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“Islamic Finance as a Catalyst for an Alternative Islamic Approach to Intellectual Property
Economic Rights”

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The purpose of this paper is to assess how the Islamic moral economy can be utilised more, specifically Islamic finance, to act as a vehicle to generate unprecedented growth in the current intellectual property rights regime in the MENA region, with particular focus on the Gulf Co-operation Council (GCC) and worldwide. Islamic finance has developed within the constraints of sharia law and has seen exceptional growth in asset size and global expansion. This paper will identify the main principles of Islamic finance that contribute to the success of Islamic economy and demonstrate the potential transformational impact of Islamic finance on intellectual property economic rights. The main sharia compliant areas to be considered are; musharaka, mudaraba, murabaha, takaful, istisna, ijara, salam and sukuk.

The paper will outline the founding principles of Islamic finance, the governance of sharia boards, different frameworks of sharia-compliant investment products and the transformational impact of intellectual property rights on the varying Islamic finance investment tools. Further, the paper will discuss an integrated approach to intellectual property rights which learns lessons from the Islamic finance sector in relation to infrastructure, regulation and sharia compliance. The lessons learnt from Islamic finance will inform the overall framework of recommendations for an Islamic based intellectual property model. The use of Islamic finance as a vehicle to promote better intellectual property rights in terms of defining a new intellectual property approach is novel, it creates alternative models of Islamic economic development. In essence an Islamic intellectual property based regime can be developed to provide alternative intellectual property products, similar to how the Islamic finance industry has developed sharia compliant banking as an alternative to conventional banking. Through developing an Islamic based intellectual property rights economy as an alternative paradigm in the GCC and MENA region, Islamic finance can evolve from the initial operational aspect of Islamic moral economy and grow into the intellectual property economy.

.Research objectives:

- to analyse the founding principles of Islamic finance products and utilise the Islamic economic knowledge to improving intellectual property rights protection, similar to how Islamic finance provides an alternative to western banking;
- to improve consumer and investor protection through mirroring ethical Islamic banking principles to intellectual property;
- to establish Intellectual property sharia boards to promote regulatory cooperation for Islamic intellectual property rights through setting up internal auditing committees, introducing governance ethics, initiating periodic reviews and assurances for intellectual property rights.

Purpose of Research

The purpose of the research is to identify the main principles of Islamic finance and apply lessons learnt from the success of Islamic finance to intellectual property economic rights. The main Islamic finance principles to examine are; the founding principles of Islamic finance, the governance of sharia boards, the development of Islamic finance in different states, an analysis of the different frameworks of sharia-compliant investment products and the potential impact of intellectual property rights on the varying Islamic finance investment tools.

Methodology

Islamic finance is a well regulated industry with a number of key organisations and institutions both at a government level and from the business sector that control and oversee the development of Islamic finance. The main resources that have been accessed are from desk based research with the gathering of data from; financial services authorities, financial services centres, national Islamic banks, federal laws, sharia boards, reports, Islamic finance scholars, articles by leading authors in the field of Islamic finance and sharia sources.

Main Findings

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

gharar¹. 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) activity² and riba³. It is the financial sources of sharia law that have been used to infer sharia compliance of intellectual property rights but Islamic finance has yet to be utilised to develop an Islamic intellectual property rights protection framework.

Islamic finance has managed to grow as an industry despite not all Islamic countries adhering to sharia at the same constitutional level. 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 Group⁴, developed under an ijara structure⁵ and financed through the Dubai branch of FWU AG Group.

There are four main Islamic finance structures that can be translated to an Islamic intellectual property economic rights model. 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, Islamic states 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.

1. Introduction

¹ Hayat, U. (2014), Islamic Finance: Ethics, Concepts, Practice (a summary), The Chartered Financial Analyst (CFA) Institute Research Foundation. Available at http://www.cfainstitute.org/learning/foundation/research/Documents/islamic_finance_ethics_concepts_practice.pdf.

² 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.

³ See the Quran at 2:275. Available at www.quran.com.

⁴ Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>.

⁵ Ali Qayyum, M. (2013), New Horizon Global Perspective on Islamic Banking and Insurance, Institute of Islamic Banking and Insurance. Available at <http://www.islamic-banking.com/NewHorizonDigital/IIBImarch2013/index-march2013.html>.

Islamic finance is very much enshrined in ethical guidelines that are deeply rooted in a religion that it must abide by⁶. In Islamic teachings, money is a measure of value as oppose to a commodity⁷. Therefore, in line with Islamic teachings, the money should be put to practical use, invested to create wealth and not be a commodity of itself⁸. It is the earning of a passive return on capital, which is identified as the back bone to the definition on the prohibition of riba⁹. In its simplest terms, sharia expressly prohibits the making of money from money¹⁰. It requires the creation of real value for the participants of a transaction¹¹. The same prohibition of interest applies to debt whereby the risk and responsibility in the debt is shared between all contractually obligated parties¹².

Islamic finance is defined as sharia compliant financial transactions which can be used as an alternative to conventional western banking methods¹³. Islamic finance emerged in the early 1960s with the objective of providing alternative financial contracts in conformity with sharia principles as necessitated by primary and secondary sources of Islam. Mit Ghamr Local Savings Bank in Egypt in 1963 is widely accepted as the first modern attempt at Islamic banking¹⁴. Following on from this, Dubai established the first Islamic Bank in 1975, known as the Dubai Islamic Bank¹⁵.

⁶ Hayat, U. (2014), Islamic Finance: Ethics, Concepts, Practice (a summary), The Chartered Financial Analyst (CFA) Institute Research Foundation. Available at http://www.cfainstitute.org/learning/foundation/research/Documents/islamic_finance_ethics_concepts_practice.pdf.

⁷ Ahmad, A. (2012), The Time Value of Money Concept in Islamic Finance, The American Journal of Islamic Social Sciences, pages 66 to 89. Available at <http://uaelaws.files.wordpress.com/2012/05/the-time-value-of-money-concept-in-islamic-finance.pdf>.

⁸ Saeed, A. (2012), Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation, Studies in Islamic Law and Society, Volume 2, Brill Academic Publishers.

⁹ Elasrag, H. (2011), Principals of the Islamic Finance: A Focus on Project Finance, Munich Personal RePEc Archive. Available at http://mpira.ub.uni-muenchen.de/30197/1/MPRA_paper_30197.pdf.

¹⁰ Fisho-Oridedi, A. (2010), The Prohibition Of Riba Under Islamic Law: What Are The Implications For International Contracts? Centre for Energy, Petroleum and Mining Law and Policy.

¹¹ Elasrag, (2011), Principals of the Islamic Finance: A Focus on Project Finance, Munich Personal RePEc Archive. Available at http://mpira.ub.uni-muenchen.de/30197/1/MPRA_paper_30197.pdf.

¹² Mirakhor, A. (2006), Profit-and-loss sharing contracts in Islamic finance, Handbook of Islamic banking. Available at <http://202.154.59.182/mfile/files/Economics/Handbook%20of%20Islamic%20Banking/Chapter%204%20Profit-and-loss%20sharing%20contracts%20in%20Islamic%20finance.pdf>.

¹³ Khalid, M. (2013), Fundamental of Islamic Banking - Framework of Islamic Financial System and Historical Development of Islamic Banking and Finance in Malaysia, Universiti Teknologi Mara. Beck, T. (2013), Islamic vs. conventional banking: Business model, efficiency and stability, Journal of Banking & Finance, Volume 37, Issue 2, February 2013, Pages 433–447. Available at http://ac.els-cdn.com/S0378426612002920/1-s2.0-S0378426612002920-main.pdf?_tid=b6195f62-96c4-11e4-a4db-00000aacb361&acdnat=1420673414_a5be4510b722d8a1b52b95eed93067d7.

¹⁴ Nisar, S. (2003), The Practices of Islamic Banking and Finance: A Historical Perspective. Available at http://www.shariqnisar.com/images/My_writings/Islamic%20Finance%20History.pdf. Ariff, M. (1988), Islamic Banking , Asian-Pacific Economic Literature, Volume 2, Number 2, pages 46 to 62. Available at

Islamic finance has developed through a series of fatwas that are passed by Islamic scholars and jurists. A fatwa is a result of human interpretation of the sharia. A fatwa can be passed based on the interpretation of texts and recordings from primary and secondary sharia sources. They are not viewed as the ordained word of Allah (SBTH) but rather a permissible method of analysing and or combining different sharia principles to come to a decision. Fatwas are issued by sharia boards to rule on whether a new Islamic finance product is sharia compliant or to amend an existing fatwa. Interestingly, there is no prescribed religious hierarchy in the Quran or Sunnah, for the field of Islamic scholars who interpret the different sources of sharia law. Therefore the decisions require enforcement by banks, legislation and financial institutions to make them binding.

As will be seen later below in the founding principles of Islamic finance, the focus will be on the GCC states and how they 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, the compliance mechanisms in place, the role of supervisory boards and public confidence, will be utilised to make recommendations for an Islamic law based intellectual property model.

2. Founding principles of Islamic finance

"There is nothing prohibited except that which God prohibits ... to declare something permitted prohibited is like declaring something prohibited permitted¹⁶."

<http://www.nzibo.com/IB2/Islamic%20Banking%20-%20Mohammed%20Ariff.pdf>. Asutay, M. (2013), Reflecting on the Trajectory of Islamic Finance: From Mit Ghamr to the Globalisation of Islamic Finance, Afro Eurasian Studies, Volume 2, Issues 1 & 2, Spring & Fall 2013, pages 5 to 14. Available at http://www.afroeurasianstudies.net/dosyalar/site_resim/veri/0344147.pdf.

¹⁵ Wilson, R. (2009), Kuwait Programme on Development, Governance and Globalisation in the Gulf States: The development of Islamic finance in the GCC, The Centre for the Study of Global Governance. Available at <http://eprints.lse.ac.uk/55281/1/Wilson-2009.pdf>. Presley, R. (2012), Directory of Islamic Financial Institutions, Routledge: Banking and Finance, Croom Helm Limited. Available at <https://books.google.co.uk/books?id=wEhLHpkpC9cC&pg=PA209&dq=dubai+islamic+finance+institutions&hl=en&sa=X&ei=ITy-VL-KPMfaaorRgrgM&ved=0CDOQ6AEwBA#v=onepage&q=dubai%20islamic%20finance%20institutions&f=false>

e. Accessed on 19.01.2015. Also see Dubai Bank at <http://dubanks.com/banks/dubai-islamic-bank>.

¹⁶ Majwood, S. (2007), The Biography of Imam Iba Al Qayim, Translated by Abdul Rafi-Adewala, Darussalam Publishers & Distributors. Also quoted in Thomas, A. (2004), Interest in Islamic Economics: Understanding Riba, Routledge Publishers, 2006, page 63.

Islamic finance, at its core, is an ethical and equitable mode of finance, the origins of which can be traced back to sharia principles found in the Quran and Sunnah¹⁷. The Quran, the highest source of Islamic law, unconditionally prohibits sinful (haram) activity¹⁸ and riba¹⁹ in financial transactions. However, although the Quran and Sunnah are unequivocally clear on what defines haram activity, there is no unanimity about the limitations or scope of the prohibition of riba²⁰. This is largely due to the interpretation of the leading Quranic verse on riba found in Surah Baqarah at verse 275 and also at eight other verses²¹. Riba and gharar are at the heart of the connection between intellectual property and Islamic finance as both sectors prohibit transactions that involve riba and gharar.

Islamic finance is not a sector that is seamless in its governance nor is it exempt from conflict. The differences in interpretation of sharia raises issues on the harmonisation of Islamic finance products. Some divergence is unavoidable given that the cultural, political, economy and social beliefs in individual countries will differ from others²².

There are a number of sharia scholars who specialise in Islamic finance and derive the necessary Islamic jurisprudence known as fiqh²³. Islamic jurisprudence is recognised in the Quran as a method of understanding the way of the Prophet Muhammed²⁴. Based in Jeddah, Saudi Arabia, the Islamic Fiqh Academy comprises of leading scholars who make decisions

¹⁷ Usmani, T. (2004), An Introduction to Islamic Finance, Arham Shamsi. Available at <https://books.google.co.uk/books?id=0aDStX-qUAGC&printsec=frontcover#v=onepage&q&f=false>.

¹⁸ 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.

¹⁹ See the Quran at 2:275. Available at www.quran.com.

²⁰ Shafaat, A. (2005), Islamic Perspectives, One, Riba in the Quran. Available at <http://www.islamicperspectives.com/Riba1.htm>. Thomas, A. (2004), Interest in Islamic Economics: Understanding Riba, Routledge Publishers. Ghias, S. (2009), Contemporary Islamic Finance: Innovations, Applications and Best Practices, 6, Edited by Ahmed, John Wiley & Sons. Available at <https://books.google.co.uk/books?id=hc6RXn8KzewC&pg=PT234&dq=islamic+finance+defined+by+leading+scholars&hl=en&sa=X&ei=ItuuVI6RO8vH7AaGvIGQAg&ved=0CDMQ6AEwAg#v=onepage&q=islamic%20finance%20defined%20by%20leading%20scholars&f=false>. Accessed on 06.03.2015. Warde, I. (2000), Islamic Finance in the Global Economy, Edinburgh University Press, Redwood Books, Trowbridge, Wilts. Electronic version available at <http://www.iefpedia.com/english/wp-content/uploads/2011/03/2000-Ibrahim-Warde-Islamic-finance-in-the-global-economy-Edinburgh-University-Press1.pdf>.

²¹ See the Quran at 2:275-280, 3:130, 4:161 and 30:39. Available at www.quran.com.

²² Hussain, I. (2006), Islamic Finance Industry: Positioned for Growth, 2nd Pakistan Islamic Banking Conference held at Karachi on November 8, 2006.

²³ Fiqh is the consensus opinion of a group of scholars and exists in all aspects of sharia. For Islamic finance fiqh is concerned with consensus opinions pertinent to sharia compliant financial products.

²⁴ See the Quran at 2:129, 2:159, 2:231 and 62:2. Available at www.quran.com.

on permissible Islamic finance products²⁵. The International Fiqh Academy, Saudi Arabia, has played a pivotal role in the development of Islamic finance. The Dow Jones Islamic Index²⁶ and Islamic bonds, known as sukuks, are two key changes that have been synonymous to the expansion of Islamic financial markets. The Dow Jones Islamic Index sharia board has the five most eminent sharia scholars in modern day Islamic finance, Sheikh Nizam Yaquby, Dr. Mohammed Daud Bakar, Sheikh Dr. Mohamed A. Elgari, Shaykh Abdul Sattar Abu Ghuddah and Sheikh Yusuf Talal DeLorenzo. The scholars are all from different countries as a purposeful attempt to give the Dow Jones Islamic Index as wide a remit for investment as possible. Also, it needs to be noted that the scholars are from countries that are leaders in the Islamic finance market such as; Malaysia, Saudi Arabia and Bahrain²⁷. The main Islamic finance products that are principal commodities in the sector are discussed below in order to then apply Islamic finance principles to developing an integrated approach to intellectual property rights in the GCC and MENA region.

3. Islamic finance products

There are a number of sharia compliant frameworks that are in existence across the Islamic finance market. In relation to its impact on intellectual property, there are a number of relevant sharia compliant practices that have overcome the inevitable dichotomy that arises when Islamic law principles are married to western concepts, something which the intellectual property sector could benefit from.

In order to make recommendations on how Islamic finance can engender better compliance with 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 frameworks²⁸. Further, as the purpose behind analysing Islamic finance products is to identify the role Islamic finance can play in further developing intellectual

²⁵ Schoon, N. (2010), *Islamic Banking and Finance*, 14, page 144, Spiramus Press Limited. Available at <https://books.google.co.uk/books?id=SiNaZcPUu4IC&pg=PA144&dq=fiqh+of+islamic+finance&hl=en&sa=X&ei=3Ue0VOjpAY3B7Abz1YGQCg&ved=0CCAQ6AEwAA#v=onepage&q=fiqh%20of%20islamic%20finance&f=false>.

²⁶ Dow Jones Islamic Market Indices. Available at <http://www.djindexes.com/islamicmarket/>.

²⁷ Sharia Supervisory Board, The Dow Jones Islamic Index available at <http://www.djindexes.com/islamicmarket/>.

²⁸ 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 hassan.

property rights protection in the international arena, the areas of; musharaka, mudaraba, murabaha, sukuk and takaful will be analysed to propose potential application to intellectual property.

4. 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 relationship²⁹. 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 services³⁰. 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.

5. 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.”

²⁹ Jobst, A. (2007), Monetary and Capital Markets Department - The Economics of Islamic Finance and Securitization, International Monetary Fund (IMF) Working Paper. Available at <https://www.imf.org/external/pubs/ft/wp/2007/wp07117.pdf>.

³⁰ Hamzah, Z. (2011), Shariah-compliant Intellectual Property based Financing, Talk by Zaid Hamzah at INCEIF. Available at <http://www.iefpedia.com/english/wp-content/uploads/2011/11/Shariah-compliant-IP-based-Financing-INCEIF-talk-9-Nov-2011.pdf>.

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 partnership³¹, there is the potential to develop intellectual property based mudaraba agreements.

6. Murabaha – contract of sale

Murabaha is a contract of sale, also known as cost plus financing and is primarily concerned with Islamic financing³². 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 predetermined³³. The main purpose of this is to avoid gharar. 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 cost³⁴.

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. There are a number of Quranic references in relation to contract law. Quranic references attributed to contract law include Surah Al-Mā'idah, Verse 1, “*O you who have believed, fulfill [all] contracts*”³⁵. Further references focus on honouring contractual promises and documenting the contract³⁶. In considering contract law it is useful to have a comparator. In English contract

³¹ Rahman, Z. (2007), Accounting Treatment For Mudarabah Regarding Unrestricted Investment Deposits in Malaysian Islamic Banks, Islamic Business Research Center. Available at <http://www.kantakji.com/media/3067/v114.pdf>.

³² See Murabaha on Shariah Ruling, The institute of Islamic Banking and Insurance (IIBI). Available at http://www.islamic-banking.com/murabaha_sruling.aspx.

³³ Iqbal, Z. (2011), An Introduction to Islamic Finance: Theory and Practice, John Wiley & Sons.

³⁴ Karim, R. (2013), Islamic Finance: The New Regulatory Challenge, Wiley Finance Series. Available at <https://books.google.co.uk/books?id=nWeEtWDqeEAC&pg=RA1PT201&dq=no+gharar+in+murabahaha&hl=en&sa=X&ei=ZpyyVKnZG9H7apugugH&ved=0CCIQ6AEwAA#v=onepage&q=no%20gharar%20in%20mura bahaha&f=false>.

³⁵ See the Quran at 5:1, Sahih International Translation. Available at www.quran.com.

³⁶ See the Quran at 2:282, Sahih International Translation reads, “*O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness*”

law there are seven key elements which make up contract formation; agreement, consideration, intention to create legal relations, form, capacity, consent and legality. Even where all the required elements of a contract are met, a contract will not have legal effect under sharia law if it contains an attribute of gambling³⁷, alcohol³⁸ or forbidden meat³⁹. Taking agreement first of all, in sharia law this is not as straightforward as one party making an offer which the other accepts given the influence of the doctrines of *riba*⁴⁰ and *gharar*⁴¹. *Riba* is the doctrine on the prohibition of interest payments, undue profits or excessive gain from a transaction and *gharar* deals with risk, speculative transactions, ambiguity or excessive uncertainty in contracts⁴².

Two key elements of general theory of contract are evident at Surah An-Nisā', Verse 4, to have mutual consent and gainful exchange⁴³. The Sunnah further expands on the obligations on contracting parties to fully disclose the value of their bargain and any defects that exist; *“both the buyer and the seller give the option of either confirming or cancelling the bargain three times, and if they speak the truth and mention the defects, then their bargain will be blessed, and if they tell lies and conceal the defects, they might gain some financial gain but they will deprive their sale of (Allah's) blessings⁴⁴.”* As the Gulf states have embarked on international contracts and treaties,

two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. And let not the witnesses refuse when they are called upon. And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you, except when it is an immediate transaction which you conduct among yourselves. For [then] there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is [grave] disobedience in you”. Available at www.quran.com. Also see Quran at 2:177, 4:12, 4:33, 5:89, 9:1, 9:111, 17:34 and 23:8.

³⁷ See the Quran at 2:219, 5:3, 5:90, 5:91 and 5:92. Available at www.quran.com. The link between intellectual property and gambling comes from the potential for royalties to be deemed so uncertain as to be like gambling and therefore further research in the relationship between intellectual property and gambling within an Islamic context will shed light on how a potential reward for risk can exist. See Jamar, S. (1992), The protection of intellectual property under Islamic law, Capital University Law Review. Available at <http://www.iefpedia.com/english/wp-content/uploads/2009/10/The-Protection-of-Intellectual-Property-Under-Islamic-Law.pdf>.

³⁸ See the Quran at 2:219, 5:3, 5:90, 5:91, 5:92 and 16:67. Available at www.quran.com.

³⁹ See the Quran at 2:259,, 5:3, 6:121, 6:145, 16:14, 22:37. Available at www.quran.com.

⁴⁰ Fisho-Oridedi, A. (2009), The prohibition of *riba* under Islamic law: what are the implications for international contracts? See Quran 4:161 *“And [for] their taking of usury while they had been forbidden from it, and their consuming of the people's wealth unjustly. And we have prepared for the disbelievers among them a painful punishment”*.

⁴¹ Al Satti, A. (2003), The Permissible Gharar (Risk) in Classical Islamic Jurisprudence, Islamic Economy, Volume 16, No 2, Pages 3 to 19. See page 3.

⁴² Wilson, R. (2009), The development of Islamic finance in the GCC Working Paper, Kuwait Programme on Development, Governance and Globalisation in the Gulf States at page 27.

⁴³ See the Quran at 4:29. Available at www.quran.com.

⁴⁴ Sahih Bukhari Chapter Number 34, Hadith number 327.

riba and *gharar* have played a significant role in financial transactions⁴⁵, particularly in Islamic finance.

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”*⁴⁶.

7. 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 period⁴⁷. 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 bond⁴⁸. Whereas in conventional bonds,

⁴⁵ Fisho-Oridedi, A. (2009), The prohibition of riba under islamic law: what are the implications for international contracts?

⁴⁶ Bank Negara Malaysia, (2010), Principles and Practices of Shariah in Islamic Finance, page 21. Available at http://www.bnm.gov.my/guidelines/05_shariah/01_murabahah_02.pdf.

⁴⁷ Balala, M. (2010), Islamic Finance and Law: Theory and Practice in a Globalized World, 3, page 29, IB Tauris Company Limited. Available at <https://books.google.co.uk/books?id=nloBAwAAQBAJ&pg=PA29&dq=A+sukuk+is+an+Islamic+bond+that+defines+the+proportionate+beneficial+ownership+of+the+asset+to+the+investor,+for+a+specific+time+period.&hl=en&sa=X&ei=y1i1VLLMGMTZaq70gig&ved=0CBkQ6AEwAQ#v=onepage&q=A%20sukuk%20is%20an%20Islamic%20bond%20that%20defines%20the%20proportionate%20beneficial%20ownership%20of%20the%20asset%20to%20the%20investor%2C%20for%20a%20specific%20time%20period.&f=false>.

⁴⁸ Eisenberg, D. (2012), Islamic Finance: Law and Practice, 4 at 4.174, Oxford University Press. Available at <https://books.google.co.uk/books?id=1a5aF9t8cZ4C&pg=PT204&dq=a+sukuk+structure+the+sukuk+holders+each+hold+an+undivided+beneficial+ownership+in+the+underlying+assets.&hl=en&sa=X&ei=0IW1VJyMA4iB>

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 limit⁴⁹.

Sukuks are commonly offered under ijara based structures. Ijara relates to the usufructs of assets and or services from the lesser to the lessee. Ijara is not a delayed sale as such as ownership remains with the lesser and the lessee has a right to the use of the asset⁵⁰. 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 Group⁵¹. 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 structure⁵². 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 investors⁵³. 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.

8. 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,

Ucamg4AH&ved=0CBoQ6AEwAQ#v=onepage&q=a%20sukuk%20structure%20the%20sukuk%20holders%20each%20hold%20an%20undivided%20beneficial%20ownership%20in%20the%20underlying%20assets.&f=false.

⁴⁹ Godlewski, C. (2011), Do markets perceive sukuk and conventional bonds as different financing instruments? Bank of Finland, BOFIT Institute for Economies in Transition. Available at <http://www.suomenpankki.fi/pdf/168527.pdf>.

⁵⁰ Ghuddah, A. (2007), Ijarah [Lease], Dallah Al-Barakah Group. Available at <http://www.albaraka.com/media/pdf/Research-Studies/RSIJ-200706201-EN.pdf>.

⁵¹ Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>.

⁵² Ali Qayyum, M. (2013), New Horizon Global Perspective on Islamic Banking and Insurance, Institute of Islamic Banking and Insurance. Available at <http://www.islamic-banking.com/NewHorizonDigital/IIBImarch2013/index-march2013.html>.

⁵³ Rizvi, M. (2013), Islamic finance gains popularity across the globe, Khaleej Times. Available at http://www.khaleejtimes.com/kt-article-display-1.asp?xfile=data/uaebusiness/2013/November/uaebusiness_November321.xml§ion=uaebusiness.

joint indemnity and common interest⁵⁴. 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. In relation to intellectual property, takaful can be vital leverage in the contractual agreement as it offers security and a contingency plan to investors. What is most relevant to the development of intellectual property rights through Islamic finance is how Islamic finance is governed by the GCC states when considering the role of Islamic scholars, the structure of sharia boards and internal governance systems. Intellectual property has developed in the GCC along a very similar timeline to Islamic finance. Historically, principles of both date back to a pre colonisation era in the GCC, however in terms of its modernisation, both intellectual property and Islamic finance have developed over the last three decades. Therefore before Islamic finance principles can be applied to intellectual property, it is imperative to outline Islamic finance governance.

9. Islamic finance scholars and sharia boards

Islamic scholars sit on sharia boards with the main role of acting as an independent body of specialised jurists to direct, review and supervise Islamic finance services⁵⁵. The sharia board, in an Islamic financial institution (IFI), is an integral component of corporate governance⁵⁶. The sharia board plays a key role in endorsing the overall work of the Islamic financial institution⁵⁷. Appointment to a sharia board is made by the board of directors of individual financial institutions and consists of a chairman, secretary and sharia advisors⁵⁸.

⁵⁴ Takaful Islamic Insurance, Institute of Islamic Banking and Insurance. Available at http://www.islamic-banking.com/takaful_insurance.aspx.

⁵⁵ Malkawi, B. (2014), A Bright Future: Towards an Enhanced Shariah Supervision in Islamic Finance, The European Financial Review. Available at <http://www.europeanfinancialreview.com/?p=487>.

⁵⁶ Malkawi, B. (2013), Shari'ah Board in the Governance Structure of Islamic Financial Institutions, The American Society of Comparative Law, The American Journal of Comparative Law.

⁵⁷ Jaffer, S. (2004), Islamic Asset Management: Forming the Future for Shari'a-compliant Investment Strategies, 17, page 247, Euromoney Books. Available at <https://books.google.co.uk/books?id=cxYRVpP91I8C&pg=RA1-PA247&dq=structure+of+a+sharia+board&hl=en&sa=X&ei=c6u6VOWCGNHjaMyqgoAO&ved=0CFAQ6wEwCA#v=onepage&q=structure%20of%20a%20sharia%20board&f=false>. Accessed on 27.03.2015. Also see Htay, S. (2012), Accounting, Auditing and Governance for Takaful Operations, John Wiley and Sons Singapore Pte Limited. Available at <https://books.google.co.uk/books?id=s9fDavp4zqEC&pg=RA2-PT64&dq=structure+of+a+sharia+board&hl=en&sa=X&ei=c6u6VOWCGNHjaMyqgoAO&ved=0CFMQ6AEwCQ#v=onepage&q=structure%20of%20a%20sharia%20board&f=false>.

⁵⁸ Malkawi, B. (2014), A Bright Future: Towards an Enhanced Shariah Supervision in Islamic Finance, The European Financial Review. Available at <http://www.europeanfinancialreview.com/?p=487>. Accessed on 27.03.2015. Also see Shari'ah Supervisory Board [Religious Board], Institute of Islamic Banking and Insurance. Available at http://www.islamic-banking.com/shariah_supervisory_board.aspx.

The sharia advisors are Islamic scholars however there is no centralised database of Islamic scholars. The world database for Islamic finance and banking⁵⁹ accounts for the most prominent scholars, but there is no international system of ranking scholars or rating their expertise. The sharia boards are governed by national legislation, governance frameworks and audit requirements. Standard setting in the governance of sharia boards and sharia compliant products was introduced by the Malaysian Islamic Financial Services Board (IFSB). It was set up in 2002 to provide an international standard-setting body that regulates and supervises agencies that have a vested interest in the Islamic financial services sector⁶⁰. The IFSB has members from all the GCC states along with Brunei, Bangladesh, Egypt, Indonesia, Iran, Jordan, Malaysia, Maldives, Mauritius, Nigeria, Pakistan, Singapore, South Africa, Sudan and Syria⁶¹. In relation to sharia board governance, there are five key uniform areas that all boards are required to abide by. These are; confidentiality, independence, competence, consistency and disclosure⁶².

Islamic jurisprudence falls under four main schools of thought, Hanbali, Shafii, Maliki, and Hanafi. Therefore depending on which school of thought a particular country follows there can be some deviances in the opinions of the sharia boards. To counteract this, although sharia boards are set up by individual institutions across a number of countries, scholars from different countries, sit on several boards concurrently. Inadvertently this creates a power paradigm whereby a select number of scholars sit on all the main sharia boards. For example, Mufti Muhammad Taqi Usmani, as one of the most renowned Islamic finance scholars, he is in high demand and currently is chairman of eleven boards and a member of a further five boards⁶³.

⁵⁹ Further details on the World Database of Islamic finance and banking is available at <http://www.wdibf.com/index.html>.

⁶⁰ The full background to the Islamic Financial Services Board (IFSB) is available at <http://www.ifsb.org/background.php>. The IFSB has over 184 members comprising of 59 regulatory and supervisory authorities, 8 international inter-governmental organisations, 112 financial institutions and 5 self-regulatory organisations operating in 44 jurisdictions.

⁶¹ Islamic Financial Services Board, (2009), Guiding Principles On Shari`Ah Governance Systems For Institutions Offering Islamic Financial Services. Available at <http://www.ifsb.org/standard/IFSB-10%20Shariah%20Governance.pdf>.

⁶² Grais, W. (2006), Corporate Governance and Shariah Compliance in Institutions Offering Islamic Financial Services, World Bank Policy Research Working Paper 4054. Available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4054>. Obid, S. (2014), Towards a comprehensive theoretical framework for sharia governance in Islamic financial institutions, *Journal of Financial Services Marketing*, pages 304 to 318, Palgrave McMillan.

⁶³ Mufti Muhammad Taqi Usmani is a chairman of the following sharia boards; Central Bank of Bahrain, Abu Dhabi Islamic Bank, U.A.E., Meezan Bank Ltd., Karachi, Pakistan, International Islamic Rating Agency, Bahrain, Pak-Kuwait Takaful, Karachi, Pak-Qatar Takaful, Karachi, JS Investments Islamic Fund, Karachi, JS Islamic Pension Savings Fund, President and Shaikul-Hadith, Centre for Islamic Economics, Pakistan, Jamia

Another example is Sheikh Dr. Mohamed Ali Elgari who also sits on a number of boards⁶⁴. What this has led to is a significant crossover of a select few scholars who are collectively a majority of the same board members with positions on many boards⁶⁵. There is a very direct benefit of this in terms of harmonisation of decisions across the various boards and thus providing unanimity. However, from a practical point of view, there are strategic shortcomings in the selection of board members as there are no clear regulations or protocols in place as a vetting process⁶⁶. Nor is there any framework in place to assess how much capacity, both in time and expertise, individual scholars have to serve on so many boards⁶⁷. Also, there are limited structures in place to ensure scrutiny, accountability for decisions and checks and balances if the same members serve on boards in conflicting capacities⁶⁸.

10. Main criticisms of sharia boards

Darul Uloom Karachi, International Shariah Standard Council set up by the Accounting and Auditing Organization for Islamic Financial Institutions, Bahrain, Arif Habib Investments, Pakistan International Element Islamic Fund, Karachi. He is a member of the following shariah boards; Guidance Financial Group, USA, Arcapita Bank, Bahrain, Islamic Corporation for the Development of the Private Sector (ICD), an organ of IDB Jeddah, Islamic Fiqh Academy of Rabita-al-‘Alam-e-Islami, Makkah and International Islamic Fiqh Academy, Jeddah.

Available at http://muftitaqiusmani.com/index.php?option=com_content&view=article&id=2&Itemid=5.

⁶⁴ Executive Profile, Sheikh Mohamed Bin Ali Elgari PhD, Former President and Director, Wafa Insurance states he is connected to 85 board members in 10 different organisations across 10 different industries. Available at

<http://investing.businessweek.com/research/stocks/people/person.asp?personId=26936030&ticker=SINDIAN:A>

⁶⁵ Siddique, R. (2010), A Sharia scholar’s place on the board, Gulf News. Available at <http://gulfnews.com/business/features/a-sharia-scholar-s-place-on-the-board-1.625445>. Visser, H. (2013), Islamic Finance: Principles and Practice, Second Edition, 5, page 123. Available at <https://books.google.co.uk/books?id=Y30tAgAAQBAJ&pg=PA123&dq=many+sharia+boards+have+same+members&hl=en&sa=X&ei=xw-zVOnJGJHgatPigsAO&ved=0CCAQ6AEwAA#v=onepage&q=many%20sharia%20boards%20have%20same%20members&f=false>.

⁶⁶ Ali, A. (2014), Business Ethics in Islam, Edward Elgar Publishing Limited, 6, The Ethics of Banking and Financial Services, page 109. Warde, I. (2010), Islamic Finance in the Global Economy, 12, Religious Issues and Challenges: Defining Islam and Interpreting the Sharia, page 235, Edinburgh University Press. Available at <https://books.google.co.uk/books?id=4jDMQd7yVX4C&pg=PA235&dq=many+sharia+boards+have+same+members&hl=en&sa=X&ei=xw-zVOnJGJHgatPigsAO&ved=0CFUQ6AEwCQ#v=onepage&q=many%20sharia%20boards%20have%20same%20members&f=false>.

⁶⁷ Davies, A. (2012), Rock star scholars a risk for Islamic finance, Thomson Reuters, Edited by Torchia, A. Available at <http://www.reuters.com/article/2012/02/29/finance-islamic-scholars-idUSL5E8DG31N20120229>.

⁶⁸ Gruening, H. (2008), Risk Analysis for Islamic Banks, 11, page 189, The International Bank for Reconstruction and Development, The World Bank. Available at <https://books.google.co.uk/books?id=EjlsEs4yPMC&printsec=frontcover&dq=scrutiny+and+checks+and+balances+of+shariah+boards+islamic+finance&hl=en&sa=X&ei=6Rq0VMDjElmAU-vcg-gF&ved=0CDMQ6AEwAw#v=onepage&q&f=false>. Warde, I. (2010), Islamic Finance in the Global Economy, 12, Religious Issues and Challenges: Defining Islam and Interpreting the Sharia, page 235, Edinburgh University Press. Available at <https://books.google.co.uk/books?id=4jDMQd7yVX4C&pg=PA235&dq=many+sharia+boards+have+same+members&hl=en&sa=X&ei=xw-zVOnJGJHgatPigsAO&ved=0CFUQ6AEwCQ#v=onepage&q=many%20sharia%20boards%20have%20same%20members&f=false>.

The main criticisms of sharia boards are in the lack of accountability of scholars, limited transparency in the decision making processes employed by scholars and a lack of clear guidance on the minimum level of expertise required from a scholar⁶⁹. To address the criticism, most IFI’s have set up internal auditing committees and other regulatory systems such as compliance, governance ethics, periodic reviews and assurances. Auditing is the most accepted form of review as it is sharia compliant. There are Quranic references that support the need for verification and authorisation in business. For example in Surah al-Insyiqaq, verses 6 to 9, indicate to an auditing process as well as Surah Al-Infithar, verses 10 to 12⁷⁰.

11. International standard setting in Islamic finance

Islamic finance is a growing industry in the GCC⁷¹ and 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, MENA region and worldwide. The aim of the research therefore is to introduce an Islamic law based intellectual property economy as an alternative paradigm in the GCC to boost the Islamic economy which currently relies heavily on Islamic finance.

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 as discussed earlier, 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

⁶⁹ Alkhamees, A. (2013), The impact of Shari'ah governance practices on Shari'ah compliance in contemporary Islamic finance, *Journal of Banking Regulation*, Palgrave MacMillan. Obid, S. (2014), Towards a comprehensive theoretical framework for sharia governance in Islamic financial institutions, *Journal of Financial Services Marketing*, pages 304 to 318, Palgrave MacMillan.

⁷⁰ See the Quran at 82:10-12 and 84:6-9. Available at www.quran.com.

⁷¹ Anderson, S. (2014), GCC Islamic finance prospects bright in spite of growth hiccups, *Saudi Gazette*. Available at <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20141012220943..> Kassem, M. (2014), GCC to lead growth in sukuk market, *The National*. Available at <http://www.thenational.ae/business/banking/gcc-to-lead-growth-in-sukuk-market>. Colombo, S. (2014), Bridging the Gulf: EU-GCC Relations at a Crossroads, 7, page 270, Edizioni Nuova Cultura. Available at https://books.google.co.uk/books?id=n9qrAwAAQBAJ&pg=PA270&dq=islamic+finance+growing+industry+gcc&hl=en&sa=X&ei=UnHBVMSNOore7Abp_oCoBw&ved=0CEcQ6AEwBQ#v=onepage&q=islamic%20finance%20growing%20industry%20gcc&f=false.

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 responsibility⁷².

12. 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 and beyond, 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 Group⁷³. 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.

⁷² Islamic Centre for the Development of the Private Sector (ICD) and Thomson Reuters, (2013), Mapping Global Islamic Finance Development, Islamic Finance Development Report. Available at <http://auscifwp.files.wordpress.com/2013/12/icd-islamic-finance-development-report-2013.pdf>.

⁷³ Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>.

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.

13. 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.

14. 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 onset⁷⁴.

Each GCC state has a dedicated institution to intellectual property protection and these institutions are heavily influenced by international pressures to conform to higher standards of TRIPS without addressing the reasons behind why the GCC 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.

At the first level, there needs to be an overarching regional board that 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 and 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 and MENA region is missing an “Islamisation” of the intellectual property rights that the states are obliged to protect, both from national legislative commitments and international agreements. By Islamisation, 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 and MENA states can develop from a TRIPS compliance level to an integrated approach to potentially 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.

⁷⁴ 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.

National level intellectual property based sharia boards will add an extra tier to the integration of intellectual property to sharia law at a constitutional level. By creating national level boards, each 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. 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.

15. Strengthen the intellectual property market structure

The intellectual property market structure highlights pertinent structural and operational flaws in the current intellectual property system in the GCC. 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.

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.

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 Islamic based approach to intellectual property, developing 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.

16. Improve compliance in terms of systems and controls

In order to improve existing systems and controls in intellectual property, 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.

17. Address issues around the efficiency of supervisory procedures

There are practices from Islamic finance that can have a positive influence on how 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.

18. Greater public confidence in the intellectual property sector

Islamic finance has secured public confidence in its established products. There is notable 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 intellectual property rights piracy as well as a high level of religiosity to Islam. El Bialy and Gouda (2011) developed a religious loyalty index that assessed the interplay between intellectual property violations in a given country and the importance of religion to the citizens of a given country. Muslim countries have the highest level of religiosity to Islam than other religions⁷⁵.

Their empirical research has found that Muslim developing countries have a high level of both intellectual property based piracy as well as a high level of religiosity to Islam⁷⁶. Therefore, there is an anomaly between how Islamic law supports intellectual property and how citizens of Islamic countries with a high religiosity are high intellectual property infringers. The findings of Bialy and Gouda’s research is not a new concept, a number of scholars argue the view that for citizens of Islamic countries, intellectual property is seen as a foreign concept, protecting western interests and benefits⁷⁷. Consequently, many citizens of Islamic countries do not view intellectual property

⁷⁵ The religious loyalty index is based on the adherence of followers to their religion and the research of El Bialy and Gouda found that Muslims have the highest level of religiosity as seen in El Bialy, N. and Gouda, M. (2011), Can Shari’a be a Deterrent for Intellectual Property Piracy in Islamic Countries?, *The Journal of World Intellectual Property*, Volume 14, pages 441 to 466.

⁷⁶ El-Bialy, N. and Gouda, M. (2011), *Enforcing IPR Through Informal Institutions: The Possible Role of Religion in Fighting Software Piracy*, Joint Discussion Paper Series in Economics, by the Universities of Aachen, Gießen, Göttingen, Kassel, Marburg and Siegen.

⁷⁷ Abu-Ghazaleh, T. (2001), *Challenges to Arab Industries in Acquiring and Selling Appropriate Technologies*, Beltrametti, S. (2009), *The Legality of Intellectual Property Rights under Islamic Law*. In: *The Prague Yearbook of Comparative Law and Jamar, S. (1992), The Protection of Intellectual Property under Islamic Law*, Capital

infringement as a crime in the same sense they would view theft of a tangible asset.

Bialy and Gouda argued sharia does support intellectual property protection as Muslim judges use *qiyas* in dealing with intellectual property piracy. The reasoning was based on the interpretation of property law which has been expanded to include intellectual property⁷⁸. The main relevant finding of the empirical research was that Muslim countries were found to have a high level of religiosity to Islam and a high level of intellectual property infringement. This will be a running thread throughout the research as the argument for an Islamic based approach to intellectual property rights is supported by the religion loyalty index as given the adherence citizens of Muslim countries have to religion, the role sharia law can potentially play in bridging the gap between religiosity and intellectual property infringement is very valuable.

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.

19. Islamic finance as a catalyst for a modified intellectual property rights approach

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;

University Law Review, Carroll, J. (2001), Intellectual Property Rights in the Middle East: A Cultural Perspective, Fordham Intellectual Property, Media and Entertainment Law Journal Volume 11, Issue 3 and Cullen, C. (2010), Can TRIPS Live in Harmony with Islamic Law: An Investigation of the Relationship between Intellectual Property and Islamic Law?

⁷⁸El-Bialy, N and Gouda, M. (2011), Enforcing IPR Through Informal Institutions: The Possible Role of Religion in Fighting Software Piracy, Joint Discussion Paper Series in Economics by the Universities of Aachen, Gießen, Göttingen, Kassel, Marburg and Siegen, page 26.

- 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 is an area where many states have made significant progress in the evolution of the industry and the initiation of a number of sharia compliant financial products. The GCC and MENA 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, 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 gharar⁷⁹. 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) activity⁸⁰ and riba⁸¹. It is the financial sources of sharia law that have been used to infer sharia compliance of intellectual property rights but Islamic

⁷⁹ Hayat, U. (2014), Islamic Finance: Ethics, Concepts, Practice (a summary), The Chartered Financial Analyst (CFA) Institute Research Foundation. Available at http://www.cfainstitute.org/learning/foundation/research/Documents/islamic_finance_ethics_concepts_practice.pdf.

⁸⁰ 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.

⁸¹ See the Quran at 2:275. Available at www.quran.com.

finance has not been utilised to develop an integrated intellectual property rights protection framework.

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 products⁸². 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 Group⁸³, developed under an ijara structure⁸⁴ 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

⁸² Malkawi, B. (2014), A Bright Future: Towards an Enhanced Shariah Supervision in Islamic Finance, The European Financial Review. Available at <http://www.europeanfinancialreview.com/?p=487>.

⁸³ Further details on FWU AG Group are available at <http://www.fwugroup.com/cms/index.php?id=23>.

⁸⁴ Ali Qayyum, M. (2013), New Horizon Global Perspective on Islamic Banking and Insurance, Institute of Islamic Banking and Insurance. Available at <http://www.islamic-banking.com/NewHorizonDigital/IIBImarch2013/index-march2013.html>.

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 because of its shortcomings such as; lack of transparency, the level of independence observed by sharia boards and accountability measures, there is 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.

Therefore, the premise behind adopting Islamic finance structures to promote Islamic based intellectual property economic 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 Islamic intellectual property economic rights model. There are aspects of Islamic finance products that can form the basis of an intellectual property framework such as the first ever intellectual property sukuk with an ijara structure utilised by FWU AG Group or risk-sharing partnerships such as a musharaka that could be translated to intellectual property investment with returns flowing in from hybrid musharaka and intellectual property based projects and sale of the intellectual property assets.

20. Conclusion

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 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 have been outlined in this that 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. Islamic finance can act as a catalyst for a modified intellectual property rights approach and incorporate the research findings on the structure of Islamic finance, 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. Islamic finance will have a transformational impact on intellectual property rights as the Islamic moral economy can grow beyond the realms of Islamic finance and into the intellectual property market.