

Chapter 1

“Infidels at the Gates” –

Introduction and Context



1.1 Introduction and Context

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

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

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

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

¹ The Gulf Cooperation Council came into existence on 26 May 1981, in part as a response to perceived threats from an Islamic fundamentalist Iran, an imperialistic Ba’athist Iraq, the state of civil war in Yemen, and the recent Soviet intervention in Afghanistan – all of which threatened to destabilise the ruling dynasties in the Gulf region and to involve their states in wider conflicts. The one remaining Gulf state that is not a member of the GCC is Yemen, which has been seeking entry to the GCC since 1996. Until October 1995, Yemen existed as two separate states engaged in separatist movements and civil war. Yemen’s application has been sponsored by Oman and Qatar, but has been vetoed by Saudi Arabia, the main obstacle being the difference between Yemen’s and the GCC members’ political and economic systems. In January 2002, Yemen was granted observer status at GCC affiliated non-political bodies and agencies, and in October 2002, Yemen and the GCC signed a protocol defining the relationship between the two sides - considered to be the first step towards Yemen’s full membership of the GCC.

context of their accession to World Trade Organisation (WTO) membership, the consequent compliance with the requirements of the WTO's Agreement on the Trade-Related Aspects of Intellectual Property Rights (1994) (TRIPS) and the international conventions for the protection of intellectual property rights upon which the Agreement draws and builds, namely the Paris, Berne, and Rome Conventions and the Washington Treaty². In brief, TRIPS serves as the benchmark for this study. Because of length limitations, the thesis does not attempt to offer a detailed commentary on the text of each law, but instead focuses on the salient features of each area of intellectual property protection and their particular idiosyncratic features.

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

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

² The Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the International Convention for the Protection of Performers, Producers of Phonograms, adopted at Rome on 26 October 1961, and the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989. Although the Washington Treaty never entered into force, its provisions nevertheless became enforceable through TRIPS Arts 35 - 38.

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

An appreciation of the enforcement and recognition of intellectual property rights in the Gulf is incomplete without an understanding of the religious, political and cultural forces deeply rooted in Middle East history, that shape the protection of intellectual property rights in the Middle East today.³ Accordingly, the position of *Shariah* law as a major influence upon the intellectual property rights protection and the constitutional and judicial framework in which it resides is reviewed, as background and context for the examination of the region's intellectual property laws. The precedence of Islamic law, or the *Shariah*, as a legal imperative is unequivocal; its status has been described thus:

“Behind all secular law stands the *Shariah* law of Islam ... the *Shariah* runs like a golden thread through the legal systems of the Arab Middle East.”⁴

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

³ John Carroll, “Intellectual Property Rights in the Middle East: A Cultural Perspective”, (2000/2001) 11 *Fordham Intellectual Property Media and Entertainment Law Journal* 555.

⁴ William M Ballantyne, *Commercial Law in the Arab Middle East: The Gulf States* (1986), 1-2.

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

1.2 The GCC States and the Development of Intellectual Property Laws

What makes a study of these six GCC member states of current-day relevance and interest is that the emergence of each as a modern state is a very recent occurrence, and yet they have assumed a not insignificant regional and global influence in present international affairs and trade. With the arguable exception of Saudi Arabia, the other five states have taken quantum leaps in their national development, to emerge from being quasi-feudal or disputative tribal regions under actual or effective foreign domination into stable and sophisticated independent sovereign states, in just two generations or less. Bahrain, Kuwait, Qatar and the seven sheikhdoms of the Trucial States (that later formed the UAE) were still part of the UK Persian Gulf interests until they gained independence in 1961 (Kuwait) and 1971 (Bahrain, Qatar and the seven sheikhdoms). Oman, although long an independent sovereign state was still under British influence prior to

1970, and deemed the most feudal and withdrawn of all the Arab Gulf countries; it did not start to emerge from this pseudo-feudal state until the present sultan overthrew his father in a British-backed palace coup in 1970.⁵ The consequence of this dominant British influence, at least in the eastern Gulf region, was that a system of British laws and justice prevailed throughout the Gulf region until 1971 (except for Gulf nationals on matters within the province of Shariah law), and this influence, modified and added to by other western influences, continued well after independence.

As part of their ongoing respective political, economic and social metamorphoses, the legal systems of the GCC states have undergone dramatic, radical and progressive change and development over the last thirty years or so, and that change is continuing. The major trend has been a greatly increased codification of law and administered regulation which has entailed increasing substitution of institutionalised procedures for the former informal, discretionary exercise of personal authority sometimes based on local interpretation of Shariah legal principles.⁶ With this movement toward codification of the law and the institutionalisation of the judiciary and government, there has emerged a growing tension between the protection of local and national interests and traditions and the governmental recognition of the need to embrace western-based legal and economic principles, practices and infrastructures.

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

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

⁶ Nicholas Angell, "An Overview of Legal Structures in the GCC countries", Legal 500 Research Paper No. 3 (March 2002), available at www.legal500.com/devs/emirates/cc/uacc_010.htm

