

## **The Qatari Blockade: Was an International Legal Resolution Possible?**

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## The Qatari Blockade: Was an International Legal Resolution Possible?

Tensions with Qatar generally revolved around its support for political Islamist movements such as the Muslim Brotherhood and Hamas; its relationship with Iran; and its ownership of the media network, Al Jazeera. As a result of this, Qatar was accused of terrorism, conspiring with a regional rival<sup>1</sup> and meddling in the internal affairs of other countries by Saudi Arabia, the United Arab Emirates (UAE), Bahrain and Egypt (the Quartet). In June 2017, they imposed a land, sea and air blockade of Qatar, expelled Qatari nationals and severed all diplomatic ties. This dispute was ultimately resolved through diplomacy – as with most other disputes between the Arabian Gulf states – after three and a half years in January 2021 via the Al-Ula Agreement. Given the expense, loss of income, the effect on families and time taken to reach a resolution, it is worth considering whether this matter could have been effectively resolved through international legal action. This paper briefly examines some of the international and regional legal issues involved in the situation such as the lawfulness of the embargo and to a lesser extent, the principle of GCC economic citizen, the right to family life and the defences of countermeasures and national security. This paper posits that although the dispute was resolved through diplomacy and international legal recourse was unavailable in many of the issues raised, a legal resolution was needed to address unresolved underlying points of contention and highlight inconsistencies in the GCC legal framework.

Keywords: Gulf Corporation Council (GCC); Middle East; diplomacy; international law; economic sanctions; human rights

### Background

The 2011 Arab Spring unsettled the already tense situation in the Gulf when Saudi Arabia and Qatar were seen to back different sides. Years of diplomatic agitation finally came to a head on May 24, 2017, when authorities in Saudi Arabia and UAE blocked Al Jazeera's website as a result of false statements attributed to Qatar's emir which hackers had posted on its website the previous day. The comments praised Iran and criticised US foreign policy. Between 5 and 6 June 2017 the Quartet responded by severing diplomatic relations with Qatar and imposing a land, sea and air embargo to and from Qatar. They ordered that their citizens leave Qatar and that Qatari citizens leave their countries within a 14-day period. Saudi Arabia, UAE and Bahrain also imposed an air blockade banning Qatari registered airlines from their airspace. These sanctions in essence cut all commercial activity between themselves and Qatar; separated families and infringed upon Qatar Airways' (amongst others) access to their skies. The Quartet required that Qatar meet a list of thirteen demands before sanctions would be lifted. These demands included the closing of the Al Jazeera media network and all other news outlets funded by Qatar; payment of reparations for loss of life and other financial losses caused by

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<sup>1</sup> A. Barnard et al, *5 Arab Nations Move to Isolate Qatar, putting the US in a Bind*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/2017/06/05/world/middleeast/qatar-saudi-arabia-egypt-bahrain-united-arab-emirates.html>.

Qatar's policies; closure of the Turkish military base under construction; and scaling down of diplomatic ties with Iran. Qatar vehemently insisted that it had done nothing wrong and refused to meet the demands. The demands in fact had the opposite effect - Qatar deepened its relationship with Turkey and Iran both economically and diplomatically. Both countries filled the gaps in the food shortage created by the sanctions and provided alternative flight routes; with Qatar paying Iran one hundred million dollars for Qatar Airways overflights.<sup>2</sup> In addition, full diplomatic ties with Iran were restored. With Qatar successfully surviving the sanctions, there appeared to be no end in sight.

This three-and-a-half-year impasse nonetheless ended on the 5<sup>th</sup> of January 2021 with the signing of a reconciliatory agreement known as the Al-Ula Agreement at the 41<sup>st</sup> Gulf Cooperation Council (GCC) summit. The Quartet lifted the sanctions and agreed to restore diplomatic relations. Media outlets commented that Qatar in response froze all state related legal action against them;<sup>3</sup> it is unclear whether this was a legal or diplomatic move. However, in some cases, formal requests for the suspension of proceedings were made before the relevant dispute settlement bodies. In other cases, Qatar simply did not take any action to progress the matter.

Although sanctions had been imposed by Egypt, for the purpose of this paper, I have chosen to forgo Egypt in favour of focusing on the members of the GCC - Saudi Arabia, UAE and Bahrain - because they imposed more extensive sanctions and also belong to a regional organisation with a legal framework applicable in this analysis. The GCC is an international regional organisation which seeks to foster cooperation and integration in all areas of society including diplomacy, security and economics. It still comprises of the original founding members: Saudi Arabia, UAE, Bahrain, Qatar, Kuwait and Oman, despite applications for membership having been made by other countries.<sup>4</sup> All six member nations are monarchies; Bahrain, Qatar and Kuwait are constitutional monarchies; Saudi Arabia and Oman are absolute monarchies; and UAE is a federal monarchy (each of the seven emirates which make up the UAE are governed as absolute monarchies). They also have a common cultural and historical background and over the past forty years they have worked to foster economic and social integration. There is also a customs union in place within the GCC.

When there is a fall out between nations, the first course of action in solving the dispute would be dialogue. This failed in this case as all diplomatic channels had been closed and replaced with sporadic disjointed diplomatic comments. The next course of action would be to impose countermeasures by either not fulfilling an obligation owed under international law to the aggrieving party or by taking unilateral action against them. This option was not ideal in this case as the balance of power weighed against Qatar. A final course of action would be to seek legal redress as Qatar did. This paper discusses

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<sup>2</sup> Guney Yildiz, *GCC Summit, Will Lifting of the Blockade Reshape the Middle East*, FORBES (Jan. 4, 2021, 5.24pm), <https://www.forbes.com/sites/guneyyildiz/2021/01/04/gcc-summit-will-lifting-of-the-qatar-blockade-reshape-the-middle-east/?sh=110fd5d86e1f>.

<sup>3</sup> Sohail Mahmood, *Gulf Cooperation Council (GCC) Summit, Kingdom of Saudi Arabia, January 5-6, 2021: A Brief Analysis*, FOREIGN POLICY NEWS (Jan. 7, 2021), <https://foreignpolicynews.org/2021/01/07/gulf-cooperation-council-gcc-summit-kingdom-of-saudi-arabia-january-5-6-2021-a-brief-analysis/>.

<sup>4</sup> Jordan and Morocco.

some of the international legal issues raised in this case as well as other courses of action available to Qatar had the matter not been resolved.

## **International Legal Issues**

This dispute raised a plethora of issues such as the restriction on the use of airspace; border closures which restricted the free movement of persons and goods; embargoes which restricted trade in goods and services; and the closure of embassies which severed diplomatic ties. These concerns cut across several disciplines such as politics, diplomacy, airspace, economics, trade as well as human and social rights. As politics and diplomacy tend to be outside of the purview of law, this paper's consideration will be limited to where these disciplines interact with international and regional law.

International law is a body of rules established by states through either continuous practice (custom) or by agreement (such as treaties, conventions, charters and protocols) which these states consent to be bound by. Some treaties enter into force immediately they are signed. Most enter into force after ratification - either unanimously or by a specified minimum number of states. Resolutions of international organisations such as the United Nations (UN) or the GCC are generally not binding and therefore not international law.<sup>5</sup> They do however have legal significance and carry considerable political force in that they may be used to affirm established rules of international law and may be cited as articulations of the same.<sup>6</sup>

Qatar has sought legal redress based on the following principles and their applicable conventions: access to and transit through airspace under both the Convention on International Civil Aviation 1944 (also known as the Chicago Convention) and International Air Services Transit Agreement 1944 (also known as the Transit Agreement); racial discrimination protected by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; and non-discrimination in international trade brought under the non-discrimination rules of the World Trade Organization (WTO) agreements.

Some other international legal issues arise from both outside and within the GCC framework. These include: the right to family life; the free movement of goods; and the rights of the GCC economic citizen.

## ***Global***

### *Aviation – Access & Transit Through Airspace*

In October 2017, Qatar instigated an application before the Council of the International Civil Aviation Organization (ICAO) against the sanctioning countries over the prohibition of the use of their airspace pursuant to Articles 84 and II (2) of the Chicago Convention and the Transit Agreements respectively. Although the jurisdiction of the ICAO was questioned, the International Court of Justice (ICJ) ruled in July 2020 that the ICAO has jurisdiction to hear the matter and can thus proceed with the same. This matter is still pending.

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<sup>5</sup> Resolutions that are decisions of the UN Security Council (note not the General Assembly) are for example, an exception to this rule by virtue of Article 25 of the UN Charter. This article states that member nations agree to accept and carry out decisions of the Security Council.

<sup>6</sup> Vaughan Lowe, *International Law: A Very Short Introduction* 34 (2015).

### *Human Rights – Racial Discrimination*

In 2018, Qatar brought an action before the ICJ against the UAE based on discrimination. The Court dismissed the case in February 2021. It found that it had no jurisdiction to entertain the application stating that the dispute was not in relation to racial discrimination but to nationality, which is not within the scope of the Convention.<sup>7</sup>

### *Trade – Non-Discrimination Principles*

Qatar initiated a general action for consultation in July 2017 with Saudi Arabia, UAE and Bahrain (separately) under the dispute settlement rules of the WTO. Its legal base rests upon the Most Favoured Nation (MFN) principle of the General Agreement on Tariffs and Trade (GATT) 1994 as provided for in Articles I and XIII as well as provisions on transit, publication of measures, imposition of quotas under the GATT and similar provisions within the General Agreement on Trade in Services (GATS) and the Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement. In consideration of the MFN principle which is said to be the cornerstone of the WTO, Article I of the GATT provides that any customs duties, charges, rules and formalities connected with import and export that give an advantage, favour, privilege or immunity to any product originating in or destined for a contracting state shall be granted to all like products originating in or destined for all contracting states. According to Trebilcock, case law extends this provision beyond tariffs but also to rules and formalities applicable to import and export.<sup>8</sup> In international trade, conditions may be placed on like goods for various lawful reasons such as meeting health and safety standards or avoiding the infringement of existing patents. Conditions placed must relate to the characteristics of the product and must be applied to all like products regardless of country of origin. In *Indonesia - Auto case (1998)*, the panel found that conditions imposed related to the country of origin and not to the product characteristics and thus violated Article I.<sup>9</sup>

Article XIII provides that any prohibition or restriction (quantitative restriction) applied by a contracting party to the import or export of a product from another contracting state must be applied to all like products from all contracting states.

The GATT thus requires that where duties, charges, rules, formalities and quantitative restrictions are applied, that they be applied equally to all contracting parties and must relate to the nature of the product. As the rules and formalities applied by the sanctioning countries constituted a complete quantitative restriction on all goods originating from Qatar alone, simply on the basis that the goods originated from Qatar and did not pertain to product characteristics, it would appear that these countries were in violation of Articles I and XIII.

The MFN principle is subject to a number of exceptions; some of those which could potentially be related to this dispute are: Article XXIV on customs unions and free trade agreements; Article XXI on national security; and Article XX(a) – General Exceptions.

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<sup>7</sup> UN's Top Court Dismisses Qatar Discrimination Case Against UAE, AL JAZEERA (Feb. 4, 2021), <https://www.aljazeera.com/news/2021/2/4/uns-top-court-dismisses-qatar-discrimination-suit-against-uae>.

<sup>8</sup> Michael J. Trebilcock, *Advanced Introduction to International Trade Law* 39 (2015).

<sup>9</sup> Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶¶ 14.141-142, WTO Doc. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R; Doc 98-2505, (adopted July 23, 1998).

Article XXIV allows member states to form customs unions. Customs unions are a collection of territories where duties and other restrictive regulations of commerce are eliminated with respect to substantially all trade in goods originating from the territories of the union and where they agree to impose substantially the same amount of duties and other regulations of commerce on trade arriving from outside of the union.<sup>10</sup> It could have been argued by the sanctioning countries that since the formation of the GCC customs union was after the signing of the GATT then any restrictive practice of the customs union should supersede the GATT. It is unlikely that this argument will carry much weight however, as Article XXIV(4) makes it clear that the purpose of a customs union is to facilitate trade and not to raise barriers to it.

Saudi Arabia, UAE and Bahrain did cite the protection of their national security as a reason for instituting the sanctions. This defence is permitted under Article XXI of the GATT and is discussed later in this paper.

Article XX(a) states that contracting parties may adopt measures necessary to protect public morals “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” The 1983 Panel Report on *United States (U.S.) - Imports of Certain Automotive Spring Assemblies* considered ‘arbitrary and unjustifiable discrimination.’ They examined a ban on imports of certain automotive spring assemblies, under an exclusion order of the U.S. International Trade Commission (ITC), which the ITC had found infringed U.S. patents. In examining the measure in light of Article XX, the panel noted that the exclusion order was directed against imports of certain automotive spring assemblies produced in violation of a valid U.S. patent from all foreign sources, and not just from Canada. It found, therefore, that the exclusion order was “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against countries where the same conditions prevail.”<sup>11</sup>

Furthermore, in considering ‘a disguised restriction on international trade’ the Panel found that the exclusion order would not prohibit the importation of automotive spring assemblies produced by any producer outside the U.S. who had a licence from Kuhlman Corporation to produce these goods. Consequently, the Panel found that the exclusion order had not been applied in a manner which constituted a disguised restriction on international trade.<sup>12</sup>

There is little guidance on what constitutes ‘public morals’ and what sort of test would be applied to identify its existence. Nonetheless, it is clear that the intention of the GATT is for restrictive measures to be legitimate as opposed to an underhanded way of limiting trade; and for measures to be applied in the same way to all contracting parties. Qatar’s crime was its support of so-called terrorist organizations; relationship with Iran; and ownership of Al Jazeera. The fact that other GCC nations also have media

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<sup>10</sup> General Agreement on Tariffs and Trade art. 24.8.a, Apr. 15, 1994,  
[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm).

<sup>11</sup> Panel Report, *United States – Import of Certain Automotive Spring Assemblies*, ¶ 56, L5333 - 30S/107 (May 26, 1983).

<sup>12</sup> *Id.*

outlets; that some have cordial relationships with Iran – for example, Oman was secretly mediating between the US and Iran for years before the signing of the Joint Comprehensive Plan of Action (JCPOA);<sup>13</sup> and that each GCC state can in one way or another be said to support terrorist groups – for example, in Kuwait, the Muslim Brotherhood enjoys the right of activism and is represented in parliament;<sup>14</sup> makes it unlikely that this exception to the MFN rules would have been successful in this situation because there were other countries in which the ‘same conditions prevail’ and which did not have any sanctions imposed upon them.

The matters involving Saudi Arabia and Bahrain are still pending before the WTO despite requests for consultations - which is the first stage of the dispute settlement procedure - having been requested by Qatar in July 2017. Qatar could have moved the matter on to the next stage by requesting the establishment of a dispute settlement panel but it has neither done this nor withdrawn the request for consultations nor notified the WTO of a mutually agreed solution.<sup>15</sup> A notably different approach was taken in the matter with the UAE. A panel was requested in October 2017 and continued to carry out its work. In December 2020, it informed Qatar of delays due to the complexity of the dispute and disruptions resulting from COVID-19 and stated that it expected to issue its final report in the first quarter of 2021. The proceedings were suspended in January 2021 upon the request of Qatar, following the Al-Ula Agreement.<sup>16</sup>

### *Trade – Intellectual Property*

Interestingly, a related issue involving the intellectual property rights of BeIN, a Qatari media company was initiated before the WTO in October 2018. A panel was requested in November 2018 and their report which was circulated in June 2020 found in favour of Qatar. Saudi Arabia has appealed the decision to the Appellate Body of the Dispute Settlement Body of the WTO.<sup>17</sup>

### *Human Rights – Right to Family Life*

Another international legal issue raised which could potentially have been contested is the right to family life. Statistics show that the number of GCC citizens moving within member states had multiplied from 4.5 million in 1995 to over 14 million in 2007 with the numbers ever

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<sup>13</sup> Marc Valeri, *Oman’s Mediatory Efforts in Regional Crises*, NOREF EXPERT ANALYSIS (March 2014) (discussing Oman’s mediatory efforts in the MENA region).

<sup>14</sup> Ibrahim Fraihat, *Superpower and Small-State Mediation in the Qatar Gulf Crisis*, 55(2) THE INTERNATIONAL SPECTATOR 79–91 (2020) (discussing models of mediation in the Qatar Gulf crisis).

<sup>15</sup> Current Status, *DS528: Saudi Arabia – Measures relating to trade in goods and services, and trade-related aspects of intellectual property rights*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds528\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds528_e.htm) (last visited May 6, 2021).

<sup>16</sup> Current Status, *DS526: United Arab Emirates – Measures relating to trade in goods and services, and trade-related aspects of intellectual property rights*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds526\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm) (last visited May 6, 2021).

<sup>17</sup> Current Status, *DS567: Saudi Arabia – Measures concerning the protection of intellectual property rights*, WTO [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds567\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm) (last visited May 6, 2021).

increasing.<sup>18</sup> The principle of GCC economic citizenship which shall be discussed further in the next section, developed under the umbrella of economic cooperation and granted extensive social rights that created an ideal atmosphere for the flourishing of multi-national families. Thus, often a father and child would be of one nationality, and the mother of another. The effect of the blockade was to tear families apart for an indefinite period.

Bahrain has ratified both the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) which both recognise at Articles 23 and 10 respectively, the family as the natural and fundamental group unit of society deserving of the widest possible protection. Saudi Arabia, UAE and Bahrain have all ratified the Convention on the Rights of the Child 1989 (CRC) which contains provisions protecting the right of the child to preserve their family relations.<sup>19</sup>

By developing the principle of GCC economic citizen over forty years and then abruptly prohibiting the free movement of persons thus denying multi-national families the ability to reside together and communicate with each other and therefore interfering with their right to family life, the sanctioning countries appear to be in contravention of various human rights treaties including the ICCPR, ICESCR and CRC.

Qatar could have taken advantage of the UN Human Rights Complaints procedure. Article 10 of the Optional Protocol to the ICESCR, and Article 12 of the Optional Protocol (on a communications procedure) to the CRC set out a procedure for the relevant committee to consider complaints from one state party which considers that another state party is not giving effect to the provisions of the convention. This procedure applies only to state parties who have made a declaration accepting the competence of the Committee in this regard.<sup>20</sup>

Articles 41-43 ICCPR set out a more elaborate procedure for the resolution of disputes between state parties starting with the referral of the matter to the Human Rights Committee and cumulating in the establishment of an ad hoc Conciliation Commission. The procedure applies only to states party to the ICCPR who have made a declaration accepting the competence of the Committee in this regard.<sup>21</sup>

Qatar has ratified the ICCPR, ICESCR and CRC. It has however not ratified the optional protocols to the latter two conventions leaving it unable to take advantage of the complaints procedure contained therein. It can utilize the complaints procedure

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<sup>18</sup> *GCC Common Market Facts and Figures*, GCC INFORMATIONAL CENTRE, STATISTICAL DEPARTMENT (2009), <https://www.gcc-sg.org/en-us/CognitiveSources/DigitalLibrary/Lists/DigitalLibrary/Statistics/1274592562.pdf> (last visited Nov. 12, 2020).

<sup>19</sup> Such as Article 8: “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.”

<sup>20</sup> *Human Rights Bodies – Complaints Procedure*, OHCHR, <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate> (last visited Dec. 1, 2020).

<sup>21</sup> *Id.*

under the ICCPR against Bahrain but only if both countries have accepted the competence of the Human Rights Committee in this regard.

### ***Regional - GCC***

#### *Free Movement of Goods & the Customs Union*

The air, land and sea embargo effectively severed commercial ties with Qatar. This is contrary to the aim of the Charter establishing the GCC, signed in May 1981 which laid down the foundation for economic integration of the union. Article 4 states that the object of the community shall be “To effect coordination, integration and inter-connection between Member States in all fields in order to achieve unity between them.”

Building upon this objective, the GCC Unified Economic Agreement (UEA) signed on November 11, 1981 and ratified in 1982 sets out a plan for joint economic action. It established a free trade area and provided for the free movement of goods between the countries. Article 1 states that:

- a. “The Member States shall permit the importation and exportation of agricultural, animal, industrial and natural resource products that are of national origin. Also, they shall permit exportation thereof to other Member States.
- b. All agricultural, animal, industrial and natural resource products that are from Member States shall receive the same treatment as national products.”

Article 2 goes on to exempt all agricultural, animal, industrial and natural resource products that are of national origin from customs duties.

In December 2001 at Muscat, GCC leaders ratified the Economic Agreement (EA); an updated version of the 1981 agreement. This agreement constitutes a vital advance towards full economic integration which is to culminate in a monetary union. It facilitated the formation of a customs union which was established in 2003. The agreement, in Article 1 specifically eliminates all tariff and non-tariff barriers to intra-GCC trade.

The prohibition of both Qatari exports into embargo imposing countries and of exports from their countries into Qatar appears to be in violation of the spirit of the Charter and the provisions of both the UEA 1981 and the EA 2001. It also undermines the customs union.

#### *GCC Economic Citizenship*

Saudi Arabia said in a statement published by the Saudi official news agency; “In implementation of the decision to sever diplomatic and consular relations, Saudi citizens are not allowed to travel to Qatar or stay in it or pass through it. Saudi residents and visitors in Qatar must leave within 14 days.” The statement added; “Saudi Arabia unfortunately prevents Qataris from entering or visiting Saudi Arabia for security reasons and gives Qatari residents and visitors 14 days to leave.”<sup>22</sup>

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<sup>22</sup> *How Many Days do Qataris Have to Exit Saudi Arabia, the UAE and Bahrain?*, AL ARABIYA ENGLISH (June 5, 2017, 12:00 PM), <https://english.alarabiya.net/en/News/gulf/2017/06/05/How-many-days-do-Qataris-have-to-leave-Saudi-Arabia-UAE-and-Bahrain->.

Article 8 of the UEA provides for the free movement of persons and capital as well as the right of ownership and freedom of exercising economic activity. It states that:

“The Member States shall agree on executive principles to ensure that each Member State shall grant the citizens of all other Member States the same treatment as is granted to its own citizens without any discrimination of differentiation in the following fields:

1. Freedom of movement, work and residence.
2. Right of ownership, inheritance and bequest.
3. Freedom of exercising economic activity.
4. Free movement of capital.”

The 2001 Agreement takes this provision further by expanding in Article 3 the definition of ‘person’ to include both natural and legal persons. It also states that there shall be no discrimination between the citizens of any member country in “all economic activity” and constitutes an inexhaustive list of economic activities ranging from residence to work; to tax treatment; education; health and social services.

As a result of these provisions and various declarations, the term ‘GCC economic citizen’ was coined showing the GCC’s desire to give citizens of all member countries equal social and economic rights across the six member states. Not only is this right enshrined in the letter of the law, it is also established in the custom of the region. Abdulrahman Bin Hamad Al-Attiyah a former Secretary General of the GCC stated that it is a fundamental principle that GCC natural and legal citizens shall be accorded the same rights and privileges as accorded its own citizens in all economic areas.<sup>23</sup>

The principle of GCC economic citizenship has achieved many gains and tangible outputs for the citizens of GCC countries. These include free movement, residence, equal treatment in government and private sector, social insurance and pensions, engagement in professions and craft, engagement in economic, investment and service activities, real estate ownership, stock ownership, and formation of corporations, education, health, and social services as well as capital movement and tax treatment.<sup>24</sup> By restricting Saudis, Emiratis and Bahrainis from entering Qatar and vice versa, these governments were denying their citizens their right to free movement and participation in economic activity and were at face value in contravention of not just the spirit of the Charter but also of Article 8 of the UEA, Article 3 of the EA, as well as customary international law of the region which enshrines the principle of GCC economic citizenship.

### *Right to Family Life*

Article 10 of the GCC Human Rights Declaration 2014 lists freedom of movement, residence and departure as fundamental human rights. Article 16 guarantees the right to private life which may not be infringed. It states; “nor can a person’s family affairs, residence, correspondence or communications be interfered with.” By restricting Saudis, Emiratis and Bahrainis from entering Qatar and vice versa, the blockading countries were denying multi-national families

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<sup>23</sup> Gulf Cooperation Council, *supra* note 18.

<sup>24</sup> *Id.*

the ability to reside together and communicate with each other and thus interfered with their right to family life.

Article 30 of the EA provides for a temporary suspension of performance of certain provisions of the Agreement subject to a consideration of the local situation and to the authorization of the Supreme Council. There does not appear to have been either a formal consideration of the local situation by the GCC nor an authorization by the Supreme Council of the actions taken against Qatar.

There are no other provisions under the above mentioned GCC agreements which provide a defence to the non-performance of any of the provisions examined above.

### **Defences Raised by the Sanctioning Countries**

Although the sanctions appear to have been instigated by politically motivated events, Saudi Arabia, UAE and Bahrain contend that there is a legal basis for their imposition of unilateral coercive action. The ICJ summarized their legal claim as follows; “In 2013 and 2014, following years of diplomatic activities, the members of the GCC adopted a series of instruments and undertakings, referred to collectively as the Riyadh Agreement, under which Qatar ‘committed to cease supporting, financing or harbouring persons or groups presenting a danger to national security, in particular terrorist groups.’... (after) Qatar had allegedly failed to abide by its commitments, they adopted a range of countermeasures ‘with the aim of inducing compliance by Qatar.’”<sup>25</sup> An official Saudi government statement said that the decision to sever diplomatic and consular ties with Qatar was based on its sovereign rights which are protected by international law as well as the need to protect its national security from the threats of terrorism and extremism. The other blockading countries issued similar statements.<sup>26</sup>

Note that it is not in every circumstance in which a state commits an internationally unlawful act against another state that wrongfulness arises. Just as a human beings may have a defence for committing a crime, a state may have an excuse for committing acts that would otherwise be unlawful and are thus precluded from the wrongfulness of those internationally unlawful acts.<sup>27</sup> Two such excuses/defences given by the sanctioning countries are countermeasures and national security.

### ***Countermeasures***

It is a well-established principle of international law that countermeasures may be taken where a state is injured by the unlawful act of another state. The aggrieved state is entitled to suspend its own performance of some obligation owed to it or to impose sanctions on the contravening state in order to induce that state into fulfilling its obligations. Countermeasures are in a sense breaches of international law but they are justified and deemed lawful because of the prior illegal act of the state against which they are implemented. In order to determine whether the unilateral actions taken by Saudi Arabia, UAE and Bahrain constitute a lawful countermeasure, a provision of international law must have been violated, the measure taken must be

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<sup>25</sup> *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar): Overview of the Case*, ICJ, <https://www.icj-cij.org/en/case/173> (last visited Nov. 30, 2020).

<sup>26</sup> A. Barnard, *supra* note 1.

<sup>27</sup> Ademola Abass, *International Law: Text, Cases, and Materials* 483 (2nd ed. 2014).

commensurate with the injury suffered and must not violate the rules of international law on the protection of human rights and on the use of force.<sup>28</sup>

It was alleged that Qatar violated the provisions of the Riyadh Agreement by not ceasing its support of certain terrorist groups. Granted, Qatar sometimes plays what some would say is an outsized diplomatic role in the region: It has been an increasingly vocal diplomatic player and is also seen as a major financial and strategic supporter of the Muslim Brotherhood - an Islamist movement banned in Saudi Arabia and the UAE - as well as other political militant dissident groups in the Middle East; it has taken a back-channel role in diffusing points of contention in the Syrian war - it paid millions of dollars to insurgent and militant groups in hostage brokered deals and prisoner exchanges. In some cases, this money was alleged to have gone to militia leaders loyal to Iran; but interestingly, the act of supporting militant groups is an action also associated with its accusers. Several of the other Sunni-led monarchies in the region have played similar roles.<sup>29</sup>

Nonetheless, Qatar vehemently insists that it has not acted unlawfully.

Ms Alena Douhan, A UN Special Rapporteur appointed by the UN Human Rights Commission to examine the impact of unilateral coercive action and human rights in the Arabian Gulf affirmed in her report that the allegations against Qatar both as a supporter of terrorism and as an interferer with state sovereignty were unfounded.<sup>30</sup> She condemned the punitive measures as a violation of human rights and concluded that such unilateral actions were only lawful when authorized by the UN Security Council, or were countermeasures, or did not breach state obligations and did not violate fundamental human rights. As such, she called on the countries to settle their political differences based on the rule of law.<sup>31</sup>

If Qatar was found to be in breach of the Riyadh Agreement, then the use of Countermeasures as a defence to the imposition of unilateral coercive measures would be accepted under international law as long as they were commensurate with the injury suffered and did not violate the rules of international law on the protection of human rights and the use of force.

In this case, even if Qatar breached its obligations under the Riyadh Agreement, the countermeasures taken violate the rules of international law on the protection of human rights and are therefore unlawful. Saudi Arabia, UAE, and Bahrain cannot use the principle of countermeasures to justify the breach of their international obligations as the countermeasures imposed were unlawful.

### ***National Security***

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<sup>28</sup> Lowe, *supra* note 6, at 44.

<sup>29</sup> A. Barnard, *supra* note 1.

<sup>30</sup> *UN Expert Calls for Immediate Lifting of Sanctions Against Qatar*, AL JAZEERA (Nov 12, 2020), <https://www.aljazeera.com/news/2020/11/12/un-expert-calls-for-immediate-lifting-of-sanctions-against-qatar>.

<sup>31</sup> *UN Human Rights Expert Urges Four Gulf States to Lift Unilateral Sanctions Against Qatar*, UN HUMAN RIGHTS OFFICE OF THE COMMISSIONER (Nov 12, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26499&LangID=E>.

The protection of a country's security is accepted as an exception to the performance of obligations under many international treaties. For example, Article XXI(b) of the GATT states that no provision in the agreement shall prevent a contracting party from taking action it considers necessary for the protection of its essential security interests in three circumstances:

“(i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations.”

The most relevant of these circumstances, based on the facts is subsection (iii) – “taken in the time of war or other emergency in international relations.”

On April 5, 2019, the WTO panel found in a dispute between Ukraine and Russia that what is an ‘essential security’ interest is justiciable and thus reviewable contrary to the position held by Russia in the case. This matter involved a ban and restriction on traffic in transit by rail and road from Ukraine, through Russia to Kazakhstan and the Kyrgyz Republic. The panel found that the measures justified by Article XXI(b)(iii) must be made in good faith and have a plausible connection to the national security cited. This criterion can be objectively reviewed.

In this case, the panel found the invocation of the essential security exception to be necessary to protect national security (was made in good faith) and that it had a plausible connection to the national security interest cited. It defined an ‘emergency in international relations’ as “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.”<sup>32</sup> The panel acknowledged that relations between Russia and Ukraine had deteriorated to such a degree that they were of concern to the international community. That by December 2016 the situation was recognised by the General Assembly as involving armed conflict and since 2014 several countries had imposed sanctions against Russia in connection with the situation.

Although there was tension between the sanctioning countries and Qatar, it was not of armed conflict nor of a likelihood of the same amongst themselves. The tension appears to be a political one hinged on proxy wars, support for political Islamist groups, relationships with enemy states and media influence. It is hard to see this meeting the definition of ‘emergency in international relations’ as defined by the panel. The panel did however observe that the specific interests at issue will depend on the particular situation and perception on the state in question.

## **Dispute Resolution**

Redress of violations of international law can be sought through international dispute resolution mechanisms such as commissions, tribunals and courts. These systems only have the power to hear cases in which jurisdiction has been given to them by the parties either through prior approval by way of a treaty or acquiescence to a specific matter. As mentioned earlier, Qatar

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<sup>32</sup> Panel Report, *Russia – Measures Concerning Traffic in Transit*, ¶ 7.111, WTO Doc. WT/DS512/R, (adopted Apr. 26, 2019).

has sought redress through the ICAO, ICJ and WTO in the areas of airspace, racial discrimination and international trade respectively; and has suspended all legal action in response to the Al-Ula Agreement.

In the area of the right to family life, although there is a UN Human Rights complaints procedure in place for the protection of this right under the various treaties discussed, Qatar could only have taken advantage of the procedure under the ICCPR against Bahrain. To do so, both Qatar and Bahrain must have declared that they recognised the competence of the Human Rights Committee to consider complaints.

In the areas of the free movement of goods; upholding the customs union; GCC economic citizenship and the right to family life as protected under the GCC Human Rights Declaration; Qatar could have sought redress through the GCC's dispute resolution mechanism.

The GCC Charter provides for the creation of a Commission for the Settlement of Disputes which shall be formed by the Supreme Council on an ad hoc basis where a dispute arising from either the interpretation or implementation of a provision of the Charter cannot be settled by either the Council of Ministers or the Supreme Council.

Article 27 of the EA provides for the settlement of disputes by a specialised judicial commission should the Secretariat General and then the Commercial Arbitration Centre not be able to settle the dispute amicably. Should the charter of the specialized judicial body not have entered into force, the matter shall be referred to the competent GCC committee for settlement.

Unfortunately, the Commission for the Settlement of Disputes has never been constituted for a dispute or concern regarding the interpretation or implementation of the GCC Charter.<sup>33</sup> Neither has the specialised judicial commission ever been formed.<sup>34</sup> It also does not appear that a purely public international law dispute has ever been resolved through the GCC legal framework despite the existence of several disputes and points of contention. This might be because "GCC (law) has no supremacy over national laws. Rather they are subject to the rule that the subsequent law repeals the previous law. Each country is to try to enact laws which do not contradict those enacted by the GCC."<sup>35</sup> Both laws carry equal weight, and no hierarchy is created within the GCC legal structure. Thus, a contrary subsequent national law will repeal a previous GCC law. The fact that the GCC creates rights for its citizens which cannot be enforced without political motivation undermines its purpose and legal framework.

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<sup>33</sup> Fathi Hussain & Mahdi Zahraa, *Dispute Settlement Mechanisms: Gulf Cooperation Council Practice v. European Union Practice*, 36 ARAB LAW QUARTERLY 1, 20 (2021), (a comparative analysis of the EU and GCC dispute settlement mechanism).

<sup>34</sup> *Id.*

<sup>35</sup> Email correspondence with Dr. Al Anzi, professor of international law, Kuwait University, Kuwait (Apr. 24, 2021).

## **Could the dispute between Saudi Arabia, UAE, Bahrain and Qatar have been resolved through international legal action?**

Certain aspects of the dispute such as those involving airspace and trade could most certainly have been resolved through international legal action because rights were created, dispute settlement procedures were established and dispute settlement bodies had jurisdiction over both the subject matter and the disputing countries.

But even though Qatar commenced international legal action, it is not on the face of it evident that they were committed to resolving the matter in this manner; because on the one hand, Qatar initiated dispute settlement proceedings but on the other hand, progressed the matter in some cases and not in others. The Arabian Gulf countries generally settle their disputes through diplomacy and very rarely initiate legal action. This reluctance to initiate legal action might be because of their shared cultural, historical and political background along with the forty years of social and economic integration which makes them look more like family rather than indifferent neighbours. It is certainly not only in the interest of GCC citizens that their harmonious relationship be maintained but also of the international community because the Arabian Gulf has long been seen as a bastion of stability in a region beset by conflict.

Most will agree that dialogue is the best way to resolve any dispute. If there is political will, a diplomatic resolution can be achieved within a few months; as in this case, where interest in achieving a settlement was galvanized by the Trump administration in the last few months of their term, concluding in a resolution within the first week of January 2021. In contrast, legal processes tend to be lengthy and can take years for a final decision to be reached. However, when diplomacy fails and a country is not in a position to effect change through unilateral action, international legal redress should be sought. Plus, a political resolution may gloss over a dispute and not always address its underlying issues – as has happened here.<sup>36</sup>

A remedy under international law is different from one under domestic law in that a country cannot be arrested as a way of enforcing an action. A contravening state on the other hand, may have its membership of certain international organisations suspended, have fines and/or sanctions levied against it by different members of the international community (including both international organisations and individual countries) or have acts of retortion<sup>37</sup> carried out against it. The effect of a finding in favour of Qatar would have been that it no longer stood alone but would have had the political weight of the international community behind it.

Although a resolution was eventually reached through diplomacy, it seems unsatisfactory that families across the Gulf had to wait three-and-a-half years to be reunited; that many GCC citizens forfeited their social and economic rights; that Qatar spent extravagant amounts of money filling in avoidable food shortage gaps and paying for alternate flight routes; and that an undue amount of income from trade was lost over what would appear to be clear violations of international law. It thus seems apt that legal clarification of the matter is received. If a proper conversation on the legal

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<sup>36</sup> Gerald M. Feierstein, *The GCC Al-Ula Statement: Perhaps a Step, but not a Solution*, MIDDLE EAST INSTITUTE (Jan. 6, 2021), <https://www.mei.edu/blog/gcc-al-ula-statement-perhaps-step-not-solution>.

<sup>37</sup> These are the imposition of unfriendly measures and the removal of friendly concessions. This may include for example, the withdrawal of investments or the removal of visa concessions such as a visa waiver program.

implications of this dispute is not held, it could set a precedent for similar impositions in the future on other countries. As this dispute has been resolved and legal proceeding dropped as a consequence, I think it prudent that Qatar request an advisory opinion from the pertinent institutions on the legal issues raised. Ms Alena Dohan of the UN Human Rights Commission has already given her report on the impact of the sanctions on human rights in the Arabian Gulf. Unfortunately, an advisory opinion is outside of the mandate of the WTO Dispute Settlement Body and also appears to be outside of the purview of the ICAO,<sup>38</sup> but perhaps this would be a good time to strengthen the legal framework and dispute resolution mechanism of the GCC so that an advisory opinion may be given on the matters of contention and future disputes between member states can be handled in a more timely and intimate manner.

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<sup>38</sup> Under both the Chicago and Transit Agreements.

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