Islamic finance as a catalyst for an alternative approach to conventional intellectual property rights protection and growth

The potential relationship between Islamic finance and Intellectual Property law will be the main focus of this article. The relationship is analysed from the two perspectives of; how an intellectual property asset can be the capital for an Islamic finance product and for the main purpose of this paper, how Islamic finance can inform the development of an alternative approach to conventional intellectual property rights protection and growth.

The research analyses international intellectual property (IP) regimes with a particular focus on the Gulf Co-operation Council (GCC) states and an assessment of the relationships between legislation, enforcement mechanisms and to develop an alternative system to intellectual property protection by utilising the successful sharia based structures of Islamic finance as an alternative to conventional banking and to develop Islamic IP as an alternative to conventional IP. The main rationale behind why the GCC states have been analysed for the development of an alternative intellectual property model is they already comply with Trade Related Intellectual Property Rights (TRIPS) and with increased pressure to comply with TRIPS Plus standards, the GCC states are the ideal Union to adopt an alternative approach, with other similar states following suit. More importantly, what makes the GCC states a relevant case study for the research is that they are a unique Union in that all states abide by Islamic law.

A very early concept of using an IP asset in Islamic finance structures can be seen in the FWU AG sukuk for $55m. FWU issued the sukuk in 2012, making it the first sukuk of its kind that has intellectual property rights as the underlying asset in the form of a computer software programme, developed under an ijara structure. This is the first time a European country has issued an intellectual property based sukuk through the Dubai branch of its subsidiary FWU Dubai Services[[1]](#endnote-1)

Therefore it is a hybrid of Islamic finance and intellectual property rights within a sharia compliant framework that has developed under existing Islamic finance compliant products known as sukuk and ijara, which will be explained and examined further.

Introduction

The analysis of Islamic finance and the application of successful sharia compliant models in Islamic finance to intellectual property is a novel area of research, bringing together key lessons learnt from the success of Islamic finance, international intellectual property laws and applying them to the development of an integrated approach to intellectual property rights in the GCC and similar religious states. This is an innovative area of research as Islamic finance is a trillion dollar industry and most importantly withstood the financial crisis when conventional banking collapsed. Given the intellectual property market has the potential for growth in developing states, an innovative model incorporating Islamic finance principles with intellectual property to create an integrated intellectual property model, an Islamic intellectual property model. Therefore Islamic finance can act as a springboard to creating a modified sharia compliant intellectual property protection model. Through the development of an international integrated approach to intellectual property rights which takes into account; the structure of developing states, international agreements and pressures, the international institutions, Islamic finance and both societal and religious views will lead to a novel approach to international intellectual property protection.

In order to make recommendations on how Islamic finance can engender better compliance with current international intellectual property rights, the main Islamic finance products will be considered in terms of the rationale behind each product and the role of sharia boards in promulgating the sharia compliant frameworks[[2]](#endnote-2). Further, as the purpose behind analysing Islamic finance products is to identify the role Islamic finance can play in further developing intellectual property rights protection in the GCC, the areas of; musharaka, mudaraba, murabaha, sukuk and takaful will be analysed to propose potential application to intellectual property.

Purpose of Research

The research focuses on the intellectual property developments made by the member states of the GCC and how intellectual property development and subsequent deployment, can act as a catalyst for financial prosperity. The main purpose of the research is to analyse and examine the intellectual property provisions currently in existence within the GCC states. The aim is to provide recommendations to improve the current level of intellectual property protection at an international level in the GCC through an integrated intellectual property protection model.

There have been three main stages in the development of intellectual property in the Gulf states; a pre Trade Related Aspects of Intellectual Property Rights (TRIPS) stage, the current level of TRIPS compliance and a push towards TRIPS Plus. To date, each individual Gulf state has developed its intellectual property laws at varying rates. Post 2000, the Gulf states all display a set of intellectual property laws that are largely compliant with TRIPS. Therefore a question arises as to how much scope there is in the current laws to accede to more stringent intellectual property provisions. The research will show this is a key question for the GCC, its international partners and the wider trading communities of the World Trade Organisation (WTO). There is a widening gap between the level of intellectual property standards that are demanded by developed countries and the capability of the GCC states to enforce these standards (Price 2009).

Through intellectual property the region is opening itself up to further foreign direct investment which can lead to a positive impact on the economy (Ulrichsen 2011; Thirwall 2000 and Berg 2007). The underlying theme behind the legislative changes that have taken place in the GCC, is the influence of sharia law (Price 2007). The research will assess the impact of sharia law on the decisions taken by the GCC in intellectual property law development. It is an important area of study as developing Muslim countries are struggling with meeting international standards and a successful integrated approach to intellectual property rights could impact on a number of countries and trade agreements with developed states (El-Bialy 2011).

Where the study of intellectual property developments and Islamic law becomes multi-faceted is when consideration is given to the dichotomy that has arisen between the levels of intellectual property legislation in the Gulf states against the pressures from international states to increase intellectual property enforcement mechanisms. There are international pressures on the GCC states to adopt enhanced intellectual property laws for which they lack the necessary expertise, infrastructures and judicial experience to implement (Khoury 2007).

Research objectives

The research objectives addressed in this article are to:

* Examine the international pressures on the GCC to increase TRIPS compliance to TRIPS Plus.
* Analyse the success of Islamic finance, in particular the creation of sharia compliant frameworks as an alternative to conventional banking and the role of sharia boards.
* Apply lessons learnt from the successes achieved in the Islamic finance sector to the development of an integrated approach to intellectual property rights protection.
* Identify how intellectual property development in the GCC can be enhanced through Islamic finance.
* Propose a more sharia complaint model for international intellectual property development based on Islamic finance structures.
* Make recommendations on how intellectual property rights can be better protected by learning from Islamic finance.

Pressure on the GCC to increase from TRIPS to TRIPS Plus compliance

To present a current snapshot of the GCC at the TRIPS compliance level, the GCC is currently the European Union's (EU) fifth largest export market and the EU is GCC’s second trading partner and follows the main international provisions of the General Agreement on Trade and Tariffs (GATT), WTO and TRIPS[[3]](#endnote-3). The GCC have developed national laws and regulations in intellectual property rights to bring it in on par with legislative and regulatory developments in the international arena[[4]](#endnote-4). Since the formation of the GCC, the GCC Patent Office was established in Riyadh, Saudi Arabia, in 1992 and can grant patents across all member states[[5]](#endnote-5). The focus of developed countries, in particular the US, is to develop international standards beyond those offered by the GCC Patent Office. Despite its union status, the GCC has yet to finalise uniform provisions to meet the growing challenges posed for the development and diversification of national exports and international trade[[6]](#endnote-6). For instance, in an attempt to unify legislation, the GCC states have enacted a Trademark Law however this has not yet been put into effect[[7]](#endnote-7).The enforcement lacunae in the GCC approach to intellectual property is a common theme; laws are set up, legislation is enacted but the implementation stage of the laws lacks effective infrastructure-related action.

Each GCC state has incorporated TRIPS into their national laws and allowed TRIPS requirements to influence policies and procedures ((Adolf 2001; Kernohan 2004; Mohamadieh 2006 and Gervais 2007). After the Uruguay Round of trade negotiations, TRIPS was initiated as an agreement was reached between WIPO and WTO on the implementation of intellectual property worldwide (Khanna 2002). TRIPS promote a free market ideology, giving intellectual property right holders a minimum level of protection in foreign territories (Landes 2009). The TRIPS agreement outlines several important trade related aspects of intellectual property. It requires signatory countries to adhere to the Paris Convention, Berne Convention and other WTO Conventions[[8]](#endnote-8), giving it the alternative title of “Berne and Paris-plus” Agreement (Stamatoudi 2010). It necessitates implementation of its criteria for intellectual property protection through monopoly grants of limited duration, granting a monopoly over any type of intellectual property, enforcement provisions and dispute settlements methods. Each individual GCC state observes and strengthens their interests relating to TRIPS based on their internal development strategies and there is considerable variation between the states[[9]](#endnote-9).

In terms of TRIPS Plus, The main TRIPS plus criteria that the GCC will struggle with is the increased enforcement requirements. Efforts to reduce intellectual property infringement since TRIPS have been met with lukewarm success at best as seen in areas such as software piracy which are stagnant and therefore the Gulf states need to do more than simply make legislative changes (Price 2012). The danger for the GCC is a widening gulf between its intellectual property laws and the public acceptance of the new regimes.

These lacunae can be addressed through understanding the development and expansion of successful initiatives such as sharia compliant banking which under the heading of Islamic finance is an industry worth $2 trillion globally (Vizcaino 2015). Islamic finance products boost the economy in the GCC and by translating the successful sharia compliant banking model to intellectual property protection there is an opportunity to fuel a knowledge driven economy that promotes intellectual property rights in conjunction with established Islamic law principles as concepts of sharia law play a significant role in Islamic finance products.

Islamic Finance Products

The developments of Islamic finance in the GCC run parallel with the oil boom, (World Finance 2014; Warde 2000; Clement 2004 and Grais 2006), and over the last three decades, the GCC states have heavily invested in developing sharia compliant banking (Khan 2009; Garbois 2012 and Wilson 2009). As will be seen below, the GCC states have adopted far more sophisticated and rigorous infrastructures to developing an Islamic finance market than they have in regards to intellectual property. The central findings from the Islamic finance sector of how the products are structured and the compliance mechanisms in place, will be utilised to make recommendations for the intellectual property sector.

Musharaka (profit loss sharing of capital)

Musharaka is one of the most established sharia compliant products and is based on the basic tenets of Islamic finance that require the financing to operate on a profit loss sharing system as oppose to a lender borrower relationship (Jobst 2007). There are different definitions of the profit loss sharing partnership, depending upon the contribution each partner is making. The most common profit loss sharing relationship is known as musharaka where the proportion of profit to be distributed between the partners must be agreed upon when the contract is agreed. The defining feature of musharaka is that the ratio of profit for each partner must be determined in proportion to the actual profit accrued to the business, as oppose to the proportion of the capital invested by partners. Secondly, musharaka deals with the sharing of loss. Where there is a loss, musharaka stipulates a sharing of the loss in exact accordance with the capital invested by each partner. Therefore, where the profit is determined by the actual profit accrued to the business, the loss is calculated by the ratio of investment (Ghais 2009).

Risk-sharing partnerships based on musharaka could be a natural fit for intellectual property investment with returns flowing in from hybrid musharaka and intellectual property based projects, licensing, royalties, subscriptions and sale of the intellectual property assets. There is a lack of understanding of intellectual property based financing among the Islamic financial fraternity, both within the GCC and beyond, to become involved in intellectual property innovation, to fill the financial gap between ideas and the ability to commercialise them into marketable products and services (Hamzah 2011). As musharaka is the profit and loss sharing of capital, the sharia compliant frameworks for musharaka can be extended to intellectual property based capital. The value of the Intellectual property asset can be the equivalent to intellectual capital invested and profit parameters can be based on agreed values.

Mudaraba – profit loss sharing of trade and capital

Another form of a profit loss sharing relationship in Islamic finance that differentiates from mushraka due to its sharing of trade and capital is known as mudaraba, it varies from mushraka as not all partners have to provide capital. Mudarabah is a special kind of partnership where some partners can provide work in trade and others can provides the capital. The partner that works in trade is known as the “mudarib” and the partner that provides the capital is known as the “rabb ul-mal.”

There are three distinct differences between musharaka and mudaraba. Firstly, the investment is not the same in the two types of investment. In musharaka the investment comes from all the partners, whereas in mudaraba the investments come from the partner or partners that are investing the capital, the rabb-ul-mal. Therefore, the musharaka is a partnership where the profit and potential loss is capital, while mudaraba is a partnership in profit not in capital. Secondly the management of the mudaraba and musharaka vary. In mushararkah, the partners can determine who participates in the management of the business and to what level as well as who can work for the business. In mudaraba, the mudarib participates in the management of the business and not the rabb-ul-mal (Amin 1986). Thirdly, the sharing of loss is not the same. As not both parties provide capital in mudaraba, the loss cannot be shared based on capital invested. Instead, the party that provides capital loses capital and the party that provides the trade loses their labour(Heck 2006).

From an intellectual property stance, mudaraba contracts aim to make profit by sharing trade and capital, therefore the capital need not only be in a tangible form but can also be intangible property based capital. As a mudaraba agreement is a contract in which certain property or stock is offered by the owner or to the other party to form a joint partnership(Rahman 2007), there is the potential to develop intellectual property based mudaraba agreements.

Murabaha – contract of sale

Murabaha is a contract of sale, also known as cost plus financing and is primarily concerned with Islamic financing. There are specific features of murabaha where there is a set increment on the original price, which is agreed upon by the parties from the onset. By agreeing the set increment on the original price in advance, the expected rate of return is predetermined(Iqbal 2011). The main purpose of this is to avoid usury. By making both the original price and profit to be made known to the buyer, the risks of usury in the dealings are limited. Along with the profit being known, all the expenses to be acquired by the seller in honouring the agreement, such as freight costs or custom duty, are included in the cost price. The mark up is then applied to the aggregate cost (Karim 2013).

Murabaha has a great deal of crossover potential to intellectual property as one of the founding tenets of intellectual property protection in sharia law is found in Islamic principles of contract law. Intellectual property assets such as trademarks, patents and copyrights, can act as underlying assets of a murabaha contract. This is a novel approach to trademark protection in Islamic countries as it is applying risk-averse strategies that are found in Islamic finance to intellectual property rights protection and is an area of further research. For example, a murabaha mode of financing may be sought from an Islamic bank to purchase a trademark. The Islamic bank may purchase the trademark and sell it on the basis of a murabaha agreement with a mark-up price to be paid back over a an agreed time period. The Central Bank of Malaysia’s sharia advisory board has considered intellectual property as the subject matter of a murabaha contract. The illustration it provides is; “*a customer seeks financing from an IFI to purchase a brand name of a distributor known as Fitforall valued at RM500,000 that will enable the customer to be part of the retail chain to sell the goods under the brand name. The brand provides product quality assurance to existing and potential brand-loyal customers, as well as an established international distribution network. The IFI may purchase the brand name and sell it to the customer at a mark-up price of RM750,000 to be paid over a period of 5 years*”(Bank Negara 2010).

Sukuk- Islamic bond

A sukuk is an Islamic bond that defines the proportionate beneficial ownership of the asset to the investor, for a specific time period (Balala 2010). A sukuk is set up in such a way that despite the sukuk investor having a common share in the ownership of the assets based investment; it does not represent a debt owed to the issuer of the bond (Eisenberg 2012). Whereas in conventional bonds, the capital protection is achieved through a loan agreement, sukuks are able to distinguish their structure from conventional bonds by offering an alternative to the traditional loan agreement. Instead, there is a binding agreement by the issuer to repurchase certain assets over a specified time limit (Godlewski 2011).

Sukuks allow Islamic finance institutions to access short to long term financing against government backed bonds. For example, in Bahrain, the Central Bank of Bahrain will issue sukuks on behalf of the government (Ali Qayyum 2011). Sukuks are a growing product in the Islamic finance world and cover a range of underlying assets such as; a partnership bond (mudarabah sukuk), a joint venture (musharaka sukuk), leasing (ijara sukuk), purchase orders (murabaha sukuk), project finance (istisna sukuk) or a combination of assets (Garg 2012). Sukuks issue a profit rate as oppose to an interest rate that would be found under a conventional bank (Afshar 2013). The profit rate is deemed sharia compliant as it reflects the productivity of the asset Islamic Finance Resource 2010). Sukuks are growing at a fast pace, both within the GCC states and globally. Sukuks have been offered by the GCC and Malaysia, the traditional Islamic finance hubs, as well as Turkey, Pakistan and the United Kingdom. Most notable is the UK’s bid to stamp its mark in the Islamic finance sector by issuing the first sovereign sukuk by a non-member of the Organisation of Islamic Co-operation, (HM Treasury 2014). Other non-member countries are also considering sukuks, for example, Luxembourg, Tunisia, Kenya and South Africa (Strohecker 2014).

Sukuks are commonly offered under ijara based structures. Ijara translates to a lease agreement, operating as a contractual hiring agreement where a contract is entered in to where the consideration is the benefit received from an asset or a service in return for compensation. The contracting parties are defined as the lessor who is the owner of the asset and the lessee who is the beneficiary of the property. Ijara relates to the usufructs of assets and or services from the lesser to the lesee. Ijara is not a delayed sale as such as ownership remains with the lesser and the lesee has a right to the use of the asset (Ghuddah 2007). Sukuks is an area of Islamic finance where the underlying asset of the ijara based structure is intangible property.

The link between intellectual property and Islamic finance is only just starting to emerge. The first ever sukuk with the underlying asset a form of intellectual property right was introduced by the German based finance company, FWU AG Group. FWU AG Group issued a US $55,000,000 sukuk in 2012, making it the first sukuk of its kind that has intellectual property rights as the underlying asset in the form of a computer software programme, developed under an ijara structure (Qayyum 2013). This is the first time a European country has issued an intellectual property based sukuk through the Dubai branch of its subsidiary FWU Dubai Services GmbH. The financing for the sukuk was provided by GCC-based investors (Rizvi 2013). Therefore it is a hybrid of Islamic finance and intellectual property rights within a sharia compliant framework that has developed under existing compliant products of sukuk and ijara.

Takaful – Islamic insurance

Takaful is a sharia compliant form of insurance. Takaful, at its core, is founded on specific principles concerning the separation of shareholder operations from the funds. The ownership of the takaful passes to the policyholder and is based on elements of shared responsibility, joint indemnity and common interest (Takaful Islamic Centre). Takaful offers insurance by setting up a contract between participants who each contribute money into a pooling system in order to guarantee each other against loss or damage. Takaful, thus provides an alternative to commercial insurance which involve riba and gharar, while setting out responsibilities of each participant to cooperate and protect each other. Takaful is sharia compliant as it sets from the onset how profits from the investment are to be shared(Htay 2012).

In a takaful contract, each participant is expected to make a mutual contribution, known as tabarru, which aims to limit the risk of uncertainty that typically exists in conventional insurance agreements(Anthony 2011). Takaful can be combined with existing Islamic finance products such as mudaraba or a hybrid of different products (Caprio 2012). In relation to intellectual property, takaful can be vital leverage in the contractual agreement as it offers security and a contingency plan to investors.

Despite the various anomalies in the level of sharia compliance by each GCC state and in the interpretation of Islamic finance by different Islamic finance institutions, Islamic finance is a growing industry in the GCC (Anderson 2014; Kassem 2014 and Colombo 2014). All the GCC states have varying levels of sharia compliance, yet despite this; they are able to offer a range of products that are accepted by the public. This is a key feature of the success of Islamic finance that the intellectual property sector has not managed to address. If Islamic finance can continue to grow within the GCC and despite the varying levels of sharia compliance in each individual state, then there are grounds for developing similar Islamic based intellectual property structures that can be adopted across the GCC states.

Islamic finance sharia boards

The crux of the success of Islamic finance is in its sharia boards, prominent scholars who are well respected and the decisions of whom are accepted. Although serving on several sharia boards consecutively has been criticised, it can also be said to be a vital lever for success in the industry. By having sharia scholar from different states serve together on a given board, it gives the decisions unilateral appeal and as a result, more weight. This is mainly due to the fact that the decision is consequently not seen as the decision of one nation or one particular school of thought, but rather as a sharia compliant decision that appears to transcend cultural and political differences.

The intellectual property sector in the GCC does not have the same level of emphasis on sharia boards and this is where both developed countries and Islamic countries as a whole are missing an opportunity in gaining public acceptance of the intellectual property sector.

Further Islamic finance is constantly evolving and adopting practises in order to offer some level of co-ordination between various sharia based finance institutions. Most recently, attempts have been made to rank the efforts of the main countries offering Islamic finance products to regionalise the regulatory frameworks of the Islamic finance industry. The Islamic Centre for the Development of the Private Sector (ICD) and Thomson Reuters have attempted to rank countries that operate Islamic Banking. ICD and Thomson Reuters have developed a composite weighting index to measure overall performance of Islamic Finance by an aggregate assessment of quantitative development, knowledge, governance awareness and corporate social responsibility (Islamic Centre for the Development of the Private Sector (ICD) and Thomson Reuters 2013). The first report was published in 2013 and Bahrain has been the best performing GCC state in both 2013 and 2014.

The role of Islamic finance in intellectual property

The potential role of Islamic finance in the development of an integrated approach to intellectual property protection in the GCC has not yet been fully considered. The first ever intellectual property based sukuk within an ijara structure was introduced by the German based finance company, FWU AG Group. The intellectual property based sukuk introduced by FWU AG Group demonstrates how intellectual property based assets can be a viable option in Islamic finance services and structures. Consequently Islamic intellectual property financing will not only protect the intellectual property rights in the underlying asset, but promote intellectual property rights as sharia compliant and therefore stemming from Islamic, rather than western roots.

The link between Islamic finance and intellectual property is only just starting to emerge with the global Islamic finance market closely following FWU’s intellectual property based sukuk. Many other countries are now developing Islamic finance based products and it is only a matter of time before intellectual property as an asset permeates the Islamic finance sector. Hence why, an integrated approach to intellectual property rights through the medium of Islamic finance will prove crucial to not only the GCC states, but across all international regions.

Islamic finance as a vehicle to drive intellectual property in the GCC

Overall, there are four main components of Islamic finance regulation that need to be re-enforced in intellectual property protection. All the GCC states have; developed some form of a financial market infrastructure, they have improved consumer and investor protection, promoted regulatory cooperation, have built and continue to build human capital. Therefore, rather than treating intellectual property as standalone rights, the systems and regulations in Islamic finance can be applied to intellectual property protection.

By placing emphasis on more effective co-ordination between the GCC states, there is an opportunity to improve enforcement and public acceptance of intellectual property law. Intellectual property protection needs to be developed under five main strands; consistent regulation of intellectual property rights demonstrating consistency with sharia law, strengthen the intellectual property market structure, improve compliance in terms of systems and controls, address issues around the efficiency of supervisory procedures and most importantly, engender greater public confidence in the intellectual property sector.

Intellectual property based sharia boards

The first area of Islamic finance that would make a significant change to the governance of intellectual property in the GCC is an intellectual property rights equivalent to Islamic finance sharia boards. Although there is a general acceptance of intellectual property rights in the GCC and each GCC state is TRIPS compliant, internal frameworks for exhibiting a level of sharia compliance that is both transparent and publicly accepted are not quite there. The first recommendation, from the analysis of Islamic finance, is to address the shortfall in the somewhat minimalistic approach to intellectual property protection through the introduction of intellectual property based sharia boards. **The recommendation is twofold, firstly to adopt the successful principles of Islamic finance and secondly to overcome the shortcomings in Islamic finance from the onset[[10]](#endnote-10).**

Each GCC state has a dedicated institution to intellectual property protection. These institutions are heavily influenced by international pressures to conform to higher standards of TRIPS without addressing the reasons behind why the GCC states are struggling to maintain TRIPS compliance, let alone accelerating to TRIPS Plus. Therefore, there are two levels of intellectual property sharia boards that are required.

An overarching regional board that is represented by each GCC state and comprises a GCC state level intellectual property board would act as a higher authority for internal disputes and appeals. The regional board would have clear criteria for what constitutes an Islamic intellectual property scholar. Oman, as the latecomer to Islamic finance had an opportunity to not only reinvent the wheel with Islamic finance in the GCC, it reflected on the shortcomings of the sharia boards in other states to give Islamic finance the best start possible. It is the same logic that needs to be applied to intellectual property, as this is an opportunity for the GCC to mitigate ahead of the changes in the international market. The overarching GCC intellectual property board can set limitations on how many boards an Islamic intellectual property advisor can be a member of, the maximum tenures, the level of commitment needed from each board member and their key duties.

The intellectual property system in the GCC is missing an “Islamasisation” of the rights that the GCC states are obliged to protect, both from national legislative commitments and international agreements. By Islamasisation, the meaning behind this is to add a bridge between international standards on intellectual property and national laws. By investing in intellectual property sharia boards which are composed of well-respected scholars who can create sharia compliant frameworks that specify how intellectual property rights are compliant, the GCC states can develop from a TRIPS compliance level to an integrated approach to potential higher standards. It requires taking a step back from the current approach to intellectual property and re-evaluating the approach through a different lense, through Islamic finance. The regional Islamic intellectual property sharia board can act as a higher authority and the sharia scholars that sit on the regional board should not sit at a national level board to avoid potential conflict of interests.

National level intellectual property based sharia boards will add an extra tier to the integration of intellectual property in the GCC as it is clear that not all the GCC states adhere to sharia law at the same constitutional level. By creating national level boards, each GCC state can safeguard its autonomy and create a stronger and more efficient sharia compliance framework for intellectual property in line with its own legislation and governance. As discussed earlier, not all the Islamic finance sharia boards follow a centralised system, however they are able to govern Islamic finance successfully.

Therefore the practices national Islamic intellectual property based sharia boards can adopt from Islamic finance sharia boards are: to set standards for what qualifications an Islamic intellectual property sharia scholar should have, minimum and maximum terms of appointment, minimum attendance requirements and sub divisions based on individual areas of expertise in intellectual property.

**Strengthen the intellectual property market structure**

The intellectual property market structure in the GCC highlights pertinent structural and operational flaws in the current intellectual property system. As a synopsis, the structure of intellectual property protection in the GCC is regionally led through the GCC patent office, as well as national provisions such as domestic patent offices and intellectual property rights protection and enforcement institutions. The GCC patent office is ill equipped to cope with the sheer number of patents filed with the number of applications in progress in excess of 15,000 (GCC Patent Office).

Therefore in order to strengthen the intellectual property market structure, lessons can be learnt from Islamic finance. **The three main recommendations are; to adopt regulation and auditing frameworks for Islamic finance sharia boards, have a sharia compliant structure in place for each type of intellectual property right and develop intellectual property based assets within an Islamic finance structure.**

Islamic finance sharia boards are subject to scrutiny and review, there are national level issues as not all GCC states adopt a centralised model nor do they impose limitations on sharia scholar commitments, however each GCC state offers structural parameters which are not so apparent in intellectual property. By implementing national and regional level structures there is more co-ordination of intellectual property as a holistic approach to development as currently there are ad hoc powers delegated to state institutions without the necessary harmonisation of structural frameworks.

Fundamental to the success of Islamic finance is that it has created sharia compliant alternatives to conventional financial products. The intellectual property field has not done this and as a result intellectual property rights have failed to shake off their “foreigner rights” image. There is legislation and rules in place to prohibit riba and gharar in intellectual property, however Islamic finance has gone one step further and developed an Islamic version of conventional financial products. To succeed in developing an integrated approach to intellectual property, the GCC states need to develop alternative sharia compliant structures to existing intellectual property concepts.

Thirdly, the GCC states, in their bid to be market leaders for Islamic finance, need to invest in research and development structures that build on the work of FWU AG group and incorporate intellectual property based assets in existing Islamic finance products. By developing intellectual property based assets through Islamic finance, the assets are better protected as in the eyes of the public they have a seal of approval by sharia scholars.

The identified shortcomings in the Islamic finance structure which should be addressed in the integrated approach to intellectual property rights are; the lack of a centralised database of scholars, continued professional development of scholars, adopting a fit for purpose approach and addressing transparency issues.

**Improve compliance in terms of systems and controls**

Systems and controls already exist in intellectual property protection in the GCC. In safeguarding against intellectual property infringement and offering better protection, Customs law has been an area of development for the Gulf region[[11]](#endnote-11). The Common Customs Law of the Cooperation Council for the Arab states of the Gulf is adhered to by all the GCC states and prohibits the admission, transit or exit of prohibited or infringing goods except with the approval of the customs authorities. It also prohibits the admission into free zones of goods that infringe intellectual property rights. Qatar passed the first stand-alone legislation regulating intellectual property protection in border measures with an emphasis on improving the intellectual property eco system in relation to enforcement against piracy and counterfeiting[[12]](#endnote-12). To date, the customs authorities have been the most prominent in restricting trade in counterfeit and pirated goods. This epitomises the GCC approach to intellectual property compliance as it is a very top heavy approach. The GCC states do not have access to the level of resources available to countries with developed intellectual property systems, in terms of; infrastructure, legislation, case law, technical expertise and independent reports (Endeshaw 2006; Rizk and Shaver 2010). Therefore, there are specific development needs in relation to the systems and controls that are currently in operation.

In order to improve existing systems and controls in intellectual property, the GCC states need to take a step back from the front line issue and reassess their compliance procedures to be able to take a holistic approach to intellectual property rights protection. **A potential avenue through which to improve existing systems and controls in intellectual property is to learn from the shortcomings in Islamic finance in this regard namely by; setting up internal auditing committees, introducing governance ethics, initiating periodic reviews and assurances for intellectual property rights.**

Address issues around the efficiency of supervisory procedures

There are practices from Islamic finance that can have a positive influence on how the GCC states supervisory procedures operate in the field of intellectual property. There are issues around transparency and disclosures in intellectual property law which could be addressed by setting up case specific supervisory boards. There is no accessible database or bank of information on case law or judicial decisions. Further, there is a lack of access to cases that have been settled out of court, to information on judicial experience or expertise or alternative dispute settle mechanisms. Therefore, taking heed from Islamic finance, more transparency is required at government and regional levels to integrate intellectual property as a sharia compliant industry.

Greater public confidence in the intellectual property sector

Islamic finance has secured public confidence in its established products. There is conflict between different scholars on the Islamic legalities of a product and this is a flaw within the Islamic finance sector that needs to be addressed as the public will accept a principle that is a unanimous decision but will be less receptive to a product that has scholars at loggerheads. Intellectual property has never truly won the Islamic world. From research by El Bialy and Gouda, their empirical research showed Islamic developing countries had a high level of IPR piracy as well as a high level of religiosity to Islam. In contrast, Islamic finance is not only well received; it is an industry that is growing despite almost a decade of global financial woes.

Public confidence is difficult to quantify as it is very subjective. Lessons need to be learnt from the Islamic finance sector in the GCC states as how Islamic finance has been introduced, the indexes and financial institutions set up and the regulatory frameworks all demonstrate a level of ownership of Islamic finance. The GCC states need to similarly demonstrate ownership of the intellectual property rights they seek to protect, be they as they may from predominantly foreign investors.

Findings

Islamic finance has achieved success as a sharia compliant alternative to conventional banking. The industry is growing, with the market expanding beyond the Organisation of Islamic Co-operation and non-member countries weighing in with their own Islamic finance products and services. The approach taken by the GCC in developing Islamic finance is not uniform across all the GCC states, a similarity it shares with intellectual property development. Another similarity is that there is no overarching supervisory body that acts as a higher authority, where the decision would bind ratified states, at a regional level in the GCC. The timeframe in which Islamic finance has developed also runs parallel with intellectual property development amongst the GCC states.

However the purpose of this paper was to identify the sharia compliant structures that exist within the GCC states and identify how the successes of Islamic finance can be a vehicle for promoting better intellectual property rights protection in the GCC. There are five key recommendations from the analysis of Islamic finance which can be applied to an integrated Islamic based intellectually property based model. The recommendations are; Islamic based intellectual property sharia boards, strengthened intellectual property market structures, improved compliance to increase transparency through systems and controls, increased efficiency of supervisory procedures and greater public confidence in the intellectual property sector.

The findings from Islamic finance and its sharia compliant models are a springboard to creating a successful sharia compliant intellectual property rights protection approach. Further research will build on the findings of this paper and incorporate the research findings on the structure of the GCC states, international agreements and pressures, the international institutions and sharia law to propose a series of recommendations to develop an integrated approach to intellectual property rights protection.

**Key recommendations:**

* **to not rush ahead with TRIPS plus provisions without analysing alternative methods to improving intellectual property rights protection, similar to how Islamic finance provides an alternative to western banking;**
* **develop intellectual property focussed independent sharia boards;**
* **improve consumer and investor protection through mirroring ethical banking principles to intellectual property;**
* **promote regulatory cooperation through setting up internal auditing committees, introducing governance ethics, initiating periodic reviews and assurances for intellectual property rights and**
* **build human capital by investing in research and development.**

Islamic finance has coincidently developed over the same time period as intellectual property however there are significant differences in how the two sectors have evolved over three decades. Islamic finance is an area where the GCC states have made significant progress in the evolution of the industry and lead on the initiation of a number of sharia compliant financial products. The GCC states have not been as dominant in the intellectual property field, choosing to apply sharia law solely for the purposes of justifying intellectual property law within the ambit of Islamic jurisprudence. The integrated intellectual property rights approach recommends a modified approach to intellectual property rights protection. The recommendation is to not rush ahead with TRIPS plus provisions without considering alternative methods to improving intellectual property rights protection.

The paper identified the main principles of Islamic finance and applied lessons learnt from Islamic finance success to intellectual property rights protection. The main Islamic finance principles identified were; the founding principles of Islamic finance, the governance of sharia boards, the development of Islamic finance in the individual GCC states, different frameworks of sharia-compliant investment products and the impact of intellectual property rights on the varying Islamic finance investment tools.

Islamic finance has achieved success as a financial institution with ethical guidelines that abide by Islamic law and consequently operate without contravening the doctrines of riba and gharar (Hayat 2014). Islamic finance products have been established through fatwas that are passed by Islamic scholars that sit on sharia boards to rule on whether a new Islamic finance product is sharia compliant or not. Where the Islamic finance sector and intellectual property differ is that Islamic finance can trace its roots back to primary sources of sharia law as the Quran and the Sunnah prohibit sinful (haram) activity[[13]](#endnote-13)and interest (riba)[[14]](#endnote-14). It is the financial sources of sharia law that have been used to infer sharia compliance of intellectual property rights but Islamic finance has not been utilised to develop an integrated intellectual property rights protection framework.

Conclusion

Islamic finance has managed to grow as an industry despite not all Islamic countries adhering to sharia at the same constitutional level. Applying this to the GCC states, each state has its own Islamic finance institutions with Islamic scholars that sit on sharia boards with the main role of acting as an independent body of specialised jurists to direct, review and supervise Islamic finance products (Malkawi 2014). The GCC states are paving the way forward with recognizing the relationship between Islamic finance and intellectual property rights. The first ever sukuk with intellectual property rights as the underlying asset was introduced in the form of a computer software programme by the German based finance company, FWU AG Group, developed under an ijara structure (Qayyum 2013) and financed through the Dubai branch of FWU AG Group.

There are four main Islamic finance structures that can be translated to an integrated intellectual property rights protection approach. These are to; develop sharia board based market infrastructures, improve consumer and investor protection, promote regulatory cooperation and build human capital. By developing intellectual property based sharia board based market infrastructures, the GCC will start to take control over the intellectual property sector and promote fit for purpose control mechanisms through; setting up internal auditing committees, introducing governance ethics, initiating periodic reviews and assurances for intellectual property rights.

The premise behind adopting Islamic finance structures to promote better intellectual property rights protection is twofold; it is based on learning the role of sharia law in taking ownership of the Islamic finance sector and secondly addressing the shortcomings in Islamic finance in order to overcome these in the integrated intellectual property rights approach. There are aspects of Islamic finance products that can form the basis of an intellectual property framework such as risk-sharing partnerships known as a musharaka and could be translated to intellectual property investment with returns flowing in from hybrid musharaka and intellectual property based projects, licensing, royalties, subscriptions and sale of the intellectual property assets.

Islamic finance is not without its faults, however rather than reject Islamic finance as a catalyst for international intellectual property development because of its shortcomings, the solution is to address them in an alternative model to conventional intellectual property protection. The key shortcomings to address are; lack of transparency, the level of independence observed by sharia boards and accountability measures, the GCC have an opportunity to learn from both the strengths and weaknesses of the Islamic finance sector to pioneer an integrated approach to intellectual property rights for Muslim countries.

Further Research

The research work is foundational in nature, with the aim of laying down the fundamentals of an Islamic based intellectual property model that incorporates the key research objectives to act as a springboard for further research in this area. Although the research is non-empirical, there was a clear intention from the onset to further develop the findings through empirical research. Further research is crucial to the implementation of a more effective intellectual property framework and the following areas are at the forefront;

* intellectual property law and Islamic law,
* entrenching higher standards in TRIPS plus and international agreements for minimum intellectual property standards,
* analysing the potential risks attached to investor to state dispute settlement mechanisms and corporate sovereignty,
* implications of protecting national heritage and folklore expressions to provide fit for purpose intellectual property protection,
* the role Islamic finance and sharia compliant frameworks can play in intellectual property protection in Islamic states and
* the impact of intermediary vehicles for intellectual property rights protection in the GCC such as public interest, moral rights and Islamic finance from a sharia perspective.
1. Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>. [↑](#endnote-ref-1)
2. There are a number of other sharia compliant frameworks such as Bai’ al-Inah, known as a sale with a buy back agreement, however this is outside the scope of the research. The various other types of Islamic finance products will provide the framework for further research and will include; safeguarding property for another known as wadia, a surety known as kafala and loan agreements known as qard hasssan. [↑](#endnote-ref-2)
3. European Union, EU relations with the Gulf Cooperation Council (GCC). Available at <http://eeas.europa.eu/gulf_cooperation/index_en.htm>. [↑](#endnote-ref-3)
4. The Economic Agreement between the GCC States Adopted by the GCC Supreme Council (22nd Session; 31 December 2001). Also, EU, US and China are all offering to finalise FTA’s with the GCC states. [↑](#endnote-ref-4)
5. The Patent Office of the Cooperation Council for the Arab States of the Gulf. See more at <http://www.gccpo.org/AboutUSEn.aspx>. [↑](#endnote-ref-5)
6. GCC Charter, Foundations and Objectives. Available at <http://www.gcc-sg.org/eng/index895b.html?action=Sec-Show&ID=3>. [↑](#endnote-ref-6)
7. The closing statement Of the Twenty-Seventh Session of the Supreme Council of the Cooperation Council for the Arab States of the Gulf (GCC) <http://www.gcc-sg.org/eng/indexf5cf.html?action=Sec-Show&ID=129>. [↑](#endnote-ref-7)
8. **Treaty on Intellectual Property in Respect of Integrated Circuits** and International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. [↑](#endnote-ref-8)
9. UNDP and the UNDP Special Unit for South-South Cooperation, (2008), The Challenge of Assessing the Creative Economy: towards Informed Policy-making, Creative Economy Report 2008. [↑](#endnote-ref-9)
10. A detailed analysis of the shortcomings in Islamic finance and recommendations to better regulate the Islamic finance sector will be a further research interest area that will be an off shoot of the current research. The further research will deal specifically with the criticisms of sharia boards and propose changes to further enhance the regulation of the Islamic finance sector. [↑](#endnote-ref-10)
11. For the GCC and its states there is a clear recognition of the protection of intellectual property to its continued development as a dominant trading hub in the Middle East. It is the development of international trade and services via multilateral and bilateral trade agreements which allows the GCC States to act as a hub between Eastern and Western markets. [↑](#endnote-ref-11)
12. Qatar Law Number (17) of 2011 on the Border Measures for the Protection of Intellectual Property Rights, The law reflects on the wording of section 4 of TRIPS on “special requirements related to border measures”. [↑](#endnote-ref-12)
13. This includes direct or indirect investment with certain types of business areas that involve profit making from alcohol, pork products, betting and gambling. See Quran at 2:173, 2:219, 5:3, 5:90, 6:145 and 16:115. Available at [www.quran.com](http://www.quran.com) [↑](#endnote-ref-13)
14. See the Quran at 2:275. Available at [www.quran.com](http://www.quran.com). [↑](#endnote-ref-14)