

The Dynamics Of Intellectual Property Protection In The Arab Gulf States

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This article discusses the performance of the Arabian Gulf Cooperation Council (GCC) member states (namely, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE) in protecting intellectual property rights, in the context of their accession to World Trade Organisation (WTO) membership, compliance with the requirements of the WTO's Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the post-TRIPS environment. In the span of a single generation, the intellectual property (IP) protection legislative frameworks of the GCC member states have undergone dramatic change and development - and that change is continuing. The change has been characterized by a major trend towards codification of laws, and an increasing substitution of institutionalised procedures for the former discretionary exercise of personal authority largely based on local application of Shariah law. Nevertheless, the states' intellectual property laws still contain idiosyncrasies peculiar to themselves and to the GCC. The driving force behind this development has been primarily external, and hence a dichotomy has arisen between the formal expression in the legislation and its practical application through the enforcement efforts. The dichotomy arises because of these external pressures to adopt laws for which the states do not yet have the expertise, infrastructures or cultural mores to effectively execute to the level of satisfaction sought by the more demanding developed countries. Even though the GCC states have regimes that are largely TRIPS-compliant, they now face ongoing pressures from developed countries, notably the United States, to adopt even higher standards of protection - TRIPS-plus standards. The pressure is applied through bilateral investment treaties and free trade agreements, which are then being promoted by the developed countries as representing the new international consensus on intellectual property protection standards. Accordingly, intellectual property protection in the Gulf region is still, in essence, "work in progress".

Field Of Research: Business Law/International Trade

1. Introduction

As part of their modern-day political, economic and social metamorphoses, the IP 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. At the same time there has emerged a growing tension between the protection of local and national interests and traditions, and international demands for the GCC member states to embrace international western-based standards of IP protection.

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In both the legal and commercial contexts, internationalization of IP is an intrusive process that demands an active re-examination by the state of its own laws and regulations. Arab countries are being driven by pressures from a variety of sources, such as the WTO and individual developed countries, to review and upgrade their laws governing a wide range of economic activity, and to introduce a widely embracing set of laws where none previously existed. Even the GCC itself has applied pressures for conformity in the intellectual property field, albeit with limited success, in the drive for a regional cohesion.

What makes a study of the 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.

Since the late 1960s/early 1970s when they either gained their independence or emerged from sustained periods of international isolationism, the GCC member states have participated in a transformation of their IP 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, with each phase characterised by significant degrees of foreign intervention. This intervention has directed or strongly influenced the construction of the states' IP laws, but has not necessarily brought about 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 developmental phases, namely the pre-TRIPS period until the mid 1990s, is notable for the dearth of *sui generis* IP 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 (WIPO, 1975). 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 (Khoury, 2003). 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.

The second developmental phase is marked by the establishment of the WTO, the consequent introduction of TRIPS, and a post-TRIPS flurry of legislative activity by the GCC states as they attempted to meet their statutory obligations to make their IP laws TRIPS-compliant and to effectively enforce them. While TRIPS heralded a major shift in IP by establishing unprecedented levels of global protection, the shift took shape by reference largely to the needs of the leading industrialized nations. Hence, the GCC

states embarked on reshaping their IP protection regimes with fluctuating degrees of commitment. Oman, for example, which possessed few IP laws in the pre-TRIPS phase, introduced in 2000 a full suite of laws which addressed the TRIPS areas of IP rights, as well as protection for new plant varieties. In contrast, Bahrain and Kuwait, both of which had been the early pace-setters in regional IP protection, continued to rely 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 IP protection regimes required by the TRIPS phase, they are faced with a new round of imposed changes as they enter the third and current phase – 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 (Drahos, 2003). 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 chapters on IP protection. The agreements constitute much higher standards of protection than those set by TRIPS; they also require the signatory states to adopt and adhere to a range of multilateral treaties which represent TRIPS-plus standards. Both the FTAs and the multilateral treaties also reduce and restrict the flexibilities and exception provisions that TRIPS allowed to developing 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' IP 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 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 (Price, 2004). 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. Blakeney (2004) suggests that the ineffectiveness of enforcement systems can be attributed, in many cases, to:

- legislative inadequacy and inappropriateness;
- lack of human resources, funding and practical experience in the enforcement of IP rights;
- insufficient knowledge on the part of right holders and the general public, concerning their rights and remedies;
- general lack of training of officials, including the judiciary, on IP enforcement;
- systemic problems resulting from insufficient national and international coordination, including a lack of transparency; and
- challenges posed by the clash of alien cultural and economic mores with entrenched local societal attitudes.

In those states which still have TRIPS-era 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, the sanctions available to the authorities across the broad spectrum of the region's IP 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.

2. The Current Status of Intellectual Property Protection in the GCC Member States

By late 2006, all GCC member states have established comprehensive legislative regimes for the protection of IP. Most, but by no means all, of their IP laws generally reveal a willingness to comply with the international standards of IP protection as enshrined in TRIPS, even if at times they fall a little short in respect of the detail. However, the efforts of the states in achieving these standards in a remarkably short period of time 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 IP 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. With only a few notable exceptions, namely the Kuwaiti copyright and trademark laws, the states' current laws post-date TRIPS and encompass the major areas of TRIPS. Membership of WTO has also had an impact on the nature and timing of the implementation of national IP laws. Hence Oman introduced a whole suite of laws in 2000, the 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. As a rather new WTO member, acceding to the WTO Protocol in November 2005, it has received a closer and more rigorous examination of its IP legislative regimes by the other WTO members through the avenue of the Council of TRIPS.

The post-TRIPS bilateral agreements are also having an impact on the development of this regional framework. For example, Bahrain's comprehensive suite of IP laws introduced during 2006, and its adoption of a number of WIPO-administered treaties during 2005, 2006 and 2007, result directly from its obligations which ensued under its Free Trade Agreement with the United States (USTR, 2004c). However, the picture is not complete; the "lesser" IP 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.

In any case, the benchmark for the quality of an IP 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. As Endeshaw (2003) argues, “any nation, industrialized or not, can choose virtually overnight to introduce any amount of IP 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.”

Table: Current Intellectual Property Laws and International Conventions in the GCC States

		Bahrain	Kuwait	Oman	Qatar	Saudi Arabia	UAE
	Copyright	2006	1999	2000	2002	2003	2002
National IP Laws	Trade Marks	2006	2001	2000	2002	2002	2002
	Patents	2006	2001	2000	2006	2004	2002
	GCC Patent Regulation	2004	yes	1993	2003	yes	yes
	Industrial Designs	2006	2001	2000	2002	2004	2002
	Plant Varieties	2006	-	2000	-	2004	-
	Geographical indications	2006	-	2000	2002	2002	2002
	Integrated Circuits	2006	2001	2000	-	2004	2002
	Undisclosed Information	2006	-	2000	?	-	2002
	Arab Agreement on author's rights,	-	1986	-	1986	1985	-
Bodies	GCC	1981	1981	1981	1981	1981	1981
	Arab League	1971	1961	1971	1971	1945	1971
	WTO (and TRIPS)	1995	1995	2000	1996	2005	1996
	WIPO	1995	1998	1997	1976	1982	1974
WIPO Administered Treaties	<i>IP Protection Treaties</i>						
	Berne, literary works	1997	-	1999	2000	2004	2004
	Brussels, satellite signals	fta	-	fta	-	-	-
	Geneva, phonograms	-	-	-	-	-	-
	Madrid, False Indications	-	-	-	-	-	-
	Nairobi, Olympic Symbol	-	-	1986	1983	-	-
	Paris, Industrial Property	1997	-	1999	2000	2004	1996
	PLT	2005	-	fta	-	-	-
	Rome, performers, producers,	-	-	-	-	-	2005
	TLT	2007	-	fta	-	-	-
	WCT	2005	-	2005	2005	-	2004
	WPPT	2005	-	2005	2005	-	2005
	<i>Classification Treaties</i>						
	Locarno, designs	-	-	-	-	-	-
	Nice, marks	2005	yes	yes	yes	yes	yes
	Strasbourg, patents	-	-	-	-	-	-
	Vienna, marks elements	-	-	-	-	-	-

<i>Global Protection Treaties</i>							
Budapest, microorganisms	fta	-	fta	-	-	-	-
Hague, Industrial designs	fta	-	fta	-	-	-	-
Lisbon, appellations	-	-	-	-	-	-	-
Madrid Protocol, marks	2005	-	fta	-	-	-	-
PCT	20067	-	2001	-	-	-	1999
UPOV, plant varieties	2005	-	fta	-	-	-	-
Universal Copyright (1971)	-	-	-	-	-	1994	-

Source: compiled by the Author

3. A Climate of Ongoing Change

The development of the IP regimes of the GCC states are works in progress. The next major phase unfolding in this ongoing and fascinating story may well 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 IP 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 GCC member states' current IP laws still require further development to remove the idiosyncratic remnants of former laws, to bring them up to current TRIPS-plus standards in those few cases of older laws, and to introduce sanctions that are effective deterrents. The states will also need to re-examine and upgrade their IP laws to 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. Kuwait in particular still has on its statute books IP laws which not only fall well short of the current "highest international standard", but which are also TRIPS-deficient. Accordingly, Kuwait still remains on the US Special 301 Report 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 (USTR, 2006). According to recent regional media reports (Gulf News, February 2005), Kuwait has been under intense pressure from the United States to add tough new measures to its existing copyright protection laws in the near future. 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 IP protection (Arab News, 31 August 2004). The United States has warned Kuwait that it 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." (Arab News, 31 August 2004). The implication here is that, amongst other measures, the United States will continue to apply pressure for

compliance on Kuwait and the other GCC states through its Special 301 Report mechanisms.

Internationally, the GCC member states continue to be subject to US pressures to participate in the creation of a US-sponsored Middle East Free Trade Area (MEFTA), as part of its global war on terrorism and its regional security and trade strategies (USTR, 2004b). However, time will tell whether the bilateral agreements will continue to steadily elevate the standards of IP 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. The UAE FTA, for example, which was mooted originally to be completed at approximately the same time as the Oman FTA (Gulf News, 10 March, 2005), is still under uncertain negotiations some eighteen months after the Oman FTA negotiation were concluded. Negotiations with Qatar, commenced after the Oman FTA, have also slowed down.

The admission of Saudi Arabia to the WTO in November 2005 is not likely to have any new and obvious impact of great significance on its IP protection regimes, since Saudi Arabia has already been required to undertake a major overhaul of its IP legislation as part of the accession process. 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 may well 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 (WTO, 2005).

As the paradigm in international IP 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 will there be a shift in the balance of the powers in the major international fora of WTO and WIPO. The GCC member states, which to date have largely forsaken the international fora, may possibly assume in them a more vocal role as they develop domestically an understanding of the implications IP in the international context.

Arab countries have been exhorted to play a more active role in the international arena by joining forces with like-minded countries (Al-Said, 2005). However, they are unlikely to be inclined to do so by their own volition unless a particular need arises 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 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 the longstanding Saudi membership of the latter.

Where Saudi Arabia's WTO membership may have some regional impact is in restoring to some extent its uneasy and strained dominant 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. Saudi membership of WTO may also be a catalyst for the emergence of a regional bloc which, if it joins forces with other GCC members, and with other regional blocs such as ARIPO¹, and the "Group of the Friends of Development" bloc, may contribute to a shift in the balance between the developed and developing/ least developed countries in the major IP and development fora. With Yemen eventually achieving both WTO and GCC membership, the opportunity for the seven Gulf 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 may very well generate a shift in the negotiating dynamics in the WTO.

However, the areas of arguably greatest challenge will not be in the creation of new IP laws or the acceptance of their underlying principles, or even the new areas of IP which are embraced, but the establishment of the national and regional IP 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 IP laws to the standards they would seek and the standard expected of them by the developed countries and IP right-holders.

The enforcement dichotomy will not disappear with the 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 (Endeshaw, 2003) that piracy is not necessarily simply a manifestation of the lack of IP protection or enforcement, but rather characterization of the incongruity of the laws to the degree of industrial development in the state. 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 IP in these countries an uphill struggle (Endeshaw, 2003). Societies in developing countries will continue to resist changes to their IP 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

4. Closing Remarks

The push by the leading industrialised nations, led by the United States, to establish a web of regional trade blocs as part of a policy of global political controlled networks – which is what the US is striving to achieve with the MEFTA – will not be without its eventual costs. There are few illusions in the minds of the senior members of the GCC member 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 IP or in total disregard of the best interests of the protagonist states. Oman, for example, was subject to pressure by the United States, in a move tantamount to coercion, to adopt a patent protection period of twenty five years, at the very last minute before Oman's accession to the WTO was approved – a move which Oman successfully resisted, but which nevertheless generated Omani resentment (World IP Report, 2000).

At a major Gulf region 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 (Gulf Research Centre, 2005). 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. In particular, the United States was accused of not listening to the needs of the countries in the region or understanding the realities of the situation on the ground.

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 United States Trade Representative (Zoellick, 2003), made in the context of the launch of the US Administration's MEFTA strategy, is unlikely to 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.”

And Zoellick's following remarks (Zoellick, 2003), 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.”

At a subsequent 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 (Arab News, 11 November 2005). 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 Minister of Industry and Trade responded that he “fail[ed] to see the logic that if you want to achieve Arab integration, you have to go to the United States.”

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.” (Arab News, 11 November 2005).

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.

The GCC member states may 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 IP 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 IP context, the GCC member states will continue to 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 (Williams, 1998). 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 perceived hypocrisy of some industrialised nations in advocating the highest possible mandatory protection standards in respect of copyright, trademarks, patent and geographical indications, while seeking to prevent the introduction of new and equitable standards in respect of traditional knowledge and sharing of genetic resources, would not be lost on the states.

Finally, it would be a mistake to assume that the *Qur'an* and the *Shariah* are no longer relevant in the IP context, and that they will not have any influence in the future dynamics of the IP regimes of the GCC states. Public order, morality and the dictates of the *Shariah*, still impact on 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 IP 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.

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