Chapter 8

Future Directions –

TRIPS Anew, Insha’allah
8.1 Introduction

The primary objective of this thesis has been to examine the endeavours of the GCC states in establishing national intellectual property protection regimes which both meet their international treaty obligations and are congruent with their domestic policy objectives and needs.\(^1\) The benchmark for this examination has been the TRIPS Agreement.

The thesis argues that, since the late 1960s/early 1970s when they either gained their independence or emerged from sustained periods of international isolationism, the GCC states have undergone a transformation of their intellectual property legislative regimes at a very rapid rate—virtually in the timeframe of a single generation. This period of transformation has been marked by three major, but very different, phases of development of the regimes. Each phase has been characterised by significant degrees of foreign intervention which has directed or strongly influenced the construction of the states' intellectual property laws. But this foreign intervention has not necessarily caused the creation of laws which have been congruent with the states' needs or have achieved their objectives in terms of enforcement effectiveness.

The first of these phases, namely the pre-TRIPS period that continued through the mid 1990s, is notable for the dearth of sui generis intellectual property laws in place; the exceptions were few in number, and existed in the field of trademarks, patents and industrial designs. But even these laws were subject to foreign design; Bahrain's 1955 law on patents, industrial designs and trademarks was almost entirely and directly subordinate to the corresponding UK laws and processes. The Kuwaiti trademark and patent laws of 1961 and 1962 respectively were based on

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\(^1\) A secondary objective has been to establish a substantive record of the nature of the GCC states' intellectual property laws and the history of their recent development, since, to the author's knowledge, such a record has not been previously compiled.
Egyptian models which in turn derived much from corresponding continental laws. However, this dearth of *sui generis* laws does not mean that protection for certain types of intellectual property rights was not available; it existed in an overarching perspective in the divine laws of social and moral conduct laid down in the Qur'an and the Sunna of the Prophet. In a more corporeal and secular sense, and in the absence of any mainstream intellectual property framework, it also existed in the form of laws governing commercial activity and conduct. However, even these commercial laws were generally subject to foreign influence. In addition, the national frameworks for the control of publishing and public dissemination of printed material, which all GCC states actively enforced, also provided some limited protection for certain types of copyrightable material.

The second developmental phase is marked by the establishment of WTO, the consequent introduction of TRIPS, and a post-TRIPS flurry of legislative activity by the GCC states as they attempt to meet their statutory obligations to make their intellectual property laws TRIPS-compliant and their enforcement effective. TRIPS heralded a major shift in intellectual property by establishing unprecedented levels of protection to be enforced worldwide. However, the shift took shape by reference largely to the needs of the leading industrialized nations (and to a lesser extent that of the other major developed countries). WIPO, which had already been a significance influence on the states’ pre-TRIPS intellectual property laws, continued to play a crucial role in guiding the states in their compilation of their TRIPS-compliant laws and their enforcement, structural and administrative capacity-building. With fluctuating degrees of commitment, the states embarked on reshaping their intellectual property protection regimes. At one end of the spectrum, Oman, which possessed few intellectual property laws in the pre-TRIPS phase, introduced in 2000 in a single swoop a full suite of laws which addressed the TRIPS areas of intellectual property rights, plus protection for new plant varieties. On the other
hand, Bahrain and Kuwait, both of which had been the early pace-setters in regional intellectual property protection, still relied on copyright, trademark and patent laws which were either pre-TRIPS or derived from earlier pre-TRIPS laws.

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

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

- inadequacy and inappropriateness of the legislation not being drafted effectively or extensively;
- lack of human resources, funding and practical experience in the enforcement of intellectual property rights;
- insufficient knowledge on the part of right holders and the general public, concerning their rights and remedies;
- a general lack of training of enforcement officials, including the judiciary; and
- systemic problems resulting from insufficient national and international coordination, including a lack of transparency;
- challenges posed by the clash of alien cultural and economic mores with entrenched local societal attitudes.

For most of the GCC states, the principal barriers to the elimination of intellectual property infringements do not subsist so much in the substantive law, as in their practical application of the available remedies and sanctions. In those states which still have pre-TRIPS laws in force, the negative impact of the barriers are exacerbated by the presence of sanctions which are both inadequate and incomplete in scope and scale. But, irrespective of these inadequacies in a few older laws, the sanctions available to the authorities across the broad spectrum of the region’s
intellectual property laws are not being fully exploited. The reasons do not rest solely with the enforcement authorities or the judiciary; entrenched local societal, cultural and commercial attitudes also contribute to the development of this enforcement dichotomy.

There have also been areas of intellectual property within the GCC states in which there has been little or no foreign interest in establishing standards of protection in the states themselves—notably traditional knowledge cultural heritage and the offshoots of traditional medicines and indigenous plant species. However, the states themselves have for some years taken a particular interest in these areas and have taken the initiative in introducing some protection standards in these areas. All states have introduced laws to protect their cultural heritage; the exposure to the international norms of intellectual property rights have engendered an appreciation that these subjects are also a form of intellectual property entitled to protection within an international context. Oman in particular has taken a lead in this endeavour with the construction of a national database to register a number of forms of cultural heritage that encompass, song and dance, fabrics, textiles and weaving, silversmithing and traditional medicines. It has also commenced work on the registration of native plants. Oman’s action in declining to include in its FTA with the United States an extension of patentability to include all transgenic plants and animals, notwithstanding the fact that these provisions were included in the Bahrain, Morocco and Singapore FTAs may well be a small but important step in the preservation of its biodiversity intellectual property.² The other states may not be far behind.

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² See Chapter 6.5.3 earlier for further discussion on the Oman FTA provisions.
8.2 The Current Status of Intellectual Property Protection in the GCC States

By the end of 2005, all GCC states have established comprehensive legislative regimes for the protection of intellectual property. Most, but by no means all, of their intellectual property laws generally reveal a willingness to comply with the international standards of intellectual property protection as enshrined in TRIPS, even if at times they fall a little short in respect of the detail. The efforts of the GCC states in achieving these standards in a remarkably short period of time are impressive, but have been largely ignored by the major developed countries in their drive to impose upon the international community an economic/political system that has been built upon a western developed template, under the guise of global harmonization.

The comprehensive fabric of intellectual property protection that has now been constructed through a network of national laws and international conventions stands in stark contrast to the status at the beginning of the pre-TRIPS and TRIPS stages. The following table summarises the current situation in respect of domestic laws and international commitments in intellectual property the GCC states. The years listed in respect of national laws represent the year of introduction of the current law or most recent amendment of any significance. With only a few notable exceptions, notably the Bahraini copyright and trademark laws, the states’ current laws post-date TRIPS and encompass the major areas of intellectual property addressed in TRIPS. Membership of WTO has also had an impact on the nature and timing of the implementation of national intellectual property laws. Hence Oman introduced a whole suite of laws in 2000, the

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3 See Chapter 3.2, Table 1 and Chapter 3.5, Table 2.
year in which it achieved WTO accession. Saudi Arabia has been progressively upgrading its major laws since 2002, as part of its efforts to achieve WTO membership.

The status in respect of membership of the international bodies and adherence to the major international conventions and treaties encompassing intellectual property protection has also advanced apace. All GCC states are now members of WTO and WIPO, and all except Kuwait have acceded to the Berne and Paris conventions. Saudi Arabia is the most recent WTO member, acceding to the WTO Protocol in November 2005. As such, it has received a closer and more rigorous examination of its intellectual property legislative regimes by the other WTO members through the avenue of the Council of TRIPS.

However, the picture is not complete; the “lesser” intellectual property rights, as they have been described here, such as industrial designs, integrated circuits, plant varieties, and undisclosed information, have not attracted the same imperative for preservation of interests and investments, as have trademarks, copyright and patents. Hence they have received only brief reference by the GCC states, or have gained some degree of protection by association, or have been largely passed over.
Table 16: Current Intellectual Property Laws and International Conventions in the GCC States

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<tr>
<th>National IP Laws</th>
<th>Bahrain</th>
<th>Kuwait</th>
<th>Oman</th>
<th>Qatar</th>
<th>Saudi Arabia</th>
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Source: compiled by the Author

\(^4\) While all states have endorsed the GCC Unified Patent Regulations, and at various times have declared that they recognize its validity, only Oman and Qatar appear to have enacted statutes formally adopting the Regulations.

\(^5\) A local law report states that Kuwait has introduced new integrated circuits and trade secrets laws. However, news of the laws does not appear in other regular non-official sources on intellectual property, and notice does not appear in any Kuwait government websites. Accordingly, the report cannot be verified at time of writing.

\(^6\) The fta notation indicates commitments made by Bahrain and Oman under their respective FTAs.

\(^7\) Bahrain has formally acceded to Nice, but the other states have declared they subscribe to its classifications.
In any case, the benchmark for the quality of an intellectual property rights protection regime cannot be measured solely by the number of laws on the statute books or the number of international bodies joined or conventions adopted. "Any nation, industrialized or not, can choose virtually overnight to introduce any amount of intellectual property law it chooses but that would not necessarily change its backwardness." Shorn of the economic and cultural roots that is, or supposed to be, based on and evolve around, intellectual property is a set of indeterminate value except to those that the rules happen to serve because they codify the latter's national needs.

8.3 A Climate of Change

8.3.1 The Domestic Front

The GCC states efforts to protect mainstream intellectual property rights, notably patents, copyright, and trademarks have been highly commendable. In little more than a decade, the states have moved from a pre-TRIPS situation to a TRIPS-plus situation, at least as far as their legislative provisions are concerned.

But it is not surprising that the process of bringing these laws into full effect has lagged behind, since it has been completely unrealistic of the developed countries to demand that effective enforcement follows immediately on the heels of the laws themselves. Hence, for all the GCC

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9 Ibid.
states, the task is far from complete. The states have recently entered into a number of multilateral and bilateral agreements which have moved the benchmark well beyond that formerly set by TRIPS, but very few of these diplomatic commitments have been translated into local law and practice and into a TRIPS-plus era will require them to review and enhance both their legislation and their practices.

The development of the intellectual property regimes of the GCC states are works in progress. The rapid rate of progress has meant that, on occasion, laws, developments and initiatives have been initiated and replaced almost before they have had time to come into practical effect. However, the next major phase unfolding in this ongoing and fascinating story will most likely be the introduction of initiatives more attuned to national interests and needs, such as a stronger protective regime for traditional knowledge and cultural heritage. Associated with this initiative will be a fine-tuning of the more conventional intellectual property laws to also better reflect national interests. However, in this latter case, the opportunities for such refinements will be confined by, and will need to take place in the context of, the multilateral conventions and bilateral agreements into which the states have already entered.

Domestically, the states' current intellectual property laws still require further development to remove the idiosyncratic remnants of former laws, to bring them up to at least TRIPS-standards in those few cases of older laws, and to introduce sanctions that are effective deterrents. Furthermore, the states also need to reexamine and upgrade their intellectual property laws to now take account of the TRIPS-plus obligations they have agreed to under their respective bilateral agreements, and the TRIPS-plus treaties to which they have recently acceded. Bahrain and Kuwait in particular still have on their statute books intellectual property laws which not only fall well short of the current “highest international standard”, but which are also TRIPS-
deficient. Some of Bahrain's intellectual property legislative shortcomings have been addressed through the provisions included in its free trade agreement – which will require extensive amendments to a number of intellectual property laws. Bahrain has reportedly been upgrading its major intellectual property laws for some years, but these new laws have yet to appear.

Kuwait remains on the US Special 301 Priority Watch Listing, in part for the perceived deficiency in respect of deterrence in general and levels of protection against software and music piracy in its current copyright law enacted in 1993.10 According to recent regional media reports, authorities in Kuwait have been under intense pressure from the United States to add tough new measures to its existing copyright protection laws in the near future.11 Since the United States perceives the major weakness in the law to be its non-deterrent penalties, it will be pressuring Kuwait to introduce measures which include a doubling of the financial penalties and terms of imprisonment for infringements, as well as achieving more “compliance with international standards” on intellectual property protection.12 It will also require the laws to have a greater role for customs in intellectual property rights protection within the country, as well as greater coverage of IT-based issues within the scope of the regulations. A US government report on the issue warned that Washington would “consider all options, including but not limited to initiation of dispute settlement consultations in cases where countries do not appear to have implemented fully their obligations under the WTO Agreement on TRIPS.”13 The implication here is that, amongst other measures, the United States will continue to apply pressure for compliance through its Special 301 Report.


11 Jawad al-Redha, co-Chairman Middle East, Business Software Alliance, Quoted in the Gulf News, Dubai, 5 February 2005; available at http://archive.gulfnews.com/articles/05/02/05/150680.htm, last accessed 30 June 2005.


13 ibid.
Saudi Arabia will continue to face criticism from US quarters that its copyright law still lacks some basic minimum standards that are required by the WIPO Internet Treaties and TRIPS. Saudi Arabia still fails to adequately protect sound recordings, to provide for ex parte civil search orders and adequate remedies, to take action at its borders to confiscate pirated and counterfeit goods, and to provide transparency in the Saudi enforcement system generally. Saudi Arabia has also been criticised for the deficiencies of its patent administration system, with an apparent backlog of thousands of patent applications. While Oman’s initiative in 2000 to introduce a whole suite of seven separate intellectual property laws was a bold initiative, the apparent use of the one template for its “lesser” laws has allowed some incongruities to appear, and has caused some specific TRIPS provisions and some necessary enabling provisions to be left out.

Internationally, the GCC states will continue to be subject to US pressures to participate in the creation of a Middle East Free Trade Area. However, time will tell whether the bilateral agreements will continue to steadily elevate the standards of intellectual property protection, or whether the few variations which are reflected in the Oman FTA will be perpetuated and even increased, to cement a real change in direction. Certainly the UAE FTA, which was mooted originally to be completed at roughly the same time as the Oman FTA, has taken longer than originally anticipated, and it may still be some months before it is completed. The final state to complete an FTA with the United States may well be Saudi Arabia, but this may be academic, since many intellectual property issues have already been addressed as part of its market access agreement on goods and services which it was required to enter into with the United States as

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14 USTR, above n 10, 47-7.
part of its WTO membership requirements. In fact, the local Saudi press was incorrectly, but understandably, already calling this bilateral market access agreement a free trade agreement.\(^{16}\)

The admission of Saudi Arabia to the WTO in November 2005 and its accession to TRIPS is not likely to have any obvious impact of great significance on its intellectual property protection regimes. Saudi Arabia has already been required to undertake a major overhaul of its intellectual property legislation as part of their accession process – hence the impact has already occurred. In the last two years or so it has introduced new copyright and patents, industrial designs, integrated circuits and plant varieties laws, and acceded to the Berne and Paris Conventions as part of its campaign to achieve WTO membership. In any case, the US position on refusing to endorse Saudi membership of WTO is not directly related to intellectual protection, but to matters of international politics, trade and investment, notably US access to all aspects of the Saudi financial, banking and services sectors. However, the pressure upon Saudi Arabia to conform to US demands as a condition of membership presupposes that the way for TRIPS-plus standards to be introduced as part of its FTA will be a straightforward process. However, during its final accession acceptance Saudi Arabia has raised notice of prohibitions in respect of a number of imports and services, in accordance with the provisions of the WTO Charter Article 20, in order to protect Islamic values and traditions. The reservations include a total ban on the import of satellite internet receivers, pork, alcohol and narcotics, as well as bans on foreign investment, and travel, tourism and transport services in Makkah and Madinah, being the sites of Islam’s two holy mosques.\(^{17}\)

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Likewise, Yemen's accession to membership of the WTO and of the GCC will, in all likelihood, pass largely unnoticed outside the Gulf. Yemen has been seeking membership of the WTO since 2000, and of the GCC since 1996. While its intellectual property laws and enforcement systems as a whole are the most recent of all the Gulf states, it is also arguably the least important strategically and the least problematic in terms of the dimension of regional intellectual property piracy and other violations. However, its membership of WTO will complete the Gulf state memberships, and will likely coincide with its full membership of the GCC.

As the paradigm in international intellectual property protection moves from the traditional and well-established trade-related forms of protection – centering on trademarks, copyright and neighbouring rights and patents – to encompass the new emerging areas of traditional knowledge and cultural heritage, biodiversity, geographical indications with a global as distinct from a European context, and public health policy, so there will be a shift in the balance of the powers in the major international fora of WTO and WIPO. The GCC states, which to date have largely forsaken the international fora, may possibly assume in them a more vocal role as there develops domestically a growing understanding of intellectual property in the international context and a development of both an expertise and an understanding of IP and acceptance of the need for its proper protection.

However, the areas of arguably greatest challenge will not be in the creation of the laws or the acceptance of the principles behind them, or even the new areas of intellectual property which are embraced, but the establishment of the national and regional intellectual property infrastructures, and the skills development of the human resources to give effect to these national needs and aspirations. The states readily acknowledge that their infrastructures and human resource expertise are such that they are unable to enforce their intellectual property laws to the
standards they would seek and the standard expected of them by the developed countries and intellectual property right-holders.

The dichotomy that exists in the enforcement area will not disappear with the imposed introduction of new laws with even more stringent sets of control provisions, nor with bilateral agreements that allow the appearance of greater external scrutiny of policing practices. But there will be other factors remaining in play as the systemic and structural challenges are resolved. It has been suggested that piracy is not necessarily simply a manifestation of the lack of intellectual property protection or enforcement, but rather characterization of the incongruity of the laws to the degree of industrial development in the state. It may also be a manifestation of the denial of the sovereign right of a state to engage in lawmaking as it sees fit, which pushes it to adopt a position of indifference at best, or active resentment at worst, as regards the enforcement of foreign intellectual property. The perceived lack of legitimacy and fairness in forcing developing countries to subscribe to laws that significantly ignore their plight, and in particular to set up legal forms that are not congruent to the state of their economy and technology, will make the enforcement of foreign intellectual property in these countries an uphill struggle. Societies in developing countries will continue to resist changes to their intellectual property laws, and when they do make changes, they will be slow to enforce them in favour of foreign corporations at the expense of local merchants. To the extent that TRIPS-plus rules may adversely affect the economic interests of developing countries, passive resistance may be the most likely counter mechanism. The enforcement dichotomy shall remain for the time being, even though some of the states will continue to achieve successes against the

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18 Endeshaw, above n 8, 31.
19 Ibid.
20 Ibid, 34.
virtually uncontrolled counterfeiting and piracy that existed in the past. As the imperative for change becomes more internally driven, the successes against piracy will accelerate.

8.3.2 The GCC States and the International Arenas - New Memberships and New Agendas?

Developing countries have been described as “observers” in the intellectual property protection process, the implication being that they are unable in terms of expertise and capacity to match it with the developed countries. To use a sporting analogy, it might be more accurate to describe them as reluctant reserves from the second grades – required to watch the game from the sideline, but occasionally selected to enter the field of play. And in some sense the GCC states have been willing to play an observer or reserve role because it suits them at this point in time. They are only too aware of their shortcomings – in terms of legislation, infrastructure, judicial capacity and expertise in strategic intellectual property policy development and implementation. However, in this approach there is an altruistic pragmatism at play that can be too easily overlooked. Since adoption of TRIPS required laws encompassing particular and complex requirements, it made eminent sense to turn to the administrators of this multilateral benchmark, namely WIPO, to obtain such laws. By the same token, enforcement needs to be a visible action, which may be addressed by raids that are well-publicised. Yet, just as there is a cynicism on the part of the United States in respect of these attitudes, there is also a cynicism about the US publicly orated objectives in the region, and the states are not fooled about what some see as the

US double standards. They see the multinational community, of which the United States is the driving force, establishing a particular set of standards, albeit minimum ones, and then are confronted by the US government acting as agents for US businesses striving to drive up those standards.

In some matters, such as the protection of trademarks, the states’ position, as states of keen and astute traders, is not too disparate with the US position. In matters in which the states have not yet initiated a great degree of activity of local origin, such as patents protection, the US standards of protection generally do not present any imponderable difficulties. Oman, however, has shown in its FTA negotiations that it is not prepared to agree to the United States introducing unconditional and wholesale patent protection over all plant and animal forms – perhaps a realization that such action could be tantamount giving away something of its own heritage that may have enormous future potential for development in its own national interests. By declining to open the door completely on patents for plant forms, Oman is showing that it is prepared to stand firm on matters which it considers to be of particular intellectual property importance. It will be interesting to see whether the UAE, as the GCC state currently negotiating an FTA, will follow the Bahraini line or adopt the diversion away from conformity initiated by Oman.

Arab countries have been exhorted to play a more active role in the international arena by joining forces with like-minded countries. However, they are unlikely to be inclined to do so on their own volition unless there arises a particular need to develop a regional agenda that pays attention and care to their development needs and priorities. The GCC states already have in existence a regional structure that could serve as the logical springboard for launching a greater presence in international fora, namely the GCC itself. However, the GCC Council has its own

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internal dysfunctionality at present that militates against such effective presence on behalf of the Gulf states, the Middle East, the greater Arab world or another consortium of developing and least-developed nations. The GCC states, either collectively as a regional bloc or individually, have not attempted to make their presence felt in the affairs of the WTO or WIPO councils and committees, even with longstanding Saudi membership of the latter. The lack of active participation to date reinforces the view expressed earlier that membership of these two bodies, although necessary, was not always positively viewed and embraced with active participation by the states.

Where Saudi Arabia’s admission to the WTO may have some regional impact is in restoring to some extent its uneasy and strained dominating influence in the GCC, and thereby giving greater credence and influence to the GCC within the WTO and WIPO in the ongoing debate on the role and future directions of WIPO and TRIPS. With Saudi membership of WTO there may also emerge a regional bloc which, if it joins forces with other GCC members, and with other regional blocs such as ARIPO, and the “Group of the Friends of Development” bloc, may make a significant contribution to a shift in the balance between the developed and developing/least developed countries in the major intellectual property and development fora. With Saudi Arabia and Yemen achieving WTO membership, and Yemen securing membership of the GCC, there also arises the opportunity for these seven states to form their own GCC negotiating bloc within a greater Middle East or even wider Arab forum. While Saudi’s emerging presence may not directly create a bloc in its own right, it could very well make a change to the negotiating dynamics in the WTO.

ARIPO – African Regional Industrial Property Organisation. Member States are: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe.

The “Group of the Friends of Development” comprises Argentina, Brazil, Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, United Republic of Tanzania, and Venezuela.
8.3.3 The GCC States and a New Development Agenda?

In some respects, TRIPS has become somewhat superseded by the emergence of the new round of intellectual property lawmaking in the post-TRIPS world. WTO has stumbled at its recent ministerial meetings on efforts to liberalise global trade, and to also inject a greater degree of equity and access into TRIPS. At the same time, WIPO has been confronted with its own self-examination debate over proposals and counter-proposals which have the potential to significantly change its position and role in the global intellectual property arena. The new “international standard” of intellectual property protection in practical terms is fast becoming that which is defined by the terms enshrined in the latest bilateral agreement which the United States may have concluded, together with the prescriptions of the TRIPS-plus treaties, such as the WIPO Internet Treaties and TRIPS-plus conventions. The “highest international standards” become very much a moving target. Subsequent to the 2001 Doha Development Round, WIPO has been exhorted to shift its focus away from the promotion of intellectual property as a tool for economic development and instead place a greater emphasis on a development agenda.

A proposal for a development agenda for WIPO was first launched by Argentina and Brazil, and supported by a further 12 developing countries (the “Group of Friends of Development”), at the 2004 WIPO General Assembly. Over the next twelve months a further eight proposals were presented by WIPO member states on this issue, not all of which supported the development agenda. The Group of Friends of Development submission included proposals to:

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- amend the WIPO Convention to include explicit language on the development dimension;
- establish a WIPO Standing Committee on Intellectual Property and Technology Transfer;
- consider the elaboration of a treaty on access to knowledge and;
- formulate and adopt principles and guidelines for the development and implementation of technical assistance;
- consider measures to ensure wider participation of civil society and public interest groups in WIPO formulate and adopt principles and guidelines for norm-setting activities in WIPO;
- define and separate the WIPO technical assistance and capacity building functions from norm-setting related functions.

The United States countered with a proposal which advocated a partnership between members within WIPO’s current committee framework, and a very much reduced role for WIPO outside that framework. It proposed the establishment of a WIPO Partnership Programme, an internet-based tool to bring together all stakeholders to match specific needs with available resources to build on the current WIPO development programme. The Programme would have two elements – a Partnership Database and a Partnership Office. While the Programme would operate under the WIPO’s banner, the role envisaged for WIPO would be confined to the maintenance of the website and database, ensuring accessibility of all member states, evaluating requests for assistance, seeking partners for funding and executing projects. In other words, WIPO would no

longer continue to play its current active, autonomous and influential role in carrying out its development activities.

The US proposal would appear to be a targeted campaign to replace WIPO’s influential role in the development agenda by those few developed countries that have both the economic and political will to promote their own national agendas on international intellectual property protection. The partnership strategy advocated by the proposal is essentially a bilateral approach to international intellectual property development. It largely bypasses the WIPO inherent system of notional independence and checks and balances. It also enhances the legitimacy of the current US bilateral strategy, which has attracted considerable and sustained criticism from quarters of the civil society by placing the strategy squarely into the context of an apparent UN specialized agency.

However, in the US proposal there is no reference to audit or monitoring of the nature or direction of the assistance given – this being simply a matter between the developing country seeking assistance and the developed country providing it. The crucial element of financial management is also made clear in the proposal – the Programme would operate largely outside the WIPO budgetary framework and therefore outside the audit oversight. The unequal partnerships without effective moderation or independent audit, as envisaged by the US proposal, would have significant implications for developing and least developed countries. It would effectively establish investment and trade protection regimes of the type that the United States and the EU in particular have been attempting to achieve through the international fora, but on which they have been largely frustrated. The implications for the GCC states, however, may be somewhat different from other developing countries.
In a surprise move, Bahrain, in June 2005, injected its own proposal into the debate. Its proposal, co-sponsored by Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Syria, the UAE and Yemen, focuses on the importance of intellectual property in the social and economic development of developing countries, and their national development programs. The document includes specific proposals to:

- expand WIPO’s advice and technical assistance provided to SMEs and sectors dealing with scientific research and cultural industries;
- request WIPO to assist Member States in setting-up national strategies in the field of intellectual property;
- request WIPO to undertake studies to demonstrate the economic, social and cultural impact of the use of intellectual property systems in Member States;
- increase financial resources for technical assistance for promoting an IP culture with an emphasis on introducing intellectual property at different academic levels;
- request WIPO to prepare information and statistical data on technical assistance provided to developing countries and LDCs;
- request WIPO to establish a voluntary contribution fund to promote the legal, commercial and economic exploitation of intellectual property rights in developing countries and LDCs;
- request developed countries to encourage their research and scientific institutions to enhance cooperation and exchange with research and development institutions in developing countries and LDCs;

refer matters relating to functioning and management of WIPO to the competent bodies in WIPO for consideration;

- adopt guidelines while considering the Development Agenda process. The guidelines may include: financial implications for each proposal; means to avoid conflict between the role of WIPO and the international obligations of Members States; means to avoid confusion between the role of WIPO in facilitating negotiations on international treaties that it administers and the sovereign decision of Member States on whether to adhere or not to a specific treaty.

The Bahrain proposal is a conservative alternative, in essence maintaining the status quo while increasing the level of WIPO funding available to developing and least developed countries for development assistance. In practical terms, it is not that dissimilar to the US proposal, which seeks to limit the role of WIPO in providing assistance in favour of partnerships between developed members which could provide assistance and developing countries and least developed countries which seek it. The carriage of the proposal by Bahrain is a clever move presented by a non-aligned member from a group that has not had a strong presence in the past in the major issues before WIPO. Bahrain’s conservative proposal also represents an alternative to the US retrograde proposal, and has received public support within WIPO from the United States.

But the significance of the proposal by Bahrain and its co-sponsors in the context of this thesis is that it also constitutes a precedent for any of the GCC states in leading a major proposal to a WIPO General Assembly on a hotly debated subject of importance to the future direction of WIPO. Although not yet on the winning side, the Bahrain delegation has cleverly maintained sufficient distance between itself and the other major camps in order to maintain its perceived non-aligned position. It is also logical that Bahrain, arguably now having a closer diplomatic
relationship with the United States than the other GCC states following the completion of its FTA some months earlier, should be the main sponsor of its conservative proposal. Bahrain has also been the most diligent of the states in attending meetings of WIPO and its standing committees. The question arises, which only time can answer, whether this initiative may constitute the beginning of a higher profile for any of the states in particular, and the other Middle East countries in the affairs and politics of WIPO and the WTO. Cynics would argue in the negative, since all GCC states have been represented on WIPO for some years, without developing a vocal presence in its diplomatic and political arenas.

During the 2005 General Assembly's deliberations there was unanimous agreement on the importance of development. There were, however, divergent views on the best way to move the process forward. The majority of members favoured a continuation of the current process through the Inter-sessional Inter-governmental Meetings (IIMs), while a minority, led by the United States, proposed that the talks move to WIPO's Permanent Committee on Cooperation for Development relating to Intellectual Property (PCIPD). In a move that constituted a success for the Group of Friends of Development position and a setback for the US position, member states agreed "to constitute a provisional committee to take forward the IIM process to accelerate and complete the discussions on proposals relating to a WIPO Development Agenda and report with any recommendations to the General Assembly at its September 2006 session." Member states also decided that "in the interim and without prejudice to the provision of technical assistance, the PCIPD will cease to exist." The developing countries led by the Group of Friends of Development may have won the first round, but the game is by no means over.

28 The PCIPD was established in 1999 to deal with matters relating to cooperation for development with member states.
30 Ibid.
8.4 Concluding Remarks

The push by the leading industrialised nations, led by the United States, to establish a network of US controlled regional trade and political blocs as part of a global policy network-building exercise – which is what the US is striving to achieve with the MEFTA – will not be without its eventual costs. There are no illusions in the minds of the senior members of the GCC states that the United States, despite its public rhetoric to the contrary, will continue to place its own interests to the fore, irrespective of whether those interests may be contrary to international norms on intellectual property or in total disregard of the best interests of the protagonist states. Omani officials, for example, well remember that the United States, in a move that was tantamount to coercion, tried to pressure Oman into adopting a twenty-five year period of protection for patents, at the very last minute before Oman’s accession to the WTO was approved – a move which Oman successfully resisted, but which nevertheless generated some Omani resentment.31

At a Gulf major regional workshop on future GCC-US relations held soon after the 2004 US Presidential elections, the view was oft expressed that the US approach to the democratization of the GCC states constituted outright interference in their domestic affairs.32 The “messianic fervour” with which the United States pursues its democracy US-style agenda while ignoring the local character of the societies it is aiming to reform was seen as particularly problematic.33

33 Ibid.
Although the US Administration is a fervent driver of the ‘democratisation’ initiative in the Middle East, contradictory American regional interests will ensure that the initiative remains largely cosmetic in nature. The states in particular accuse the United States of not listening to the needs of the countries in the region or understanding the realities of the situation on the ground. Regardless of the prevalence of such views, there is no doubt that pressure from the US on the individual GCC states to continue to move towards the “highest international standard” will be ongoing.

Statements by US policy makers continue to reinforce a message of imposed change without consultation or consideration of local cultural values. When those statements include remarks that are critical of the states’ efforts at modernisation and reform and are derogatory to the region’s rulers, particularly when made while a guest in an Arab country, they are also unlikely to be forgotten or quickly forgiven. The following remarks of the USTR, which were made in the context of the launch of the US Administration’s MEFTA strategy, would not have endeared the US Administration to GCC state leaders:

“There is a vast wealth of human capital in the Middle East, waiting to be empowered. Now, the United States is making a long-term commitment to help those who will strive to reclaim a splendid past and create a new future: one of peace, hope, and opportunity.

The United States aims to brighten the Middle East with as many success stories as stars in the desert sky. To do so, we are charting a new constellation: shining lights of trade and investment that offer a clear course for countries in the region wishing to embark on a journey of economic openness and reform.”

Ibid.

Ibid.

The following remarks, aimed at the ruling elites of the GCC states, would also have created considerable pique and caused some disquiet:

“The U.S.-Middle East trade initiative complements and extends America’s already significant economic engagement with this region. Yet our efforts have been limited by old hatreds, political instability, corruption, bureaucracies and the privileged few who resist the competition of economic reforms, a search for enemies to blame instead of partners to build with, and price uncertainties for oil-dependent economies. To move forward, we need a unified regional strategy and a commitment to work together.”

The reactions of local policy makers and businesses to the US attitude on the gulf region surfaced during a recent Arab Business Council Conference in Bahrain on the Bahrain FTA. A number of participants reacted negatively to what they termed the “Big brother” attitude of the United States in respect of its bilateral trade agreements, perceiving them to be political devices to serve US interests in the region rather than tools to enhance the region’s economic prosperity. The claim by one US speaker at the Conference that “if Arab countries can integrate with the US through FTAs, it will be easier for them to integrate with each other”, was both resented and ridiculed by some subsequent speakers. The Jordanian Ministry of Industry and Trade responded:

“I really fail to see the logic that if you want to achieve Arab integration, you have to go to the United States.”

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37 Ibid, 7.
39 Ibid. The Jordanian Minister also acknowledged that, while the US-Jordanian FTA, signed in October 2000, had greatly enhanced Jordanian exports to the United States, and created many local job opportunities, it had failed to deliver know-how and knowledge to Jordanian industry.
Another local speaker argued that “FTAs are creating a negative environment. It is a waste of
time to think that we will achieve economic integration through the United States. The United
States will not be the gateway for our economic integration.”

Unless there is a fundamental change in US foreign policy directions to accompany the change
of US Administration after the next Presidential elections in 2008, the US strategy of
‘democratisation’ through trade-driven ‘harmonization’ will no doubt continue. The US
Administration’s methodology to achieve this objective, namely, creating a web of bilateral
agreements which enfold all GCC states into the Middle East Free Trade Area under US
coordination and direction, will also no doubt continue.

The people of the Gulf have a proverb, born out of mistrust arising from centuries of conflict and
exploitation:

“I do business with my brother, then my neighbour, then my fellow Arab, and then, and only if I have
to, with the Infidel.”

The substitution of imperial exploitation by economic and political exploitation does not change
the exploitation, only its character. Regrettably, it is not easy to change local attitudes borne out
of hard experience and reinforced over generations, and whose current-day justifications
continue to be reinforced. Cloaking the exploitation with a transparent veneer of adopted moral
superiority will only serve to exacerbate this ill-feeling and strengthen a determination to
generate change when the opportunity arises.

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40 Ibid.
The GCC states will accept without great demurral the demands of the United States and the other industrialized nations for the regional installation of the international frameworks of global intellectual property protection, and the manner in which they are demanded. Arabic cultural mores and a fine appreciation of the relative bargaining strengths of the protagonists dictate that they do so. However, such acceptance does not necessarily mean that the matter is closed and its conditions no longer negotiable. Adoption of an agreement may well constitute the conclusion of a matter and the fixation of its conditions in western eyes, but in Arabic minds it represents the status quo at a particular point of time.

In the intellectual property context, the GCC states will operate within the US-dominated paradigm for the time being. They will work towards developing those elements that suit their needs and advance their public policy objectives, and accept for the time being those elements which they are presently unable to resist or change. However most matters are forever changeable in Arabic eyes, and nothing is ever really concluded, even a formal agreement.41 Conditions agreed to in one context or point in time, may no longer be appropriate or tenable as circumstances change or time progresses. In any case, the hypocrisy of some industrialised nations in advocating the minimum (and maximum) mandatory protection standards of TRIPS, while virtually at the same time actively endeavouring to extend those standards in respect of copyright, trademarks, patent and geographical indications, and seeking to prevent new or equitable standards in respect of traditional knowledge and cultural heritage, and sharing of genetic resources, would not be lost on the GCC states.

It would be a mistake to assume that the Qur'an and the Shariah are no longer relevant in the intellectual property context, and thus will not have any influence in the future dynamics of the

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41 See Peter Williams, "Don't they Know it's Friday? Cross-cultural considerations for Business in the Gulf," (1998), 72-79.
intellectual property regimes of the GCC states. Public order, morality and the dictates of the Shariah, currently set protection parameters in the laws of the states in respect of copyright, patent and trademark protection, and will continue to do so, and the possibility of their influence growing in the future should not be discounted. Recent demonstrations throughout the Muslim world against the publications in an obscure Danish newspaper of cartoons that insulted the Prophet Mohammed (PBUH) are a graphic illustration of the power of radical Islam as a catalyst for change, even in the short-term time-frame. In the final analysis, the nature of the intellectual property protection regimes of the GCC states will be subject to further change and development, and that change is likely to involve a greater degree of internal influence than has been seen in the past – Insha’allah. 42

42 Insha’allah – literally, if the will of Allah. The Muslim believes that the hand of Allah is present in every event that occurs, or indeed, does not occur, in the mortal world. Nothing can happen without Allah ordaining it; by the same token, an event or action will not occur if Allah so ordains. Hence, conversations on future actions or events are invariably qualified by the phrase “Insha’allah”.