

**Settlement Of Intellectual Property Disputes
Within The Countries Of The Gulf Cooperation Council
Does The WTO Provide The Most Appropriate Forum?**

**تسوية منازعات الملكية الفكرية داخل دول مجلس التعاون الخليجي
هل توفر منظمة التجارة العالمية المنتدى الأكثر ملائمة؟**

Preparation

Dr. Ibrahim Mazkar Saleh Al-Otaibi

د . إبراهيم مذكر صالح العتيبي

Department of Regulations
College of Sharia and Regulations, University



قسم الأنظمة

كلية الشريعة والأنظمة ، جامعة تبوك

موجز عن البحث

عقب القرار التاريخي الذي اتخذه أعضاء مجلس التعاون الخليجي في منظمة التجارة العالمية، تعيد هذه الورقة تقييم الأهمية المستمرة لآلية تسوية المنازعات التابعة لمنظمة التجارة العالمية، لا سيما فيما يتعلق بحماية حقوق الملكية الفكرية، وحتى الآن، لم تقم بعد مؤسسات دول مجلس التعاون الخليجي بتنفيذ نظام عام وفعال للاعتراف بحقوق الملكية الفكرية وتطبيقها، ونظرًا للدرجات المتفاوتة من الحماية الممنوحة لحقوق الملكية الفكرية من السلطة القضائية من دولة أحد أعضاء مجلس التعاون الخليجي إلى أخرى، فقد ظهرت ممارسة مفادها أن الدول الأعضاء في مجلس التعاون الخليجي، التي تفتقر إلى علاج فعال للانتهاكات المتعلقة بالملكية الفكرية على المستوى الإقليمي، ستبدأ بدلاً من ذلك إجراءات تسوية المنازعات مع منظمة التجارة العالمية، لذا تقدم الورقة تحليلاً حاسم لنقاط القوة والقيود المتعلقة بمنظمة التجارة

العالمية كمتدى عالمي لتسوية المنازعات حيث يمكن لأصحاب حقوق الملكية الفكرية فرض حقوقهم داخل دول الأعضاء في مجلس التعاون الخليجي، ولقد اكتسبت هذه القضايا مكانة بارزة في أعقاب القرارات الأخيرة التي اتخذتها لجنة منظمة التجارة العالمية، مما أثار تساؤلات أوسع حول الفضائل الأشمل للتكامل التجاري في تعزيز حماية الملكية الفكرية في دول مجلس التعاون الخليجي، على من رغم اعتراضات دول مجلس التعاون الخليجي، وسيتم تحديد هذه الصراعات، بين حماية الحقوق والنفذ الوطني، واستكشافها في حالة نزاع حديث متعلق بالملكية الفكرية بين قطر والمملكة العربية السعودية، وفي التحليل النهائي، ستؤكد الورقة أن تداعيات الحكم توفر تذكيراً حاداً بالعقبات المتبقية أمام التنفيذ المحلي الفعال لأحكام منظمة التجارة العالمية، لا سيما عندما يتعلق الأمر بمسائل حساسة تتعلق بالسلطة العليا والمصالح الاقتصادية الوطنية.

الكلمات المفتاحية : تسوية المنازعات ، الملكية الفكرية ، مجلس التعاون الخليجي ، منظمة التجارة العالمية .

**Settlement Of Intellectual Property Disputes
Within The Countries Of The Gulf Cooperation Council
Does The WTO Provide The Most Appropriate Forum?**

Ibrahim Mazkar Saleh Al-Otaibi

Department of Regulations, College of Sharia and Regulations, University of Tabuk, Saudi Arabia

E-mail : imathker@ut.edu.sa

Abstract :

Following the historic decision taken by the members of the Gulf Cooperation Council in the WTO, this paper re-evaluates the continuing importance of the WTO's dispute settlement mechanism, particularly with regard to the protection of intellectual property rights, and to date, the GCC institutions have not yet implemented the system General and Effective for Recognition and Enforcement of Intellectual Property Rights Given the varying degrees of protection granted to intellectual property rights by the judiciary from one member state of the Gulf Cooperation Council to another, the practice has emerged that member states of the Gulf Cooperation Council, which lack an effective remedy for property violations, At the regional level, dispute settlement procedures will instead begin with the WTO, so the paper provides a critical analysis of the strengths and limitations of the WTO as a global forum for dispute settlement where IPR holders can enforce their rights within the member states of the Gulf Cooperation Council. These issues have gained prominence in the wake of recent decisions by the WTO Committee Mieh, which raised broader questions about the broader virtues of trade integration in enhancing intellectual property protection in the Gulf Cooperation Council countries, despite the objections of the Gulf Cooperation Council countries. Between Qatar and Saudi Arabia, and in the final analysis, the paper will stress that the implications of the ruling provide a sharp reminder of the remaining obstacles to effective domestic implementation of WTO rulings, particularly when it comes to sensitive matters of supreme authority and national economic interests.

Keywords: Dispute Settlement, Intellectual property, Gulf Cooperation Council, World Trade Organization.

Introduction

This paper seeks to determine whether the World Trade Organisation (WTO) provides the most appropriate forum for intra-Gulf Cooperation Council (GCC) disputes related to intellectual property (IP) rights given that the GCC has failed to establish an IP protection regime. This contention is based on two premises. First, all GCC Member States are WTO Member States, and second, IP right holders of one GCC Member State are more likely to compel another GCC Member State to enforce their rights by asking their home government to submit a complaint to the WTO Dispute Settlement Body. Emphasis is placed on the WTO Panel decision following consultations requested by the government of Qatar with the government of the Kingdom of Saudi Arabia (KSA).

The paper begins with a brief discussion of the GCC policy on IP rights. It explains why that IP right holders of one GCC Member State do not enjoy the same level of protection in all GCC Member States and cannot enforce their rights against any infringement within the union. This is followed by the presentation of the dispute settlement system of the WTO as the solution based on the argument that the combination of the GCC common market and trade liberalization upheld by the WTO has not only enhanced access to the GCC markets for both foreign and local GCC producers, but has also enabled GCC IP right holders to enforce their rights in all GCC Member States. The case involving Qatar and the KSA is then analysed, with focus on how a Qatari company used the WTO dispute settlement system to enforce its IP rights in the KSA, despite the objections of the government of the KSA. It is however noted that the implementation of the WTO Panel's Report is a major obstacle that must be overcome in order to establish that the WTO provides the most appropriate forum for intra-GCC disputes related to IP rights.

GCC policy on IP Rights

Since its creation in January 2003, the GCC has placed emphasis on the customs union and common market to deepen economic integration and free trade in the region.⁽¹⁾ Alshammari observes that the ratification of the Unified Economic Agreement by the GCC Member States was the most important step toward economic integration because the Agreement laid the groundwork for coordinating and standardizing monetary and customs regulations with the ultimate objective of creating a fully integrated currency union.⁽²⁾ By 2008, the GCC was said to have completed three stages of the five-stage regional integration model developed and enhanced by Frankel et al.,⁽³⁾ and Ravenhill.⁽⁴⁾ The stages completed include free trade zone, customs union, and common market. This implies that the only two stages between the GCC and full regional integration are economic union and political union. In light of the analyses of many commentators, it may be contended that the objective of regional integration in the GCC is more likely to be achieved than not. Looney for example noted that the customs union and increased viability of the private sector in the GCC had significantly reduced economic and security risks and facilitated economic diversification and industrialization.⁽⁵⁾ Roy and Zarrouk also observed that GCC states were increasingly able to impose common tariffs on non-GCC goods due to the customs union.⁽⁶⁾ The rules and procedures for collecting data across the custom union had been harmonised, enhancing regional security and ensuring that GCC citizens and organisations had equal access to the common market.⁽⁷⁾ It follows that IP right holders of one GCC Member State ought to enjoy the same level of protection in all GCC Member States and should be able to enforce their rights against any infringement within the entire union.

However, Nasser was among those who thought the economic integration of

-
- (1) These were key items in the general guidelines agreed by the signatory states. See Robert E Looney, 'The Gulf Cooperation Council's Cautious Approach to Economic Integration' (2003) 24(2) *Journal of Economic Cooperation* 137, 138-139.
 - (2) Sultan Alshammari, 'The Impact of the Customs Union Agreement on GCC Bilateral Trade, Using Aggregated and Disaggregated Data' (2019) WP/19/11 SAMA Working Paper 1, 3.
 - (3) Jeffrey A Frankel et al, *Regional Trading Blocs in the World Economic System* (Institute for International Economics 1997) 94-134.
 - (4) John Ravenhill, *Global Political Economy* (4th edn, Oxford University Press 2014).
 - (5) Robert E Looney (n 1) 154.
 - (6) Jayanta Roy and Jamel Zarrouk, *Completing the GCC Customs Union* (The World Bank 2006) 27-31. Jayanta Roy and Jamel Zarrouk, *Completing the GCC Customs Union* (The World Bank 2006) 27-31
 - (7) Hassan Hakiman, 'GCC Economic Integration: Fiction or Reality' (2015) Khamsoon Policy Paper 1, 6.

the GCC was more about desirable aspirations than reality. He argued that although the ability of the GCC to trade as a bloc (as desired by GCC leaders) was an important indicator of economic integration, in reality, intra-GCC trade was surprisingly low.⁽¹⁾ It is intriguing that the intra-GCC trade remains relatively low despite the completion of three stages of regional integration and the strong show of political will to achieve full regional integration. One of the reasons for the low intra-GCC trade is that the members of the GCC have been unable to agree on matters of national sovereignty and a common GCC security policy.⁽²⁾ There are also differences in institutional structures and reform processes that compromise regional integration. There have been sharp disagreements on single exchange rates, the use of a common fiscal policy, and identical interest rates. These largely led to the deferment of the Gulf Monetary Union (GMU).⁽³⁾ Mishraf concluded that “[t]he fear of the GMU reveals the fear of losing national autonomy on economic decisions, which are vital for the stability and survival of the small GCC countries, assuming that most monetary policies would be dictated by Saudi Arabia.”⁽⁴⁾

The fear of losing national autonomy on economic matters has been expressed markedly with regard to the control of the different forms of IP rights. In 1992, the GCC established a Patent Office in Riyadh, Saudi Arabia. Patents issued by the office are enforceable in all GCC Member States. On December 31, 2001, the GCC Supreme Council adopted the Unified Economic Agreement ratified by GCC states that contains harmonized laws and regulations on IP that reflect the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This is an agreement ratified or wholly adopted by all WTO Member States that sets the minimum standards for each State’s regulation of the IP rights of holders of other Member States. This was described as a revolution in the international regulation of IP rights.⁽⁵⁾ Despite criticisms of TRIPS as a response of the United States, the European Union (EU) and Japan to the decline in the competitiveness of their IP-

(1) Ahmzad Hussain Kamal Naser, ‘Trade and Regional Integration: Analysis of the Effectiveness in the GCC’ (2008) 1 *International Journal of Islamic and Middle Eastern Finance and Management* 95, 95-112.

(2) Kristian Coates Ulrichsen, ‘Book Review of Rory Miller, Desert Kingdoms to Global Powers: The Rise of the Arab Gulf’ (2019) 9(1) *Journal of Arabian Studies* 114, 114-116.

(3) Alexis Antoniadou, ‘The Gulf Cooperation Council Monetary Union’ in Mehran Kamrava (ed), *The Political Economy of the Persian Gulf* (Hurst 2012) 174-175.

(4) Ashraf Mishrif, ‘The GCC’s Unsettled Policy for Economic Integration’ (2021) 111 *The Muslim World* 70, 84.

(5) JH Reichman, ‘From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement’ (1996-97) 29 *New York University Journal of International Law & Policy* 11, 13-16.

intensive technology industry and the rise of emerging economies,⁽¹⁾ the GCC incorporated TRIPS into the United Economic Agreement. As such, each GCC Member State is required to provide IP rights covering all holders from the union. It follows that the GCC sought to establish an IP protection regime by ensuring that international standards are recognized and enforced in the GCC.⁽²⁾ However, it is uncertain why the GCC did not establish an IP protection regime that was based on the harmonization of the domestic laws of GCC Member States. Such a regime would have been a better reflection of the reality of GCC market.

It must be noted that the GCC was unable to enact a uniform law to govern intra-regional trade and national exports. This may explain why it was also unable to harmonise the domestic IP laws of GCC Member States. The closing statement of Supreme Council after the Twenty-Seventh Session noted that there was agreement on the Trademark Law that had been formulated.⁽³⁾ Despite the fact that the Supreme Council approved a revised version of the Trade Mark Law in 2012 (at the Thirty-third Meeting), and the Implementing Regulations of the law was approved by the Trade Cooperation Committee in 2015 (at the Fifty-first Meeting), the law has never been enacted and implemented. Thus, there is no single system for trade mark registration or a common trade market office. Each GCC state has relied on its domestic IP law to protect the rights of IP owners within its jurisdiction. This has been particularly problematic when it comes to enforcing IP rights across the region. It has been particularly difficult for IP holders in one GCC Member State to enforce their rights in other GCC Member States. Given the disjointed approach at the level of the GCC, there is good reason to contend that the WTO provides the most appropriate forum for disputes related to IP rights to be settled within a well-delineated framework. This is because IP right holders of one GCC Member State are more likely to compel another GCC Member State to enforce their rights by asking their home government to submit a complaint to the WTO Dispute Settlement Body.

(1) Daniele Archibugi and Andrea Filippetti, 'The Globalization of Intellectual Property Rights: Four Learned Lessons and Four Thesis' (2010) 1 *Journal of Global Policy* 137, 138-149.

(2) See David Price, 'The GCC Intellectual Property Regimes: Global Harmonisation or Regional Integration?' in Mohamed A Ramady (ed), *The GCC Economies: Stepping Up to Future Challenges* (Springer 2012) 131-146.

(3) The Closing Statement of the Twenty-Seventh Session of the Supreme Council of the Cooperation Council for the Arab States of the Gulf, 18-19 Dhul-Qaa'da 1427 AH/9, 10 December 2006.

Enforcing IP Rights at the Level of the WTO

Three of the six members of the GCC ratified the Final Act of the Uruguay Round and became founding WTO Member States.⁽¹⁾ This means that these GCC Member States made a firm commitment during the Uruguay Round negotiations to reduce tariffs and refrain from imposing protectionist measures that hurt fair competition by entities of other WTO signatory States. At present, all GCC Member States have made this firm commitment. Thus, the GCC has since become an important player in the WTO because all the members of the GCC are WTO Member States. Some commentators have noted that the GCC States are among the “good performers of [the WTO], providing perioding anti-protectionist pledge to the international community.”⁽²⁾ Dar and Presly intimate that there was consensus in the GCC as regards complying with the WTO standards because this enabled the Member States to present a unified front as they negotiated their membership.⁽³⁾ The combination of the GCC trade liberalization upheld by the WTO has not only enhanced access to the GCC markets for both foreign and local GCC producers, but has also enabled GCC IP right holders to enforce their rights in all GCC Member States.

All GCC States have integrated TRIPS into their domestic legislation. TRIPS is based on the free market model and promotes trade liberalization.⁽⁴⁾ IP right holders from one WTO Member State are protected in all countries that have ratified the WTO.⁽⁵⁾ This is because TRIPS requires all WTO Member States to comply with the Paris Convention for the Protection of Industrial Property, and the Berne Convention for the Protection of Literary and Artistic Works, regardless of whether the States are party to these Conventions.⁽⁶⁾ The integration of the Paris and Berne Conventions ensures that organisations and natural persons

(1) Jamal Zarrouk, ‘Policy Implications of the Uruguay Round for the Arab Countries’ in Said El-Naggar (ed), *The Uruguay Round and the Arab Countries* (International Monetary Fund 1996) Chapter 4.

(2) Habib Kazzi, ‘Is the Gulf Cooperation Council (GCC) Customs Union A Myth?’ (2017) 5(5) *Asian Journal of Business and Management* 150, 150.

(3) Humayon A Dar and John R Presley, ‘The Gulf Co-operation Council: A Slow Path to Integration?’ (2001) 24(9) *World Economy* 1162, 1162.

(4) See Peter K Yu, ‘TRIPS and Its Discontents’ (2006) 10 *Marquis Intellectual Property Law Review* 369, 386-387. However, it has been noted that the EU and the United States are increasingly using free trade agreements to circumvent TRIPS obligations in what is called TRIPS-plus agreements. See Peter Drahos, ‘Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid’ (2004) 60 *Case Western Reserve Journal of International Law* 53, 60.

(5) W Landes, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2009) 414.

(6) See Articles 1 through 12 and 19 of TRIPS.

incorporated or domiciled in a WTO Member State enjoy in all other WTO Member States the same advantages granted to nationals of these States when it comes to the protection of IP rights. It also ensures that each WTO Member State recognizes the copyrights of creators from other Member States. As such, by ratifying the WTO, each GCC State is obligated to recognize the IP rights of nationals of all other GCC States. They are also obligated to extend the advantages granted to their nationals to the nationals of other GCC States. These obligations have made the GCC Trademark Law redundant. It is almost unnecessary to establish a GCC IP protection regime. Also, given that violations of TRIPS and the Berne and Paris Conventions are settled using the WTO dispute resolution system, there is an existing mechanism for ensuring conformity of IP rights protection and enforcement in the GCC. A recent decision by the three-person WTO Panel affirms this contention.

The Case of Qatar v KSA

On October 1, 2018, the government of Qatar requested consultations with the government of the KSA regarding the latter's failure to protect the IP rights of a Qatari company to the same extent as Saudi companies. The complaint made by the government of Qatar is based on the contention that the Qatari company, beIN, had exclusive broadcasting rights in the Middle East (including Saudi Arabia) of several leagues for a range of sports, but a Saudi company, beoutQ, used beIN's content without prior authorization from the latter.⁽¹⁾ However, beIN was unable to initiate proceedings in Saudi Arabia to enforce its IP rights, and the Saudi government was unwilling to prosecute beoutQ for violating beIN's IP rights. Given that both Qatar and the KSA are GCC Member States, it may be stated that the fact the government of Qatar had to request for consultations at the WTO is sufficient evidence of the deficiency of GCC's dispute settlement system.

The political ties between both governments at the time is not relevant given that, if there was a robust dispute settlement system, the government of Qatar would have been compelled to seek a resolution from this system first. Miller intimates that GCC Member States have used different methods of negotiation and mediation to settle internal disputes over the past four decades. However, due to the political tension in region since the middle of 2017, governments refused to negotiate and it was difficult to consider mediation as a viable option.⁽²⁾ After analysing the dispute settlement mechanism of the GCC, Hussain and Zahraa concluded that there is no recognisable judicial organ in the GCC tasked with settling disputes between governments and citizens or organisations of Member States, and there is no strong political will to establish such an organ that may then have to override the decisions of domestic courts and administrative tribunals.⁽³⁾

The request for consultations is the formal procedure for initiating a dispute in the WTO. The request triggers the DSU's application. In many cases, officials of the disputing States engage in informal discussions prior to proceedings in the WTO. However, given the political tension between Qatar and Saudi Arabia at the

(1) See *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, Report of the Panel, WT/DS567/R, WTO.

(2) Rory Miller, 'Managing Regional Conflict: The Gulf Cooperation Council and the Embargo of Qatar' (2019) 10(2) *Special Issue: New Diplomacy for New Conflicts* 36, 38.

(3) See Fathi Hussain and Mahdi Zahraa, 'Dispute Settlement Mechanisms: Gulf Cooperation Council Practice v. European Union Practice' (2021) *Arab Law Quarterly* <<https://doi.org/10.1163/15730255-BJA10077>> accessed 28 September 2021.

time, it was difficult to discuss the matter informally.⁽¹⁾ Also, the fact that there was no attempt to settle the dispute at the level of the GCC reinforces the contentions that there is no supranational judicial organ tasked with settling disputes within the GCC, and the WTO is presently the most appropriate forum for the settlement of intra-GCC disputes related to IP rights.

Article 4(2) of the WTO's Dispute Settlement Understanding (DSU) provides as follows:

Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.

Thus, both Qatar and the KSA have undertaken to accord sympathetic consideration to and afford adequate opportunity for consultation regarding representations made by the governments of all WTO Member States, including their respective governments. In this light, Qatar's claim alleged that the KSA had violated Articles 3, 4, 9, 14, 16, 41, 42 and 61 of TRIPS. Although the government of the KSA refused to engage in consultations with Qatar and reluctantly participated in the panel process, it argued that its actions were justified by Article 73 of TRIPS, and the matter was not covered by the DSU. Article 73(b)(iii) of TRIPS provides that "[n]othing in this Agreement shall be construed to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests or to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests."

Article 73 of TRIPS mirrors Article XXI of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). Article 73 has been described as "a unique provision in the context of international intellectual property law" because it recognizes "the need to permit states to be excluded from their obligations under the TRIPS Agreement in order to protect their essential security interests" and "confirms the central role of the

(1) Four GCC States severed ties with Qatar on the grounds that the latter had breached the Riyadh Agreements of 2014 which required all signatories to "cease supporting, financing or harboring persons or groups presenting a danger to national security, in particular terrorist groups." Qatar was adamant that it had not violated the Agreement and argued that it was the other GCC States that had violated the principle of non-intervention and encroached upon its domaine reserve. Qatar then sought international arbitration and initiated proceedings at several international bodies including the WTO, the Civil Aviation Organisation, and the Committee on the Convention on the Elimination of All Forms of Racial Discrimination. See Alexandra Hofer, 'Sanctioning Qatar: The Finale?' (2021) Blog of the European Journal of International Law, 16 June

principle of territoriality in international trade law generally and in international intellectual property law specifically.”⁽¹⁾ However, in *Russia – Measures Concerning Traffic in Transit*, the WTO Panel noted that “there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny.”⁽²⁾ This implies that the KSA could not simply invoke Article 73 of TRIPS to shield its decisions regarding Qatar’s beIN from scrutiny.

Given that consultations failed to settle the dispute, the government of Qatar requested the establishment of a Panel on November 9, 2018. The Panel is an independent quasi-judicial body that examines the issues. It is established by the Dispute Settlement Body. This is the adjudicative phase of the dispute settlement process of the WTO. The parties are expected to accept the rulings of the Panel as binding in the same way as the rulings of the Dispute Settlement Body. This is provided for by Article 11 of the DSU.

The Panel Report was distributed to Members on June 16, 2020. The Panel agreed with the KSA that there was a crisis since June 2017 that was directly related to Saudi military interests or the protection of public order sufficient to justify an “emergency in international relations.” This conclusion was based on the fact that the KSA had severed economic and diplomatic ties with Qatar, and the severance was “the ultimate State expression of an emergency in international relations.”⁽³⁾ The Panel pointed out as follows:

When a group of States repeatedly accuses another of supporting terrorism and extremism ... that in and of itself reflects and contributes to a ‘situation ... of heightened tension or crisis’ between them that relates to their security interests.⁽⁴⁾

However, the Panel did not endorse the previously held view that invoking Article XXI of GATT (and consequently Article 73 of TRIPS) was the preserve of sovereign States under international law, and the Dispute Settlement Body could not review their motivation for the invocation of the security exceptions.⁽⁵⁾ In fact, the Panel noted that the KSA did not justify or substantiate its argument regarding the justiciability of the dispute or that the dispute was outside of the Panel’s jurisdiction. Although the KSA did not specifically make these arguments, many third parties, including the EU and Australia, stated that it was implied in

(1) Emmanuel Kolawole Oke, ‘COVID-19, Pandemics, and the National Security Exception in the TRIPS Agreement’ (2021) 12 *JIPITEC* 397, 397-398.

(2) *Russia – Measures Concerning Traffic in Transit*, WT/DS512/7, 29 April 2019, para. 7.100.

(3) *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, paras. 7.258-7.262.

(4) *Ibid*, para. 7.263.

(5) GATT, Council, ‘Minutes of Meeting’ (C/M/157, 22 June 1982) 10.

the KSA's arguments.⁽¹⁾ Nonetheless, they failed to state any grounds upon which the Panel's jurisdiction could be declined. The Panel held that Qatar's complaint was centered on WTO-inconsistency with the actions of a WTO Member State, and that clearly fell within the Panel's terms of reference. Hence, the dispute was justiciable.

As regards the KSA's argument that its actions were justified by Article 73 of TRIPS, the Panel held that the KSA was justified in preventing beIN from enforcing its IP rights in Saudi courts only in light of Articles 41(1). However, the KSA violated 42. Article 41(1) states that Members shall ensure that enforcement procedures are available under their law so as "to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse." Article 42 provides that "Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement."

Hence, the KSA was in violation of Article 42 because a company, beoutQ, subject to the KSA's jurisdiction openly engaged in the violation of a Qatari company's IP rights by streaming media content that belonged to beIN. The Panel adopted the framework it had developed in *Russia – Traffic in Transit* in light of Article XXI(b)(iii) of GATT. The Panel justified its decision to rely on the framework on the grounds that "where two sets of exceptions from obligations use similar language and requirements and set out their provisions in the same manner, the Appellate Body has considered prior panel and Appellate Body reports concerning the first set of exceptions to be relevant for its analysis under a second set of exceptions."⁽²⁾

The Panel further clarified the security exceptions under Article 73 by stating that the framework of the exceptions comprises four factors that have to be taken into consideration:

- Whether the KSA had established that there was a "war or other emergency international relations" in light of Article 73(b)
- Whether the actions in violation of the KSA's obligations under the WTO

(1) *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, pg. 50-51.

(2) The Panel cited a number of previous cases that have adopted this framework, including *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/26, 25 April 2013; *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/12, 11 May 2016.

were “taken in time of” the said war or other emergency in international relations

- Whether the KSA had established “essential security interests” to enable an evaluation of whether there was a sufficiently strong link between the KSA’s actions and the protection of its security interests
- Whether the KSA’s actions were so unrelated to the “war or other emergency international relations” as to make it less likely that the KSA would have considered its actions to be essential for protecting its essential security interests.⁽¹⁾

The Panel proceeded by holding that the KSA was not justified in invoking Article 73 of TRIPS because the failure of the Saudi government to prosecute beoutQ, contrary to Article 61 of TRIPS. Article 61 provides that “Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.”

There was prima facie evidence that beoutQ was widely available in the KSA and it was most likely operated by persons within the KSA. There was also prima facie evidence that beoutQ had violated beIN’s IP rights. Hence, the KSA’s actions were inconsistent with Articles 41, 42 and 61 of TRIPS since they prevented beIN from initiating action in the KSA against the infringement of beIN’s IP rights, and they also encouraged or tolerated beoutQ’s actions by refraining from prosecuting and sanctioning beoutQ.

(1) *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, para. 7.242.

The Implementation of the Panel's Report

The Panel's Report in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* has been very important as regards the scope of the security exceptions. The Panel seems to hold that actions that fall within the realm of "emergency in international relations" are actions related to armed conflicts or heightened tension between States. However, this is problematic because the Doha Declaration states that "public health crises, including (...) epidemics' can represent a 'national emergency', arguably support an application of Article 73(b)(iii) TRIPS ... a WHO declared pandemic should constitute an international emergency, especially if accompanied with general economic, social and political instabilities." Hence, it is uncertain why a pandemic that seriously inhibits the State's ability to maintain order should not represent an emergency.⁽¹⁾

Also, the KSA had good reasons to contend that the severance of economic and diplomatic ties between States is "the ultimate State expression of an emergency in international relations." Despite the absence of armed conflict, the severance of ties certainly creates heightened tension and motivates the States to avoid dealing with each other. However, it remains that the KSA did not establish that there was a sufficiently strong link between the KSA's decision not to prosecute beoutQ and the protection of the Kingdom's security interests.

The above notwithstanding, the implementation of the Panel's Report is another major obstacle that must be overcome in order to establish that the WTO provides the most appropriate forum for intra-GCC disputes related to IP rights to be settled within a well-delineated framework. This is because the inability to enforce the Panel's Report defeats the entire purpose of dispute settlement at the level of the WTO. The KSA reserved the right to appeal to the WTO Appellate Body, which was unavailable to resolve appeals. Also, given that the KSA and Qatar did not ratify the interim Arbitration Agreement, they were compelled to negotiate the terms and procedures of arbitration if both countries decided to pursue that option under Article 25 of the DSU.

What this shows is that although the Panel's Report provided clarity on the interpretation of Article 73 of TRIPS and Article XXI of GATT, it remains uncertain how and when the Panel's Report can be enforced. Stewart contends that despite the decisions of the Dispute Settlement Body, most of the countries that had unilaterally imposed protectionist or anticompetition measures without recourse to the WTO disputes settlement system were likely to continue to do so.⁽²⁾ Hence,

(1) Oke (n 26) 402.

(2) Terence P. Stewart, 'Qatar's WTO Dispute with Saudi Arabia – Panel Report Released from June 16, 2020' (2020) *Washington International Trade Association* 1, 5.

it is likely that, if there were no negotiation within the GCC, the GCC States that had severed ties with Qatar were likely continue to deny to prosecute the violation of the IP rights of Qatari companies or to allow Qatari companies to initiate proceedings within their jurisdiction against entities that have violated the IP rights of the Qatari companies.

In 2018, the Chair of the WTO Appellate Body, Ujal Singh Bhatia, said at the presentation of the Appellate Body's Annual Report that 2017 was an "extraordinarily strenuous year" and the Body was facing "unprecedented challenges" due to the rising number and complexity of appointments and the difficulty in appointment of new members. He noted further that this paralysis made it very difficult to enforce the Appellate Body's decisions and defeated the purpose of dispute settlement at the level of the WTO.⁽¹⁾

For over twenty years, the reluctance of WTO Member States to implement the recommendations of the Dispute Settlement Body has been highlighted as one of the major challenges facing the WTO.⁽²⁾ However, under the former GATT system, the Panel's Report could only be adopted by positive consensus by the disputing States and third parties. This safeguard was a huge roadblock to enforcement given that it essentially gave all the parties, including the respondent, a veto in dispute settlement.⁽³⁾ The WTO then introduced a rule of adoption by default whereby the Panel's Report can be implemented after adoption by the Dispute Settlement Body. Also, the complainant may seek permission to retaliate in the form of trade sanctions if the respondent fails to implement the Panel's Report within 20 days after the end of a reasonable time period. Retaliation is governed by Article 3(7) and Article 22(2) of the DSU. This is the most serious sanction that may be imposed on a Member State that fails to implement the report. Article 22(2) refers to the retaliatory measures or sanctions as "suspension concessions or other obligations under the covered agreements." Prior approval by the Dispute Settlement Body is required under Article 22(6) of the DSU. However, the retaliatory State applies the

(1) WTO, 'Unprecedented Challenges Confront Appellate Body, Chair Warns' (22 June 2018) WTO. Available at: [WTO | 2018 News items - "Unprecedented challenges" confront Appellate Body, chair warns](#) (accessed 15 September 2021).

(2) See Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' (2000) 94 *American Journal of International Law* 335, 335. See also William J. Davey, 'Evaluating WTO Dispute Settlement: What Results Have Been Achieved through Consultations and Implementation of Panel Report?' in Yasuhei Taniguchi et al (ed), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (Cambridge University Press 2007) 98.

(3) Juscelino F. Colares, 'The Limits of WTO Adjudication: Is Compliance the Problem?' (2011) 14(2) *Journal of International Economic Law* 403, 422.

countermeasures selectively against the non-compliant State. This implies that the retaliatory State ought to be able to effectively apply countermeasures against the non-compliant State, else the former would only obtain bragging rights from the entire process.

Previous studies have shown that the majority of adjudications by the Dispute Settlement Body do not reach the stage of retaliation.⁽¹⁾ Hence, the dispute settlement system of the WTO has a remarkable record of compliance despite the uncertainty regarding enforcement. Also, it has been argued that strengthening sanctions to ensure enforcement would be of little effect given that enforcement, whether multilateral or unilateral, depends on the will of the States rather than adjudicators.⁽²⁾ The case between the KSA and Qatar is another example of adjudication within the dispute settlement system of the WTO that will not reach the stage of retaliation. In January 2021, the GCC Member States signed a “Solidarity and Stability Agreement” that effectively ended the rift between the KSA and Qatar. Nonetheless, credit may hardly be given to the dispute settlement system of the WTO since resolution was achieved at the level of the GCC, via the good offices of Kuwait and a non-GCC Member, the United States.

(1) Steve Charnovitz, ‘The Enforcement of WTO Judgements’ (2009) 34 *Yale Journal of International Law* 558, 562; Jide Nzelibe, ‘The Case Against Reforming the WTO Enforcement Mechanism’ (2008) *University of Illinois Law Review* 319, 323.

(2) See Jack L. Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005) 161-162.

Conclusion

Although the GCC has placed emphasis on economic integration and free trade in the region, it has failed to establish an IP protection regime that ensures that an IP holder in one GCC Member State can enforce their rights in all GCC Member States. GCC Member States have been unable to agree on matters of national sovereignty and a common GCC security policy. There are also differences in institutional structures and reform processes that compromise regional integration. There have been sharp disagreements on single exchange rates, the use of a common fiscal policy, and identical interest rates. The fear of losing national autonomy on economic matters has been expressed markedly with regard to the control of the different forms of IP rights. Despite the fact that the Supreme Council approved a revised version of the Trade Mark Law in 2012, and the Implementing Regulations of the law was approved by the Trade Cooperation Committee in 2015, the law has never been enacted and implemented. Thus, there is no single system for trade mark registration or a common trade market office. Thus, each GCC state has relied on its domestic IP law to protect the rights of IP owners within its jurisdiction.

Thus, there is good reason to contend that the WTO provides the most appropriate forum for intra-GCC disputes related to IP rights to be settled within a well-delineated framework. This is because all GCC Member States are also WTO Member States. Hence, IP right holders of one GCC Member State are more likely to compel another GCC Member State to enforce their rights by asking their home government to submit a complaint to the WTO Dispute Settlement Body. This explains why in October, 2018, the government of Qatar requested consultations with the government of the KSA regarding the latter's failure to protect the IP rights of a Qatari company to the same extent as Saudi companies.

The government of the KSA argued that its actions were justified by Article 73 of TRIPS, and the matter was not covered by the DSU. This provided the WTO Panel with the opportunity to clarify the security exceptions under Article 73. The Panel seems to hold that actions that fall within the scope of the security exceptions are actions related to armed conflicts or heightened tension between States. Thus, although the KSA justifiably argued that the severance of economic and diplomatic ties with Qatar was "the ultimate State expression of an emergency in international relations," the KSA failed to establish that there was a sufficiently strong link between the KSA government's decision not to prosecute the Saudi infringer and the protection of the Kingdom's security interests.

However, the KSA reserved the right to appeal to the WTO Appellate Body, which was unavailable to resolve appeals. Also, since the KSA and Qatar did not ratify the interim Arbitration Agreement, they were compelled to negotiate the terms and procedures of arbitration if both countries decided to pursue that option. It follows that the implementation of the Panel's Report is a major obstacle that must be overcome in order to establish the WTO as an appropriate forum for intra-GCC disputes related to IP rights. Moreover, the dispute was finally resolved following negotiations at the level of the GCC, rather than the WTO.

References

- ❖ Alshammari S, 'The Impact of the Customs Union Agreement on GCC Bilateral Trade, Using Aggregated and Disaggregated Data' (2019) *WP/19/11 SAMA Working Paper 1*
- ❖ Antoniades A, 'The Gulf Cooperation Council Monetary Union' in Kamrava M (ed), *The Political Economy of the Persian Gulf* (Hurst 2012)
- ❖ Charnovitz S, 'The Enforcement of WTO Judgements' (2009) 34 *Yale Journal of International Law* 558
- ❖ Davey WJ, 'Evaluating WTO Dispute Settlement: What Results Have Been Achieved through Consultations and Implementation of Panel Report?' in Taniguchi Y et al (ed), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (Cambridge University Press 2007)
- ❖ Drahos P, 'Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid' (2004) 60 *Case Western Reserve Journal of International Law* 53
- ❖ Frankel JA, Stein E and Wei S, *Regional Trading Blocs in the World Economic System* (Institute for International Economics 1997)
- ❖ GATT, Council, 'Minutes of Meeting' (C/M/157, 22 June 1982)
- ❖ Goldsmith JL and Posner EA, *The Limits of International Law* (Oxford University Press 2005)
- ❖ Hakiman H, 'GCC Economic Integration: Fiction or Reality' (2015) *Khamsoon Policy Paper 1*
- ❖ Hofer A, 'Sanctioning Qatar: The Finale?' (2021) Blog of the European Journal of International Law, 16 June, 2021
- ❖ Hussain F and Zahraa M, 'Dispute Settlement Mechanisms: Gulf Cooperation Council Practice v. European Union Practice' (2021) *Arab Law Quarterly* <<https://doi.org/10.1163/15730255-BJA10077>> accessed 28 September 2021
- ❖ Kazzi H, 'Is the Gulf Cooperation Council (GCC) Customs Union A Myth?' (2017) 5(5) *Asian Journal of Business and Management* 150
- ❖ Landes W, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2009)
- ❖ Looney RE, 'The Gulf Cooperation Council's Cautious Approach to Economic Integration' (2003) 24(2) *Journal of Economic Cooperation* 137
- ❖ Mishrif A, 'The GCC's Unsettled Policy for Economic Integration' (2021) 111 *The Muslim World* 70
- ❖ Miller R, 'Managing Regional Conflict: The Gulf Cooperation Council and the Embargo of Qatar' (2019) 10(2) *Special Issue: New Diplomacy for New Conflicts* 36
- ❖ Naser AHK, 'Trade and Regional Integration: Analysis of the Effectiveness in

- the GCC' (2008) 1 *International Journal of Islamic and Middle Eastern Finance and Management* 95
- ❖ Nzelibe J, 'The Case Against Reforming the WTO Enforcement Mechanism' (2008) *University of Illinois Law Review* 319
 - ❖ Pauwelyn J, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' (2000) 94 *American Journal of International Law* 335
 - ❖ Price D, 'The GCC Intellectual Property Regimes: Global Harmonisation or Regional Integration?' in Ramady MA (ed), *The GCC Economies: Stepping Up to Future Challenges* (Springer 2012)
 - ❖ Ravenhill J, *Global Political Economy* (4th edn, Oxford University Press 2014)
 - ❖ Reichman JH, 'From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement' (1996-97) 29 *New York University Journal of International Law & Policy* 11
 - ❖ Roy J and Zarrouk J, *Completing the GCC Customs Union* (The World Bank 2006)
 - ❖ *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, Report of the Panel, WT/DS567/R, WTO
 - ❖ 'Saudi FM: Full Ties Restored Between Qatar and Blockading Nations' (January 5, 2021) Al Jazeera < [Saudi FM: Full ties restored between Qatar and blockading nations | News | Al Jazeera](#) > accessed 29 September 2021
 - ❖ Stewart TP, 'Qatar's WTO Dispute with Saudi Arabia – Panel Report Released from June 16, 2020' (2020) *Washington International Trade Association* 1
 - ❖ The Closing Statement of the Twenty-Seventh Session of the Supreme Council of the Cooperation Council for the Arab States of the Gulf, 18-19 Dhul-Qaa'da 1427 AH/9, 10 December 2006
 - ❖ Ulrichsen KC, 'Book Review of Rory Miller, Desert Kingdoms to Global Powers: The Rise of the Arab Gulf' (2019) 9(1) *Journal of Arabian Studies* 114
 - ❖ WTO, 'Unprecedented Challenges Confront Appellate Body, Chair Warns' (22 June 2018) WTO
 - ❖ Yu PK, 'TRIPS and Its Discontents' (2006) 10 *Marquis Intellectual Property Law Review* 369
 - ❖ Zarrouk J, 'Policy Implications of the Uruguay Round for the Arab Countries' in El-Naggar S (ed), *The Uruguay Round and the Arab Countries* (International Monetary Fund 1996)