Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights
(DS567)

Responses of the United States of America to Questions
From the Panel to Third Parties

July 26, 2019

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QUESTIONS FROM THE PANEL

Question 1. Canada, the European Union and Norway submit that it follows from the nature of Article 73 of the TRIPS Agreement as an exception that a panel should first make findings on the complainant's claims of violation, before making findings on whether any violations are justified under the security exception in Article 73.[1] Without referring specifically to the order of analysis, Ukraine likewise argues that every justification under Article 73 must be specific "to the aspect of the measure giving rise to a specific finding of inconsistency with the TRIPS Agreement".[2] Please comment on the correct order of analysis for the Panel, in the light of the arguments developed in the third-party submissions.

1. The Panel should begin its analysis by addressing Saudi Arabia's invocation of TRIPS Article 73(b). This order of analysis is consistent with the Panel's terms of reference and the function of panels as set forth in the DSU.

2. Under DSU Article 7.1, the standard terms of reference – which were used in this dispute – call on the Panel "[t]o examine . . . the matter referred to the DSB" by the claimant, and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." As this text establishes, the Panel has two functions: (1) to "examine" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests"[3]; and (2) to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreement.

3. DSU Article 11 confirms this dual function of panels, and similarly provides that the function of panels is to "make an objective assessment of the matter" before it, and "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

4. As DSU Article 19.1 provides, these "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement."

5. The text of TRIPS Article 73(b), however, establishes that it is for a responding Member to determine whether the actions it has taken are necessary for the protection of its own essential

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[1] Canada's third-party submission, paras. 8-19; European Union's third-party submission, paras. 36-39; Norway's third-party submission, paras. 4-5.

[2] Ukraine's third-party submission, para. 19.

[3] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870.

security interests. Consistent with the text of that provision, a panel may not second-guess a Member's determination. Accordingly, when a respondent has invoked its essential security interests under Article 73(b) as to a measure challenged before the DSB, a panel may make no findings that will assist the DSB in making recommendations or giving rulings as to a complaining Member's claims, within the meaning of DSU Articles 7.1 and 11.

6. Put differently, in light of the self-judging nature of Article 73(b), a panel would have no basis to make findings and recommendations on a complaining Member's claims if the panel determines that the responding Member has invoked its essential security interests. This result is consistent with DSU Article 19.1 and 19.2 because an essential security measure cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement, and because it would diminish the "right" of a Member to take action it considers necessary for the protection of its essential security interests for a panel or the Appellate Body to purport to find such action inconsistent with a covered agreement.

7. Under these circumstances, if the Panel finds that Saudi Arabia has invoked Article 73(b) as to the measures challenged, the Panel should limit the findings in its report to a recognition that Saudi Arabia has invoked its essential security interests, and should refrain from continuing its analysis to address the claims raised by Qatar in its submissions.

Question 2. In this case, Qatar claims that the challenged measures accord treatment below the minimum standards set out or incorporated by reference in Part II and Part III of the TRIPS Agreement. In relation to Part I of the TRIPS Agreement, Qatar claims that Saudi Arabia accords to Qatari nationals treatment less favourable than that which it accords to its own nationals with regard to the protection of IP in violation of TRIPS Article 3, and that it fails to extend immediately and unconditionally to Qatari nationals advantages granted to nationals of other countries in violation of TRIPS Article 4. However, while these claims are presented as distinct claims from the ones that Qatar makes under Part III of the TRIPS Agreement, Qatar appears to argue that the treatment/advantages accorded to Saudi nationals and non-Qatari foreign nationals is reflected in the provisions of Chapter Six of the Saudi Copyright Law, which provides for civil and criminal remedies against the infringement of copyrights that seem to correspond to those required by Part III of the TRIPS Agreement.[4] In these circumstances:

(a) Does it follow that the Panel should proceed with an order of analysis of the claims that begins with the claims under Part II and Part III of the TRIPS Agreement, before addressing the claims under Part I?

(b) Would it also follow that any findings of violation under Part III of the TRIPS Agreement would render any additional findings in respect of the claims under Part I duplicative, or vice versa?

[4] Qatar's first written submission, paras. 184-187, and 219.

8. The United States responds to Questions 2 – 5 together. The Panel need not reach the issues raised in these questions. As noted above in response to the Panel's Question 1, the Panel should begin its analysis by addressing Saudi Arabia's invocation of TRIPS Article 73(b). Consistent with DSU Articles 7.1 and 11, if the Panel finds that Saudi Arabia has invoked TRIPS Article 73(b) as to the measures at issue, the Panel may make no findings that will assist the DSB in making recommendations or rulings as to Qatar's TRIPS claims. Under these circumstances, the Panel should limit its findings to a recognition that Saudi Arabia has invoked its essential security interests.

Question 3. Qatar claims that the same aspects of the same measures violate copyright obligations in Part II of the TRIPS Agreement ("Standards concerning the Availability, Scope and Use of Intellectual Property Rights") and the enforcement obligation in Part III of the TRIPS Agreement ("Enforcement of Intellectual Property Rights").

(a) Is the relationship between the obligations in Parts II and III of the TRIPS Agreement such that the same aspects of the same measures can violate both sets of obligations simultaneously?

(b) In this case, Qatar argues that although Saudi Arabia "provides certain rights on paper (i.e. in the text of their copyright law and regulations), those rights effectively have been stripped"[5] from beIN through the measures at issue. If that is the case, does it pertain more to the copyright obligations in Part II of the TRIPS Agreement, or to the enforcement obligations in Part III of the TRIPS Agreement?

(c) Regarding Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention, Qatar argues that a WTO Member must do more than merely provide such rights in name or on paper only, and that for such rights to be meaningful, they must be "enjoyed"[6], and "due to anti-sympathy and related measures (e.g. travel restrictions) that foreclose access to counsel, the Ministry's denial of access to administrative tribunals and courts, and the complete lack of criminal remedies, beIN is unable to enjoy the legal rights guaranteed"[7] by certain of these provisions. However, is a claim about the inability to "enjoy" the rights different from or additional to the claims that the rights cannot be "enforced" under Articles 41.1, 42 and 61? In other words, would accepting Qatar's interpretation of Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention render the enforcement obligations in Part III of the TRIPS Agreement redundant? Would it suggest that the obligations in Parts II and III are merely "structural" obligations directed at ensuring the existence of general laws and

[5] Qatar's first written submission, paras. 238, 253, 272, 305, 324, and 326.

[6] Qatar's first written submission, para. 238.

[7] Qatar's first written submission, para. 322.

procedures without regarding to how they are administered in particular cases?

9. Please see the U.S. response to the Panel's Question 2.

Question 4. In the circumstances of this case, would a finding of inconsistency under one of either Article 42 or Article 61 of the TRIPS Agreement render a finding under the other obligation in that pair of provisions duplicative, and/or render duplicative or otherwise unnecessary, a finding on the additional claim under Article 41.1 of the TRIPS Agreement?

10. Please see the U.S. response to the Panel's Question 2.

Question 5. The first sentence of Article 61 of the TRIPS Agreement states that "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale."

(a) Please comment on Qatar's argument that Article 61 should be interpreted as requiring Members not only to "write down criminal procedures and penalties in their criminal laws", but "to actually *apply* those procedures and penalties, particularly in egregious cases of conduct that qualifies as a crime".[8]

(b) **In the European Union's view, the obligation in Article 61 is merely to provide for criminal procedures and penalties and "does not add an obligation to investigate and punish all cases of wilful trademark counterfeiting or copyright piracy on a commercial scale".[9] If Article 61 is interpreted as obliging Members to prosecute, does that imply that Members are under an obligation to actively prosecute *all* cases of wilful trademark counterfeiting and copyright piracy on a commercial scale? If so, would that be an impracticable obligation?**

11. Please see the U.S. response to the Panel's Question 2.

Question 6. Please comment on paragraphs 19-21 of Bahrain's third-party oral statement, regarding the self-balancing nature of the security exception in Article 73 of the TRIPS Agreement.

12. The United States agrees with Bahrain that matters of national security should not be addressed through the dispute settlement system. Bahrain has suggested that Article 73(b)(iii) is "self-balancing" because "[e]very invocation of Article 73(b)(iii) implies permission for the affected WTO Member to respond with counter-sanctions of its own."[10] Bahrain further states that when a Member has invoked its essential security interests regarding measures challenged in

[8] Qatar's first written submission, paras. 419-424.

[9] EU third-party written submission, para. 33.

[10] Bahrain's third-party written submission, para. 19.

dispute settlement, panel review "does not really change" the position of the complaining Member because "[a]t the end of a successful dispute settlement proceeding, the complaining WTO Member will only get the right to retaliate," a right that this Member already has under TRIPS Article 73 "because of its self-balancing character."[11]

13. As the United States has highlighted in its submissions,[12] negotiators of the provision that became TRIPS Article 73(b) explicitly discussed that essential security actions would not be reviewable for consistency with the agreement, and that the appropriate means of redress for a Member affected by such actions would be to bring a non-violation, nullification or impairment claim.

Question 7. In paragraphs 22 and 23 of its third-party oral statement, the United Arab Emirates stated:

> **"22. Additionally, the plausibility connection is between the overall action taken by the invoking Member and the protection of "its essential security interests". Where a Member takes broad action that may be comprised of individual measures, the approach to plausibility would have to consider the overall action. There is no basis in Article 73 to require a connection between individual measures, in isolation and outside of the context of the overall action, and the emergency and associated security interests at issue. Thus, for example, where the central action taken is the severance of diplomatic and economic relations, plausibility would involve consideration of whether there is a connection between the severance of relations as a whole and the security interests or emergency at issue.**
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> **23. The UAE therefore concludes that a panel cannot parse out the individual measures taken as part of the overall action of severing diplomatic and economic relations, and seek to apply the plausibility test to each element separately and out of context. Focusing on the overall action would be more in line with the limited and deferential nature of any inquiry under Article 73 and the other security exceptions in the WTO agreements."**
>
> **Please comment.**

14. The United States observes that it is for Qatar to define which measures it is challenging in this dispute, and it is for Saudi Arabia to make clear which of those measures it has taken for the protection of its essential security interests within the meaning of Article 73(b). If Saudi

[11] Bahrain's third-party written submission, para. 20.

[12] Third-Party Oral Statement of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), paras. 15 to 16; U.S. Third Party Submission, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 27; U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products* (India) (DS547), paras. 67 to 78 (Exhibit USA-1 to Third-Party Oral Statement of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567)).

Arabia has invoked Article 73(b) in relation to a measure challenged by Qatar in this dispute, there is no need, nor would it be appropriate, to further inquire into the "essential security interest" that Saudi Arabia is seeking to protect through that measure.

15. Under the ordinary meaning of the terms in Article 73(b), Saudi Arabia's reasons for invoking its essential security interests are not reviewable by this Panel for consistency with Saudi Arabia's WTO obligations. Nor can Saudi Arabia, consistent with Article 73(a), be asked to furnish information it considers contrary to those interests.[13]

16. Accordingly, if Saudi Arabia considers all actions challenged in this dispute to be necessary for the protection of its essential security interests, the Panel should limit its findings in its report to the observation that Saudi Arabia has invoked its essential security interests under Article 73(b).

Question 8. Are there any prior GATT or WTO cases in which a panel or the Appellate Body declined to make any findings on the ground that there was no "trade dispute"[14] or that "no satisfactory settlement" was possible? In this regard, please comment on the relevance of the reasoning and approach taken in the following cases to the Panel's assessment of this issue:

(a) Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 44-57; and

(b) GATT Panel Report, *US – Nicaraguan Trade*, paras. 5.10-5.11.

17. In a number of instances the GATT contracting parties declined to refer matters to a panel or declined to address the legality of a matter, because the matter concerned was not a trade dispute, but rather concerned security issues, and no satisfactory settlement was possible in the context of the GATT.

18. For example, in light of the U.S. invocation of Article XXI in the *United States Export Restrictions* GATT dispute, the GATT CONTRACTING PARTIES did not review the legality of the U.S. action at issue, but found that the United States had not failed to carry out its

[13] *See* U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products* (India) (DS547), paras. 138 to 139 (Exhibit USA-1 to Third-Party Oral Statement of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567) (discussing analogous provision at GATT 1994 Article XXI(a)).

[14] Saudi Arabia's first written submission, para. 11.

obligations under the GATT.[15] As described in U.S. written submissions,[16] this action by the CONTRACTING PARTIES reflects the interpretation of the essential security exception as self-judging and constitutes a subsequent agreement regarding the interpretation of the treaty or application of its provisions, within the meaning of Article 31(3)(a) of the Vienna Convention.

19. This dispute arose shortly after the GATT entered into force, when relations between the United States and Czechoslovakia deteriorated and the United States took certain measures affecting Czechoslovakia's trade. Czechoslovakia requested the CONTRACTING PARTIES to find those U.S. actions were inconsistent with the GATT 1947.[17] In response, the United States invoked its essential security interests. After discussing the matter, 17 contracting parties held—with only Czechoslovakia dissenting—that the United States had not failed to carry out its obligations under the GATT.[18]

20. In discussions leading up to this decision, the Chairman opined that the question of whether U.S. measures conformed to GATT Article I "was not appropriately put" because the United States had defended its actions under Article XXI, which "embodied exceptions" to Article I.[19] Instead, the Chairman stated, the question should be whether the United States "had failed to carry out its obligations" under the GATT 1947.[20] As described in U.S. written submissions, a number of GATT contracting parties expressed similar sentiments in supporting the dismissal of Czechoslovakia's request.[21] In rejecting Czechoslovakia's challenge to actions

[15] Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).

[16] *See* U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products* (India) (DS547), paras. 46 to 54 (Exhibit USA-1 to Third-Party Oral Statement of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567)).

[17] GATT Contracting Parties Third Session, Agenda (Revised 8th April), GATT/CP.3/2/Rev.2 (Apr. 8, 1949), item 14 ("Request of the Government of Czechoslovakia for a decision under Article XXIII as to whether or not the Government of the United States has failed to carry out its obligations under the Agreement through its administration of the issue of export licenses.").

[18] Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).

[19] Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949).

[20] Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949).

[21] *See* U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products* (India) (DS547), paras. 46 to 54 (Exhibit USA-1 to Third-Party Oral Statement of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567)).

that the U.S. had justified on the basis of its essential security interests, the GATT CONTRACTING PARTIES acknowledged that an invocation of essential security interests was not justiciable.

21. As described in more detail in written U.S. submissions,[22] on other occasions, numerous GATT contracting parties (now WTO Members) opined that matters of essential security were "political" in nature, and fell outside the competence of a trade organization. For example, in 1982, the GATT contracting parties accepted the invocation of essential security by the European Communities, Canada, and Australia in their imposition of trade restrictions affecting Argentina. In discussions of this matter, a number of contracting parties asserted that the GATT was not the appropriate forum to resolve this matter as it concerned political issues, rather than trade issues. For example:

- In a written communication, the European Communities, Canada, and Australia made clear that they did not view the GATT as the appropriate forum to address the matter; instead, they expressed hope that the situation could be resolved by "appropriate negotiations elsewhere."[23]

- The United Kingdom emphasized that the measures in question "had originated from a political dispute that went beyond the competence of the GATT and which could not be resolved in the Council."[24]

- The representative of Canada stated that "Canada's sovereign action was to be seen as a political response to a political issue" and therefore fell squarely within the exemption of Article XXI and outside the competency and responsibility of the GATT.[25]

22. Similar views – that the GATT was not a forum to resolve political disputes – were expressed during the *United States – Trade Measures Affecting Nicaragua* GATT dispute. This dispute arose after the United States imposed an embargo prohibiting all imports and exports of goods and services to and from Nicaragua. At a GATT Council meeting, Nicaragua asked the Council to condemn the U.S. measures and request that the United States revoke them immediately.[26]

23. The United States invoked its essential security interests and observed, "[i]t was not for GATT to approve or disapprove the judgement made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization, and had no

[22] U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products* (India) (DS547), paras. 105 to 127 (Exhibit USA-1 to Third-Party Oral Statement of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567)).

[23] Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982).

[24] GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 11.

[25] GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10.

[26] Minutes of Meeting of May 29, 1985, C/M/188, at 2 (June 28, 1985).

competence to judge such matters."[27] The United States noted further that "GATT had traditionally not become involved in political disputes because it was not the appropriate place to resolve them."[28] A number of others agreed with the U.S. position and likewise cautioned that the GATT was not the appropriate forum to resolve this dispute, as it concerned political matters rather than trade matters. For example:

- Canada observed "this was fundamentally not a trade issue, but one which could only be resolved in a context broader than GATT."[29]

- The European Communities, elaborating on its position in its earlier dispute with Argentina, maintained that the "GATT had never had the role of settling disputes essentially linked to security."[30] As the EC observed, "[t]he General Agreement left to each contracting party the task of judging what was necessary to protect its essential security interests."[31]

- Norway endorsed the views of the EC, and expressed hope that "efforts would be undertaken elsewhere to bring about a mutually acceptable solution of this dispute."[32]

24. As the foregoing demonstrates, a panel's ability to decline to review essential security matters is established by a subsequent agreement by the GATT CONTRACTING PARTIES interpreting the essential security exception. This ability is further confirmed by views expressed on numerous occasions by Members.

25. In the portion of *Mexico – Taxes on Soft Drinks* cited in the Panel's question, the Appellate Body upholds a panel's conclusion that "'under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it.'" However, the issue in the present dispute is not one of whether "to exercise … jurisdiction". When the DSB established this Panel and referred the matter raised in the panel request to the Panel, the DSB authorized the Panel, through its terms of reference under DSU Article 7.1, to examine that matter and to make such findings as will assist the DSB in making the recommendation under DSU Article 19.1. "Jurisdiction" is not a term found in the DSU, but this Panel (like any other panel) has the authority (jurisdiction) to act within those terms of reference.

26. The issue here is whether, consistent with its terms of reference, the Panel may make any findings on Qatar's TRIPS claims. As the United States has explained, there are no such findings that the Panel may make in this dispute because an invocation by a Member of its

[27] Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985).

[28] Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985).

[29] Minutes of Meeting of May 29, 1985, C/M/188, at 12 (June 28, 1985).

[30] Minutes of Meeting of May 29, 1985, C/M/188, at 13 (June 28, 1985).

[31] Minutes of Meeting of May 29, 1985, C/M/188, at 13 (June 28, 1985).

[32] Minutes of Meeting of May 29, 1985, C/M/188, at 13—14 (June 28, 1985).

"essential security interests" is not "justiciable". "Justiciability" is also not a term found in the DSU, but is meant to convey that such an invocation is not reviewable through dispute settlement but may merely be noted if such a matter has been brought to the dispute settlement system.

27. As described above in response to Question 1, the DSU provides that panels have a dual function to (1) examine (or make an objective assessment of) the matter referred to the DSB, and (2) to make findings as will assist the DSB in making recommendations or rulings under the covered agreement. Where the responding Member has invoked essential security regarding a challenged measure, however, the self-judging language of the essential security exception precludes the panel from making findings that will assist the DSB in making recommendations or giving rulings as to a complaining Member's claims.

28. In this sense, although the matter is within the panel's terms of reference (and therefore the Panel has "jurisdiction"), the invocation is not reviewable, and there are no other findings that are permissible (and therefore the matter is not "justiciable"). Under these circumstances, a panel should limit the findings in its report to a recognition that the responding member has invoked its essential security interests. Accordingly, the Appellate Body's conclusion in *Mexico – Taxes on Soft Drinks* on "jurisdiction" is simply not relevant to the situation in this dispute. A correct reading of the DSU text supports the U.S. understanding that matters of essential security are not justiciable, and this Panel should decline to review Saudi Arabia's invocation of TRIPS Article 73(b).

29. In the paragraphs of *US – Nicaragua Trade* cited in this Panel's questions, that panel (1) declined to recommend withdrawal of the U.S. action that had been challenged in that dispute, and (2) decided not to propose a ruling on the basic question of whether actions under Article XXI could nullify or impair benefits of the adversely affected contracting party.

30. As these conclusions and the discussions of GATT contracting parties around this report make clear, the question of whether an essential security action is inconsistent with a covered agreement is not justiciable, and this Panel should limit its findings to a recognition that Saudi Arabia has invoked its rights under TRIPS Article 73(b).

31. As noted above at paragraph 23, the United States stated in connection with this dispute – before a panel was established – that "[i]t was not for GATT to approve or disapprove the judgement made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization, and had no competence to judge such matters."[33] A number of others – including Canada, the European Communities, and Norway – also agreed that the GATT, as a trade forum, was not the appropriate context in which to resolve the dispute between the United States and Nicaragua.

32. At a GATT Council meeting that followed the issuance of this report, the United States recommended adoption of the report. Echoing its prior remarks, the United States observed again that the "GATT was not a forum for examining or judging national security disputes.

[33] Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985).

When a party judged trade sanctions to be essential to its security interests, it should be self-evident that such sanctions would be modified or lifted in accordance with those security considerations."[34] The European Communities reiterated that it "did not want [Article XXI of the GATT 1994] to be the subject of interpretation, discussion or negotiation either in the Council or in the new round."[35]

33. Although the Council could not adopt the panel's report without consensus,[36] statements by the GATT contracting parties in the discussions leading up to the panel's establishment demonstrate that invocations of Article XXI(b) were seen as self-judging and that the GATT was not intended as a forum to discuss political disputes.

[34] Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 8.

[35] Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 16.

[36] Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 17. The panel's report was never adopted.