

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

Third-Party Oral Statement  
of the United States of America

July 10, 2019

## **I. Introduction**

1. Mr. Chairman, members of the Panel: The United States welcomes this opportunity to present its views, and will address the following topics: (1) the proper interpretation of TRIPS Agreement Article 73(b)<sup>1</sup> under the customary rules of interpretation; (2) the negotiating history of Article 73(b); and (3) errors in the analysis of the panel in *Russia – Traffic in Transit*.

## **II. Proper Interpretation Of TRIPS Article 73(b)**

2. Under DSU Article 3.2, a panel is to apply customary rules of interpretation of public international law to the text of the covered agreements; these rules establish that TRIPS Article 73(b) is self-judging.<sup>2</sup> That is, each WTO Member has the right to determine, for itself, what it considers necessary for the protection of its own essential security interests, and to take action accordingly.

3. TRIPS Article 73(b) mirrors GATT 1994 Article XXI(b).<sup>3</sup> The text and context of TRIPS Article 73(b) supports an understanding that the provision is self-judging. First, in the chapeau, the ordinary meaning of the terms “it considers” establishes the self-judging nature of this provision. The word “consider[.]” means “[r]egard in a certain light or aspect; look upon

---

<sup>1</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), article 73(b).

<sup>2</sup> See U.S. Third Party Submission, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (DS567)*, paras. 5 to 13; U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products (India) (DS547)*, Section III.A.1 (Exhibit USA-1).

<sup>3</sup> As that text provides:

Nothing in this Agreement shall be construed: . . .

(b) to prevent any contracting party *from taking* any action *which it considers* necessary for the protection of *its* essential security *interests*;

(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.

as.”<sup>4</sup> Under Article 73(b), the relevant “light” or “aspect” in which to regard the action is whether that action is necessary for the protection of the acting Member’s essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member (“which it”) that must regard (“consider[.]”) the action as having the aspect of being necessary for the protection of that Member’s essential security interests.

4. Second, it is “*its* essential security interests” – the Member’s in question – that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves “its interests,” that is, potential detriments or advantages from the perspective of that Member.<sup>5</sup> Each WTO Member likewise must determine whether a situation implicates its “security” interests (not being exposed to danger<sup>6</sup>), and whether the interests at stake are “essential,” that is, significant or important, in the absolute or highest sense.<sup>7</sup> By their very nature, these questions are political and can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those circumstances.

5. Third, the text of subparagraphs (i) to (iii) of Article 73(b) also supports the self-judging nature of this provision. As an initial matter, these subparagraphs lack any conjunction – such as the cumulating conjunction “and,” or the coordinating conjunction “or” – to specify their relationship to each other. The absence of any conjunction here suggests that each of the subparagraphs (i) to (iii) must be considered for its relation to the chapeau of Article 73(b).

---

<sup>4</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 485.

<sup>5</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1393.

<sup>6</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754.

<sup>7</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852.

6. Subparagraphs (i) and (ii) – which discuss fissionable materials and traffic in arms, respectively – both begin with the phrase “relating to” and directly follow the phrase “essential security interests.” Subparagraphs (i) and (ii) thus illustrate the types of “essential security interests” that Members considered could lead to action under Article 73(b).
7. Subparagraph (iii) of Article 73(b), by contrast, begins with temporal language “taken in time of.” This language echoes the reference to “taking any action” in the chapeau of Article 73(b), as it is *actions* that are “taken,” and not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word “action,” rather than the phrase “essential security interests.” Accordingly Article 73(b)(iii) reflects a Member’s right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations.
8. Subparagraphs (i) to (iii) of Article 73(b) thus reflect that Members wished to set out certain types of “essential security interests” and a temporal circumstance that Members considered could lead to action under Article 73(b). A Member taking action pursuant to Article 73(b) would consider its action to be necessary for the protection of the interests identified in subparagraphs (i) and (ii), or to be taken in time of war or other emergency in international relations as set forth in subparagraph (iii). In this way, the subparagraphs (i) to (iii) guide a Member’s exercise of its rights under Article 73(b) while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.
9. The self-judging nature of Article 73(b) is also established by the context of its terms, as described in the U.S. third-party submission at paragraphs 8 to 13. This interpretation of Article

73(b) is also established by the subsequent agreement of the parties in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia.<sup>8</sup>

10. In brief, in that dispute Czechoslovakia requested the CONTRACTING PARTIES to find that certain U.S. actions were inconsistent with the GATT 1947. In discussing the decision to be made in the following GATT Council meeting, 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 the essential security exception, which “embodied exceptions” to Article I.<sup>9</sup> As the Chairman stated, the question before the contracting parties was whether the United States “had failed to carry out its obligations” under the GATT 1947.<sup>10</sup> With only Czechoslovakia dissenting, the CONTRACTING PARTIES found that the United States had not failed to carry out its obligations under the GATT.<sup>11</sup>

11. Thus, this subsequent agreement taken into account with the ordinary meaning of the terms of Article 73(b) confirms that, under customary rules of interpretation, TRIPS Article 73(b) leaves to each WTO Member to determine, for itself, what it considers necessary for the protection of its own essential security interests, and to take action accordingly.

---

<sup>8</sup> U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products (India)* (DS547), Section III.A.2 (Exhibit USA-1).

<sup>9</sup> 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).

<sup>10</sup> 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).

<sup>11</sup> 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) (recording affirmative votes from 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).

### **III. Negotiating History Of TRIPS Article 73(b)**

12. The negotiating history of the essential security exception confirms that (1) essential security matters are within the judgment of the acting government, and (2) a non-violation, nullification or impairment claim – as opposed to a claimed breach of underlying obligations – is the appropriate redress for a Member affected by an essential security action. The United States also described these points in its written submission.<sup>12</sup>

13. As noted, TRIPS Article 73 mirrors GATT 1994 Article XXI, and the drafting history of these provisions dates back to negotiations to establish the International Trade Organization of the United Nations (“ITO”), which proceeded alongside the GATT 1947 negotiations. In 1946, the United States proposed a draft charter for the ITO, which included exceptions provisions that related to, among other things, measures taken “in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.”<sup>13</sup>

14. As the United States asserted at that time – in 1946 – these exceptions “afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests in time of war or a national emergency.”<sup>14</sup> In 1947, the text that became TRIPS Article 73 was revised to separate the essential security exception from the “commercial” exceptions that became GATT 1994 Article XX, and to place the essential security exception at the end of the ITO Charter, so that it was broadly applicable. In addition, the essential security

---

<sup>12</sup> See Third Party Submission of the United States in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights (DS567)*, paras. 14 to 30; U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products (India) (DS547)*, Section III.A.3 (Exhibit USA-1).

<sup>13</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11.

<sup>14</sup> Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946), at 11.

exception was revised to insert the pivotal “it considers” language, which explicitly indicates the self-judging nature of this provision. As the negotiators stated in a November 1947 informal summary of the negotiations, the essential security exception would permit members to do “whatever they think necessary” to protect their essential security interests relating to the circumstances presented in that provision.<sup>15</sup>

15. Negotiators also explicitly discussed that essential security actions would not be reviewable for consistency with the underlying agreement, and that the appropriate redress for a country affected by such actions would be a non-violation, nullification or impairment claim. For example, at a July 1947 meeting, the representative of Australia withdrew an objection to the essential security provision after receiving assurance that a member affected by essential security actions would have redress pursuant to a non-violation, nullification or impairment claim.<sup>16</sup> And in early 1948, a Working Party of representatives from Australia, India, Mexico, and the United States decided to *retain* the draft charter’s non-violation, nullification or impairment provision because, as stated in their report, this provision “would apply to the situation of action taken by a Member” to protect its essential security interests.<sup>17</sup> As this Working Party concluded, essential security actions “*would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members.”<sup>18</sup> The Working Party concluded that “[s]uch other Members should, under those circumstances, have the right to bring

---

<sup>15</sup> United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947), at 35.

<sup>16</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—30.

<sup>17</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 1—2.

<sup>18</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added).

the matter before the Organization, *not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.*<sup>19</sup>

16. At another January 1948 meeting, “[f]ive representatives agreed with the Chairman that action of the type mentioned in [the essential security provision] could not be challenged by recourse to the procedures of [the dispute settlement chapter].”<sup>20</sup> However, these representatives felt that “any Member which considered that any *benefit* accruing to it being nullified or impaired” might invoke non-violation procedures “in order that compensatory measures might be permitted.”<sup>21</sup> Around the same time, ITO charter negotiators declined to incorporate an explicit reference to nullification or impairment into the essential security provision.<sup>22</sup> As the United States noted then, such a reference was “unnecessary” in light of the existing text.<sup>23</sup>

#### **IV. Errors In The *Russia – Traffic in Transit* Panel’s Report**

17. As this Panel is no doubt aware, the panel in *Russia – Traffic in Transit* found that it had authority to review multiple aspects of a responding party’s invocation of the essential security provision at Article XXI of the GATT 1994. That panel’s analysis is flawed for numerous

---

<sup>19</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added).

<sup>20</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1.

<sup>21</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (italics added).

<sup>22</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948), at 1—2.

<sup>23</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948).



reasons, including that it misunderstood the ordinary meaning of the terms and simply ignored and failed to discuss key aspects of that provision’s negotiating history.<sup>24</sup>

18. First, the panel failed to apply customary rules of interpretation. The panel acknowledged that the phrase “which it considers” in the chapeau “can be read to qualify . . . the determination of the matters described in the three subparagraphs of Article XXI(b).”<sup>25</sup> The panel gave no interpretive weight to this plain meaning, however. Instead, that panel based its conclusion on what it termed the “logical structure” of the provision.<sup>26</sup> The panel provided no explanation of what it considered to be the “logical structure” of the provision, nor did the panel explain how, consistent with customary rules of interpretation, the “logical structure” of a provision could operate to alter the ordinary meaning of its terms.

19. Second, after reaching an initial conclusion based on the “logical structure” of the essential security exception – in only a few short paragraphs – the panel proceeded to examine “a similar logical query,” that is “whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination.”<sup>27</sup> Without explanation, the panel stated that it would “focus on” subparagraph (iii) and determine whether “given their nature, the evaluation of these circumstances *can be left* wholly to the discretion of the Member invoking the provision, or is designed to be conducted objectively, by a dispute settlement panel.”<sup>28</sup>

---

<sup>24</sup> U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products (India)* (DS547), Section III.B (Exhibit USA-1).

<sup>25</sup> *Russia – Traffic in Transit*, para. 7.63.

<sup>26</sup> *Russia – Traffic in Transit*, paras. 7.62 - 7.65.

<sup>27</sup> *Russia – Traffic in Transit*, para. 7.66.

<sup>28</sup> *Russia – Traffic in Transit*, para. 7.66 (italics added).

20. Again, that panel did not indicate the basis on which this “logical query” could lead to a correct interpretation of Article XXI. The panel also left unexplained why, despite the ordinary meaning of the text of Article XXI – including the key phrase “it considers necessary” – the result of this inquiry could reveal that the evaluation of this provision is “designed to be conducted objectively.” In fact, the text of Article XXI(a) undermines both the premise and the conclusion of the panel’s query. As that provision states “[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.” Thus, under Article XXI(a), a Member need not provide any information—to a WTO panel or other Members—regarding essential security actions or the Member’s underlying security interests.

21. Third, the panel erred in its interpretation of the negotiating history of the essential security exception. Among other problems in this analysis, the panel misconstrued certain statements made during the Article XXI negotiations, including Australia’s July 1947 comments regarding the withdrawal of its objection to the essential security exception. Specifically, the panel failed to identify the article to which Australia referred in those comments, not as a general dispute settlement provision of the GATT 1947, but as the article providing for non-violation nullification or impairment claims, as discussed today and in the U.S. written submission at paragraph 27.

22. In addition, the panel failed to address other pertinent negotiating history, particularly the numerous explicit statements that confirm that the essential security exception is self-judging and the appropriate redress was considered by the negotiators to be a non-violation, nullification or impairment claim, not a claim that a Member has breached its trade obligations.

23. Essential security provisions, such as Article XXI of the GATT 1994 and TRIPS Article 73, concern matters of the utmost importance to sovereign nations. With respect to such matters, the drafters – the representatives of those sovereign nations – must be respected. As even the *Russia – Traffic in Transit* panel understood, the meaning and grammatical construction of the provision “can be read” to vest in each Member the sole determination of what “*it considers necessary* for the protection of *its essential security interests*.” This conclusion is confirmed by supplementary means of interpretation, including the negotiating history of the essential security exception. Had that panel conducted its analysis consistent with customary rules of interpretation, this is the meaning of the essential security exception that the panel would have discerned. It would risk grave damage to the WTO and its dispute settlement system were panels to attempt to needlessly second guess the decision by any WTO Member to take action it considers necessary for the protection of its essential security interests.

**V. Conclusion**

24. The United States thanks the Panel for its attention.