Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights

(DS567)

THIRD PARTY SUBMISSION OF
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I. INTRODUCTION

1. The United States welcomes this opportunity to provide its views of the proper legal interpretation of Article 73(b) of the *Agreement on Trade-Related Aspects of Intellectual Property* Rights ("TRIPS").

2. This provision, like Article XXI(b) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994), permits a WTO Member to take action "it considers necessary" to protect its essential security interests. This provision is self-judging, meaning that each WTO Member has the right to determine, for itself, what it considers in its own essential security interests and to take action accordingly.

3. In light of the self-judging nature of this provision, the Panel should limit its findings on Qatar's claimed breaches of TRIPS to a recognition that Saudi Arabia has invoked the essential security provision at Article 73(b).

II. TRIPS ARTICLE 73(B), WHICH MIRRORS ARTICLE XXI(B) OF GATT 1994, IS SELF-JUDGING

4. Article 73(b) of TRIPS mirrors Article XXI of the GATT 1994, and the self-judging nature of these provisions is clear from their text, in context. Supplementary means of interpretation—including the drafting history of these provisions and views expressed by WTO Members—further confirm that these provisions are self-judging.

A. The Text Of TRIPS Article 73(b), In Its Context, Establishes That The Exception Is Self-Judging

5. Article 73(b) of TRIPS mirrors Article XXI(b) of the GATT 1994, and the text of both provisions, in its context, establishes that these exceptions are self-judging. As both provisions state, "nothing" in the agreement 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 agreement 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.

6. The self-judging nature of TRIPS Article 73(b) is demonstrated by that provision's reference to measures that the Member "considers necessary" for the protection of its essential security interests. The ordinary meaning of "consider" is "[r]egard (someone or something) as having a specified quality" or "[b]elieve to be; think."[1] The "specified quality" for the action is that it is "necessary for" the protection of a Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates that it is the Member ("which it") that must regard ("consider[]") an action as having the quality of being necessary.

[1] *Oxford English Dictionary Online* (2019), https://en.oxforddictionaries.com/definition/consider.

7. The French and Spanish texts of Article 73(b) likewise confirm the self-judging nature of this provision. Specifically, 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 WTO Member, rather than an assertion of objective fact that could be subject to debate.

8. The context of TRIPS Article 73(b) also supports this understanding. First, the phrase "which it considers necessary" is present in TRIPS Article 73(a) and 73(b), but not in 73(c). The selective use of this phrase highlights that, under Article 73(a) and 73(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 73(b), and not reduce these words to inutility.[2]

9. Second, the context provided by GATT 1994 Article XX supports the understanding that TRIPS Article 73(b)—like GATT Article XXI(b)—is self-judging. GATT 1994 Article XX sets out "general exceptions," and a number of subparagraphs of Article XX relate to whether an action is "necessary" for some listed objective.[3] Unlike TRIPS Article 73(b) and GATT Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "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 TRIPS Article 73 and GATT 1994 Article XXI.

10. Third, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member "considers" appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. 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." Similarly, GATS Article III(5) permits "[a]ny Member" to notify the Council for Trade in Services of any measure taken by another Member which "it considers affects" the operation of GATS. Numerous other provisions of WTO agreements include similar language and thereby vest particular considerations with a WTO Member, a panel, the Appellate Body, or

[2] *US – Gasoline (AB)*, at 23 ("One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."); *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.57 ("[T]he principle of effective treaty interpretation requires us to give meaning to every term of the provision").

[3] *See* GATT 1994 Art. XX(a), (b), (d), and (i) ("[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) *necessary* to protect public morals; (b) *necessary* to protect human, animal or plant life or health; . . . (d) *necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices; . . . (i) involving restrictions on exports of domestic materials *necessary* to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination[.]") (italics added).

another entity.[4] As in TRIPS Article 73(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.

11. This understanding of "it considers" in TRIPS Article 73(b) is consistent with the Arbitrator's approach in *EC – Bananas* with respect to the phrase "if that party considers" in Article 22.3(c) of the DSU,[5] and reflects that such language is self-judging absent additional

[4] Such provisions include GATT 1994 Art. XXIII:1 ("If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired … [in three situations] the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned."); TBT Agreement, chapeau (sixth recital) ("*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement"); TBT Agreement Art. 10.8.3 ("Nothing in this Agreement shall be construed as requiring: . . . . Members to furnish any information, the disclosure of which they consider contrary to their essential security interests."); TBT Agreement Art. 14.4 ("The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected."); DSU Art. 3.3 ("The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."); DSU Art. 4.11 ("Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[], such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations."); DSU Art. 12.9 ("When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report."); DSU Art. 13.1 ("A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."); DSU Art. 17.5 ("When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."); Agreement on Rules of Origin, Article 4(1) ("The Committee may also request such other work from the Technical Committee as it considers appropriate for the furtherance of the above-mentioned objectives of this Agreement."); Agreement on Rules of Origin, Article 4(2) ("The Technical Committee may also request such other work from the Committee as it considers appropriate for the furtherance of the above-mentioned objectives of the Agreement."); Agreement on Trade Facilitation, Article 3(8) ("Each Member shall endeavor to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information."); General Agreement on Trade in Services Article XIV *bis*(a) ("Nothing in this Agreement shall be construed: to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests;"); General Agreement on Trade in Services Article XXIV(1) ("The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions."); Revised Agreement on Government Procurement Art. III(1) ("Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.").

[5] *See* DSU Article 22.3(c) ("In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures . . . if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the

text.[6] Unlike the "it considers" language in TRIPS Article 73(b), the phrase "that party considers" in DSU Article 22.3(c) is preceded by mandatory language in the chapeau ("the complaining party shall apply the following principles and procedures") and followed by permissive language in the subsection ("it may seek to suspend concessions or other obligations"). Accordingly, while the text of DSU Article 22.3(c) provides that the judgment whether to suspend concessions or other obligations resides with the party in question, the provision expressly limits that discretion by imposing an obligation to apply certain principles and procedures. Conformity with the obligation ("shall apply the following principles and procedures") was viewed as permitting review of the decision to take action.

12. By way of contrast, and further context, in at least two WTO provisions the judgment of the named actor is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party. As DSU Article 26.1 states, a non-violation complaint may be instituted, "[w]here and to the extent that such party considers *and* a panel or the Appellate Body determines" that a particular measure does not conflict with a WTO agreement, among other requirements. (italics added). Thus, in this provision, Members explicitly agreed that it is not sufficient that "[a] party considers" a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that "a panel or the Appellate Body determines that" a non-violation situation is present. A similar limitation—that a "party considers and a panel determines that"—was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c).

13. This context is highly instructive. No such review of a Member's judgment is set out in TRIPS Article 73(b), which permits a Member to take action "which it [a Member] considers necessary for the protection of its essential security interests." In agreeing to TRIPS, Members could have subjected a Member's essential security judgment to an additional check through phrasing similar to the text of DSU Articles 26.1 and 26.2. For example, Article 73 could have permitted a Member to take action to protect its essential security interests only if the Member considered "and a panel (or the Appellate Body) determined" that such action was necessary. But Members did not agree to such language in Article 73. Accordingly, Members did not agree to subject a Member's essential security judgment to review by a WTO panel.

B. Supplementary Means Of Interpretation Confirm The Self-Judging Nature Of TRIPS Article 73(b)

14. The self-judging nature of TRIPS Article 73(b) is further confirmed when that provision is interpreted based on customary rules of interpretation, as reflected in Article 31 of the Vienna Convention on the Law of Treaties. While not necessary in this dispute, recourse to supplementary means of interpretation is permissible and confirms that TRIPS Article 73(b) is self-judging. In particular, the United States draws the Panel's attention to the negotiating

circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement.")

[6] *See EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 51—61.

history of TRIPS and the GATT 1947, resolution of an early GATT dispute by the CONTRACTING PARTIES, and relevant statements by contracting parties (now Members) over time, as such materials may constitute historical background against which TRIPS was agreed.[7]

1. The Negotiating History of Article 73(b) Establishes That This Provision Was Intended To Mirror GATT 1994 Article XXI(b)

15. As noted above, the text of TRIPS Article 73(b) mirrors the text of GATT 1994 Article XXI(b). The TRIPS negotiations confirm that the drafters intended to incorporate into that agreement a security exception that would mirror the self-judging security exception at GATT 1994 Article XXI(b), and that this TRIPS exception, like its GATT counterpart, would not be subject to review by a WTO panel.

16. Specifically, a July 1990 draft TRIPS agreement would have explicitly incorporated GATT exceptions by providing that "[o]ther provisions of the [GATT] shall apply to the extent that [TRIPS] does not provide for more specific rights, obligations and exceptions thereof."[8] By December 1991, however, this reference to GATT had been replaced in relevant part by language that mirrored GATT 1994 Article XXI(b).[9] This language, mirroring GATT 1994 Article XXI, remained in the final TRIPS text at Article 73. The drafters' decision to incorporate at TRIPS Article 73 an essential security exception that mirrored GATT 1994 Article XXI confirms that TRIPS Article 73, like GATT 1994 Article XXI, is self-judging.

2. The Negotiating History Of Article XXI(b) Confirms That This Provision Is Self-Judging

17. The drafting history of GATT Article XXI(b) confirms that these provisions are self-judging. In particular, revisions to the text that became GATT Article XXI—and later TRIPS Article 73—during negotiation reflects the negotiators' intention that this provision be self-judging, and not subject to the same review as invocations of GATT 1994 Article XX.

18. The drafting history of GATT 1994 XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations ("ITO"). In 1946, the United States proposed a draft charter for the ITO, which included the following two exceptions provisions:

> Article 32 (General Exceptions to Chapter IV):
>
> > Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures
> > . . . .

[7] *EC – Computer Equipment (AB)*, para. 86 ("With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.").
[8] *See* Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990), at 78.
[9] Draft Final Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991), Annex III, at 90.

> (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.
>
> Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):
>
> > None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.[10]

19. The United States asserted at the time that Article 32(e) "afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests" in a time of war or a national emergency.[11] As originally drafted, however, neither exceptions provision was explicitly self-judging. These provisions lacked the key phrase that appears in the current text of GATT 1994 Article XXI(b) regarding action by a Member that "it considers necessary for" the protection of its essential security interests. In addition, the essential security exception set out in Article 32 of the ITO draft charter was one of twelve exceptions, several of which later formed the basis for the general exceptions at GATT 1994 Article XX. Thus, this initial proposed text drew no distinction between essential security interests and other issues that would permit derogation from ITO commitments.

20. In March 1947, the same exceptions text was proposed as both GATT Article XX and Article 37 the ITO draft charter, in Chapter V, which related to "[g]eneral commercial policy." This text provided that:

> 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures
> . . . .
> (e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.[12]

[10] 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.
[11] Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946), at 11.
[12] Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 31 (ITO draft charter) & 77 (GATT draft text). *See also* Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 ("The draft [GATT] reproduces many provisions of the [ITO draft] Charter."). In addition to item (e) that provided an exception for measures "[i]n time of war or other emergency in international

21. The chapeau of this proposed text and a number of the subparagraphs are identical to what would become GATT 1994 Article XX. With its proviso, the chapeau contemplated panel review so that the exceptions would not be applied to discriminate unfairly. The subparagraphs corresponding to essential security were included in this proposed text, together with other exceptions, and thus were subject to the proviso in the chapeau, like these other exceptions. This structure suggests that, at that time, not all drafters may have viewed the essential security exception in subparagraph (e) as self-judging.

22. In May 1947, the United States offered amendments to the ITO draft charter, and proposed removing, *inter alia*, subparagraph (e) from the ITO draft charter exceptions provision quoted above at paragraph 20.[13] In the U.S. proposal, item (e) would be included in a new article, to be inserted at an "appropriate" place at the end of the ITO draft charter, so that these exceptions would apply to the whole charter.[14] The United States also proposed that the new article would begin by stating "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures," including those relating to the protection of essential security interests.[15]

23. Thereafter, the United States proposed the addition of a new chapter, entitled "Miscellaneous" at the end of the ITO draft charter, and that the proposed exceptions to the charter as a whole be included in this new chapter.[16] The United States also suggested additional text to this exceptions provision, to make the self-judging nature of these exceptions explicit. Under this U.S. proposal, the draft exceptions provision stated:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which *it considers contrary* to its essential security interests, or to prevent any Member from taking any action which *it may consider to be necessary* to such interests:
>
> a) Relating to fissionable materials or their source materials;

relations" relating to the protection of essential security interests, the proposed text also included other security-based exceptions at items (c), (d), and (k), respectively, providing for measures "[r]elating to fissionable materials; [r]elating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; … [or] [u]ndertaken in pursance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security."

[13] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947).

[14] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947).

[15] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947).

[16] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236 (July 4, 1947), at 1, 12—14.

> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> *c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;*
>
> d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.[17]

24. For the first time in the drafting of this provision, the text now referenced what a Member considered to be necessary, explicitly indicating that this provision could be invoked based on a Member's own judgment. Moreover, this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interests. The drafting history thus shows that a deliberate textual distinction was drawn between the self-judging nature of exceptions pertaining to essential security and exceptions related to other interests that, unlike the removal of the security-based exceptions referenced above, were retained as part of the "[g]eneral commercial policy" chapter of the ITO draft charter.

25. In subsequent revisions, the explicitly self-judging nature of this ITO draft charter exception remained, and in fact was strengthened and emphasized. Specifically, in July 1947, the language of the exception was changed from "action which *it may consider* necessary" to the current GATT formulation, "action which *it considers* necessary for the protection of its essential security interests."[18]

26. Regarding the exception's scope, at a 1947 meeting of the ITO negotiating committee, the delegate from The Netherlands requested clarification on the meaning of a Member's "essential security interests," and suggested that this reference could represent "a very big loophole" in the ITO charter.[19] The U.S. delegate responded that the exception would not "permit anything under the sun," but suggested that there must be some latitude for security measures.[20] The U.S. delegate further observed that in situations such as times of war, "no one would question the need of a Member, or the right of a Member, to take action relating to its

[17] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236, at Annex A (July 4, 1947). Emphases added.
[18] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947), at 25—26. *See also* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (retaining "it considers" language at ITO draft charter provision on essential security). The GATT Article XX text proposed in March 1947, described in paragraph 20 above, was likewise revised in August 1947 to reflect the current operative language of GATT Article XXI(b). *See* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947), at 47.
[19] 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 19.
[20] 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 19.

security interests and to determine for itself—which I think we cannot deny—what its security interests are."[21] In those discussions the Chairman made a statement "in defence of the text," and recalled the context of the essential security exception as part of the ITO charter.[22] As the Chairman observed, when the ITO was in operation "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind" raised by The Netherlands delegate.[23]

27. During the same meeting, the Chairman asked whether the drafters agreed that actions taken pursuant to the essential security exception "should not provide for any means of redress."[24] In response, the U.S. delegate observed that such actions "could not be challenged in the sense that it could not be claimed that the Member was violating the Charter."[25] The United States acknowledged, however, that a member affected by such actions "would have the right to seek redress of some kind" under Article 35(2) of the ITO charter, which permitted recourse "whether or not [a measure] conflicts with the terms of this Charter."[26] In lifting a reservation on the essential security exception, the delegate from Australia stated that, as the exception was "so wide in its coverage"—particularly the "which it may consider to be necessary" language—Australia's agreement was done with the assurance that "a Member's rights under Article 35(2) are not impinged upon."[27] Therefore, the negotiating history again demonstrates the negotiators understood that the essential security exception was "so wide in its coverage" that actions taken thereunder could not be claimed violations of the ITO charter; and that while the delegates considered that a claim for nullification or impairment "whether or not a measure conflicts" with

[21] 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 20.
[22] 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 21.
[23] 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 21.
[24] Verbatim Report, Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/PV/33 (July 24, 1947), at 26.
[25] Verbatim Report, Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 & 29.
[26] Verbatim Report, Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 & 29. *See also* Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30, at 2 (Jan. 9, 1948) ("After extensive discussion of sub-paragraph (b) of Article 89 it was decided to allow this sub-paragraph to remain as in the Geneva text. The working party considered that this subparagraph would apply to the situation of action taken by a Member such as action pursuant to Article 94 of the Charter. Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such 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."
[27] Verbatim Report, Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/PV/33 (July 24, 1947), at 27. *See also* Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33, at 5 (July 24, 1947) ("During the discussion the Delegate for Australia stated that it should be clear that the terms of Article 94 [on essential security] would be subject to the provisions of paragraph 2 of Article 35. On being assured that this was so he stated that he did not wish to make any reservation.").

the agreement might be available, they were clear that a Member could not claim that another Member had violated the security exception and therefore unsuccessfully invoked that exception.

28. As the foregoing demonstrates, the drafters of the security exception that became GATT 1994 Article XXI(b)—and later TRIPS Article 73(b)—made several intentional choices that make clear that this provision is self-judging. Specifically, they separated this provision from the "commercial" exceptions that became Article XX, altered the placement of this text so that it was broadly applicable, and inserted the pivotal "it considers" language. Separate summaries of the draft charter prepared in late 1947 by the United States and the broader negotiating group specifically comment on the self-judging nature of this provision. As a U.S. summary report from September 1947 states, the essential security exceptions "had been so worded as to make it clear that members will be able to apply them as they themselves may determine."[28] Similarly, a November 1947 informal summary by the negotiating group states that the essential security exceptions would permit members to do "whatever they think necessary" to protect their essential security interests relating to the circumstances presented in that provision.[29]

29. As noted above at paragraphs 15 and 16, the drafters of TRIPS decided to incorporate at Article 73 an essential security exception that mirrored GATT Article XXI. This decision by the TRIPS drafters confirms that TRIPS Article 73, like GATT Article XXI, is self-judging and is not subject to review by a WTO panel.

30. Accordingly, the drafting history of Article XXI(b) and TRIPS Article 73(b) confirms that a Member's invocation of its essential security interests in defense of an action taken in time of war or other emergency in international relations is self-judging and not subject to review by a dispute settlement panel.

3. The Resolution Of A GATT Dispute Between The United States And Czechoslovakia (1951) Confirms The Self-Judging Nature of GATT Article XXI(b) and TRIPS Article 73(b)

31. The resolution of an early GATT dispute by the CONTRACTING PARTIES likewise confirms the self-judging nature of GATT Article XXI(b) and TRIPS Article 73(b). This dispute arose shortly after the conclusion of the GATT 1947—which included Article XXI exactly as it appears in GATT 1994—and concerned Czechoslovakia's claims that the United States had engaged in discrimination in breach of Article I by withholding certain export licenses.[30] When Czechoslovakia requested a decision under Article XXIII regarding this dispute, the United States invoked Article XXI.[31] After discussing the matter, the CONTRACTING PARTIES

[28] Preliminary Summary of Geneva Draft of ITO Charter, Changes from New York Draft (Sep. 15, 1947), at 14.
[29] United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947), at 35.
[30] Note by the Secretariat, Article XXI, Negotiating Group on GATT Articles, MTN/GNG/NG7/W/16 (Aug. 18, 1987), at 4.
[31] *See* Statement by the Head of the Czechoslovak Delegation, Mr. Zdeněk Augenthaler to Item 14 of the Agenda, GATT/CP.3/33 (May 30, 1949), at 11 ("Request of the Government of Czechoslovakia for a decision under Article XXXII 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"); Reply by the Vice-Chairman of the United

held—with only Czechoslovakia dissenting—that the United States had not failed to carry out its obligations under the GATT.[32]

32. In discussions leading up to this decision, the United Kingdom commented that the U.S. action appeared to be justified "because every country must be the judge in the last resort on questions relating to its own security."[33] On that basis, the United Kingdom's representative suggested dismissing Czechoslovakia's request for a decision.[34] The representative of Pakistan opined that, because the situation involved Article XXI, "the case called for examination only under the provisions of that article."[35] 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.[36] The CONTRACTING PARTIES' decision, following these discussions, that the United States had not breached its obligations under the GATT provides further confirmation of the self-judging nature of GATT Article XXI.

4. In Other Instances, WTO Members Have Repeatedly Expressed The View That Article XXI(b) Is Self-Judging

33. In other GATT disputes implicating a Contracting Party's essential security interests, Members have consistently expressed the view that Article XXI is self-judging. For example, in 1961, Ghana justified its boycott of certain goods under the provisions of Article XXI and opined that under this provision each contracting party was the "sole judge" of "what was necessary in its essential security interests."[37]

34. In 1970, Egypt justified its boycott of certain goods, and several members of the relevant Working Party supported this position, arguing the boycott measures were political and not commercial, therefore falling within the exception of Article XXI.[38]

35. In 1982, the European Communities ("EC") and its member States, Canada, and Australia, used Article XXI to justify restricting trade in certain imports for non-economic reasons. The EC representative stated that the EC and its member states had taken these measures based on "their inherent rights, of which Article XXI of the General Agreement was a reflection."[39] Further, the EC representative explained that the exercise of these "inherent rights"

States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949), at 2—3 & 4 (referring to provisions of GATT Article XXI and stating that the United States is "making use of these exceptions").

[32] Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9.

[33] Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949), at 1. *See also* Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 7—8.

[34] Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949), at 1. *See also* Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 7—8.

[35] Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 6.

[36] Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9.

[37] Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 196.

[38] *See* Note by the Secretariat, Article XXI, Negotiating Group on GATT Articles, MTN/GNG/NG7/W/16 (Aug. 18, 1987), at 6.

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

constituted a "general exception" that "required neither notification, justification nor approval."[40] As the EC representative reasoned, the procedures applied by contracting parties over the previous thirty-five years "showed that every contracting party was—in the last resort—the judge of its exercise of these rights."[41]

36. In the same discussion, 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.[42] Expressing the same view, the representative of Australia stated that "the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification."[43] The European Communities and its member States, Canada, and Australia communicated the same position in writing to GATT contracting parties.[44] As these and other invocations of Article XXI demonstrate, the self-judging nature of this exception is well-known to Members, and they have resorted to it when and as they deemed necessary.

37. In later discussions of the same matter, the United States stated that "[t]he General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests."[45] The United States further observed that, when a party had taken actions it considered necessary to protect its essential security interests, the CONTRACTING PARTIES had "no power" to question that party's judgment.[46]

38. Thus, the U.S. understanding of the essential security provision at GATT 1994 Article XXI, and by extension TRIPS Article 73, has been consistent since its drafting, and the U.S. has consistently understood this provision to be self-judging. Moreover, as is clear from the foregoing discussion, that U.S. understanding is consistent with the plain text of Article XXI, as well as that provision's negotiating history, a decision of the CONTRACTING PARTIES, and numerous statements by Members.[47]

III. IN LIGHT OF THE SELF-JUDGING NATURE OF TRIPS ARTICLE 73, THE SOLE FINDING THE PANEL MAY MAKE CONSISTENT WITH ITS TERMS OF REFERENCE UNDER DSU ARTICLE 7.1 IS TO NOTE THE INVOCATION OF ARTICLE 73

39. Under DSU Article 7.1, the Dispute Settlement Body ("DSB") has established terms of reference for the Panel to examine the matter referred to the DSB by Qatar and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided

[40] GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982), at 10.
[41] GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982), at 10.
[42] GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982), at 10.
[43] GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982), at 11.
[44] Communication to the Members of the GATT Council, L/5319/Rev.1 (May 18, 1982), at 1 (noting that the EC and its member States, Canada, and Australia had taken the actions in question based on "their inherent rights of which Article XXI of the General Agreement is a reflection").
[45] GATT Council, Minutes of Meeting, C/M/159 (August 10, 1982), at 19.
[46] GATT Council, Minutes of Meeting, C/M/159 (August 10, 1982), at 19.
[47] The recent panel report in the *Russia –Traffic in Transit* dispute fails to engage with these materials and therefore is not persuasive in finding to the contrary. *See* Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted Apr. 26, 2019, paras. 7.59 to 7.104.

for in [TRIPS]."[48] Similarly, DSU Article 11 states that the "function of panels" is to make "an objective assessment of the matter before it" and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

40. In light of the self-judging nature of TRIPS Article 73(b), the Panel may make no findings that "will assist the DSB in making [] recommendations" as to Qatar's claimed breaches of TRIPS, because no finding of WTO-inconsistency may be made. Under these circumstances, the Panel should limit its findings in this dispute to a recognition that Saudi Arabia has invoked its essential security interests under the relevant provisions.

IV. CONCLUSION

41. The United States appreciates the opportunity to provide its views in this third-party submission and hopes that its comments will be useful to the Panel.

[48] Note by the Secretariat, *Saudi Arabia – Measures Concerning The Protection Of Intellectual Property Rights*, Constitution of the Panel Established at the Request of Qatar, WT/DS567/4 (Feb. 19, 2019).