally cover the following characteristics (which also closely follow TRIPS Article 22.1):
“any expression or sign indicating the geographical name of a country, region, locality or place which serves to designate a product originating therein, the quality, characteristics and reputation of which are due exclusively or partly to the geographical environment, the natural or human factors of such origin” 154

Bahrain adds the qualification that limits the application of its law to geographical indications originating in WTO member states or states which accord Bahrain reciprocal treatment. In brief, goods may not be designated by or with a geographical indication or presented in a manner which:

- misleadingly suggests or implies that they originate in a geographical area other than their true place of origin, even where the geographical indication used is literally correct; or
- by virtue of its use, constitutes an act of unfair competition, including the use of a false geographical indication with a mention of the true place of origin, and the use of a geographical indication in translation.155

The Bahraini law entitles “any interested party whose rights have or appear to have been infringed” to seek redress for an infringement of an intellectual property right.156 The Omani law is a little more expansive, extending the right to seek redress to:

“competent authorities, natural persons or any interested group of producers or consumers of any natural, agricultural, industrial or handicraft products having a distinctive characteristic or reputation attributable to their geographical origin, and any person trading in such articles”157

154 Qatar, Law No. 9 of 2002, art 1; Oman, Royal Decree No. 40/2000, art 1.
155 Bahrain, Legislative Decree No. 16 of 2004, art 2.
156 Ibid, art 11.
The Qatari trademark law permits “persons who reside in a place especially reputed for the production of certain goods to prevent those who trade in similar goods produced in other places from affixing to their goods marks which would mislead the public as to the origin of those similar goods.”

Some limitations to protection are allowed by the “usage in good faith” and “prior usage” provisions of TRIPS Article 24(5) and (7) in the Omani law, but not in the Bahraini law.

Any earlier continuous use of a geographical indication relative to a given country shall be deemed lawful if it was effected in good faith and for a sufficient period of time before the law came into operation. No guidance is given as to what may constitute a “sufficient period of time”, an interpretation which shall possibly fall to the judicial system for eventual adjudication. This same limitation also applies trademarks registered in good faith which are identical to or similar to a geographical indication.

Excluded from protection are geographical indications which are also:

- identical to the customary term or common name of a good or service (Bahrain);
- the name of a person or business used in a manner which is not misleading (Bahrain);
- not protected or used (or have ceased to be protected or used) in their country of origin (Bahrain and Oman); or
- contrary to public order or morality (Oman).

157 Oman, Royal Decree No. 40/2000, art 2.
159 Bahrain, Legislative Decree No. 16 of 2004, art 9; Oman, Royal Decree No. 40/2000, art 10.
160 In this context, TRIPS Article 24.4 applies the benchmark of ten years prior to 15 April 1994.
161 Bahrain, Legislative Decree No. 16 of 2004, art 9; Oman, Royal Decree No. 40/2000, art 4.
The three laws do not require a geographical registration to be registered to benefit from the protection provided by the laws. However, in recognition of the implications of Article 24.9 of TRIPS, which removes any obligation a member to protect a geographical indication which is not or no longer protected in its own country, Bahrain, Qatar and Oman all make provision for the creation of national registers for the eventual possible registration, protection, and recognition by other TRIPS signatories, of their own geographical indications.

4.6.4 Additional Protection for Wines and Spirits

The notion of providing protection, let alone additional protection, for alcohol-related goods or services would be anathema to most GCC states, notwithstanding their general obligations under Article 23.1 of TRIPS to provide protection for geographical indications for wines and spirits. However, the states will exercise their exception prerogatives under Article 23.2, which allows a state to refuse or invalidate a trademark which carries a wine or spirit geographical indication if a state’s legislation so permits. And, as already mentioned, each state’s trademark law makes provision for a trademark application that is contrary to public order or morality to be refused registration. It is not surprising, therefore, that the GCC devote little attention to the protection of geographical indications, let alone those relating to wines and spirits.

On the contrary, trademarks with a relationship with wines and spirits, irrespective of whether they also contain a geographical indication, are not registrable in most GCC states. Applications

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162 See discussion in sections 4.3 and 4.6 above.
163 See also the discussion in section 4.3.6 above, in respect of the classification of goods and services
for the protection of marks relating to wines and spirits will be rejected on the grounds that the marketing, sale or importation of the goods which they identify constitute a breach of public order and morality and are therefore prohibited. The sale of wines and spirits (and all alcoholic beverages) is prohibited in Saudi Arabia and some of the emirates in the UAE, according to Islamic law.

Oman appears to adopt a slightly more liberal stance than the other Gulf states to wines and spirits and the protection of geographical indications relating to them. Neither the Omani geographical indications law nor the trademarks law makes any specific reference to either a higher level of protection or, indeed, their inclusion in or exclusion from protection under the law. However, in a response to questions posed by WTO members on this issue, Oman has advised that the law grants protection to all geographical indications including those relating to wines and spirits. Unlike some of its neighbouring states, the sale of alcohol products is not banned in Oman, but is available, as a rather lucrative commercial activity, to non-Muslim resident expatriates under strictly regulated and controlled conditions.


165 Non-Muslim expatriates who earn above a prescribed minimum monthly wage, may pay a licence fee and registration book from the Muscat police headquarters enabling them to buy specified amounts of alcohol at specially designated (and discreetly disguised) shops. Under Oman's commercial agency laws, the companies operating the "trading shops", as they are generally known, must have at least 50% Omani ownership.
4.7 Industrial Designs

4.7.1 TRIPS Industrial Designs Provisions and Requirements

In addition to its general standards of protection, TRIPS devotes just two articles to protection of industrial designs, less than the attention given to the additional protection for geographical indications attached to wines and spirits. However, TRIPS requires members to also comply with the Paris Convention’s provisions relating to patents generally, and to its specific industrial design provisions of Articles 4E, 5B, 5bis and 5quinquies. Paris Convention Article 5quinquies states simply that industrial designs shall be protected. TRIPS Article 25.1, on the other hand, obliges members to provide for the protection of independently created industrial designs that are new or original; a member may deem a design not to be new or original if it does not significantly differ from known designs or combinations of known design features, and may decline to extend protection to designs dictated essentially by technical or functional considerations.

Members are required to grant the owner of a protected industrial design the right to prevent third parties not having the owner’s consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes. As with other intellectual property rights, some limited exceptions may be allowed, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs, do not unreasonably prejudice the

167 TRIPS, art 26.
legitimate interests of the owner of the protected design, and take account of the legitimate interests of third parties. The period of protection available shall amount to at least 10 years, the term “amount to” prescription providing some flexibility in respect of initial and renewal terms that might be established.

Textile designs, which come within the scope of industrial designs, receive a special mention. In order to take into account the short life cycle and sheer number of new designs in the textile sector, requirements for securing protection of such designs, in particular in regard to any cost, examination or publication, must not unreasonably impair the opportunity to seek and obtain such protection. Members are free to meet this obligation either through industrial design law or through copyright law.

4.7.2 Regional Industrial Design Laws

The GCC states address their TRIPS obligations by incorporating some degree of protection for industrial designs either in their patents laws (Kuwait, Saudi Arabia and the UAE), trade mark law (Qatar), or by a discrete industrial designs law (Oman). Bahrain does not provide any specific protection. Notwithstanding these different approaches, the nature of the protection in each state is quite similar, although the scope of the respective laws varies. Oman offers the most comprehensive laws which go beyond addressing the TRIPS minimum standards.

Bahrain originally provided protection for industrial designs within its 1955 regulation which encompassed patents, designs and trademarks. As part of an overall strategy to adopt discrete

168 Ibid, art 25.2.
laws in each of the main areas of intellectual property, along the lines of the Omani model, Bahrain removed the trademark provisions into a separate law in 1991 and followed suit with a new patent and utility models law in 2004. As a consequence, any remnant of the original law was repealed, thereby removing any reference to, and therefore any protection for, industrial designs. Pending the introduction of a proposed new industrial designs and models law, industrial designs currently remain unprotected.\(^{169}\)

By way of contrast, Kuwait is still reliant upon legislation originally enacted in 1962, but which has been subjected to amendment (rather than total replacement) in 1999 and again in 2001.\(^{170}\) The only changes of any real substance made to the 1962 law in respect of industrial designs in the amending legislation have related to period of protection, and fees and charges.

Qatar has incorporated industrial design protection in four brief articles within its current trademark law. Because of their brevity and consequent omissions, the industrial designs provisions will likely require further enhancement in the future. Specific reference to industrial designs is limited to acknowledging the right of a person to register a design and to prevent others from exploiting it, to stipulating a period of protection, and a simple statement applying the general provisions of the law to industrial designs, provided that such application “is without prejudice to its special character.”\(^{171}\) What is meant by “its special character” is not explained.

\(^{169}\) However, for the last few years Bahrain has had in draft form a proposed industrial designs law, as part of its new suite of intellectual property legislation. It has previously asserted that the new law will ensure the availability of modern and comprehensive protection of industrial designs in line with the requirements of the TRIPS Agreement. Bahrain’s draft law, when it eventually enters into force, should be the most advanced and comprehensive of the regional laws on industrial design protection.

\(^{170}\) Originally, Kuwait, Law No. 4 of 1962, the Law of Patents, Designs and Industrial Models, as amended by Law No. 4 of 1999 and Law No. 3 of 2001.

\(^{171}\) Ibid, art 42-45.
Saudi Arabia and the UAE have, for the first time, incorporated provision for the protection of industrial designs into their recently enacted patents laws. However, the attention given to them in the Saudi law is still very slight, namely, just two articles referring to the nature of an industrial design necessary to qualify for protection and the right of the owner of an industrial design to take action against any infringements against those rights. The UAE law goes into some greater detail, encompassing both industrial designs and models, as well as extending to them the general provisions within the law.

Table 7: Current Industrial Design Protection in the GCC States

<table>
<thead>
<tr>
<th>State</th>
<th>Law/Decree</th>
</tr>
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<tbody>
<tr>
<td>Bahrain</td>
<td>-</td>
</tr>
<tr>
<td>Oman</td>
<td>Royal Decree No. 39/2000, the Law on the Protection of Industrial Designs.</td>
</tr>
<tr>
<td>Qatar</td>
<td>Law No. 9 of 2002 in respect of Trade Marks, Business Names and Data, Industrial Designs and Geographical Indications.</td>
</tr>
</tbody>
</table>

Source: compiled by the author

4.7.3 Character and Scope of an Industrial Design

Except for Qatar’s law, the laws of the GCC states’ various descriptions of an industrial design are very similar in their essential elements, and generally encompass the following:

172 Saudi Arabia, Royal Decree M/27 of 1425 (AH) (2004), arts 59-60. Prior to the introduction in mid 2004 of this omnibus law on patents, layout-designs of integrated circuits, new plant varieties, and industrial models, industrial designs were not protectable or registrable in Saudi Arabia, due to the absence of a dedicated design statute or any provision in its other intellectual property legislation. UAE, Law No. 17 of 2002, specifically Articles 43 - 53.
"... any composition of lines or colours or any three dimensional form, whether or not associated with colours, shall be deemed to be an industrial design to be used in industrial or handicraft production, including textile designs, provided that such composition or form gives a special appearance to the product of industry or handicraft."  

The UAE’s description goes somewhat further and distinguishes between an industrial design and an industrial model, the former defined as “any innovative creation of lines or colours, which generates a product that can be used in industry or craft” and the latter as “any innovative three-dimensional shape that can be used in industry or craft”. KUWAIT, on the other hand, retains a more conservative definition, omitting reference to any three dimensional form. An industrial design or model is defined as “any arrangement of lines or any type of figure, whether coloured or uncoloured, designed for use in industrial production by a mechanical, manual or chemical process shall be considered as a design or industrial model.” By contrast, and possibly by a drafting oversight, Qatar does not offer any description of an industrial design in its current law, although it offers definitions of the other areas of industrial property covered by the law.

Commonly excluded from protection are designs which may be contrary to public order or morality, while Saudi Arabia goes one step further by also excluding designs which are contrary to Shariah law. As permitted by TRIPS Article 25.2, none of the states allow protection to extend to designs dictated essentially by technical or functional considerations. An industrial design cannot be registered if it lacks originality or has entered the public domain through publication or use prior to the filing of an application for registration or the priority application.
A common exception to the public domain qualification on protection applies generally in respect of industrial designs which are displayed at international exhibitions or scientific conferences and for which provision exists for temporary protection.

The nature of protection generally provided accords to the right holder the exclusive right to prevent any third party from using the industrial design in the manufacture of any product, or importing or otherwise possessing any product related to the industrial design or model for the purpose of using or offering for sale. The Bahraini, Omani, Saudi and UAE laws each require an industrial design to be registered to qualify for protection. They enshrine the principle of “first to register”, registration being a presumption of ownership. While some allowance can be made for exceptions to this principle where “the contrary is established”, the absence of implementing regulations or judicial authority in each case does not provide any guidance as what may constitute “the contrary”. In the case of the Qatari law, the general application of the trademark provisions may by implication extend some protection to industrial designs, in the absence of any specific reference to an obligation for registration.

Consistent with TRIPS Art 26.3, the period of protection is universally at least 10 years from date of application or priority filing, with provision for an extension for an additional five years. Curiously, the Qatari law still provide for only five years protection, albeit with opportunity for extension for two further similar periods but nonetheless subject to renewal application deadlines and payment of the requisite fees. As the total period of Qatar’s possible protection available amounts to more than 10 years, it can be argued that Qatar still complies with TRIPS Article 26.3 in outcome if not entirely in spirit.

178 Qatar, Law No. 9 of 2002 art 44.
According to the current draft in limited circulation of its proposed industrial designs law, Bahrain alone of the GCC states will acknowledge that moral rights exist in respect of industrial design protection. It will require that the provisions of its industrial design protection law shall not violate the moral or artistic rights relating to industrial designs, whether such rights are derived from the law itself or from international agreements to which Bahrain is a party.\(^{179}\) It will also acknowledge the rights of attribution of the creator or inventor of the design, irrespective of whether another person is the registered owner. However, it cannot be assumed that these provisions will be retained when the final form of the law is enacted.

The laws of Oman, Saudi Arabia and the UAE all make particular reference to the protection of textile designs, which are generally acknowledged as being within the scope of industrial designs, and therefore accorded the same degree of protection.\(^{180}\) They provide no other special protection or treatment for textile designs, other than this acknowledgement, and none make reference to the requirements of TRIPS Article 25.2 in respect of the non-impairment of the opportunity for protection.

### 4.7.4 Infringements

The nature of an infringement against an industrial design is described very briefly and succinctly. It is described variously as:

\(^{179}\) Bahrain was advising the WTO Council of TRIPS in 2001 that the issuance of an industrial designs law, prepared with WIPO assistance, would occur in the near future; see WTO Council for Trade-Related Aspects of Intellectual Property Rights, Review of Legislation: Bahrain, Document, IP/Q4/BHR/1 (01-6218), 6 December 2001, 1, 3.

- any act of exploitation as permitted by their respective laws which is undertaken without
the prior approval of the right holder (Saudi Arabia);\textsuperscript{181}
- imitating a registered industrial design, knowingly using a registered industrial design
with intention to mislead, and falsely claiming an industrial design is registered (Oman,
Qatar and the UAE);\textsuperscript{182} or
- knowingly selling, offering for sale, importing or otherwise trading in products or
materials on which there appears an imitation of a registered industrial design, or falsely
claiming that a design is registered (Kuwait).\textsuperscript{183}

\section*{4.8 Layout-Designs (Topographies) of Integrated Circuits}

\subsection*{4.8.1 TRIPS Provisions and Obligations (TRIPS Articles 35-38)}

TRIPS requires members to provide protection on the basis of certain provisions of the
Washington Treaty on Intellectual Property in Respect of Integrated Circuits (Washington,
1989).\textsuperscript{184} These provisions deal, \textit{inter alia}, with the definition of an “integrated circuit” and

\textsuperscript{182} Oman. Royal Decree No. 39/2000, art 47-48; Qatar, Law 9 of 2002, art 12; UAE, Federal Law No. 17 of
\textsuperscript{183} Kuwait, Law No. 4 of 1962 as amended by Law No. 4 of 1999 and Law No. 3 of 2001, art 46.
\textsuperscript{184} Washington Treaty on Intellectual Property in Respect of Integrated Circuits, Articles 2 – 7 (except Article 6(3)),
Article 12 and Article 16(3). The Washington Treaty was opened for signature in May 1989, but has never come
into force.
“layout-design (topography)”, requirements for protection, exclusive rights and limitations, as well as exploitation, registration and disclosure.\textsuperscript{185}

TRIPS adds to the Washington Treaty provisions on four points;

- the minimum term of protection shall 10 years, instead of the eight years stipulated in the Washington Treaty (Article 38.1);
- the rights must extend to articles incorporating infringing layout-designs (Article 36);
- unwitting infringers must be allowed to use or sell stock already acquired or ordered at the time of being advised of their infringement (Article 37.1); and
- the conditions of TRIPS Article 31 in respect of compulsory licencing or government use without the authorization of the right holder apply \textit{mutatis mutandis} to layout-designs, instead of the more generous corresponding provisions of the Washington Treaty (Article 37.2).

In essence, TRIPS excludes provisions of the Washington Treaty (notably those on compulsory licencing) that had been rejected by the US and Japan during the negotiations on the Treaty, and supplements the latter with the stricter provisions that those countries had failed to obtain at the Washington Diplomatic Conference.\textsuperscript{186}

\textsuperscript{185} The Washington Treaty, Articles 2 (i) and (ii) define an integrated circuit and layout design (topography) as follows:

- an “integrated circuit” means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function;
- a “layout-design (topography)” is defined as the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.

The TRIPS obligation to protect layout-designs applies to such layout-designs that are original in the sense that they are the result of their creators' own intellectual effort and are not commonplace among creators of layout-designs and manufacturers of integrated circuits at the time of their creation. The exclusive rights include the right of reproduction and the right of importation, sale and other distribution for commercial purposes. Members are required to consider unlawful the unauthorized sale, importation, or distribution for commercial purposes of a protected layout-design or integrated circuit incorporating such design or an article incorporating such integrated circuit if it contains an unlawfully reproduced layout design.

The minimum period of protection is 10 years from date of filing for registration, or from the date of first commercial exploitation where a member does not require registration as a condition for protection; in any case, protection may lapse 15 years after the creation of the layout design.

4.8.2 Regional Layout-Design Legislation

As is the case with plant varieties, the protection of layout designs is not an issue generating any great concern or attention with either the GCC states or developed countries operating, or with interests, in the GCC states. As Correa points out, the semi-conductor industry is highly concentrated in a few industrialised countries, and technological advancement is an interactive, cumulative process in which improvements are directly based on the pre-existing stock of carefully guarded knowledge. Developing countries are most unlikely to have the technological skills and knowledge capacity to manufacture counterfeit products that incorporate

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187 TRIPS, art 35, and Rome Convention, art 3.2.
188 TRIPS, art 36.
189 Ibid, art 38.2-3.
190 Correa, above n 187, 234.
chips and chip technology produce; they are net importers of such products. The impact of TRIPS in respect of layout-designs integrated circuits is likely to be felt mainly in respect of the importation of these products, which, in any case, will be slight. While software counterfeiting has been an ongoing problem of some dimension in the GCC states, counterfeit chip technology production or importation involving the states does not appear to have ever arisen as an issue as far as the chip technology industry is concerned.\textsuperscript{191} It is not surprising, therefore, that the GCC states have either largely ignored the issue of protection of layout-designs (Bahrain, Qatar and the UAE), or have simply added reference to layout designs to the general provisions of their other intellectual property laws (Kuwait and Saudi Arabia).\textsuperscript{192} Only Oman has introduced discrete legislation for the protection of layout designs of integrated circuits.\textsuperscript{193}

### Table 8: Current Layout-design of Integrated Circuits Protection in the GCC States

<table>
<thead>
<tr>
<th>State</th>
<th>Legislation</th>
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<tbody>
<tr>
<td>Bahrain</td>
<td>-</td>
</tr>
<tr>
<td>Kuwait</td>
<td>Law No. 4 of 1962 concerning Patents, Designs and Industrial Models, as amended by Law No. 4 of 1999 and Law No. 3 of 2001.</td>
</tr>
<tr>
<td>Oman</td>
<td>Royal Decree No. 41/2000 promulgating the Law on Layout Design (Topographies) of Integrated Circuits.</td>
</tr>
<tr>
<td>Qatar</td>
<td>-</td>
</tr>
<tr>
<td>UAE</td>
<td>-</td>
</tr>
</tbody>
</table>

Source: compiled by the author

\textsuperscript{191} For example, the matter has not arisen as an issue in either the USTR annual 301 reports, or in the submissions of the major industry lobby groups to the USTR.

\textsuperscript{192} Neither Qatar nor the UAE at present possess any legislation providing protection for layout-designs. However, Qatar reportedly has had in preparation for a few years a new law based on WIPO’s model law on the protection of lay-out designs (topographies) of integrated circuit, which Qatar would no doubt thereby assert will be compatible with TRIPS requirements; see WTO Document IP/N/QAT/2 (02-3450), 21 June 2002, 2.

\textsuperscript{193} Although Bahrain, again, has prepared an integrated circuits law which has been in local circulation in draft form for some time, and which it was anticipated (since 2001) would be soon published. See WIPO Document, IP/Q4/BHR/1 (01-6218), 6 December 2001, 1, 3.
Kuwait’s provision for the protection for layout-designs of integrated circuits in its other intellectual property laws, is token, to say the least. It argues that protection has been provided for layout-designs by extending to them the protection already given to industrial designs and models in the state’s patent and designs law.\textsuperscript{194} It has achieved this by the simple strategy of inserting the words “and integrated circuits” after the words “designs and industrial models” wherever the latter appears throughout the patents and designs law.\textsuperscript{195} Accordingly, the period of protection, the nature of infringements, and the sanctions and relief that apply in respect of designs and industrial models, also apply to layout designs. For example, a layout design must therefore be registered to obtain protection, and protection is provided for a period of 10 years from date of application.

However, the Kuwaiti law as it currently stands does not provide any definition or description of what may constitute an integrated circuit (as it does for a design and an industrial model). This strategy has had the effect of creating by implication an inappropriate description of an integrated circuit as being the same as that for a design or industrial model, namely, “any arrangement of lines or any type of figure, whether coloured or uncoloured, designed for use in industrial production by a mechanical, manual or chemical process…”\textsuperscript{196}

The nature and authoritative source of any protection of layout-designs of integrated circuits within the general framework of the UAE intellectual property regime is confused, and they appear, therefore, to receive only a limited measure of protection – and then more by implication than by specific provision. In July 2001, the UAE advised the WTO that layout designs were protected under its patent law, and specifically that the law’s provisions relating to industrial


\textsuperscript{195} These amendments were introduced to the Kuwaiti original 1962 patents and designs law by Law No. 4 of 1999 Kuwait, Law No. 4 of 1999, art 1.
designs and models applied equally to integrated circuits - a similar strategy to that adopted by Kuwait, but without the legislative formalisation. The basis for such claim in the patent law is unclear, and the relationship between industrial designs or models and layout-designs is equally unclear. Hence the period of protection provided was five years (soon to be extended to 10 years under imminent amendments). In March 2002, the UAE again advised the WTO that topographies were classified among the works protected under its copyright law. The period of protection was the same as that available to other forms of copyrightable material, namely, the lifetime of the right holder plus 25 years (again, soon to be extended under imminent amendments) - very much greater than the 10 year period provided by TRIPS Article 38 or by the UAE’s corresponding patent legislation. The WTO appears to have been satisfied with the UAE response since there is no record of the contradictory explanations having been pursued further.

Since the UAE Ministry has not received any applications for registration of layout designs of integrated circuits at the time of this writing, the integrity of the above claims have not yet been tested. Nor have there yet been cases on infringements of right-holder’s rights in respect of integrated circuits to come before the UAE federal or local courts to clarify under which law a prosecution for infringement of the right the owner of a layout design might proceed.

198 The UAE Law No. 44 of 1992 was amended in late 2002 by Law No. 17 of 2002. In particular, the period of protection for patents was extended from five years to 10 years, to come into compliance with the requirements of TRIPS Article 26.3.
200 The UAE Law No. 40 of 1992, the Law for the Protection of Intellectual Compilations and Author’s Rights was amended by Law No. 7 of 2002, to extend a 25 year term of protection to 30 years, to come into compliance with TRIPS Article 12.
4.8.3 The Nature and Scope of a Layout-Design

The Omani law is striking for its brevity, containing just eleven short articles. It appears to share the same template as Oman’s geographical indications law, with subject-specific text substituted where appropriate. In comparison, the Saudi omnibus law on patents, plant varieties, industrial models, and layout designs, dedicates five articles specifically to the protection of layout designs, and further extends its general provisions to apply equally to industrial designs. Accordingly, it covers as much, if not more, ground than the Omani law. In both cases, the respective laws base their layout-design provisions on the corresponding WIPO model law.201 Both laws borrow directly from Article 1(i) and (ii) of the TRIPS model law for their definitions of an integrated circuit and layout-design:

- integrated circuit: a product, in its final form or an intermediary form, which consists of interconnections or elements at least one of which is active and which is intended to perform an electronic function;
- layout design: any three dimensional disposition of interconnections or elements of an integrated circuit, at least one of which is active, which is intended for manufacture.202

The Saudi law adds a requirement, which is absent from the Omani law, for originality as a fundamental criterion for protection along the lines of Article 2(1) of the TRIPS model law.203 Both exclude from registrability any layout-design which has already been commercially exploited anywhere else for more than two years.

202 Oman, Royal decree No. 41/2000, arts 1 and 2. See also above n 185.
Both laws presume registration as a prerequisite for protection, while at the same time, registration presumes ownership; unless the contrary is established, the registrant is deemed to be the right-holder of the layout-design and thereby its creator.\textsuperscript{204} The right-holder alone has the right to commercially exploit the layout-design, and is entitled to protection against unlawful importation, sale or distribution for commercial purposes of the layout-design or other articles in which the layout design is incorporated.\textsuperscript{205} The emphasis here is on commercialisation; both laws still allow use of a layout-design without the owner's authorisation for research or teaching, personal or non-commercial purposes, or where the responsible minister deems such use is in the public interest.\textsuperscript{206}

The Omani law affords protection for a period of ten years from the date of filing an application for registration, while Saudi Arabia adheres more closely to the requirements of Article 38.1 of TRIPS, and affords protection from the date of filing or from the date of its first local or external commercial exploitation, whichever is the earlier.\textsuperscript{207} Saudi Arabia also includes the qualification of Article 6(3) of the Washington Treaty and Article 38.3 of TRIPS (but omitted from the WIPO model law, and ignored by the Omani law), that in all cases the term of protection expires 15 years after the creation of the layout design (thereby allowing an extension to the original 10 year period).

The Saudi law goes even further than its Omani counterpart, in that it provides for a system of compulsory licencing as included the Washington Treaty (but for which neither TRIPS nor the WIPO model law makes any provision). In brief, a non-exclusive compulsory licence may be

\textsuperscript{204} Oman, Royal Decree No. 41/2000, art 2; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 49.
\textsuperscript{205} Oman, Royal Decree No. 41/2000, art 4; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 51.
\textsuperscript{206} Oman, Royal Decree No. 41/2000, art 4; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), arts 52, 53.
\textsuperscript{207} Oman, Royal Decree No. 41/2000, art 7; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 19(b).
granted in accordance with the same provisions that apply to the award of compulsory licences for patents.\textsuperscript{208}

In addition to the omissions noted above, the Omani law also lacks any provision for the following:

- reverse engineering;
- application of international treaties and their precedence, and national treatment or MFN provisions, even though these are included in the WIPO model law;
- transfer of title or cancellation of registration;
- administrative provisions relating to gazetral of applications and registrations, or implementing provisions.

Both laws provide, in almost identical text, a simple description of an infringement as being an act that includes the copying a layout design in whole or part, or knowingly importing, selling or distributing a layout design or the integrated circuit of which it may be part.\textsuperscript{209} Saudi Arabia adds that falsely claiming or indicating that a layout-design is registered also constitutes an infringement.

\textsuperscript{208} See Section 4.4.6 above.
\textsuperscript{209} Oman, Royal Decree No. 41/2000, art 11; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 51.
4.9 Undisclosed Information, Trade Secrets and Unfair Competition

4.9.1 TRIPS Provisions and Requirements (Article 39-40)

TRIPS provides that undisclosed information and trade secrets are deemed to be protectable under the rules of unfair competition. The protection does not confer any exclusive right, but provides the right (and the obligation) to prevent practices contrary to honest commercial practices with respect to both the disclosure and acquisition of undisclosed information. TRIPS Article 39 requires members to ensure effective protection against unfair competition as provided in Article 10bis of the Paris Convention by protecting undisclosed information. Persons and legal entities must be able to prevent information lawfully within their control from being acquired by, or disclosed to, others without their consent in a manner contrary to honest commercial practices, provided that such information:

- is secret in that it is not generally known, either as a whole or in its various parts, to persons who would normally deal with that kind of information;
- has commercial value because of its secret state; and

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210 The Paris Convention, Article 10bis requires the countries to provide effective protection against unfair competition. Any act of competition contrary to honest practices in commercial or industrial matters is an act of unfair competition. In particular, the following are prohibited:
- all acts which create confusion by any means in respect the establishment, goods, or activities of a competitor;
- false allegations in the course of trade which discredit the establishment, goods or activities of a competitor;
- indications or allegations the use of which is liable to mislead the public in respect of the nature, manufacturing process, characteristics, suitability of purpose, or quantity of goods.
TRIPS Article 39.3 makes a particular requirement to provide protection against unfair commercial use of undisclosed test or other data submitted as a condition for gaining market approval for new pharmaceutical or agricultural chemical products or for products which utilise new chemical entities. It requires members to protect such data against disclosure, except where it is necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.

In respect of the control of anti-competitive practices, TRIPS Article 40 requires members to recognise that some licensing practices pertaining to intellectual property rights which restrain competition may have adverse effects on trade and impede the transfer and dissemination of technology. Members may adopt, consistent with other TRIPS provisions, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive. TRIPS also provides for a mechanism allowing for consultation and exchange of relevant confidential information between members in situations where companies from those members are involved in a dispute over anti-competitive practices.

211 A note to TRIPS Article 39 describes “a manner contrary to honest commercial practices” as at least: “practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties which knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.”

The common position of the GCC states in respect of the provision of protection for undisclosed information and trade secrets within the prescription of TRIPS Article 39 is to either largely ignore the matter (Kuwait, Qatar and Saudi Arabia), or to incorporate some notional provision within the scope of other intellectual property laws (Oman and the UAE). Bahrain, on the other hand, has recently enacted a law for the protection of trade secrets, which also touches on the nature of acts that are contrary to honest commercial practices. In respect of anti-competitive practices in contractual licences, as outlined by TRIPS Article 40, only Bahrain and Oman makes specific acknowledgement to the requirement to control such practices, although all states can also refer to, and rely on, the extensive provisions that already exist outside the intellectual property protection regime. All states can justifiably argue that protection of undisclosed information and anti-competitive practices, being essentially commercial matters, are addressed in detail in their respective commercial codes, civil codes and penal codes.²¹²

Kuwait, Qatar and Saudi Arabia would acknowledge that they do not provide any specific legislative protection of undisclosed information or trade secrets in the intellectual property context, but would claim that some levels of protection are already included elsewhere within their legislative frameworks governing commercial conduct, or that the introduction of appropriate legislation is being examined. Kuwait, for example, has argued that its copyright law guarantees protection of undisclosed information in the copyright context since the owner of

²¹² It is outside the scope of this thesis to examine the level of protection provided for undisclosed information, trade secrets or other commercial-in-confidence information, outside the intellectual property context. It is worth noting, however, that all GCC states have made provisions in this regard in their commercial transactions laws, commercial agency laws, and commercial, civil and penal codes.
a copyright has exclusive right to determine publication of his work. Accordingly, anyone who discloses such information without prior consent from the rightful owner commits an infringement under its copyright law. However, this line of argument does not take account of the fact that copyright deals with rights of attribution and economic exploitation but does not encompass rights or obligations in respect of disclosure or non-disclosure. It also ignores the freedom of use provisions in respect of copyrighted works which can bring a work into the public domain. More importantly it ignores the fact that TRIPS Article 39 and Paris Convention Article 10bis address a requirement for the protection of proprietary information that is not otherwise protected by patents, copyrights, or industrial designs and models laws.

Saudi Arabia has claimed that some protection for undisclosed information of a proprietor nature already exists under other laws outside the intellectual property context. It has asserted that rights relating to the protection of undisclosed information are covered by the Islamic Shari'ah and by existing laws such as the commercial code, commercial transactions code, and the banks control regulation. Saudi Arabia has also indicated that it is considering the introduction of an Unfair Competition Law, which will encompass provision for trade secrets and undisclosed information. Qatar a few years ago indicated that it, too, was in the process of considering a new law, apparently based on a model law prepared by WIPO, and apparently compatible with TRIPS. However, in both cases, the new laws have yet to emerge.

214 WTO Working Party on the Accession of the Kingdom of Saudi Arabia, Additional Questions and Replies, Document WT/ACC/SAU/6/Add.3 (96-4561), 30 October 1996. The Saudi Companies Law, Article 22, for example, provides for sanctions against any government official who improperly or without authorisation, divulges company secrets to which he has, or has had, access by reason of his duties.
215 Ibid.
Oman provides just one article concerning the protection of undisclosed information in its trademark law, while the UAE has included slightly more provision for "Know-how", as it is described, in its patents and industrial designs law. Both provide for the respective laws’ general provisions to apply equally to acts of intentional contravention of their unfair competition or protection of trade secrets provisions.

Bahrain’s new law for the protection of trade secrets is rather brief. It consists of just nine clauses, only four of which deal substantively with trade secrets and dishonest commercial practice (the other five addressing matters relating to enforcement, administration and due process). It incorporates the requirements of TRIPS Article 39, including protection of test data submitted to government authorities for obtaining marketing approval of pharmaceutical or agricultural products.

Table 9: Current Trade Secrets and Anti-Competitive Practices Protection in the GCC states

<table>
<thead>
<tr>
<th>Country</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bahrain</td>
<td>Law No. 7 of 2003 in respect of Trade Secrets</td>
</tr>
<tr>
<td>Kuwait</td>
<td>--</td>
</tr>
<tr>
<td>Oman</td>
<td>Royal Decree No. 38/2000, the Law on Trade Marks, Indications and Secrets, and Protection from Unfair Competition.</td>
</tr>
<tr>
<td>Qatar</td>
<td>--</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>--</td>
</tr>
<tr>
<td>UAE</td>
<td>Federal Law No. 17 of 2002 for the Industrial Regulation and Protection of Patents, Industrial Drawings and Designs</td>
</tr>
</tbody>
</table>

Source: compiled by the author
4.9.3 Nature of Protection of Undisclosed Information

Bahrain, Oman and the UAE, borrowing directly from TRIPS Article 39, all provide that undisclosed information, or “know-how”, must be protected if:

- it is unknown, or not available among, or readily accessible, to persons who normally deal with such kind of information;
- it draws its commercial value from its confidentiality or secrecy;
- the owner or person lawfully in control of the information has taken reasonable steps to keep it secret.\(^{217}\)

There is no specified period of protection period. Rather, the obligation to protect remains in effect as long as the undisclosed information’s value is unknown and it remains secret. Know-how acquired through one’s own means or through legal means may be used or disclosed or transferred it to another party, but that other party may not use disclose or communicate any element of know-how without consent of its owner. Disclosure without approval of the owner of the know-how constitutes an infringement, provided that the person committing the act was aware of the confidential nature of the know-how or could not have ignored such nature.

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\(^{217}\) Bahrain, Legislative Decree No. 7 of 2003, art 2; Oman, Royal Decree No. 38/2000, art 34; UAE, Federal Law No. 17 of 2002, art 39-40.
4.9.4 Protection of Information Relating to Pharmaceutical Products

Bahrain and Oman both make some limited provision for the protection of undisclosed test or other data submitted by an applicant for market authorisation of a pharmaceutical or agricultural chemical product which utilises new chemical entities. In language that is virtually identical to the TRIPS Article 39.3 text, the prohibition on disclosure in both laws:

"... shall extend to undisclosed tests or data which were the outcome of considerable effort, and which are submitted to the competent authorities for the purpose of obtaining approval for marketing of pharmaceutical or agricultural chemical products utilising new chemicals entities."\(^{218}\)

Bahrain goes a little further by providing, as required by TRIPS Article 70.8 & 70.9, that the government authority in receipt of the tests or data must protect them against disclosure for as long as they remain secret. It must also prohibit their unfair commercial use by preventing any third party using the data without approval in the marketing of similar drugs or products for 5 years following the date of marketing approval of the drugs or products in Bahrain.\(^{219}\)

The UAE position on protection of pharmaceutical and agrochemical products realizes an even stronger level of protection.\(^{220}\) Articles 70 and 71 of the UAE patent law provide that inventions dealing with the chemistry of drugs or pharmaceutical compounds will be protected by letters patents or utility certificates if they meet the conditions required by the law and its implementing regulations as of 1 January 2005. The UAE will continue to accept, register and examine patent

\(^{218}\) Bahrain, Legislative Decree No. 7 of 2003, art 2; Oman, Royal Decree No. 38/2000, art 34.
\(^{219}\) Legislative Decree No. 7 of 2003, Article 2
\(^{220}\) See also Section 4.4.3 above.
applications in respect of pharmaceutical products, and to grant the product exclusive marketing rights for a period of five years or until the patent is granted or refused, whichever comes first. However, some degree of protection has already been in place through Ministerial Decree No. 404 of 2000, which stipulates that no drug or new pharmaceutical compound might be registered unless it has been granted a patent - thereby extending to the drug or compound the protection and confidentiality applicable to patents. The decree also requires the secrecy of information attached to an application for registration of a drug or pharmaceutical compound to be protected. This issuance of the ministerial decree action was a direct response to pressure brought to bear by US pharmaceutical industry groups through the office of the US Trade Representative.\textsuperscript{221}

4.9.5 Control of Anti-Competitive Practices in Contractual Licences

Oman includes in its patent law, a single statement taken directly from Article 10bis of the Paris Convention to describe acts of unfair competition and then proceeds to apply the general provisions of its trademarks law, including sanctions, to such acts. The nature of the acts includes:

- acts of such nature as to create confusion with another establishment, goods or services, in the course of any industrial or commercial activity;
- unjustified false allegations against any commercial or industrial producer with the intention of damaging or diluting goodwill or reputation;

\textsuperscript{221} The role of the USTR and the implications and impact of its annual Special 301 Reports is discussed at greater length in Chapter 6.3 following.
use, in the course of any industrial or commercial activity, of indications or allegations that mislead the public as to the characteristic features of the goods or services. 222

Bahrain’s law provides that the following constitute acts which are contrary to honest commercial practices:

- disclosure of secret information acquired by a party to a “confidentiality agreement”;
- disclosure, or inducement to disclose, secret information in breach of a duty of trust;
- misappropriation of information by unlawful means including fraud, espionage, theft or other improper means;
- acquiring trade secrets from another person while knowing, or being capable of knowing, that such other person has acquired the trade secrets unlawfully. 223

As a rather curious and awkward inclusion for a law of this nature - which indicates that the law was largely and loosely constructed by borrowings from Bahrain’s other intellectual property laws - provision is included for a person whose rights have, or appear to have, been infringed to seek provisional relief. Such relief includes the cessation of the infringement, the provisional seizure of articles and goods including imported goods on arrival; and the seizure of infringing machinery and tools, and related evidence. 224

222 Oman, Royal Decree No. 38/2000, Article 33.
223 Bahrain, Legislative Decree No. 7 of 2003, Article 4.
4.10 New Plant Varieties

4.10.1 TRIPS Provisions and Obligations

Protection of new plant varieties as a distinct and separate intellectual property right falls outside the scope of TRIPS, which confines the treatment of their protection to being a patent matter. TRIPS Article 27.3(b), in addressing patentable subject matter, provides that inventions which include plants and essentially biological processes for the production of plants, other than non-biological and microbiological processes, may be excluded from patentability. However, it still requires members to “provide for the protection of plant varieties either by patents or by an effective sui generis system or by a combination of both.”

It has been suggested that this flexibility reflects the lack of consensus on the form that protection of plant varieties should take – that is, whether they should be protectable under the European approach of breeder’s rights, or the US and Japanese approach of patents. These different approaches lead to a different scope and extent of protection. While the breeders’ rights regime permits protection of a plant variety as determined by a specific combination of genes, it does not allow for the protection of particular genes, a possibility instead allowed under patent law.

Outside of the TRIPS patent-protection approach, the international standard of protection is that established by the Convention of the International Union for the Protection of New Plant

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Chapter 4

Varieties (1999) - the UPOV Convention. The Convention grants protection of a new plant variety to the breeder - the breeder being defined as the person who breeds, or discovers and develops, and registers, a new plant variety. The bounds or characteristics of “discovers and develops” are the subject of intense international debate. However, “breeding” may include the isolation and propagation of a naturally occurring mutation or variation. To be deemed protectable, a plant variety must meet the conditions of being:

- new, by virtue of not being the subject of prior commercial acts;
- distinct, by being clearly distinguishable from any other variety;
- uniform or homogeneous in its relevant characteristics;
- stable, after a cycle of propagation or repeated propagation;
- variety denominated, having a denomination under which it may be commercialised.

The breeder’s basic right in respect of a particular plant variety encompasses the production, reproduction and conditioning for propagation, together with the selling, marketing, importing or exporting and stocking of the new variety. The scope of the right includes not only to the plant variety or propagated material itself, but also the harvested material and may extend to products made directly from the harvested material. The breeder’s rights do not prohibit use by others of protected propagation material for non-commercial or private purposes, for experimental purposes or for the purpose of breeding other varieties. But this is a limited use, in effect

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226 “UPOV Convention” being the Act of the International Convention for the Protection of New Varieties of Plants of 2 December 1961, as revised at Geneva on 19 March 1991. Although UPOV is an autonomous international body, its association with WTO and WIPO in particular is close, with the WIPO Director-General being ex officio UPOV Secretary-General. WIPO has prepared a Plant Breeder’s Rights Bill, which serves as its sui generis alternative to the TRIPS patent-protection approach. The Bill is based on the 1991 UPOV Convention.
227 UPOV Convention, arts 5-9.
228 Ibid, art 14(1)-(3).
229 Ibid, art 15(1).
confined to research and experimental uses. The use by others provision does not automatically extend to include farmers, or recognize their rights to use farm-saved or own-harvested propagating material or seed for replanting. The existence and possible application of a farmer’s right, if any, is left to the Convention signatories to decide, depending on their own circumstances or interests, or to the bargaining outcomes of multilateral or bilateral agreements.230

4.10.2 Current New Plant Varieties Provisions

As is the case with layout designs of integrated circuits, statutory protection of new plant varieties has received little attention or action from the GCC member states, and there is little indication of external pressure within the context of the WTO upon the GCC states to comply with their TRIPS obligations at this stage.

Within their current patent laws, the GCC states have expressly excluded from patentability plants and essentially biological processes for the production of plants, as permitted under TRIPS Article 27.3(b). However, the states have either largely ignored the issue of protection of new plant varieties (Bahrain, Kuwait, Qatar and the UAE), or have added a few specific provisions on the protection of new plant varieties to the general provisions of patent laws (Saudi Arabia). Only Oman has followed the sui generis alternative offered by TRIPS Article 27.3(b) by enacting specific legislation for the protection of new plant varieties, although Bahrain for some years has had in local circulation a draft new plant variety protection law along similar lines to Oman’s law. Both Bahrain and Oman will be required to ratify or accede to the

230 Ibid, art 15(2).
UPOV Convention as part of their respective free trade agreements with the United States; Bahrain has recently lodged its instruments of accession, and the draft law will now need to be enacted to enable local implementation of the Convention’s provisions.  

Bahrain, Kuwait, Qatar, and the UAE do not make any provision or other reference, either in their respective patent laws or other intellectual property laws, for the protection of new plant varieties. Bahrain, Kuwait and the UAE have stipulated in their patent laws that patent protection shall not be extended to plant varieties and essentially biological ways for producing them (excluding microbiological processes or the products thereof), but have not developed any alternative protecting legislation. Qatar does not have its own patent laws, adhering instead to the GCC Unified Patent Regulation. However, the GCC regulation also excludes plant species and varieties from patent protection in the same manner as these individual GCC states. The Omani law follows the plant breeders’ regime for the protection of new plant varieties enshrined in the UPOV Convention. The law was prepared in consultation with WIPO and based on some (but not all) elements of the UPOV Model Law on the Protection of New Plant Varieties, from which it draws much of its text, although Oman is not a signatory to the UPOV Convention. Saudi Arabia, on the other hand, has adopted a hybrid approach that borrows both from patent-protection approach and the sui generis option. It dedicates five articles within its patent law specifically to the protection of new plant varieties, but also provides for the general patent provisions to apply equally to new plant varieties.

231 Bahrain lodged its instruments of accession in June 2005; the Convention came into effect in Bahrain in December 2005.
232 See the discussion on patentability in the GCC states’ patent laws under Section 4.4.2 and 4.4.3 above.
233 In June 2002, Qatar was advising the WTO Council for TRIPS that the GCC Council was currently examining a separate form of regulation on plant variety protection and that this legislation, once approved, would apply in Qatar. However, the GCC Council has yet to draft, let alone issue, such a law. See WTO Council for Trade-Related Aspects of Intellectual Property Rights, Review of Legislation: Responses from Qatar to the questions posed by Australia, Canada, the European Communities and their member States, Switzerland and the United States, IP/C/W/346 (02-3101), 5 June 2002, 1, 6.
Table 10:  Current New Plant Varieties Protection in the GCC States

<table>
<thead>
<tr>
<th>Country</th>
<th>Legal Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bahrain</td>
<td>Legislative Decree No. 12 of 2005 ratifying Bahrain’s accession to the</td>
</tr>
<tr>
<td></td>
<td>International Convention for the Protection of New Plant Varieties (UPOV</td>
</tr>
<tr>
<td></td>
<td>Convention)</td>
</tr>
<tr>
<td>Kuwait</td>
<td>-</td>
</tr>
<tr>
<td>Oman</td>
<td>Royal Decree No. 92/2000, the Law on the Protection of New Plant Varieties.</td>
</tr>
<tr>
<td>Qatar</td>
<td>-</td>
</tr>
<tr>
<td>UAE</td>
<td>-</td>
</tr>
</tbody>
</table>

Source: compiled by the author

4.10.3 Scope of Protection for New Plant Varieties

To qualify for protection, a plant variety, or its propagation types or elements, must be new or novel, distinct, homogeneous, and constant or stable. Saudi Arabia stipulates that for the purposes of its law, a variety is new or novel if it (or its propagating material) has not been marketed within the country for more than one year or marketed elsewhere for more than six years in the case of trees or vines or four years in the case of all other plant varieties. A variety is deemed to be distinct if it is distinguishable from other known varieties by at least one characteristic, is uniform if the differences between its elements are within generally accepted limits, and is stable if its main characteristics remain unchanged after repeated propagation. Oman does not include a definition or explanation of the meaning, limitations or characteristics of these conditions for protection in its law or refer back to the UPOV explanations, but defers them to the implementing regulations.
The right of protection by registration is granted to the breeder of the plant variety or his successors in title, the breeder being commonly defined as the person who breeds, discovers or develops a plant variety. Registration grants to the breeder, being the right owner, the right to:

- sole utilisation of propagating types and elements for the commercial plant production;
- transfer all or part of the utilisation right, with or without financial consideration;
- prevent third parties from utilising the right, and to seek precautionary relief;
- obtain legal compensation against infringements;
- require any person offering for sale or marketing the plant variety or its propagating elements to use the registered designation or name for that plant variety.

However, exceptions to this right permit use of the protected plant variety for experimental or research activities and personal non-commercial use.

Neither Oman nor Saudi Arabia formally recognise nor even acknowledge the right of the farmer to further propagate and use plant material which is the product of a harvest on his own holding, but which may otherwise be patent-protected plant material. Oman’s law devotes twelve articles to detailing breeder’s rights without once mentioning farmer’s rights or the equivalent.\textsuperscript{234} Saudi Arabia’s law in effect excludes any provision for farmer’s rights by stipulating that such acts as producing or propagating patented plant material, adapting it for the purposes of propagation, or storing it for such purposes, constitutes an infringement of the rights of the plant patentee.\textsuperscript{235} Such rights extend to harvested material in whole or in part. The Omani law, rather more

\textsuperscript{234} Oman, See Royal Decree No. 92/2000, Chapter Two, “Breeder’s Rights” arts 7-14, 16-17, 19-20.
\textsuperscript{235} Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), arts 56(a) & (b). These provisions in essence replicate the breeder’s rights as detailed in the WIPO Model Law, art 14.
succinctly, provides that an infringement constitutes any act of intentional infringement on the
breeding right registered in accordance with the law.\textsuperscript{236}

Both laws provide that protection is granted to plant varieties for available for a period of 25
years for trees and vines and 20 years for all other plants, from the date of granting of the right,
both provisions being consistent with UPOV and the WIPO model law.\textsuperscript{237}

The Omani and Saudi laws also provide for a system of compulsory licence to be available for
plant varieties, as is permitted under the TRIPS patent provisions, but for which no provision is
made in the UPOV and the WIPO model law.\textsuperscript{238} A non-exclusive compulsory licence may be
granted where the owner of the plant variety has not made sufficient use of the plant variety for
three years from date of registration, and has not otherwise agreed to grant a licence on
reasonable terms to the applicant, or where the award of the compulsory licence is necessary to
protect the public interest. The issuance of a compulsory licence does not prejudice the right of
the right-holder to reasonable compensation.

Oman's law has not received any real scrutiny from WTO. In the review of Oman's intellectual
property legislative regime conducted by the Council of TRIPS during June 2001, Oman escaped
any questioning by members on its plant variety protection law.\textsuperscript{239} Up to December 2005, the
Omani responsible ministry had not received any applications for the registration of plant
breeding rights, so the efficacy of the law has yet to be tested.

\textsuperscript{236} Oman, Royal Decree No. 92/2000, art 6.
\textsuperscript{237} Oman, Royal Decree No. 92/2000, art 9; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), art 19(c).
\textsuperscript{238} Royal Decree No. 92/2000, arts 21-22; Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004), arts 24-31.
\textsuperscript{239} See WTO Council for Trade-Related Aspects of Intellectual Property Rights, Review of Legislation: Oman,
4.11 Conclusions

The picture that emerges from the foregoing examination of the GCC states’ intellectual property legislative regimes is that, at the global level, the regimes have a thread of common purpose and generally a broad strategic direction. However, at the local level of individual laws, there exists both considerable similarity and significant deviation in their content and structure. In some instances, laws share common material, and it is apparent that there has been wholesale borrowing in a number of cases - to the extent that their texts (in the English language translations at least) are virtually identical. However, some laws also retain their own peculiar idiosyncrasies in other instances; they reveal glaring omissions and are notable for their brevity and lack of sophistication when compared with the corresponding statutes of their sister GCC states. This is particularly the case in respect of the region’s copyright laws.

From mid 2000, the WTO’s Council of TRIPS initiated a review programme of national implementing legislation of member states who had taken advantage of WTO’s five year transitional period from the date of introduction of TRIPS and states that had joined after January 2000. Bahrain, Kuwait, Oman, Qatar and the UAE all participated at different times in the review. The review is illuminating, because it would appear to indicate that the process, at least as far as the GCC states were concerned, was more important than the outcome. Kuwait was the first of the GCC states to undergo the review process, with the review of its laws initiated at the Council’s November 2000 meeting. At its subsequent meeting a year later, the Council Chair informed members that Kuwait had now provided answers to all follow-up questions, which had been circulated.249 The Council agreed that the item concerning the review

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of Kuwait’s intellectual property laws be deleted from the agenda, it being understood that any
debate or analysis of Kuwait’s responses to individual questions, the adequacy or otherwise of those
responses, or the general efficacy of its intellectual property laws, appears to have taken place.

A similar scenario existed in respect of the reviews of the intellectual property laws of Bahrain,
Oman, and the UAE, all of which were initiated in June 2001. By November that year, it was
reported that the initial answers provided by Bahrain and Oman were still being analysed by
some members, and responses from Oman and the UAE to some follow-up questions posed by
members were still outstanding. The meeting agreed that the review of Bahrain’s laws be
deleted from the agenda, while Oman and the UAE were urged to provide outstanding responses
without delay. The UAE reported in June 2002 that it was due to soon introduce patents,
trademarks and copyright laws which were TRIPS-compliant. Although the UAE still had some
responses to questions outstanding, the Council agreed to delete its review from the agenda.
Similarly, Oman’s review was also deleted at the September 2002 meeting when Council learned
that it had provided answers to outstanding questions.

Qatar’s review, scheduled for November 2001, was postponed to the second half of 2002
because Qatar was still finishing the process of bringing its intellectual property laws into TRIPS
compliance. At the June 2002 meeting of the Council, members were informed that Qatar had
responded to most of the questions submitted by members. Qatar provided a brief introductory
overview of the structure of its legislation in the areas covered by TRIPS and proposed changes

241 Ibid. 6.
242 WTO Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, 25-27 June 2002,
Document IP/C/M/36/Add.1 (02-4741), 10 September 2002, 3-4.
243 WTO Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, 17-19 September
to make its legislation TRIPS compatible.\textsuperscript{244} However, the review still remained incomplete. Thereafter, references to Qatar’s incomplete review of its legislation appear spasmodically between the November 2002 and June 2005 meetings, without any further input from Qatar or resolution of the review. And there the matter appears to have rested.

The form of the responses provided by the GCC states in their respective reviews consisted substantially of repeating back extracts and quotes from the laws themselves, with little in the way of commentary or explanation of any great substance. It should be remembered that the GCC states construct their responses with the guidance of WIPO; perhaps more accurately, the answers were prepared for them. One could be forgiven for assuming that the reviews were simply going through the motions, except in areas of genuine concern to the major players. Perhaps one reason for this role-play and the nature of the responses is that the real action of the developed countries to preserve their hold on the areas of intellectual property rights of concern and commercial interest was already moving into other fora outside the TRIPS context, such as the environment of the TRIPS-plus treaties and the forum of bilateral relationships. If the outcome of the Council of TRIPS reviews is, in essence, a ‘signing off’ on the compliance level of the GCC states’ intellectual property laws, then the states might feel entitled to argue that, by the end of 2002 that they established legislative regimes for the protection of intellectual property which generally comply with the international standards as laid down by TRIPS. However, as the foregoing review of the states’ intellectual property laws has pointed out, and which the states themselves would freely acknowledge, the legislative regimes still contain many shortcomings and omissions. While their achievements in the field of intellectual property protection have been impressive, being achievements that have occurred largely over a single generation, there is still further work to be undertaken to attain full TRIPS compliance.

\textsuperscript{244} Ibid, 4-5.
It should be no surprise that the intellectual property laws of the GCC states which are the most comprehensive, sophisticated are those relating to copyright and neighbouring rights, trademarks and patents, since these are the three areas which have concerned the developed countries in ensuring that their own rights and investments in the Gulf region are protected. The “lesser rights”, as they have been described herein, in which there is not the same imperative for preservation of interests and investments, have either gained some degree of protection by association or have been largely passed over.

A conclusion that emerges from a scrutiny of the GCC states’ performance in respect of their adoption of the international standards on intellectual property protection is that those states which were the original leaders in the process of establishing intellectual property protection regimes, namely Bahrain and Kuwait, have since lagged behind the other states in upgrading their laws and enforcement systems. It is somewhat incongruous that Bahrain is still operating with a trademark and copyright laws that predate TRIPS and are thus TRIPS non-compliant. On the other hand, the states which were last to set in place their intellectual property regimes, notably Oman and the UAE, have not only caught up with the other states, but have since surpassed them. The UAE, which was the last GCC states to introduce any intellectual property laws, has since been the first GCC state to adopt the major post-TRIPS agreements on enhanced intellectual property protection – notably the Patent Cooperation Treaty (PCT), the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).

It is suggested that the intellectual property laws of the GCC states are ripe for, and would be significantly enhanced by a process of review leading towards a greater degree of regional harmonisation. Such review should focus upon the elimination of some of those idiosyncrasies
and the **mutual adoption** of the positive and comprehensive elements of the more recent and robust laws. The existence of intellectual property laws which enjoy a greater degree of regionally common substantive provisions would make a useful contribution to state initiatives towards effective implementation. Given the importance of effective border controls as a crucial element in any enforcement strategy, common provisions relating to movement and control of goods across state borders would make a significant contribution to the campaigns to combat the increasing problem of regional intellectual property piracy and counterfeiting. Harmonised laws would also complement the other GCC regional trade initiatives – such as those directed towards regional free trade areas, common customs union, and the proposed common currency. The GCC states as a regional group have already embraced a regional patents protection law to complement their national patents laws, and have been examining for some years the practicability of introducing a regional trademark law – again, to complement national laws. At a more pragmatic level, a greater degree of harmonisation of the region’s intellectual property laws may well lead to an enhanced understanding of the laws themselves at the operational level, and facilitate the collectivisation of locally-nurtured talent and expertise that is emerging in the states’ various ministries, judiciaries and enforcement agencies. In contrast, the paucity of strategic regional direction leaves the individual states susceptible to the external unilateral pressures to conform to the intellectual property laws of the industrialised countries, rather than local laws which more appropriately address national and regional needs.

However, having the requisite laws, irrespective of whether they are TRIPS-compliant or still have TRIPS-related shortcomings, is one thing; being able to effectively enforce them and achieve the desired outcomes is another matter – as Chapter 5 explores.