United Arab Emirates – Measures Relating To Trade In Goods And Services, And Trade-Related Aspects Of Intellectual Property Rights
(DS526)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

October 2, 2019

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

I. THE TEXT OF GATT ARTICLE XXI, IN ITS CONTEXT, ESTABLISHES THAT THE EXCEPTION IS SELF-JUDGING

1. The text of GATT 1994 Article XXI(b), in its context, establishes that the exception is self-judging. As Article XXI(b) states, "nothing" in GATT 1994 shall be construed to prevent a WTO Member from taking "any action" which "it considers necessary" for the protection of its essential security interests. This text establishes that (1) "nothing" in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest, and (2) the action necessary for the protection of its essential security interests is that which the Member "considers necessary" for such protection. The French and Spanish texts of Article XXI(b) confirm the self-judging nature of this provision. Use of the subjunctive in Spanish ("estime") and the future with an implied subjunctive mood in French ("estimera") support the view that the action taken reflects the beliefs of the Member, rather than an assertion of objective fact that could be subject to debate.

2. The context of Article XXI(b)(iii) also supports this understanding. First, the phrase "which it considers necessary" is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase "which it considers" in Article XXI(b), and not reduce these words to inutility.

3. Second, the context provided by Article XX supports the understanding that Article XXI(b) is self-judging. Article XX sets out "general exceptions," and a number of its subparagraphs relate to whether an action is "necessary" for a listed objective. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce "necessary." Furthermore, Article XX includes a chapeau which subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member's action, is absent from Article XXI.

4. Third, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member "considers" appropriate or necessary. For example, under Article 18.7 of the Agreement on Agriculture, "[a]ny Member" may bring to the attention of the Committee on Agriculture "any measure which it considers ought to have been notified by another Member." As in GATT 1994 Article XXI(b), the text of such provisions makes clear that the judgment of whether a situation arises is left to the discretion of the named actor.

II. GATS ARTICLE XIV*BIS* AND TRIPS ARTICLE 73 ARE ALSO SELF-JUDGING

5. GATS Article XIV*bis*(1)(b) and TRIPS Article 73(b) include the same operative language as GATT Article XXI(b). This language, in context, establishes that the exceptions at GATS Article XIV*bis*(1)(b) and TRIPS Article 73(b) are not subject to review by a WTO panel. The drafting history of the GATS and TRIPS provisions further confirms that these provisions, like GATT Article XXI, are self-judging.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENT

I. Proper Interpretation Of GATT 1994 Article XXI(b), GATS Article XIV*bis*(b), And TRIPS Article 73

1. 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 GATT 1994 Article XXI(b) is self-judging. 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. GATS Article XIV*bis*(b) and TRIPS Article 73(b) mirror GATT 1994 Article XXI(b), and accordingly are also self-judging.

2. The text and context of these provisions support this understanding. First, the ordinary meaning of the terms "it considers" in the chapeau establishes the self-judging nature of this provision. The word "consider[]" means "[r]egard in a certain light or aspect; look upon as." Under Article XXI(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.

3. 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. Each WTO Member likewise must determine whether a situation implicates its "security" interests (not being exposed to danger), and whether the interests at stake are "essential," that is, significant or important, in the absolute or highest sense. 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.

4. Third, the text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. As an initial matter, these subparagraphs lack any conjunction 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 XXI(b). In addition, subparagraphs (i) and (ii) 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 XXI(b). Subparagraph (iii), by contrast, begins with temporal language "taken in time of." This language echoes the reference to "taking any action" in the chapeau of Article XXI(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 XXI(b) 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.

5. Subparagraphs (i) to (iii) of Article XXI(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 XXI(b). A Member taking action pursuant to Article XXI(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 XXI(b) while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

6. The self-judging nature of Article XXI(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. There, 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 Article XXI, which "embodied exceptions" to Article I. 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. With only Czechoslovakia dissenting, the CONTRACTING PARTIES found that the United States had not failed to carry out its obligations under the GATT. This subsequent agreement taken into account with the ordinary meaning of the terms of Article XXI(b) confirms that, under customary rules of interpretation, Article XXI(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. The same is true of the essential security exceptions at GATS Article XIV*bis*(b) and TRIPS Article 73(b).

II. Negotiating History Of GATT 1994 Article XXI(b)

7. The negotiating history of these essential security provisions 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.

8. The drafting history of the essential security 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." As the United States asserted 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." In 1947, the text that became Article XXI(b) was revised to separate the essential security exception from the "commercial" exceptions that became 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 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.

9. Negotiators also 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, 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. 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. 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." The Working Party concluded that "[s]uch other Members should, under those circumstances, have the right to bring 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."

III. Errors In The *Russia – Traffic in Transit* Panel's Report

10. 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. That panel's analysis is flawed for numerous reasons.

11. 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)." The panel gave no interpretive weight to this plain meaning. Instead, that panel based its conclusion on what it termed the "logical structure" of the provision. 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.

12. Second, after reaching an initial conclusion based on the "logical structure" of the essential security exception, the panel examined "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." 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." 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, 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 Article XXI(a) 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." 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.

13. Third, the panel erred in its interpretation of the negotiating history of the essential security exception. Among other problems, the panel misconstrued certain statements made during the negotiations, including Australia's July 1947 comments regarding the withdrawal of its objection to the essential security exception. 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.

14. Essential security provisions 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 Member to take action it considers necessary for the protection of its essential security interests.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

1. Response to Question 11: It is for the UAE, as the responding Member, to define what measures it has taken for the protection of its essential security interests under GATS Article XIV*bis*. If the Panel determines that the UAE has invoked its essential security interests as to a particular measure, the Panel should limit the findings in its report concerning that measure to a recognition that the UAE has invoked its essential security interests. The Panel should not continue its analysis to address the claims raised by Qatar in its submissions or to determine whether challenged measure(s) may be justified under GATS Article XIV(a).

2. Response to Question 14: There is no legal requirement that the Panel assess the consistency of the measures with the provisions allegedly infringed prior to examining their consistency with Article XXI of the GATT 1994 and the equivalent GATS and TRIPS provisions. In fact, rather than beginning with an assessment of the consistency of the challenged measures with the covered agreements, the Panel should begin by addressing the UAE's invocation of GATT 1994 Article XXI(b), GATS Article XIV*bis*(b), and TRIPS Article 73(b).

3. This order of analysis is consistent with the Panel's terms of reference and the function of panels as set forth in the DSU. Under DSU Article 7.1, the standard terms of reference, 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"; 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. DSU Article 11 confirms this dual function of panels. Article 19.1 provides that 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." 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."

4. The text of GATT 1994 Article XXI(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 security interests. Consistent with the text of Article XXI(b), a panel may not second-guess a Member's determination. Accordingly, when a respondent has invoked its essential security interests as to a challenged measure, 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. This result is consistent with DSU Article 19 because an essential security action cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement, and because it would diminish a Member's "right" to take action it considers necessary for the protection of its essential security interests if a panel or the Appellate Body purported to find such action inconsistent with a covered agreement.

5. Under these circumstances, if the Panel finds that the UAE has invoked GATT 1994 Article XXI(b) and similar GATS and TRIPS provisions as to the measures challenged, the Panel should limit the findings in its report to a recognition that the UAE has invoked its essential security interests.

6. Response to Question 15: The Panel's question refers to the second sentence of DSU Article 26.1. As indicated by its opening clause, the four provisos at (a) to (d) of Article 26.1, second sentence, apply to only a certain situation in which claims under GATT 1994 Article XXIII(1)(b) may be asserted, namely, "[w]here and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement." The first sentence, by contrast, does not contain such language and applies "whether or not [a challenged measure] conflicts" with a covered agreement. This context provided by the first sentence of Article 26.1 indicates that, under the second sentence of that provision, when a complaining Member has asserted both breach and non-violation claims, a panel or the Appellate Body could reach the non-violation claims only if the breach claims fail, and consideration of any such non-violation claims would be subject to the provisos at subparagraphs (a) to (d). DSU Article 26.1 does not change the meaning of Article XXIII:1(b) or Article XXI(b) of the GATT 1994. Nor does DSU Article 26.1 alter the fact that negotiators of the provision that became GATT 1994 Article XXI(b) considered that the appropriate redress for a Member affected by essential security actions of another Member was a non-violation, nullification or impairment claim.