

1 ARTICLE 73	1
1.1 Text of Article 73.....	1
1.2 Article 73(b)	1
1.2.1 Subparagraphs of Article 73(b).....	1
1.2.1.1 Subparagraph (iii).....	1
1.2.1.1.1 "war or other emergency in international relations"	2
1.2.1.1.2 "taken in time of"	5
1.2.1.2 Chapeau of Article 73(b)	6
1.2.1.2.1 The "action" covered by the invocation of Article 73(b)(iii)	6
1.2.1.2.2 "essential security interests".....	7
1.2.1.2.3 "which it considers"	8

1 ARTICLE 73

1.1 Text of Article 73

Article 73

Security Exceptions

Nothing in this Agreement shall be construed:

- (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent a Member 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; or
- (c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security

1.2 Article 73(b)

1.2.1 Subparagraphs of Article 73(b)

1.2.1.1 Subparagraph (iii)

1. In *Saudi Arabia – Intellectual Property Rights*, the Panel addressed the respondent's defence raised under Article 73(b)(iii) of the TRIPS Agreement. The Panel began its interpretation of Article 73(b)(iii) by drawing parallels between Article 73(b)(iii) of the TRIPS Agreement and Article XXI(b)(iii) of the GATT 1994:

"[T]he wording of Article 73(b)(iii) of the TRIPS Agreement is identical to that of Article XXI(b)(iii) of the GATT 1994, which was first interpreted by the panel in *Russia – Traffic in Transit*. The panel's interpretation of Article XXI(b)(iii) in that dispute gave rise to an analytical framework that can guide the assessment of whether a

respondent has properly invoked Article XXI(b)(iii) of the GATT 1994, or, for the purposes of this dispute, Article 73(b)(iii) of the TRIPS Agreement."¹

2. Given the textual similarities between Article 73(b)(iii) of the TRIPS Agreement and Article XXI(b)(iii) of the GATT 1994, the Panel in *Saudi Arabia – Intellectual Property Rights* applied the four-step analytical framework formulated by the panel in *Russia – Traffic in Transit*. The Panel framed this analytical framework as follows:

"a. whether the existence of a 'war or other emergency in international relations' has been established in the sense of subparagraph (iii) to Article 73(b);

b. whether the relevant actions were 'taken in time of' that war or other emergency in international relations;

c. whether the invoking Member has articulated its relevant 'essential security interests' sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests; and

d. whether the relevant actions are so remote from, or unrelated to, the 'emergency in international relations' as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency."²

1.2.1.1.1 "war or other emergency in international relations"

3. With respect to the first step in the analytical framework, the Panel in *Saudi Arabia – Intellectual Property Rights* stated that a panel would be required to assess whether the existence of a "war or other emergency in international relations" has been established in the sense of subparagraph (iii) of Article 73(b). The Panel elaborated on the content of this requirement as introduced by the panel in *Russia – Traffic in Transit*:

"The panel in *Russia – Traffic in Transit* concluded that the circumstance in subparagraph (iii) is 'an objective fact' that is 'amenable to objective determination'.³ In other words, the panel concluded that the adjectival clause 'which it considers' in the chapeau of Article XXI(b)(iii) of the GATT 1994 'does not qualify the determination of the circumstance[]' in subparagraph (iii). In that panel's view, the evaluation of whether the respondent has satisfied the circumstance in subparagraph (iii) must 'be made objectively rather than by the invoking Member itself'.

The panel also concluded that the term 'emergency in international relations' refers generally 'to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state'. Such situations, in the panel's view, 'give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests'. For the panel, while 'political' and 'economic' conflicts could sometimes be considered 'urgent' and 'serious' in a political sense, such conflicts will not be 'emergenc[ies] in international relations' within the meaning of subparagraph

¹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.241.

² Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.242.

³ (footnote original) In its interpretation of this phrase in Article XXI(b)(iii) of the GATT 1994, the panel in *Russia – Traffic in Transit* took into account several elements, including: (a) the operation of subparagraphs (i) to (iii) as clauses that "qualify and limit the exercise of the discretion accorded to Members under the chapeau" (Panel Report, *Russia – Traffic in Transit*, para. 7.65); (b) the "substantially different" nature of the subject matter in subparagraphs (i) to (iii), each of which establishes an "alternative" requirement (ibid. paras. 7.67-7.68); (c) the ordinary meaning of the term "war" and the use of the term "or" to indicate that war is but one example of a larger category of "emergency in international relations" (ibid. para. 7.72 (emphasis omitted)); and (d) the negotiating history of Article XXI of the GATT 1947, which revealed, *inter alia*, that the potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those circumstances specified in subparagraphs (i) to (iii) (ibid. para. 7.98(b)).

(iii) 'unless they give rise to defence and military interests, or maintenance of law and public order interests'."⁴

4. After having outlined the analytical framework provided in *Russia – Traffic in Transit*, the Panel proceeded to the first and second steps in the analytical framework under Article 73(b)(iii) of the TRIPS Agreement. These steps together entail consideration of two issues: (a) whether an "emergency in international relations" exists between the disputing parties, and (b) whether the anti-sympathy measures and non-application of criminal procedures and penalties to beoutQ were "taken in time of" this emergency.⁵

5. Regarding the first step of the analytical framework, the Panel concluded that an "emergency in international relations" existed within the context of the dispute. The Panel focused, in particular, on the "situation ... of heightened tension or crisis" between the parties:

"[T]he Panel considers that 'a situation ... of heightened tension or crisis' exists in the circumstances in this dispute, and is related to [the respondent's] 'defence or military interests, or maintenance of law and public order interests' (i.e. essential security interests), sufficient to establish the existence of an 'emergency in international relations' that has persisted since at least 5 June 2017. The Panel notes at the outset that it is the combination of the considerations that follow which sustains this conclusion, rather than any one of them being necessarily decisive in its own right."⁶

6. The Panel proceeded to outline four considerations that led to this conclusion: (a) the nature and significance of the severance of all relations by the respondent with the complainant; (b) the grave and serious nature of the deterioration of relations between the parties as exhibited by the respondent's allegations that the complainant had repudiated certain agreements designed to combat terrorism in the region; (c) the fact that the "action" to be examined under the chapeau of Article 73(b) is not the severance of all relations; and (d) the fact that certain forms of cooperation between the disputing parties highlighted by the complainant did not call into question the nature of the emergency.

7. First, the Panel recalled that, on 5 June 2017, the respondent "severed diplomatic and consular relations with [Qatar], and imposed comprehensive measures putting an end to all economic and trade relations between [itself and Qatar]". The Panel also noted that a press agency in the respondent's territory reported the actions of the respondent and their underlying rationale:

"An official source stated that the Government of the Kingdom of Saudi Arabia emanating from exercising its sovereign rights guaranteed by the international law and protecting its national security from the dangers of terrorism and extremism has decided to sever diplomatic and consular relations with the State of Qatar, close all land, sea and air ports, prevent crossing into Saudi territories, airspace and territorial waters."⁷

8. As part of this first consideration, the Panel also discussed the significance of the severance of all relations by the respondent and other WTO Members with the complainant:

"The Panel agrees with Saudi Arabia that one Member's severance of 'all diplomatic and economic ties' with another Member could be regarded as 'the ultimate State expression of the existence of an emergency in international relations'. The UAE observed that Saudi Arabia's severance of relations with Qatar, 'in and of itself, indicates the gravity of the situation', and 'there are few circumstances in international relations short of war that constitute a more serious state of affairs'.

The Panel notes that the severance of diplomatic or consular relations has been characterized as 'a unilateral and discretionary act usually decided upon only as a last resort when a severe crisis occurs in the relations between' a sending state and a

⁴ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.244-7.245.

⁵ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.256.

⁶ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.257.

⁷ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.258.

receiving state. The severance of such relations typically brings about 'the termination of all direct official communication between' the two states. The severance of diplomatic relations is an 'exceptional' act, and it has been observed that '[b]reaking off diplomatic relations has become rarer and they are nowadays sometimes even maintained in times of armed conflict. ... The temporary or permanent recall of a mission is used more frequently and is resorted to in case of security issues or serious crises in diplomatic relations.' It has also been observed that the breaking off of diplomatic and consular relations "was usually accompanied by rising tension in public opinion and by hostility'.

In this connection, the Panel further notes that Article 41 of the UN Charter—located in Chapter VII thereof, entitled 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'—provides that the UN Security Council may decide what measures, short of the use of armed force, are to be employed to give effect to its decisions. Article 41 states that these measures 'may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.

Saudi Arabia's severance of all diplomatic, consular and economic ties with Qatar, viewed in the context of similar actions taken by several other nations and the relevant history recounted in this Report, falls into the category of cases in which such action can be characterized in terms of an exceptional and serious crisis in the relations between two or more States."⁸

9. Moving to the second consideration, the Panel noted that the respondent repeatedly alleged that the complainant had, *inter alia*, repudiated certain agreements that were designed to address regional concerns of security and stability, supported terrorism and extremism, and interfered in the internal affairs of other countries. The Panel declined to state any position on the relations between these two parties, observing only the "grave and serious nature of the deterioration and rupture in relations between these Members" and the explicit relationship between these agreements and the respondent's security interests:

"The Panel expresses or implies no position concerning any of these allegations, and recalls that Qatar strongly denied the various accusations made by Saudi Arabia. It suffices to observe that the nature of the allegations constitutes further evidence of the grave and serious nature of the deterioration and rupture in relations between these Members, and is also explicitly related to Saudi Arabia's security interests. In the Panel's view, when a group of States repeatedly accuses another of supporting terrorism and extremism, as described in greater detail earlier, that in and of itself reflects and contributes to a 'situation ... of heightened tension or crisis' between them that relates to their security interests. Thus, in the light of the reasons advanced by Saudi Arabia for its actions, the Panel does not accept Qatar's view that the events culminating in the severance of relations can be characterized as a 'mere political or economic' dispute."⁹

10. As to the third consideration, the Panel noted the argument of the complainant and a third party that it might involve circular reasoning and/or render one of the two main elements of Article 73(b)(iii) redundant, if the respondent's severance of all diplomatic and economic relations with the complainant on 5 June 2017 were deemed to constitute both the "emergency in international relations" under subparagraph (iii) and the "action which [the respondent] considers necessary for the protection of its essential security interests" under the chapeau of Article 73(b). The Panel ultimately disagreed with this line of argumentation:

"It is not necessary for the Panel to determine whether, and if so, to what extent one and the same action or factual circumstance may constitute both an 'emergency in international relations' and the 'action' the Member concerned considers 'necessary for the protection of its essential security interests' and 'taken in time of' that emergency. In this case, the 'action' that the Panel must examine under the chapeau of

⁸ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.259-7.262.

⁹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.263.

Article 73(b) is not the severance of diplomatic and economic relations that took place on 5 June 2017."¹⁰

11. The Panel then further clarified the actions that it would examine under the chapeau of Article 73(b):

"The Panel recalls that the 'action[s]' that it must examine under the chapeau are the specific acts and omissions attributable to Saudi Arabia that it has found to be inconsistent with the TRIPS Agreement. In this case, these are: (a) the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals; and (b) Saudi Arabia's non-application of criminal procedures and penalties to be applied to beoutQ. Qatar itself stressed that the severance of relations is distinct from the measures it is challenging."¹¹

12. Finally, as regards its fourth consideration, the Panel did not consider that various forms of cooperation between the disputing parties highlighted by the complainant would call into question the persistence of the "emergency in international relations" between the parties. The Panel stated that it was not in dispute that the complete severance of diplomatic, consular and economic relations has remained essentially unchanged between June 2017 and the present.¹²

1.2.1.1.2 "taken in time of"

13. With respect to the second step of the analytical framework, the Panel noted that the panel in *Russia – Traffic in Transit* had examined the introductory phrase "taken in time of" in subparagraph (iii). The Panel stated the following:

"This phrase connects the 'action' referred to in the chapeau of paragraph (b) to the phrase 'emergency in international relations' in subparagraph (iii). In the panel's view, this introductory phrase 'require[s] that the action be taken *during* the war or other emergency in international relations'. The connection between these two elements constitutes a 'chronological concurrence [that] is also an objective fact, amenable to objective determination'.¹³

14. Applying this provision to the facts, the Panel recalled its foregoing assessment of the existence of an "emergency in international relations" and its conclusion that this emergency has persisted since at least 5 June 2017. The Panel considered that it followed from this assessment and conclusion that the two actions that it must examine under the chapeau of Article 73(b) were "taken in time of" the "emergency in international relations"¹⁴:

"The measures at issue are of a continuing nature, as opposed to acts or omissions that occurred or were completed on a particular date, and neither party has suggested that the Panel must assign any dates to them for the purposes of examining the claims and defences before the Panel. In the Panel's view, it suffices to note that beoutQ did not commence operations until August 2017, and hence the actions to be examined under the chapeau were 'taken in time of' the 'emergency in international relations' that has persisted since at least 5 June 2017.

The Panel thus concludes that the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (i.e. anti-sympathy measures), and Saudi Arabia's non-application of criminal procedures and penalties to be applied to beoutQ, were 'taken in time of war or other emergency in international relations'.¹⁵

¹⁰ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.264.

¹¹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.265.

¹² Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.266.

¹³ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.247.

¹⁴ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.269.

¹⁵ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.269-7.270.

1.2.1.2 Chapeau of Article 73(b)

1.2.1.2.1 The "action" covered by the invocation of Article 73(b)(iii)

15. Prior to determining the requirements under the chapeau of Article 73(b) for invoking the security exception contained therein, the Panel in *Saudi Arabia – Intellectual Property Rights* determined whether the "action[s]" referred to in the chapeau of Article 73(b) covered the measures found to violate the specified obligations of the TRIPS Agreement. The Panel noted that the respondent's arguments under Article 73(b)(iii) of the TRIPS Agreement focused on its "comprehensive measures" taken on 5 June 2017. This led the complainant to state repeatedly that these "actions" were not the measures that it was challenging, and to argue that the respondent had therefore not actually invoked any defence under Article 73(b) with respect to the specific measures at issue in this dispute.¹⁶

16. The Panel concluded that the "actions" covered by the respondent's invocation of Article 73(b)(iii) of the TRIPS Agreement included the anti-sympathy measures and the non-application of criminal procedures and penalties to beoutQ.¹⁷ The Panel arrived at this conclusion based on its understanding of the respondent's submissions as invoking Article 73 in respect of, and to be applied to, the entire matter before the Panel. The Panel explained the reasoning that had informed its understanding of the respondent's application of Article 73, and responded to the complainant's assertions that the respondent had not invoked Article 73 with respect to the measures at issue:

"In its first written submission, Saudi Arabia stated that it has 'properly invoked the Security Exception in Article 73(b)(iii) of the TRIPS Agreement' and the consequence of that, according to Saudi Arabia, is that the Panel 'should decline to proceed further in this dispute because a WTO dispute settlement panel is not capable of resolving the national security matter at issue'. In its second written submission, Saudi Arabia stated that it 'has established that its invocation of the *Security Exceptions* under Article 73 of the TRIPS Agreement is justified and that no additional findings be made in this dispute'. In short, according to Saudi Arabia, the effect of its invocation of Article 73 was that no further findings can be made in this dispute and thus Article 73 operated to end the case. On that basis, the invocation of Article 73 was an invocation of the security exception in respect of, and which applied to, the entire matter before the Panel.

To clarify the relationship of the 'measures at issue' identified by Qatar and the 'comprehensive measures' taken by Saudi Arabia on 5 June 2017, the Panel asked Saudi Arabia 'whether Saudi Arabia is asserting that any of the acts or omissions raised by Qatar as the measures at issue are 'action which it considers necessary for the protection of its essential security interests' for purposes of Article 73 of the TRIPS Agreement'. Saudi Arabia responded that, with the potential exception of the travel restrictions, it was not asserting that any of the alleged acts or omissions is an 'action which it considers necessary for the protection of its essential security interests' for purposes of Article 73 of the TRIPS Agreement. This statement was relied upon by Qatar as a concession by Saudi Arabia that Article 73 was not being invoked in respect of the measures at issue in this case. Thus, Qatar contended, the invocation of Article 73 must fail.

However, a closer analysis of Saudi Arabia's position shows that Saudi Arabia was not resiling from what it had set forth in its written pleadings. Rather, Saudi Arabia invoked Article 73 in respect of, and as applied to, the entire matter before the Panel, and was not directing its invocation at the specific measures identified by Qatar. The Panel notes that, given that Saudi Arabia denied that some of the measures identified by Qatar existed in fact, it would have been contradictory for Saudi Arabia to say that it had invoked Article 73 specifically in respect of measures whose existence it denied.

Saudi Arabia affirmed that its invocation of Article 73 covered the measures at issue identified by Qatar. Saudi Arabia argued that Qatar's panel request asserts the

¹⁶ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.273.

¹⁷ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.278.

existence of a 'direct relationship' between the comprehensive measures and the related measures referenced by Qatar. Saudi Arabia also adopted the view 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'. In response to a question by the Panel, Saudi Arabia stated that it considers that the 'comprehensive measures ... extend to and encompass the measures referenced by the complaining party in this dispute'. Saudi Arabia's position was that the comprehensive measures were taken precisely for the purpose of protecting the essential security interests for which it invokes the security exception in Article 73."¹⁸

1.2.1.2.2 "essential security interests"

17. With respect to the third step of the analytical framework, the Panel in *Saudi Arabia – Intellectual Property Rights* noted that the panel in *Russia – Traffic in Transit* had concluded that a panel would be required to assess whether a respondent has sufficiently articulated its "essential security interests" in the sense of the chapeau of paragraph (b). The Panel considered that essential security interests would relate to "the quintessential functions of the state" and would be governed by the obligation of good faith:

"The panel noted that 'essential security interests' is evidently a narrower concept than 'security interests', with the former generally concerning 'those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally'. For the panel, '[t]he specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances'. For these reasons, the panel considered that 'it is left, in general, to every Member to define what it considers to be its essential security interests'.

The panel noted, however, that a Member is not 'free to elevate any concern to that of an 'essential security interest''; rather, 'the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith'. For the panel, this 'obligation of good faith' requires that Members not use the security exception as a means to circumvent their WTO obligations.¹⁹ The panel concluded that '[i]t is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.'"²⁰

18. Applying its interpretation of the legal provision to the facts, the Panel considered that the respondent sufficiently articulated its "essential security interests". The Panel was cognizant of the dangers of terrorism and extremism invoked by the respondent, as well as the nature of its assessment of the respondent's invocation of its essential security interests as not being "particularly onerous":

"First, Saudi Arabia has expressly articulated its 'essential security interests', in terms of protecting itself 'from the dangers of terrorism and extremism'. Thus, the situation in this case contrasts to the situation that arose in *Russia – Traffic in Transit*, in which the respondent appeared not to expressly articulate its essential security interests at all. Second, the interests identified by Saudi Arabia are ones that clearly 'relat[e] to the quintessential functions of the state, namely, the protection of its territory and its

¹⁸ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.274-7.277.

¹⁹ (footnote original) In what it deemed a "glaring example" of a respondent's circumvention of its WTO obligations, the panel in *Russia – Traffic in Transit* stated that a respondent could seek, hypothetically, to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system. The respondent would do so "simply by re-labelling trade interests that it had agreed to protect and promote within the system, as 'essential security interests', falling outside the reach of that system". (Panel Report, *Saudi Arabia – Intellectual Property Rights*, fn 781 to para. 7.249 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.133.))

²⁰ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.249-7.250.

population from external threats, and the maintenance of law and public order internally'.

Although Qatar argued that Saudi Arabia's formulations of its essential security interests are 'vague' or 'imprecise', the Panel sees no basis in the text of Article 73(b)(iii), or otherwise, for demanding greater precision than that which has been presented by Saudi Arabia. The Panel recalls that, in *Russia – Traffic in Transit*, the standard applied to the invoking Member was whether its articulation of its essential security interests was 'minimally satisfactory' in the circumstances. The requirement that an invoking Member articulate its 'essential security interests' sufficiently to enable an assessment of whether the challenged measures are related to those interests is not a particularly onerous one, and is appropriately subject to limited review by a panel. The reason is that this analytical step serves primarily to provide a benchmark against which to examine the 'action' under the chapeau of Article 73(b). That is, this analytical step enables an assessment by the Panel of whether either of the challenged measures found to be inconsistent with the TRIPS Agreement is plausibly connected to the protection of those essential security interests.

Based on the foregoing, the Panel concludes that Saudi Arabia's articulation of its relevant 'essential security interests' is sufficient to enable an assessment of whether there is any link between the relevant actions and the protection of its essential security interests."²¹

1.2.1.2.3 "which it considers"

19. With respect to the fourth and final step of the analytical framework, the Panel noted that the panel in *Russia – Traffic in Transit* had considered the "obligation of good faith" to apply not only to the respondent's articulation of "its essential security interests", but also to the connection between the measures at issue and those interests. The panel in *Russia – Traffic in Transit* further elaborated on this obligation:

"This obligation, for the panel, is 'crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests'. Specifically, a panel must determine 'whether the measures are so remote from, or unrelated to, the ... emergency that it is implausible that [the respondent] implemented the measures for the protection of its essential security interests arising out of the emergency'."²²

20. With respect to the connection between the measures and the essential security interests, the Panel noted that both parties had suggested that the Panel may and should assess the relationship (if any) between the relevant measures and the "emergency in international relations".²³ The Panel considered that the respondent sought to protect its essential security interests by ending any direct or indirect interaction with the complainant:

"The Panel notes that Saudi Arabia's position in this dispute is that it seeks to protect Saudi citizens and the Saudi population, Saudi government institutions, and the territory of Saudi Arabia from the threats of terrorism and extremism. One of the means through which Saudi Arabia seeks to protect these essential security interests is by ending any direct or indirect interaction between Saudi Arabia and Qatar, extending to their respective populations and institutions. An action that Saudi Arabia has taken for this purpose is to refuse to interact with Qatar in the context of WTO dispute settlement proceedings. Another is to end or prevent any direct or indirect interaction or contact between Saudi Arabian and Qatari nationals."²⁴

²¹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.280-7.282.

²² Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.252.

²³ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.283.

²⁴ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.284.

21. The Panel then turned to the two sets of measures at issue that it had found to violate specified obligations of the TRIPS Agreement to determine whether these measures, in the context of the "action[s] taken pursuant to Article 73, were justified under that provision.

22. The first set of measures, directly or indirectly, had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (anti-sympathy measures). The Panel considered the relevant question for this set of measures to be whether they "m[e]t a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they [were] not implausible as measures protective of these interests". The Panel determined, therefore, that it must review whether the anti-sympathy measures "[were] so remote from, or unrelated to, the ["emergency in international relations"] as to make it implausible that [the respondent] implemented the measures for the protection of its essential security interests arising out of the emergency".²⁵

23. Ultimately, the Panel concluded that the anti-sympathy measures "m[e]t a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they [were] not implausible as measures protective of these interests".²⁶ The Panel reached this conclusion on the basis of the connection between the anti-sympathy measures, on the one hand, and the travel restrictions and the umbrella policy imposed by the respondent to prevent all interaction with the complainant and its nationals. The Panel also highlighted the close relationship between the general anti-sympathy measures and the instruction from the respondent to law firms in its territory not to act for certain foreign right holders:

"The measures aimed at denying Qatari nationals access to civil remedies through Saudi courts may be viewed as an aspect of Saudi Arabia's umbrella policy of ending or preventing any form of interaction with Qatari nationals. Given that Saudi Arabia imposed a travel ban on all Qatari nationals from entering the territory of Saudi Arabia and an expulsion order for all Qatari nationals in the territory of Saudi Arabia as part of the comprehensive measures taken on 5 June 2017, it is not implausible that Saudi Arabia might take other measures to prevent Qatari nationals from having access to courts, tribunals and other institutions in Saudi Arabia. Indeed, it is not implausible that, as part of its umbrella policy of ending or preventing any form of interaction with Qatari nationals, as reflected through, *inter alia*, its 5 June 2017 travel ban intended to 'prevent[] Qatari citizens' entry to or transit through the Kingdom of Saudi Arabia', which forms part of Saudi Arabia's 'comprehensive measures', Saudi Arabia might take various formal and informal measures to deny Saudi law firms from representing or interacting with Qatari nationals for almost any purpose.

As an ancillary consideration, the Panel also notes the direct link made by Qatar itself between the anti-sympathy measures preventing law firms from representing beIN, on the one hand, and the 'comprehensive measures' taken on 5 June 2017, on the other hand. Saudi Arabia maintained that the 'comprehensive measures' are an 'action which it considers necessary for the protection of its essential security interests', a point that Qatar does not dispute. Specifically, as elaborated earlier, Qatar explained that '[t]he instruction to lawyers in Saudi Arabia to refrain from representing beIN is closely related to the general anti-sympathy measures, and indeed, would appear to be a natural application of that measure'. The Panel recalls that the general anti-sympathy measures were announced by Saudi news outlets on 6 June 2017, i.e. the day after Saudi Arabia's severance of relations with Qatar. The Panel also finds it significant that Qatar's argument has focused on the manner in which the anti-sympathy measures 'work together' with the travel restrictions that were announced on 5 June 2017, and which undoubtedly constitute an integral part of the 'comprehensive measures' taken by Saudi Arabia. Indeed, Qatar's submissions consistently refer to these two measures in tandem, using the formulation 'anti-sympathy and related measures (e.g. travel restrictions)'.²⁷

24. The Panel did not discern a similar connection, however, between the respondent's essential security interests and its authorities' non-application of criminal procedures and penalties to the

²⁵ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.285.

²⁶ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.288.

²⁷ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.286-7.287.

copyright pirate at issue in the dispute. In contrast to the anti-sympathy measures discussed above, which might be viewed as an aspect of the respondent's umbrella policy of ending or preventing any form of interaction with nationals from the complainant's territory, the Panel was unable to discern any basis for concluding that the application of criminal procedures or penalties to the copyright pirate would require any entity in the respondent's territory to engage in any form of interaction with the foreign television operator or any other national of the complainant.²⁸

25. The Panel noted that multiple third-party right holders submitted evidence directly to the Saudi authorities and made such evidence available to these authorities in the course of the dispute. This evidence reproduced concerns raised by foreign right holders about the activities of the copyright pirate and technical reports concerning its operations and use of satellites to transmit its pirated content to users.²⁹

26. The Panel also agreed with the statements of certain third parties that called into question whether a plausible connection could exist between the non-application of criminal procedures and penalties by the respondent to protect the rights of foreign right holders, on the one hand, and the comprehensive measures severing all relations with the complainant. The Panel further elaborated on this issue as follows:

"The Panel recalls that the non-application of criminal procedures and penalties to beoutQ, a commercial-scale broadcast pirate, affects not only Qatar or Qatari nationals, but also a range of third-party right holders. The Panel recalls that several third parties commented on the question of whether—and, if so, how—the non-application of criminal procedures and penalties to beoutQ could plausibly be connected to Saudi Arabia's essential security interests. Brazil stated that it 'fails to see how the respondent's proffered essential security interests, or any country's essential security interests for that matter, could be protected by allowing the operation of a copyright pirate whose broadcasts have spread beyond the respondent's borders and encompass not only the copyrights held by the claimant's nationals but by other countries' nationals as well, including Brazil's'. Similarly, the European Union stated that, without taking a position on the facts of this case, it would 'welcome a detailed explanation clarifying why, in order to protect its essential security interests, Saudi Arabia considers it necessary to breach the rights of third party right-holders'. In its third-party oral statement, the European Union reiterated that it 'would appreciate it if Saudi Arabia could provide a plausible explanation of the reasons why 'it considers necessary' to allow the systematic infringement of the intellectual property rights of EU right holders in order to protect its essential security interests'.

The Panel observes that, in further contrast to the anti-sympathy measures, neither party has suggested that there is any direct link between the non-application of criminal procedures and penalties, on the one hand, and any action taken on, or consequential to, the 5 June 2017 'comprehensive measures' severing relations with Qatar, on the other hand. Whereas the anti-sympathy measures were announced on 6 June 2017, there is no such temporal connection between the non-application of criminal procedures and penalties and the 5 June 2017 'comprehensive measures'. For the reasons given above, there is also no rational or logical connection between the comprehensive measures aimed at ending interaction with Qatar and Qatari nationals, and the non-application of Saudi criminal procedures and penalties to beoutQ.

The Panel concludes that the non-application of criminal procedures and penalties to beoutQ does not have any relationship to Saudi Arabia's policy of ending or preventing any form of interaction with Qatari nationals. Therefore, the Saudi authorities' non-application of criminal procedures and penalties to beoutQ is so remote from, or unrelated to, the 'emergency in international relations' as to make it implausible that Saudi Arabia implemented these measures for the protection of its 'essential security interests'. As a consequence, the Panel concludes that the non-application of criminal procedures and penalties to beoutQ does not 'meet a minimum requirement of

²⁸ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.289.

²⁹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.290.

plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests'." ³⁰

27. For all of the reasons above, the Panel found that the requirements for invoking Article 73(b)(iii) were met in relation to the inconsistency with Article 42 and Article 41.1 of the TRIPS Agreement arising from the anti-sympathy measures. The Panel also found that the requirements for invoking Article 73(b)(iii) were not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from the respondent's non-application of criminal procedures and penalties to the actions of the copyright pirate within its jurisdiction. ³¹

Current as of: December 2023

³⁰ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.291-7.293.

³¹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.294.