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SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

REPORT OF THE PANEL

Excerpted version prepared by Prof Daniel Gervais for teaching purposes only.¹

1. The Panel's terms of reference, as set forth in WT/DS567/4, are the following:
 - To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Qatar in document WT/DS567/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.
2. On 6 February 2019, Qatar requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 18 February 2019, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Donald McRae. Members: Ms Annabelle Bennett; Ms Beverley Pereira

A. FACTUAL ASPECTS

1) Saudi Arabia's Legal and Regulatory Context

3. The Saudi Ministry of Media (formerly the Ministry of Culture and Information) and the General Commission of Audio and Visual Media (GCAM) are the governmental entities "in charge of any broadcast, publication, and distribution of written, visual, or audio media content". This includes "the granting of media licences in ... Saudi Arabia and [matters relating to] broadcast, publication, and distribution using media channels and multiplatform, which encompass broadcast signals via satellites".
4. All television and media channels that are interested in operating in Saudi Arabia "must obtain all required licences from the relevant regulatory authorities which may permit operation in the media field and more specifically in relation to publishing and distributing media content or sale and importation of all required reception equipment for the provision thereof". To be licensed as a broadcaster, an entity must satisfy certain objective criteria specific to the broadcasting business, and then generally applicable Saudi law must be observed, including, but not limited to, copyright law, publications law, competition law and criminal law. Broadcasting approval requirements are set out in the regulations of

¹ Free to use with attribution, subject to the same copyright restrictions, if any, that apply to the original text. Paragraph numbers do not match those of the original report. Footnotes omitted. Original document: 123 pages.

GCAM. These provide, among other things, that a Pay TV service shall not be operated in Saudi Arabia without a licence from GCAM. A broadcasting licence may not be renewed or can be cancelled if its holder does not comply with broadcasting laws and regulations or with any other generally applicable Saudi law.

5. Saudi Arabia's domestic copyright regime is established through its Copyright Law and Implementing Regulations. [...] Both parties agreed with the premise that professional sports broadcasts constitute protected "works" under the provisions of the Berne Convention (1971) as incorporated into the TRIPS Agreement, and are covered by the definition of "Audio-Visual Work" under Article 1 of Saudi Arabia's Copyright Law, or otherwise protected under the Copyright Law.
6. Article 13 of the Implementing Regulations provides that "[a]ny use beyond that specified by the owner of audio, visual and broadcasting works shall be deemed an infringement of copyright", including "communication [of] the work to the public without obtaining a prior license from the owners of the copyright" and "[b]reaking of protective barriers for the purpose of presenting broadcasting materials through illegal means". The latter is understood to cover the sale and making available of illegal decoders, a prohibition that is reinforced by Articles 15 and 17 of the Implementing Regulations. Article 11 of the Implementing Regulations on "Infringement Liability" extends to secondary liability by providing, inter alia, that "[a]ny person who obtains an original copy of any intellectual work and exploits it by means of renting, adaptation or permitting others to copy or reproduce it or any other acts which affect or obstruct the author from exercising his rights shall be deemed to have infringed the Copyright".
7. With respect to broadcasting organizations, Article 18 of the Copyright Law provides that the scope of the Copyright Law shall cover "[w]orks of broadcasting organisations". Article 7 of the Implementing Regulations provides broadcasting organizations with "the right to prohibit any of the following acts if undertaken without their authorisation: (1) [f]ixation and reproduction of broadcasts[;] (2) [r]etransmission by wireless means and communication of materials to the public[;] (3) [d]etermining the means of direct broadcast and reception or through receivers or by cable[; and] (4) [t]ransmission to the public of radio broadcast in public places or through internal wire broadcasts of closed compounds".
8. Pursuant to Saudi law, several entities are involved in the initiation, investigation and adjudication of allegations of infringement of the above-mentioned copyrights and related rights. In certain cases, the initiation of such procedures and investigations could ultimately lead to the application by the Saudi government of criminal penalties. Under Article 20 of the Implementing Regulations, entitled "Detection Tasks", "officials of the General Department of Copyright in Riyadh and its branches in the Kingdom's provinces" are "responsible for the task of detecting violations and securing the evidence proving the existence of an infringement of copyright, such as equipment, works or commodities". Article 21 of the Implementing Regulations then explains that, "upon receiving the evidence" resulting from the "detection tasks", the "General Department of Copyright or the competent branch shall" move forward with a number of procedures including "analyzing the content of evidence", after which it must then prepare a report (pursuant to Article 22). Article 23 of the Implementing Regulations, entitled "Investigation of Violations", refers to a "competent investigating officer", and sets out procedures for the task of investigating. After the Saudi government performs its investigation, and in accordance with Article 23(11) of the Implementing Regulations, the "General Department of Copyright shall refer the cases and violations along with all relevant documents to the Committee".
9. The "Committee" referred to in Article 23(11) of the Implementing Regulations is established pursuant to Article 25 thereof, entitled "Violation Review Committee". Referred to as the "Copyright Committee" by Qatar, it is established to adjudicate any allegations of copyright infringement referred to it. Once the Copyright Committee takes a decision by majority vote with respect to any such allegations, its decision is subject to a subsequent layer of approval before it is made final. The elements of the operation of the Copyright Committee, insofar as they have been described generally above, do not appear to be contested by either party.[...]

2) The Political Context

10. The issues that arise in this dispute must be understood in the context of the serious deterioration of relations between Saudi Arabia, Qatar and certain other countries from the MENA region. On 5 June 2017, Saudi Arabia, the UAE and other nations severed all relations with Qatar. In their respective submissions to the Panel, the disputing parties (and the UAE as a third party) each referred to the 5 June 2017 severance and/or the events leading up to the severance and, as noted below, the disputing parties characterized the severance of relations as constituting relevant "background" to the measures at issue in this dispute.
11. Saudi Arabia characterized the events leading up to its severance of relations with Qatar as "relevant background information". However, Saudi Arabia went further, submitting also that the "severance of relations between the two countries and the publicly-stated reasons for the measures of Saudi Arabia constitute the only relevant facts in this dispute".
12. For its part, Qatar explained in its first written submission that the "rampant piracy at issue in this dispute has occurred against the background of Saudi Arabia having imposed, since 5 June 2017, a scheme of coercive economic measures against Qatar". In its panel request, Qatar stated also that:
13. In June 2017, Saudi Arabia imposed a scheme of diplomatic, political, and economic measures against Qatar. Such measures impacted, *inter alia*, the ability of Qatari nationals to protect intellectual property rights in Saudi Arabia. ... The multiple Qatari companies severely impacted by these measures include beIN Media Group LLC and affiliates ("beIN").
14. According to Saudi Arabia, especially since 2011, "the security situation in many countries in the [MENA] region has been unstable, with wars, terrorism, and instability prevailing in many places for many different reasons, causing a devastating effect on human life and on the stability of national governments and multiple crises in international relations". Saudi Arabia provided the following summary of and perspective on the events leading up to the 5 June 2017 severance. The Panel expresses or implies no position concerning any of these allegations. The Panel further recalls that Qatar, while maintaining that many of Saudi Arabia's assertions about the events leading up to the severance of relations are irrelevant to the specific measures at issue, strongly denied certain accusations made by Saudi Arabia. Among other things, Qatar maintains that the period leading up to that date was characterized by cordial and cooperative relations between Qatar and Saudi Arabia.
15. In the context of its discussion of the security situation, Saudi Arabia submitted that "years of active diplomacy at the highest national levels" took place within the Gulf Cooperation Council (GCC), a regional council established by Saudi Arabia, Bahrain, Kuwait, Oman, Qatar and the UAE. According to Saudi Arabia, it and other GCC Countries "have acted, individually where necessary and collectively wherever possible, to uproot the sources of instability in our region". Saudi Arabia stated that "[c]onsistent with this commitment", in November 2013, Bahrain, Kuwait, Qatar and the UAE signed the "First Riyadh Agreement", which established a collective understanding of the causes for, and solutions to, instability and violence in the region.
16. The First Riyadh Agreement included a collective commitment by signatories to refrain from taking certain actions that were identified as the cause of instability, and which are set out in the three paragraphs of the First Riyadh Agreement. The First Riyadh Agreement set forth the following obligations:
 - No interference in the internal affairs of the Council's states, whether directly or indirectly. Not to give harbor or naturalize any citizen of the Council states that has an activity which opposes his country's regimes, except with the approval of his country; no support to deviant groups that oppose their states; and no support for antagonistic media.

- No support to the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the Council States through direct security work or through political influence.
 - Not to present any support to any faction in Yemen that could pose a threat to countries neighboring Yemen.
17. The Mechanism Implementing the Riyadh Agreement was signed by all GCC Countries on 17 April 2014 and set forth implementation procedures regarding the obligations contained in the Riyadh Agreement. It identified certain agreed threats to the security and stability of GCC Countries, reaffirmed the obligations undertaken in the First Riyadh Agreement, and established specific procedures to ensure compliance with commitments undertaken. It also reiterated and expanded upon the obligations listed in the First Agreement relating to the "Internal Security" of GCC Countries, their "Foreign Policy" and their "Internal Affairs". The Implementing Mechanism further clarified that "[i]f any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take an[y] appropriate action to protect their security and stability".
18. Saudi Arabia asserted that, between November 2014 and June 2017, Qatar continued to violate the explicitly agreed terms of the Riyadh Agreements by supporting and harbouring extremist individuals and organizations, many of whom had been designated as terrorists by the United Nations and by individual countries; supporting and allowing terrorist and extremist groups to use Qatar-based and Qatar-sponsored media platforms to spread their messages; and "[e]ngaging in activities that threatened the security and stability of GCC Countries as detailed in reports by intelligence chiefs, including as mandated under the Riyadh Agreements, the details of which will not be presented in the context of this WTO dispute".
19. On 19 February 2017, Qatar's Foreign Minister sent a letter to the Secretary General of the GCC calling upon the GCC Countries to "agree to terminate the Riyadh Agreement which has been overtaken by events at the international and regional levels." Saudi Arabia said that it considered this letter to amount to "a repudiation by Qatar of its obligations under the Riyadh Agreements" (to which Qatar responded that the letter could not reasonably be read in that manner).
20. Saudi Arabia asserted that, between 19 February 2017 and 5 June 2017, Qatar continued to act against Saudi Arabia's essential security interests, in violation of the terms of the Riyadh Agreements. Saudi Arabia asserted that, in addition to continuing to harbour and support extremists and terrorists, Qatar had purportedly made ransom payments to secure the release of kidnapped members of the Qatari royal family. (Qatar responded that these assertions should be rejected as having no basis in fact.)
21. According to Saudi Arabia, it was in the light of the above developments, and following Saudi Arabia's further consideration of remaining viable options to protect its essential security interests in view of Qatar's failure to abide by its commitments under the Riyadh Agreement, that Saudi Arabia determined that severing all diplomatic and consular relations would be the only way to protect effectively its sovereign interests.
22. On 5 June 2017, Saudi Arabia severed relations with Qatar, including diplomatic and consular relations, the closure of all ports, the prevention of Qatari nationals from crossing into Saudi territory, and the expulsion within 14 days of Qatari residents and visitors in Saudi territories.

3) The broadcasting operations of the Qatari-based beIN Media Group

23. beIN Media Group LLC (beIN) is a global sports and entertainment company headquartered in Qatar.
24. To build its business, beIN has made substantial investments in acquiring licences to broadcast content produced by major international right holders. To this end, it has obtained the exclusive rights to broadcast, and to authorize others to broadcast, prime

sporting competitions in the MENA region, including in Saudi Arabia. beIN's content includes, but is not limited to, broadcasts of: the major European football leagues, Major League Baseball, the National Basketball Association, the National Football League, the US Open Tennis Championships, the Fédération Internationale de Football Association (FIFA) World Cup, the Union of European Football Associations (UEFA) Champions League and many others.

25. The rights to broadcast this content have been licensed on a territorial basis, and beIN holds exclusive rights to broadcast in the territory of Saudi Arabia. As a licensor and commercial broadcaster of sports and entertainment content, beIN's revenues are largely generated from subscriptions to beIN's television packages. Saudi Arabia is the largest and most important market in the MENA region, and is strategically important to beIN and its right holders.
26. beIN generally owns the copyright in: (a) any match/event commentary produced by beIN (for example, Arabic match commentary) on particular matches/events; (b) any studio programming produced in and around the relevant live matches/events (excluding any match/event footage included within such studio programming but including any beIN filmed player/manager interviews, and other beIN produced non-match footage); (c) beIN logos (including on-screen channel bugs) included within the relevant transmission; and (d) any beIN commissioned/owned musical works included within the relevant transmissions.
27. In addition, beIN owns the related rights conferred on broadcasting organizations, including the right to prohibit unauthorized fixations, reproductions of fixations and rebroadcasting by wireless means of broadcasts, as well as communications to the public of television broadcasts of the same.
28. Following Saudi Arabia's severance of relations with Qatar on 5 June 2017, the Saudi Ministry of Culture and Information blocked access to beIN's website in Saudi Arabia since early June 2017. Since that time, customers connecting from a Saudi internet protocol address have been redirected to a page stating that beIN websites violate Saudi law.

4) The emergence of beoutQ

29. In August 2017, beoutQ began the unauthorized distribution and streaming of media content that is created by or licensed to beIN, and beIN continues to broadcast in the MENA region. The name "beoutQ", i.e. "be out Qatar", is a play on the name beIN Sports. beoutQ illegally streams and broadcasts the contents of beIN's sports channels, replacing beIN's logo with that of beoutQ. It provides access to 10 beIN sports channels (both live and pre-recorded by beoutQ). In addition to pirated versions of live broadcasts, beoutQ also creates unauthorized reproductions of those broadcasts for later replay as reruns.
30. While beoutQ initially limited its activities to streaming pirated content online, it expanded to the retail sale of beoutQ-branded set-top boxes (STBs) throughout Saudi Arabia and other countries. These STBs receive satellite broadcasts of pirated content and, as discussed further below, they also provide access to Internet Protocol Television (IPTV) applications offering thousands of pirated movies, TV shows and TV channels around the globe. Web streaming appears to have been terminated in favour of beoutQ's satellite-based broadcasting to STBs.
31. In addition to illegally providing access to beIN channels 1-10, the beoutQ STBs come pre-loaded with IPTV applications and portals that lead to other pirated content. Allegedly, the beoutQ custom app store, which comes pre-loaded on the device, contains 25 applications (apps), including 12 IPTV apps, which are used to watch live television and video-on-demand (VOD) content over the Internet. Some of these apps allegedly offer between 2,300 and 4,000 live or recorded television channels from all over the world with thousands of movies available in different languages, and up to 35,000 TV show episodes. The Show Box application, which has come to be known as the "Netflix of piracy", provides free access to more than 4,700 movies, 700 TV-shows and 35,000 TV-show episodes via streaming or direct download to the STB. The other five IPTV applications tested by beIN

offer thousands of live television channels in addition to VOD content and require activation codes (subscriptions) that can be purchased online. These applications offer all major US and European television channels, live US sports events and movies and TV shows in English and other languages. Some of these IPTV applications also broadcast the pirate beoutQ sports channels.

B. THE MEASURES AT ISSUE

32. According to Qatar, the measures at issue "include the following specific acts and/or omissions:
- (i) Saudi Arabia's acts and omissions that result in Qatari nationals being unable to protect their intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property;
 - (ii) Saudi Arabia's acts and omissions that result in failure to accord Qatari nationals treatment no less favourable than that accorded to Saudi Arabia's own nationals or nationals of other countries, with regard to the protection of intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property;
 - (iii) Saudi Arabia's acts and omissions that make it unduly difficult, for Qatari nationals to access civil judicial remedies, or to seek remedies, in respect of enforcement of intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property rights; and,
 - (iv) Saudi Arabia's omission to prosecute, as a criminal violation, piracy on a commercial scale, of material in which copyright is owned by, or licensed to, Qatari nationals."
33. Qatar submitted that the above "acts and omissions" are "reflected" in the following "evidence", which may also be analysed as specific "measures" at issue in this proceeding :
- a. the 19 June 2017 Circular allegedly issued by the Ministry of Culture and Information and GCAM which, according to Qatar, served effectively to strip beIN of the legal right to protect any intellectual property rights related to the beIN channels;
 - b. so-called "anti-sympathy measures" allegedly imposed shortly after the severance of relations on 5 June 2017, and which allegedly subject lawyers based in Saudi Arabia to legal jeopardy if they express support for and/or provide assistance to Qatar and Qatari nationals, and thereby prevent beIN from securing legal representation needed to access civil enforcement procedures against the infringement of its intellectual property rights;
 - c. the travel restrictions, imposed on or shortly after 5 June 2017, to the extent that they, in combination with the anti-sympathy measures and other measures, allegedly prevent beIN from being able to access civil enforcement procedures against the infringement of its intellectual property rights by initiating procedures or testifying in person;
 - d. the Ministerial approval requirement of Copyright Committee decisions which, as applied to beIN, allegedly prevents beIN from being able to access civil and criminal enforcement procedures against the infringement of its intellectual property rights;
 - e. Saudi Arabia's alleged failure to apply criminal procedures and penalties against beoutQ , despite the evidence that beoutQ's activities constitute copyright piracy on a commercial scale and the evidence that it is directed and controlled by persons and entities subject to the criminal jurisdiction of Saudi Arabia; and
 - f. Saudi Arabia's alleged promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts.
34. Qatar asserted that certain of these measures "work together" to prevent beIN from accessing Saudi courts and tribunals to protect its intellectual property rights, and stresses that it challenges their "combined operation".

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35. Article 3.3 of the DSU refers to "measures taken by another Member", without limitation as to the government agencies involved, and "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings". The Panel is guided by the following legal considerations in its assessment of the existence of the measures at issue, and in its assessment of the other disputed factual issues underlying all of Qatar's various claims under Parts I, II and III of the TRIPS Agreement.²
36. For the purposes of the DSU, the notion of "measures" is not restricted by requirements as to form. Although measures challenged in the WTO are often reflected in legal instruments such as enacted legislation, measures enacted or applied through other instruments that are legally binding in a Member's domestic legal framework (decrees, directives, regulations, notifications, judicial decisions, etc.) have also been subject to challenge. A determination of whether an instrument is a "measure" "must be based on [its] content and substance ... and not merely on its form or nomenclature." The legal status of an instrument within the domestic legal system of the Member concerned is not dispositive of whether that instrument is a measure for purposes of WTO dispute settlement.
37. Only those acts or omissions attributable to a WTO Member are subject to WTO obligations. However, under Article 4(1) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Articles on State Responsibility), "[t]he conduct of any State organ shall be considered an act of that Member under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." As a consequence, a Member is responsible for actions at all levels of government (local, municipal, federal) and for all actions taken by any agency within any level of government. Thus, the responsibility of Members under international law applies irrespective of the branch of government at the origin of the action having international repercussions. Additionally, Article 8 of the ILC Articles on State Responsibility provides that the conduct of a person or group of persons shall be considered an act of a State under international law "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

C. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

38. Qatar claims that these measures, in different combinations, violate multiple obligations in Parts I, II and III of the TRIPS Agreement, as follows:
- a. Part I of the TRIPS Agreement:
 - i. Article 3.1 of the TRIPS Agreement (national treatment), because they accord to Qatari nationals treatment that is less favourable than that accorded to Saudi nationals with regard to the protection of intellectual property; and
 - ii. Article 4 of the TRIPS Agreement (most-favoured-nation treatment), because, with regard to the protection of intellectual property, they fail to extend immediately and unconditionally to Qatari nationals advantages granted to nationals of other countries.
 - b. Part II of the TRIPS Agreement:
 - i. Articles 9(1); 11; 11*bis*(1)(i), (ii) and (iii); and 11*ter* of the Berne Convention (1971), as incorporated into Article 9 of the TRIPS Agreement, because they fail to provide authors of works with the exclusive rights mandated therein; and
 - ii. Article 14(3) of the TRIPS Agreement, because they fail to provide broadcasting organizations with the requisite exclusive rights specified therein.

² This and the next two paragraphs were moved from the "findings" section.

- c. Part III of the TRIPS Agreement:
- i. Article 41.1 of the TRIPS Agreement, because they fail to make available to Qatari nationals enforcement procedures, as specified in Part III of the TRIPS Agreement;
 - ii. Article 42 of the TRIPS Agreement, because they fail to make available to Qatari nationals civil judicial procedures concerning the enforcement of intellectual property rights, including inter alia the right to be represented by independent legal counsel; and
 - iii. Article 61 of the TRIPS Agreement, because they fail to provide for the application of criminal procedures and penalties to the wilful commercial scale piracy of beIN's copyrighted material.
39. Saudi Arabia requests that the Panel reject Qatar's claims in this dispute in their entirety, and stated that "the Panel has multiple avenues to end its work without addressing the substantive claims that have been raised in this case, including by:
- recognizing that *Security Exceptions* have been invoked;
 - confirming that Saudi Arabia's actions are justified under Article 73 of the TRIPS Agreement;
 - referencing Article 3.4 of the DSU and the impossibility of issuing a recommendation or ruling 'aimed at achieving a satisfactory settlement of the matter' or Article 3.7 of the DSU and the impossibility of securing a positive solution to the dispute; and/or
 - barring the claim because it has not been brought in good faith with the intention of addressing substantive WTO rules."
40. Furthermore, Saudi Arabia submits that "the information that Saudi Arabia has provided to support the Panel's 'objective assessment' of [its] good faith conduct in connection with the invocation of the *Security Exception* in Article 73 establishes the absence of any substantive violation of the TRIPS Agreement".

D. FINDINGS

1) Saudi Arabia's request that the Panel decline to make any findings or recommendation based on Articles 3.4, 3.7 and 11 of the DSU

41. Saudi Arabia requested that the Panel decline to make any findings or recommendation in the present case. Saudi Arabia made that request on the basis that: (a) the current dispute is "not a trade dispute at all", but a "political, geopolitical and essential security dispute"; (b) certain DSU provisions—including, in particular, Article 3.4 of the DSU—raise a "legal impediment" precluding the Panel from ruling on the merits of the claims before it; and (c) any Panel findings would be inconsequential, or a "meaningless step", in resolving this dispute because of the severance of economic relations between the parties, as was the case in the GATT dispute *US – Nicaraguan Trade*.
42. The Panel is not persuaded that it can decline to make any findings or a recommendation, i.e. "decline to exercise its jurisdiction" on the basis of Saudi Arabia's argument that the "real dispute" between the parties is not a "trade dispute". The Panel considers that it is evident from its terms of reference that it has not been asked by Qatar or the DSB to make any findings or recommendation on any wider dispute between the parties. The matter raised by Qatar in its panel request, which now forms the Panel's terms of reference, concerns alleged violations of the TRIPS Agreement. Accordingly, the matter before the Panel falls within the legal subject-matter jurisdiction of a WTO dispute settlement panel.
43. For similar reasons, the Panel is not persuaded that it can decline to exercise jurisdiction on the basis of Saudi Arabia's argument that it is impossible for any findings or recommendation to secure a positive solution to "the matter" and/or achieve a satisfactory

settlement of "the dispute" under the DSU. The Panel considers that this argument, like Saudi Arabia's argument concerning the "real dispute" not being a "trade dispute", is directed at the wider political dispute between the parties that is not at issue before the Panel. For all of these reasons, the Panel concludes that it cannot decline to exercise its jurisdiction over the claims of WTO-inconsistency that fall within its terms of reference and that the matter is justiciable.

2) beIN's access to civil enforcement procedures

44. In a letter to the Ministry dated 16 January 2018, beIN explained the difficulties it was encountering in attempting to secure legal representation to initiate copyright infringement cases in Saudi courts. beIN asked the Ministry to detail any governmental restrictions in place that may be affecting beIN's ability to commence civil proceedings.
45. In a 6 March 2018 letter to the Ministry, beIN set out its understanding of why it was unable to hire counsel to bring a copyright infringement case in Saudi courts. beIN stated that "the Saudi Government has instructed lawyers in the KSA to refrain from representing beIN ... and that it is the position of the Saudi government that beIN ... cannot bring civil legal actions relating to beoutQ broadcast piracy before the KSA courts." beIN's letter indicated that "we will proceed on the basis" of this understanding "[i]n the event that the Ministry of Culture and Information fails to respond by 14 March 2018". In its Declaration, beIN stated that it had received no response to either of the letters above.
46. With its second written submission, Qatar provided the Panel with a copy of a public joint statement made on 31 July 2019 by seven major football right holders (including FIFA, UEFA, AFC, the Premier League, Bundesliga, LaLiga and Lega Serie A). According to the joint statement, these right holders have also been unable to engage Saudi counsel or access Saudi courts and administrative tribunals in connection with the beoutQ piracy. [...]
47. In response to a Panel question asking Saudi Arabia to comment on the joint statement quoted above, Saudi Arabia stated, *inter alia*, that the reason that no law firm would be able to proceed with a case against beoutQ in Saudi courts might be that the company does not have a location in Saudi Arabia. However, there has been no evidence to support this.
48. On 19 June 2017, the Ministry and GCAM issued a Circular prohibiting the distribution of beIN media content. The Circular states that all television and media channels that are interested in operating in Saudi Arabia "must obtain all required licences" and that "[a]ll beIN channels and Al-Jazeera channels are not licensed and [do] not have the legal right to operate in the Kingdom of Saudi Arabia and its presence and provision of entertainment and Sports programs and television services in the Kingdom violates the applicable laws in the Kingdom as of the date thereof." This Circular further provides that:

Any distribution of media content either via satellites or through other means and platforms and the charging and collection of related fees in the Kingdom without obtaining the necessary licenses from the appropriate authorities, including the Ministry of Culture and Information and the General Commission of Audio and Visual Media, shall subject the distributors of such media content and content licensors, hardware suppliers, and their owners in their individual capacity to criminal prosecution and personal litigation and shall result in the imposition of penalties and fines and the loss of the legal right to protect any related intellectual property rights in accordance with the applicable laws in the Kingdom.

By itself, the content of the Circular does not purport to direct any private parties in their arrangements with beIN. However, the Panel considers that the transmission of the Circular alluding to the potential loss of "related intellectual property rights" to these foreign right holders was an action aimed at influencing these private entities in their arrangements with beIN. Qatar explained that it was transmitted as an email attachment from GCAM's official account directly to 39 right holders, including FIFA, UEFA, LaLiga, the Premier League and many others.

49. Qatar provided the Panel with several email messages from a Saudi law firm to beIN that document the following. On 1 July 2018, a Saudi law firm, representing beIN in relation to a competition law matter that had arisen prior to the severance of relations and the closing down of beIN's operations in Saudi Arabia, informed beIN via email that the Saudi Council of Competition (CCP) had called. The CCP had requested the law firm to "collect notice of a new 'criminal' case they are launching against Bein", "probably for imposing new penalties and/or administrative remedies". The law firm told beIN that, "[b]ecause of the sensitivities of these cases, if you ask us to decline accepting notice, we may be unable to accept representation on your behalf for the new case and you may have to find another lawyer". When beIN did not immediately instruct the law firm to accept service of the new criminal complaint, the law firm sent another email message to beIN two days later, on 3 July 2018. This email message, which Qatar provided as an exhibit, states:

We received a call from CCP that we must accept service on your behalf. We explained we have no authority. They threatened to stop the services of our office unless we accede to their demand. We do not believe that this course of action is correct but if they do go ahead and stop our services (that would paralyze our office) we will have no choice but to do so. Please take note.

50. The Panel considers these email exchanges to be relevant to the inability of beIN and foreign right holders to retain Saudi counsel to commence actions against beoutQ. This exchange reflects the influence that the Government of Saudi Arabia has over the decisions of lawyers based in Saudi Arabia to accept particular cases for particular clients.
51. Examining the above-referenced evidence in its totality, and recalling the applicable standard of proof and evidentiary principles in WTO dispute settlement, the Panel considers that Qatar has demonstrated that Saudi Arabia has taken "anti-sympathy measures" that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals.

3) Non-application of criminal procedures and penalties

52. The Panel now turns to the question of whether sufficient evidence has been provided to establish that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. This issue is central to Qatar's claim under Article 61 of the TRIPS Agreement, and it is disputed between the parties. Saudi Arabia maintained that Members cannot be expected to act on criminal allegations without evidence and without the cooperation of concerned right holders. Saudi Arabia reiterated that criminal procedures and penalties were not applied against beoutQ because beIN and other foreign right holders have not provided sufficient supporting evidence and cooperation. Qatar asserted that "it could not be for lack of sufficient evidence that Saudi Arabia has failed to initiate procedures and penalties against the beoutQ piracy".
53. beIN provided copies of these tweets to the Ministry, which Qatar subsequently submitted to the Panel. These tweets are reproduced below.

Time and date of tweet	Author of tweet	Content of tweet
12 June 2017	Mr Saoud Al-Qahtani, counsel for the Saudi Royal Courts	"The alternative solutions are coming soon and they are going to be free or for a low price. #Blocking_Qatari_beIN_Sport #Oh_Dulim_Greet_them_back It was their plan after buying the broadcasting rights five times the real value to insert political bulletins and programmes to damage international stability. There is a big hole in the law in their monopoly to broadcast in the region. Revise the situation in Britain and France, for example...that is enough indication."

Time and date of tweet	Author of tweet	Content of tweet
6 August 2017	Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper	"Saudi heroes will entirely pirate beIN sport channel [sic] and satellite-broadcast the full content on beoutQ channel #Launching_beoutQ_Sport_Channels2"
6 August 2017	Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper	"This streaming will be through the channel's special receiver and the subscription will be for a very low price because it does not mainly aim at getting profits #Launching_beoutQ_Sport_Channels2"
6 August 2017	Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper	"After two weeks from now, beoutQ receivers will be available in the market. It will be satellite broadcasting, not a streaming via internet #Launching_beoutQ_Sport_Channels2"
6 August 2017	Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper	"As for me, I will strongly support beoutQ channels, and I will never feel satisfied until the full piracy of beIN sport channels. Let's wait and see who is the strongest. #Launching_beoutQ_Sport_Channels2" [This tweet was accompanied by a cartoon showing beoutQ "kicking" beIN out of the market.]
N/A	Al Riyadh Newspaper	"Launching 10 sport channels broadcasting European Leagues, for low prices...Soon...marking the end of 'beIN sport' era." [This tweet contains the logos of various sports leagues, including Barclays Premier League, Ind Liga, Serie A, and LFP.]

54. All of the tweets above foreshadow that a substitute for beIN's operations would enter the Saudi market, and some of the tweets support the establishment of a pirate channel, beoutQ, to circumvent beIN's exclusive licences from third-party right holders. Saudi Arabia did not contest the content of these tweets.
55. In addition to these tweets, Qatar provided the Panel with other social media evidence, including a cartoon commercial produced by beoutQ, showing strong support for beoutQ and antipathy toward beIN. [...]
56. The Panel recalls that, in the context of denying its promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts, Saudi Arabia noted "that unofficial, non-government tweets are not usually recognized by legal adjudicators or attributed to a government without explicit approval". The Panel discusses these tweets, not because they are attributable to the Government of Saudi Arabia, but because they are evidence that beoutQ was promoted by prominent individuals and newspapers within Saudi Arabia, which is relevant to the question of whether beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia.
57. Qatar indicated that beIN has provided evidence to the Saudi authorities demonstrating that beoutQ targets the Saudi market by: (a) allowing only persons in Saudi Arabia to access its websites, (b) making its STBs widely available for sale at retail stores in Saudi Arabia, and (c) advertising its subscriptions and rate cards to viewers using prices in Saudi riyals.
58. beIN pointed out that international journalists had reported on the wide availability of beoutQ STBs in Saudi retail stores. [...] beIN also submitted additional photographic and social media evidence, in its 3 September 2018 letter to the Ministry and GCAM, showing the extent to which beoutQ targets the Saudi market. beIN submitted photographic evidence in which beoutQ appears to advertise and price, in Saudi riyals, subscriptions to its pirated content, rate cards that list the prices for advertising spots in various football matches and at various points in those matches, and Saudi brands and products.

59. Qatar also provided the Panel with a copy of a public joint statement by seven major football right holders (including FIFA, UEFA, AFC, the Premier League, Bundesliga, LaLiga and Lega Serie A). The statement provides that:

We, the rights holders of various football competitions, collectively condemn in the strongest possible terms the ongoing theft of our intellectual property by the pirate broadcaster known as 'beoutQ' and call on the authorities in Saudi Arabia (KSA) to support us in ending the widespread and flagrant breaches of our intellectual property rights taking place in the country.

60. Headquartered in Riyadh, Saudi Arabia, Arabsat is an intergovernmental organization and satellite operator whose largest shareholder is the Government of Saudi Arabia (with a stake of 36.6%) and whose CEO is a Saudi national. beIN alleged that the frequencies of this satellite operator transmit beoutQ's pirate channels and related data (firmware updates, decryption keys and signaling data) to beoutQ STBs in Saudi Arabia, according to technical reports that it has submitted to the Ministry, GCAM and Arabsat. Two of the four technical reports submitted to the Ministry, GCAM and Arabsat were also submitted to the Panel, and will be discussed below.
61. In the light of the expert technical reports [not discussed in this except] and the complaints that Arabsat received from other entities, the Panel does not accept Saudi Arabia's statement that, "[b]ased on information that it has collected, Arabsat has established that it does not distribute beoutQ content on its satellite frequencies". The technical reports demonstrate that beoutQ's pirated broadcasts are transmitted via Arabsat's satellite frequencies, and the tests performed by Arabsat's outside experts do not throw doubt on this finding, particularly given that they examine only certain frequencies at certain times.
62. The Panel considers that the evidence which was provided to Saudi authorities by beIN and other third-party right holders, and which has now been corroborated and supplemented by further evidence submitted to the Panel, supports Qatar's assertions that: (a) beoutQ's piracy was promoted by prominent Saudi nationals, (b) beoutQ targets the Saudi market, (c) beoutQ's pirate broadcasts are transmitted via Arabsat satellite frequencies, and (d) beoutQ has received assistance from a Saudi content distributor in delivering its pirated broadcasts to Saudi consumers. Taking these conclusions together, and recalling the applicable standard of proof and evidentiary principles in WTO dispute settlement, the Panel considers that Qatar has established a *prima facie* case that beoutQ is operated by

4) Public screenings of beoutQ's broadcasts

63. The Panel now turns to Saudi Arabia's alleged promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of some 2018 World Cup matches. The Panel will structure its analysis by reviewing the evidence provided by Qatar, and then considering Saudi Arabia's arguments in response to such evidence.
64. With its first written submission, Qatar provided the following categories of evidence as exhibits:
- d. a report published by Bloomberg, and the image of and hyperlink to a tweet by a *Wall Street Journal* reporter, both dated 22 June 2018, stating that a government-sponsored event was broadcasting beoutQ's pirated broadcast of the Saudi Arabia/Uruguay match on large public screens in Riyadh, including on the city's main commercial boulevard ;
 - e. an image of an announcement by the Saudi Ministry of Municipal and Rural Affairs, dated 13 June 2018, stating "294 screens in Municipal gardens and squares to broadcast World Cup Games", with a breakdown of how many screens there would be in each of the 13 regions of Saudi Arabia ;

- f. images of, and hyperlinks to, tweets by eight different Saudi municipalities promoting public screenings of broadcasts of 2018 World Cup matches, several of which included images of beoutQ's pirated broadcasts ; and
- g. photographs showing screenings of beoutQ's pirated broadcasts of the 2018 World Cup Croatia/England match on 11 July 2018 on large public screens at seven different cafes in Riyadh.
65. The Panel considers that, in the absence of effective refutation, the above evidence would suffice to substantiate Qatar's assertion that Saudi Arabia promoted public gatherings with screenings of beoutQ's unauthorized broadcasts of certain 2018 World Cup matches. Based on the foregoing, the Panel concludes that Saudi Arabia promoted public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches.
66. The Panel concludes that although Qatar did not demonstrate the existence of formal legal restrictions being applied to prevent beIN from accessing civil enforcement procedures, Qatar otherwise established that the non-initiation of civil enforcement procedures against beoutQ before Saudi tribunals by beIN, the non-application of criminal procedures or penalties against beoutQ by the Government of Saudi Arabia and the public screening of beoutQ's illegal broadcasts of 2018 World Cup matches in Saudi Arabia are all the result of acts and omissions attributable to Saudi Arabia.

5) Claims under Parts I, II and III of the TRIPS Agreement

67. Qatar raises multiple legal claims in relation to these three measures. First, Qatar claims that the anti-sympathy measures are inconsistent with: (a) the non-discrimination obligations in Article 3.1 and Article 4 of the TRIPS Agreement, contained in Part I thereof; (b) the obligations to provide authors of works with the exclusive rights mandated in Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention (1971), as incorporated by reference in Part II of the TRIPS Agreement, as well as the obligation to provide broadcasting organizations with the exclusive rights provided for in Article 14.3 of the TRIPS Agreement, also contained in Part II thereof; and (c) the obligations in Article 41.1 and Article 42 of the TRIPS Agreement, which relate to civil enforcement procedures and are included in Part III of the TRIPS Agreement. Second, Qatar claims that the non-application of criminal procedures and penalties to beoutQ is also inconsistent with most of the above-referenced obligations in Parts I and II of the TRIPS Agreement, but its claim under Part III concerns Article 61, as opposed to Articles 41.1 and 42, of the TRIPS Agreement. Third, Qatar claims that the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches is also a measure that is itself inconsistent with Articles 11 and 11*bis* of the Berne Convention (1971), and also argued that it serves as evidence of the violation of Article 61.

5.1) Claims under Article 42 of the TRIPS Agreement regarding civil and administrative procedures and remedies, and Article 41.1 on general obligations

68. Article 41 constitutes Section 1, entitled "General Obligations", of Part III of the TRIPS Agreement. Article 41.1 reads as follows:
69. Members shall ensure that enforcement procedures as specified in this Part 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.
70. As the Appellate Body has noted, "[t]hese enforcement procedures ... provide for an internationally-agreed minimum standard which Members are bound to implement in their domestic legislation".

71. Article 42, entitled "Fair and Equitable Procedures", is part of Section 2, entitled "Civil and Administrative Procedures and Remedies", of Part III of the TRIPS Agreement. Article 42 reads as follows:

Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

72. Article 42 is part of Section 2, which deals with civil and administrative procedures and remedies. Article 42 details specific requirements in respect of "civil judicial procedures" concerning the enforcement of any IP rights to ensure that such procedures are "fair and equitable". The Appellate Body has noted that, "[l]ike Section 1 of Part III, Section 2 introduces an international minimum standard which Members are bound to implement in their domestic legislation".
73. Footnote 11 to Article 42 clarifies that, for the purpose of Part III, the term "right holder" includes federations and associations having legal standing to assert such rights. The Appellate Body has noted that the term "right holders" within the meaning of Article 42 "includes persons who claim to have legal standing to assert rights".
74. The basic obligation in the first sentence of Article 42 is that Members shall "make available" to "right holders" "civil judicial procedures" concerning the enforcement of any IP right covered by the TRIPS Agreement. The Appellate Body has elaborated that "[m]aking something *available* means making it 'obtainable', putting it 'within one's reach' and 'at one's disposal' in a way that has sufficient force or efficacy"; therefore, "the ordinary meaning of the term 'make available' suggests that 'right holders' are entitled under Article 42 to have *access* to civil judicial procedures that are effective in bringing about the enforcement of their rights covered by the Agreement".
75. The Appellate Body has further noted that:
- Article 42, first sentence, does not define what the term 'civil judicial procedures' in that sentence encompasses. The *TRIPS Agreement* thus reserves, subject to the procedural minimum standards set out in that Agreement, a degree of discretion to Members on this, taking into account 'differences in national legal systems'. Indeed, no Member's national system of civil judicial procedures will be identical to that of another Member.
76. Section 2 of Part III of the TRIPS Agreement also contains Article 49, entitled "Administrative Procedures". Article 49 provides that, to the extent that any civil remedy can be ordered as a result of "administrative procedures" on the merits of a case, such procedures shall conform to the principles equivalent in substance to those set forth in Section 2.
77. The Panel considers that beIN is undoubtedly a "right holder" for purposes of Articles 41.1 and 42 of the TRIPS Agreement. The Panel considers that it is also clear that sports broadcasts of the type that beIN has been licensed to distribute constitute protected "works" under the provisions of the Berne Convention (1971) as incorporated into the TRIPS Agreement, and are covered by the definition of "Audio-Visual Work" under Article 1 of Saudi Arabia's Copyright Law, or otherwise protected under the Copyright Law. The Panel notes that there is no disagreement between the parties on this issue. In addition, beIN generally owns the copyright in any match/event commentary produced by beIN, as well as studio programming such as interviews, beIN logos and musical works. beIN also owns the related rights conferred on broadcasting organizations, including the right to

prohibit unauthorized fixations, reproductions of fixations and rebroadcasting by wireless means of broadcasts, as well as communications to the public of television broadcasts of the same. In some instances, beIN had the right to take action under the Saudi Copyright Law in respect of an infringed copyright work or related right where beIN is not the owner of that right.

78. The Panel has found that Saudi Arabia has taken measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals. Given that beIN is a right holder for purposes of Article 42 of the TRIPS Agreement, it follows that Saudi Arabia has acted inconsistently with the specific requirement, in the third sentence of Article 42, that parties "shall be allowed to be represented by independent legal counsel".
79. The Panel notes that Qatar has also argued that, because of the travel restrictions at issue, Qatari nationals are generally not permitted to enter the territory of Saudi Arabia, including to initiate, conduct, or testify in proceedings for the enforcement of IP rights.
80. [T]he Panel concludes that Saudi Arabia has acted in a manner inconsistent with Article 42 of the TRIPS Agreement by taking measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals.

5.2) Claim under Article 61 of the TRIPS Agreement regarding criminal procedures

81. Article 61, which constitutes Section 5, entitled "Criminal Procedures", of Part III of the TRIPS Agreement, reads as follows:
82. 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. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.
83. Qatar's claim is directed at the obligation in the first sentence of Article 61 that Members "shall provide for criminal procedures and penalties to be applied at least in cases of wilful ... copyright piracy on a commercial scale." This obligation was invoked as the basis for a claim in one prior case, *China – Intellectual Property Rights*, and that panel's findings provide guidance on the interpretation and application of this provision.
84. The scope of the obligation to "provide for criminal procedures and penalties to be applied" is limited by the phrase "at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale". As the panel in *China – Intellectual Property Rights* noted:
85. Part III of the TRIPS Agreement distinguishes between the treatment of wilful trademark counterfeiting and copyright piracy on a commercial scale, on the one hand, and all other infringements of intellectual property rights, on the other hand, in that only the former are subject to an obligation regarding criminal procedures and penalties. This indicates the shared view of the negotiators that the former are the most blatant and egregious acts of infringement. This view must inform the interpretation of Article 61.
86. As regards the term "wilful", the panel in *China – Intellectual Property Rights* explained that it "functions as a qualifier indicating that trademark counterfeiting or copyright piracy is not subject to the obligation in the first sentence of Article 61 unless it is 'wilful'." This

word, in the panel's view, "[which] focus[es] on the infringer's intent, reflects the criminal nature of the enforcement procedures at issue."

87. As regards the terms "trademark counterfeiting" and "copyright piracy", the panel in *China – Intellectual Property Rights* considered that the definitions of the similar terms "counterfeit trademark goods" and "pirated copyright goods" provided in footnote 14 to Article 51 of the TRIPS Agreement are relevant to understanding the meaning of these terms in the context of Article 61. Footnote 14(b) provides that, for purposes of the TRIPS Agreement, the term "pirated copyright goods" shall mean:
88. [A]ny goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.
89. The panel in *China – Intellectual Property Rights*, furthermore, clarified the meaning of the term "on a commercial scale" as follows:
90. [A] "commercial scale" is the magnitude or extent of typical or usual commercial activity. Therefore, counterfeiting or piracy "on a commercial scale" refers to counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market. The magnitude or extent of typical or usual commercial activity with respect to a given product in a given market forms a benchmark by which to assess the obligation in the first sentence of Article 61. It follows that what constitutes a commercial scale for counterfeiting or piracy of a particular product in a particular market will depend on the magnitude or extent that is typical or usual with respect to such a product in such a market, which may be small or large. The magnitude or extent of typical or usual commercial activity relates, in the longer term, to profitability.
91. The Panel observes that what is typical or usual in commerce is a flexible concept. The immediate context in the second sentence of Article 61, which is closely related to the first, refers to the similarly flexible concepts of "deterrent" and "corresponding gravity". Neither these terms nor "commercial scale" are precise but all depend on circumstances, which vary according to the differing forms of commerce and of counterfeiting and piracy to which these obligations apply.
92. The first sentence of Article 61 states that Members "shall provide for criminal procedures and penalties to be applied". The meaning of the phrase "to be applied" in this provision has arisen as a general interpretative issue in this case, one not addressed in prior WTO jurisprudence.
93. In the Panel's view, the obligation in the first sentence of Article 61 of the TRIPS Agreement is not automatically discharged through the creation of a formal written law that provides for the criminalization of wilful commercial-scale piracy without regard to whether and, if so, how the written law is applied in practice. In cases where a Member has not taken actions that could lead to the application of criminal procedures and penalties against wilful commercial-scale piracy, an assessment of compliance with Article 61 must consider the evidence available to the authorities and other relevant circumstances. Naturally, the onus would rest on the complaining Member to establish that, notwithstanding that another Member's written law provides for criminal penalties and procedures to be applied to cases of wilful copyright piracy, that Member has acted inconsistently with Article 61 in relation to the manner in which its authorities have applied the law.
94. The Panel considers this interpretation to be consistent with the ordinary meaning of the relevant terms of Article 61 of the TRIPS Agreement. In particular, the verb to "apply" is defined as "[t]o bring (a rule, a test, a principle, etc.) into contact with facts; to bring to bear practically; to put into practical operation". This would suggest that Members have an obligation to put criminal procedures and penalties into practical operation.

95. It is important to consider Article 61 in the context of the whole of the TRIPS Agreement and the distinctions that it draws. The Panel agrees with Qatar that the phrase "to be applied" in Article 61 can be contrasted with the use of the phrase "shall make available" in Article 42. The phrase can also be contrasted with the phrase "shall have the authority" in Articles 44, 45 and 46 of the TRIPS Agreement, and with the more general phrase, in Article 41.1, that requires Members to ensure that enforcement procedures as specified in Part III "are available".
96. Certain other elements of the context of Article 61 are difficult to reconcile with the view that the obligation in the first sentence of Article 61 requires nothing more of Members than that they formally "write down criminal procedures and penalties in their criminal laws" without regard to whether and, if so, how they are applied. Article 1.1, first sentence, speaks in broader and more general terms of each Member being required to "give effect" to TRIPS provisions; and, in its third sentence, refers more widely to the implementation of obligations in a Member's "legal system and practice". Likewise, the general obligation under Article 41.1 is that Members shall ensure that enforcement procedures as specified in Part III are available under their law "so as to permit effective action" against any act of infringement of IP rights covered by the TRIPS Agreement.
97. The Panel considers that a restrictive interpretation of the terms "shall provide for criminal procedures and penalties to be applied" would also be at odds with the object and purpose of Article 61. The object and purpose of Article 61 includes singling out what negotiators of the TRIPS Agreement understood to be the two "most blatant and egregious acts of infringement" and "[t]his view must inform the interpretation of Article 61." A restrictive interpretation of the obligation in the first sentence of Article 61 would also be difficult to reconcile with the TRIPS Agreement's overall object and purpose of "provid[ing] effective and appropriate means for the enforcement" of trade-related IP rights, as reflected in subparagraph (c) of the second recital of the preamble.
98. The parties and a number of third parties provided views on the scope of the obligation in Article 61 to provide for criminal procedures and penalties "to be applied". The Panel notes that both parties, and third parties that expressed a view, agree with the view that Article 61 does not contain an obligation on Members to investigate and prosecute *all* suspected cases of wilful "trademark counterfeiting" and "copyright piracy" on a commercial scale. The Panel accepts that view.[...]
99. In the Panel's view, the conduct of beoutQ amounts to "wilful ... copyright piracy on a commercial scale".
100. Turning next to the question of whether Saudi Arabia has "provide[d] for criminal procedures and penalties to be applied" to beoutQ's commercial-scale piracy, Saudi Arabia has not identified any such action. Rather, Saudi Arabia argued that its authorities have taken no such action because they have received "no credible evidence".
101. The Panel has found that Qatar has established a *prima facie* case that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. The Panel has also found that beIN and other foreign right holders repeatedly sent detailed information to the Saudi authorities to inform them of beoutQ's alleged piracy, and the extensive evidentiary basis for concluding that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. Additionally, the Panel has found that, while taking no action to apply criminal procedures and penalties to beoutQ, Saudi authorities engaged in the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches. The Panel notes Saudi Arabia's assertions, as reflected in certain media reports, that its authorities have taken actions to seize beoutQ's STBs, thus acknowledging that beoutQ is engaging in illegal activities.
102. Having considered all of the evidence before it, the Panel concludes that Qatar has discharged its burden of establishing that, notwithstanding that Saudi Arabia's written law may provide for criminal penalties and procedures to be applied to cases of wilful copyright piracy on a commercial scale, its authorities have acted inconsistently with the obligation in the first sentence of Article 61 to "provide for criminal procedures and penalties to be

applied" to the operations of beoutQ. The Panel therefore concludes that Saudi Arabia has acted inconsistently with Article 61 of the TRIPS Agreement.

5.3) Claims under Part I and Part II of the TRIPS Agreement

103. In its first written submission, Qatar set forth its interpretation of the language "treatment no less favourable", "nationals of other Members", and "with regard to the protection of intellectual property" in the context of Article 3.1, as well as the corresponding textual elements of the legal standard in Article 4. Qatar also presented a detailed discussion and analysis of each of the obligations in Articles 9, 11, 11 *bis* and 11 *ter* of the Berne Convention (1971) and Article 14.3 of the TRIPS Agreement.
104. However, the Panel recalls that the WTO dispute settlement system is not meant "to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute", and that a panel "need only address those claims which must be addressed to resolve the matter in issue in the dispute". For the reasons that follow, the Panel considers it appropriate to exercise judicial economy in respect of Qatar's remaining claims concerning the anti-sympathy measures, the non-application of criminal procedures and penalties and the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches.
105. In the light of its finding that the anti-sympathy measures (in particular the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals) violate Articles 41.1 and 42 of the TRIPS Agreement and its finding that the non-application of criminal procedures or penalties to beoutQ violates Article 61 of the TRIPS Agreement, the Panel considers it unnecessary to make findings on Qatar's additional claims that these same measures violate Articles 3.1 and 4 of the TRIPS Agreement. In the Panel's view, these additional claims under Part I are premised on the alleged inability of Qatari nationals to access civil and criminal remedies to enforce their IP rights.
106. In the light of its findings under Articles 41.1, 42 and 61 of the TRIPS Agreement, the Panel also considers it unnecessary to make findings on Qatar's additional claims relating to the anti-sympathy measures and non-application of criminal procedures and penalties under Part II of the TRIPS Agreement.

6) Saudi Arabia's invocation of Article 73(b)(iii) of the TRIPS Agreement

107. Saudi Arabia has invoked the security exception in Article 73(b)(iii) of the TRIPS Agreement. In the light of its findings in sections 7.2 and 7.3 above, the Panel will determine whether the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (i.e. the anti-sympathy measures), and/or Saudi Arabia's refusal to provide for criminal procedures and penalties to be applied to beoutQ, constitute "action which it considers necessary for the protection of its essential security interests ... taken in time of war or other emergency in international relations".
108. Article XXI(b)(iii) of the GATT 1994, which is identical to Article 73(b)(iii) of the TRIPS Agreement, was recently addressed by the panel in *Russia – Traffic in Transit*. It held that a panel must determine for itself whether the invoking Member's actions were "taken in time of war or other emergency in international relations" in subparagraph (iii) of Article XXI(b) of the GATT 1994. It further found that a panel's review of whether the invoking Member's actions are ones "which it considers necessary for the protection of its essential security interests" under the chapeau of Article XXI(b) of the GATT 1994 requires an assessment of whether the invoking Member has articulated the "essential security interests" that it considers the measures at issue are necessary to protect, along with a further assessment of whether the measures are so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member

implemented the measures for the protection of its "essential security interests" arising out of the emergency. According to the panel in *Russia – Traffic in Transit*, the obligation of a Member to interpret and apply Article XXI(b)(iii) of the GATT 1994 in "good faith" requires "that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests".

109. In this dispute, both parties interpreted Article 73(b)(iii) of the TRIPS Agreement by reference to, and consistently with, the interpretation of Article XXI(b)(iii) of the GATT 1994 developed by the panel in *Russia – Traffic in Transit*. However, the parties' arguments reveal divergent views on three fundamental issues pertaining to the applicability of the security exception in Article 73(b)(iii) to the facts and measures at issue: (a) whether there is an "emergency in international relations" in the sense of subparagraph (iii) of Article 73(b); (b) whether Saudi Arabia has articulated its "essential security interests" with sufficient clarity and precision; and (c) whether—and, if so, how—the measures that Saudi Arabia characterizes as the "action which it considers necessary for the protection of its essential security interests" under the chapeau of Article 73(b) relate to any of the specific measures challenged by Qatar in this dispute.
110. As previously stated, the wording of Article 73(b)(iii) of the TRIPS Agreement is identical to that of Article XXI(b)(iii) of the GATT 1994, which was first interpreted by the panel in *Russia – Traffic in Transit*. The panel's interpretation of Article XXI(b)(iii) in that dispute gave rise to an analytical framework that can guide the assessment of whether a respondent has properly invoked Article XXI(b)(iii) of the GATT 1994, or, for the purposes of this dispute, Article 73(b)(iii) of the TRIPS Agreement.
111. Specifically, a panel may proceed by assessing:
- a. whether the existence of a "war or other emergency in international relations" has been established in the sense of subparagraph (iii) to Article 73(b);
 - b. whether the relevant actions were "taken in time of" that war or other emergency in international relations;
 - c. whether the invoking Member has articulated its relevant "essential security interests" sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests; and
 - d. whether the relevant actions are so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency.
112. The first step in the analytical framework outlined above requires a panel to assess whether the existence of a "war or other emergency in international relations" has been established in the sense of subparagraph (iii) of Article 73(b). The panel in *Russia – Traffic in Transit* concluded that the circumstance in subparagraph (iii) is "an objective fact" that is "amenable to objective determination". In other words, the panel concluded that the adjectival clause "which it considers" in the chapeau of Article XXI(b)(iii) of the GATT 1994 "does not qualify the determination of the circumstance[]" in subparagraph (iii). In that panel's view, the evaluation of whether the respondent has satisfied the circumstance in subparagraph (iii) must "be made objectively rather than by the invoking Member itself".
113. The panel also concluded that the term "emergency in international relations" refers generally "to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state". Such situations, in the panel's view, "give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests". For the panel, while "political" and "economic" conflicts could sometimes be considered "urgent" and "serious" in a political sense, such conflicts will not be "emergenc[ies] in international relations" within the meaning of subparagraph (iii) "unless they give rise to defence and

military interests, or maintenance of law and public order interests". Saudi Arabia and Qatar each appeared to generally agree with the interpretation of subparagraph (iii) provided above, as both referred to the interpretations of the panel in *Russia – Traffic in Transit*.

114. Turning to the second step of the analytical framework, the panel in *Russia – Traffic in Transit* examined the introductory phrase "taken in time of" in subparagraph (iii). This phrase connects the "action" referred to in the chapeau of paragraph (b) to the phrase "emergency in international relations" in subparagraph (iii). In the panel's view, this introductory phrase "require[s] that the action be taken *during* the war or other emergency in international relations". The connection between these two elements constitutes a "chronological concurrence [that] is also an objective fact, amenable to objective determination".
115. Saudi Arabia and Qatar both appeared to generally agree, implicitly or expressly, with the panel's interpretation of the phrase "taken in time of". Notably, Saudi Arabia also referred to the "temporal relation" that should exist between qualifying emergencies and related "actions". None of the third parties expressed any disagreement with this aspect of the panel's interpretation.
116. Proceeding to the third step in the analytical framework, the panel in *Russia – Traffic in Transit* concluded that a panel would be required to assess whether a respondent has sufficiently articulated its "essential security interests" in the sense of the chapeau of paragraph (b). The panel noted that "essential security interests" is evidently a narrower concept than "security interests", with the former generally concerning "those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally". For the panel, "[t]he specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances". For these reasons, the panel considered that "it is left, in general, to every Member to define what it considers to be its essential security interests".
117. The panel noted, however, that a Member is not "free to elevate any concern to that of an 'essential security interest'"; rather, "the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith". For the panel, this "obligation of good faith" requires that Members not use the security exception as a means to circumvent their WTO obligations. The panel concluded that "[i]t is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."
118. Moving to the fourth and final step of the analytical framework set out above, the panel in *Russia – Traffic in Transit* considered the "obligation of good faith" to apply not only to the respondent's articulation of "its essential security interests", but also to the connection between the measures at issue and those interests. This obligation, for the panel, is "crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests". Specifically, a panel must determine "whether the measures are so remote from, or unrelated to, the ... emergency that it is implausible that [the respondent] implemented the measures for the protection of its essential security interests arising out of the emergency".

"taken in time of war or other emergency in international relations"

119. The Panel agrees with Saudi Arabia that one Member's severance of "all diplomatic and economic ties" with another Member could be regarded as "the ultimate State expression of the existence of an emergency in international relations". The Panel thus concludes that the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (i.e. anti-sympathy measures), and Saudi Arabia's non-

application of criminal procedures and penalties to beoutQ, were "taken in time of war or other emergency in international relations".

"action which it considers necessary for the protection of its essential security interests"

120. The "actions" covered by Saudi Arabia's invocation of Article 73(b)(iii) of the TRIPS Agreement include the anti-sympathy measures and the non-application of criminal procedures and penalties to beoutQ.

Saudi Arabia's articulation of its "essential security interests"

121. First, Saudi Arabia has expressly articulated its "essential security interests", in terms of protecting itself "from the dangers of terrorism and extremism". Second, the interests identified by Saudi Arabia are ones that clearly "relat[e] to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally". The Panel concludes that Saudi Arabia's articulation of its relevant "essential security interests" is sufficient to enable an assessment of whether there is any link between the relevant actions and the protection of its essential security interests.

The connection between the measures and the essential security interests

2. The measures aimed at denying Qatari nationals access to civil remedies through Saudi courts may be viewed as an aspect of Saudi Arabia's umbrella policy of ending or preventing any form of interaction with Qatari nationals. Given that Saudi Arabia imposed a travel ban on all Qatari nationals from entering the territory of Saudi Arabia and an expulsion order for all Qatari nationals in the territory of Saudi Arabia as part of the comprehensive measures taken on 5 June 2017, it is not implausible that Saudi Arabia might take other measures to prevent Qatari Tnationals from having access to courts, tribunals and other institutions in Saudi Arabia. [...] The Panel considers that the anti-sympathy measures "meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests".
122. In the Panel's view, however, the same conclusion cannot be reached regarding the connection between Saudi Arabia's stated essential security interests and its authorities' non-application of criminal procedures and penalties to beoutQ. In contrast to the anti-sympathy measures, which might be viewed as an aspect of Saudi Arabia's umbrella policy of ending or preventing any form of interaction with Qatari nationals, the Panel is unable to discern any basis for concluding that the application of criminal procedures or penalties to beoutQ would require any entity in Saudi Arabia to engage in any form of interaction with beIN or any other Qatari national.
123. The Panel recalls that the non-application of criminal procedures and penalties to beoutQ, a commercial-scale broadcast pirate, affects not only Qatar or Qatari nationals, but also a range of third-party right holders.
124. The Panel observes that, in further contrast to the anti-sympathy measures, neither party has suggested that there is any direct link between the non-application of criminal procedures and penalties, on the one hand, and any action taken on, or consequential to, the 5 June 2017 "comprehensive measures" severing relations with Qatar, on the other hand. Whereas the anti-sympathy measures were announced on 6 June 2017, there is no such temporal connection between the non-application of criminal procedures and penalties and the 5 June 2017 "comprehensive measures". For the reasons given above, there is also no rational or logical connection between the comprehensive measures aimed at ending interaction with Qatar and Qatari nationals, and the non-application of Saudi criminal procedures and penalties to beoutQ.
125. The Panel concludes that the non-application of criminal procedures and penalties to beoutQ does not have any relationship to Saudi Arabia's policy of ending or preventing any

form of interaction with Qatari nationals. Therefore, the Saudi authorities' non-application of criminal procedures and penalties to beoutQ is so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that Saudi Arabia implemented these measures for the protection of its "essential security interests". As a consequence, the Panel concludes that the non-application of criminal procedures and penalties to beoutQ does not "meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests".

E. CONCLUSIONS AND RECOMMENDATION

For the reasons set forth in this Report, the Panel concludes as follows:

- a. The Panel has no discretion to decline to make any findings or recommendation in the case that has been brought before it;
- b. With respect to Qatar's claims under Parts I, II and III of the TRIPS Agreement:
 - i. Qatar has established that Saudi Arabia has taken measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals, and thus Saudi Arabia has acted in a manner inconsistent with Article 42 and Article 41.1 of the TRIPS Agreement;
 - ii. Qatar has established that Saudi Arabia has not provided for criminal procedures and penalties to be applied to beoutQ despite the evidence establishing *prima facie* that beoutQ is operated by individuals or entities under the jurisdiction of Saudi Arabia, and thus Saudi Arabia has acted inconsistently with Article 61 of the TRIPS Agreement;
 - iii. in the light of these findings, it is unnecessary to make findings on Qatar's additional claims under Parts I and II of the TRIPS Agreement.
- c. With respect to Saudi Arabia's invocation of the security exception in Article 73(b)(iii) of the TRIPS Agreement:
 - i. the requirements for invoking Article 73(b)(iii) are met in relation to the inconsistency with Article 42 and Article 41.1 of the TRIPS Agreement arising from the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals; and
 - ii. the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia's non-application of criminal procedures and penalties to beoutQ.
3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with the TRIPS Agreement, they have nullified or impaired benefits accruing to Qatar under that Agreement.
4. Pursuant to Article 19.1 of the DSU, the Panel recommends that Saudi Arabia bring its measures into conformity with its obligations under the TRIPS Agreement.