

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

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 manoeuvrability that TRIPS permitted developing and least developed countries. The bilateral agreements are reinforced by demands that the signatory states not only adopt higher standards enshrined in the FTAs themselves but also adopt and adhere to a range of multilateral treaties which represent TRIPS-plus standards. Both the FTAs and the multilateral treaties reduce and restrict the flexibilities and 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.

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.³ 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

³ See Chapter 3.2, Table 1 and Chapter 3.5, Table 2.

