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SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS567/R.

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WORKING PROCEDURES OF THE PANEL

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WORKING PROCEDURES OF THE PANEL

Adopted on 27 March 2019

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If Saudi Arabia considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. Saudi Arabia shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to

the Panel. Qatar shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Qatar should be numbered QAT-1, QAT-2, etc. Exhibits submitted by Saudi Arabia should be numbered SAU-1, SAU-2, etc. If the last exhibit in connection with the first submission was numbered SAU-5, the first exhibit in connection with the next submission thus would be numbered SAU-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The Panel will provide for two substantive meetings with the parties, the purpose of which will be to allow each party to directly address the Panel. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Qatar to make an opening statement to present its case first. Subsequently, the Panel shall invite Saudi Arabia to present its point of view. Before each party takes the floor, it shall provide the Secretariat with a provisional written version of its statement, which the Secretariat shall then make available to other participants. If interpretation is needed, each party shall provide additional copies for the interpreters.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days prior to the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments to the Panel regarding the other party's statement, or ask the

other party questions through the Panel. Neither party is under any obligation to respond to questions posed by the other party.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Qatar presenting its statement first. Before each party takes the floor, it shall provide the Secretariat with a provisional written version of its closing statement, if available, which the Secretariat shall then make available to other participants.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing. Neither party is under any obligation to respond to questions posed by the other party.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and submit any response that it wishes to make to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that Saudi Arabia shall be given the opportunity to present its oral statement first. If Saudi Arabia chooses not to avail itself of that right, it shall so indicate no later than 5.00 p.m. (Geneva time) three working days before the meeting. In that case, Qatar shall present its opening statement first, followed by Saudi Arabia. The party that presented its opening statement first shall present its closing statement first.

Third party session

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit a single integrated executive summary. It shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions, oral statements, and if possible, its responses to questions. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. The integrated executive summary shall be limited to no more than 30 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant.

The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

b. Each party and third party shall submit 1 paper copy of its submissions and 1 paper copy of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.

c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.

d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

e. Each party shall send all communications and documents directly to the Secretariat, which the Secretariat will then proceed to transmit promptly to the other party. Unless a party and the Secretariat agree on an alternative electronic medium (e.g. the DDSR) for transmitting communications and documents to the other party, the Secretariat will transmit all communications and documents from a party to the other party by forwarding the email which the submitting party will have sent to the DS Registry and other Secretariat staff in accordance with paragraph 30(c). Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the

third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. Documents from or to third parties shall be served by email or on a CD-ROM, DVD or USB key only, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall indicate, in writing, whether copies have been served on the parties and third parties, as appropriate, at the time it provides a document to the Panel.

f. Each party and third party shall submit its documents by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF QATAR

I. INTRODUCTION

1. This dispute raises fundamental issues under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). Specifically, in this dispute, the Panel has the opportunity to opine on the following question: Does the TRIPS Agreement provide any disciplines with respect to a WTO Member that not only permits, *but actively encourages and promotes,* the widespread piracy of copyrighted works? Unlike the other WTO Agreements, the TRIPS Agreement is focused on the protection of *private rights – i.e.*, intellectual property ("IP") rights held by nationals of WTO Members. That is why, unlike any other WTO Agreement, the TRIPS Agreement dedicates an entire Part to enforcement (Part III), going so far as to include a requirement that Members shall provide for application of criminal procedures and penalties in cases of commercial scale copyright piracy.

2. For Qatar, the answer to the question posed above is clearly "yes". In fact, the TRIPS Agreement, in general, including Part III thereof, in particular, was negotiated precisely for this purpose—to ensure that WTO Members protect intellectual property rights created and held by nationals of other WTO Members. With strong intellectual property protection, creators can be rewarded for the development of new works, inventors can be rewarded for the risk and investment that comes with developing new technologies, and trademark and geographical indication rights holders can distinguish their products and services from those of their competitors. Without such rewards and protection, such works, technologies, and varied products and services may never be present in the marketplace.

3. The Kingdom of Saudi Arabia ("KSA" or "Saudi Arabia") has, for over two years, actively and aggressively violated its obligations under the TRIPS Agreement, particularly with respect to intellectual property rights held by Qatari nationals (and their licensors) that have been infringed by the sophisticated, widespread operations of the Saudi-based broadcast pirate known as "beoutQ". More generally, such violations have exposed deep-seated and fundamental flaws in Saudi Arabia's commitment to providing enforcement procedures consistent with the obligations in Part III of the TRIPS Agreement.

4. Beyond enforcement procedures, Saudi Arabia has gone so far as to explicitly state, in an official circular, that beIN Media Group ("beIN"), a Qatari national, along with its "content licensors, hardware suppliers", and others affiliated with beIN, would incur the "loss of the legal right to protect any related intellectual property rights".[1]

5. There can be no justification for this type of open and blatant disregard for the disciplines of the TRIPS Agreement. This is particularly true when a WTO Member has permitted, and indeed supported, a situation within its borders that constitutes the most widespread, sophisticated pattern of broadcast piracy that the world has ever seen. The witness statement submitted as Exhibit QAT-222 demonstrates that officials at the highest levels of the Saudi government were involved in the beoutQ piracy from the outset, including the very authorities responsible for enforcing copyrights.

6. In response to the *prima facie* case Qatar has established, Saudi Arabia has attempted to keep Qatar's claims out of the WTO's dispute settlement system altogether, relying on the national security exception of the TRIPS Agreement (*i.e.*, Article 73). However, throughout the proceedings, Saudi Arabia has not properly invoked—let alone substantiated—the affirmative defense in Article 73(b) of the TRIPS Agreement, with respect to any of the measures at issue in the present dispute.

7. In particular, Saudi Arabia repeatedly clarified that it does not consider the measures at issue in the present dispute necessary for the protection of its essential security interests. Further, Saudi Arabia has failed to demonstrate that its measures were taken "in time of war or other emergency in international relations".

[1] Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, 19 June 2017, **(Exhibit QAT-1)**, p. 2.

8. Despite Saudi Arabia's repeated assertions that it would not engage with the substance of the dispute, Saudi Arabia engaged actively throughout the proceedings and, in particular, addressed the measures and claims at issue in its responses to the Panel's questions after the first substantive meeting. Nevertheless, Saudi Arabia has left unrefuted the extensive evidence submitted by Qatar.

9. With respect to the limited facts that Saudi Arabia has attempted to rebut, Saudi Arabia sets forth only unsupported or irrelevant assertions. And, in the rare instance when Saudi Arabia has actually submitted evidence that it asserts refutes Qatar's *prima facie* case, such evidence generally bolsters Qatar's position.

II. FACTUAL ASPECTS

A. 19 June 2017 Circular

10. Through its 19 June 2017 Circular (the "Circular"), the Saudi Ministry of Culture and Information ("Ministry") and the Saudi General Commission of Audiovisual Media ("GCAM") prohibited the distribution of beIN media content and made it punishable by, among other things, "the loss of the legal right to protect any related intellectual property rights".[2] As beIN may be considered a distributor and/or content licensor of the beIN channels covered by the Circular, this measure served to effectively strip beIN (and its licensors) of the legal right to protect any intellectual property rights related to, and in respect of the content broadcast on, the beIN channels.

B. Piracy of content created by, and licensed to, Qatar-based beIN Media Group

11. Qatar has provided ample evidence of the widespread piracy of beIN media content in Saudi Arabia, including through extensive video and photographic evidence. Qatar has shown that, through subscriptions and beoutQ-branded set-top boxes ("STBs"), beoutQ has illegally transmitted beIN's coverage of tens of thousands of high-profile sporting events. This includes original copyright content owned by beIN, as well as original copyright content owned by third party licensors, including sports leagues from around the world.

12. In addition, Internet Protocol Television ("IPTV") applications on beoutQ STBs and the beoutQ custom app store offer access to thousands of pirated live TV channels, movies, and TV show episodes. One IPTV application, the Show Box application, which has come to be known as the "Netflix of piracy", has provided free access to more than 4,700 movies and 35,000 TV show episodes via streaming or direct download to the box.

13. beoutQ's websites have also facilitated illegal web streaming of pirated content, including sporting events licensed to beIN by international content creators.

14. Not only has beoutQ continued to illicitly broadcast pirated content through its own satellite broadcasts, but beoutQ content has also been intercepted and redistributed by the so-called "pirates of the pirates", and thereby has spread across the globe. Moreover, beoutQ has been intercepted and rebroadcasted by a prominent Saudi-owned and Saudi-based channel, Saudi 24, including the pirated broadcast of the Asian Football Confederation ("AFC") Champions League match on 12 March 2019. Saudi 24 added its own graphics to the screen, however, including its own logo and even an image of Saudi Arabia's leaders apparently watching the game or otherwise overseeing the broadcast.

15. None of these facts about the beoutQ piracy has been contested by Saudi Arabia.

1. Saudi government support for, facilitation of, and participation in, the beoutQ piracy

16. Qatar provided extensive evidence of the Saudi government's support for, facilitation of, and participation in the beoutQ piracy. For example, Qatar provided evidence that the Ministry of Municipal and Rural Affairs of Saudi Arabia published flyers ahead of the 2018 Fédération Internationale de Football Association ("FIFA") World Cup, advertising 294 display screens allocated across the 13 regions of Saudi Arabia – all broadcasting beoutQ. Qatar also provided evidence of numerous tweets posted by official Twitter accounts of Saudi municipal governments, promoting public screenings of beoutQ's broadcasts of the 2018 FIFA World Cup. In addition, Qatar provided

[2] Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, 19 June 2017, (**Exhibit QAT-1**), p. 2.

evidence that international journalists reported on Saudi government-sponsored events that featured beoutQ-pirated World Cup content.

17. Qatar further provided evidence that in the days leading up to the launch of beoutQ, a key advisor to the Saudi court tweeted that "alternative solutions are coming soon … free or for a low price", followed by the hashtag #Blocking_Qatari_beIN_Sport.

18. Moreover, as revealed by the witness statement submitted as Exhibit QAT-222, the beoutQ project was established and operated under the overall control and direction of the Saudi government. The witness, who served on beoutQ's staff from its inception, testifies to the involvement of the highest levels of the Saudi government—the Saudi Royal Diwan—and the very authorities responsible for enforcing copyrights in Saudi Arabia—the Ministry of Culture and Information and GCAM.

2. Availability of beoutQ boxes

19. Since the autumn of 2017, beoutQ STBs and subscriptions have been widely and openly available for purchase in Saudi retail outlets; and beoutQ pirate channels have been openly shown at cafes and restaurants across Saudi Arabia.

20. Qatar has provided ample photographic evidence demonstrating the ready availability of beoutQ in Saudi Arabia. For example, Qatar has provided photographic evidence that in November 2017, October 2018, April 2019, and May 2019, beoutQ STBs (after having passed through Saudi customs) were visibly displayed, promoted, and sold in electronics stores in Jeddah, Riyadh, and Dammam. Qatar has also provided photographic evidence that in July 2018, April 2019, and June 2019, numerous restaurants and cafes in Jeddah, Riyadh, and Dammam openly showed beoutQ channels on televisions at their establishments. Indeed, the United States government has confirmed in its 2019 Special 301 Report that, at least as of 25 April 2019, beoutQ STBs "continue to be widely available and are generally unregulated in Saudi Arabia".[3]

21. In order to provide a glimpse of the extent and blatant nature of the beoutQ piracy in Saudi Arabia, Qatar submitted images of the store front and a business card for "**beout Q 2**", a store in the Al Fakhriyah District of Al Dammam, Saudi Arabia that was found to distribute beoutQ as recently as May 2019. In a WTO Member that has no respect for the IP rights of beIN and its licensors, and that promotes and allows copyright piracy to run rampant without any discipline, it should come as no surprise that even the pirates themselves become victims of the most blatant forms of IP infringement.

3. Use of Arabsat satellites

22. Qatar has demonstrated that in order to broadcast beIN's proprietary media content via satellite transmission, beoutQ uses frequencies from the satellites of Arabsat, an intergovernmental satellite operator headquartered in Riyadh and of which Saudi Arabia is the largest shareholder. The Saudi government's control over Arabsat and its day-to-day operations is evidenced by the fact that the CEO of Arabsat, Khalid Bin Ahmed Balkheyour, is a Saudi citizen and a former Saudi government official. Indeed, as a Saudi citizen resident in Riyadh and working within Saudi territory, he is subject to Saudi Arabia's anti-sympathy measures (as detailed below, in Section II.C). Notably, Saudi Arabia has implicitly acknowledged during these proceedings that Arabsat can effectively be viewed as an instrument of the Saudi government.

23. Qatar has provided evidence that beoutQ itself has publicized its relationship with Arabsat, tweeting in December 2017 that beoutQ channels are broadcast on Arabsat satellite Badr °26. Further, detailed independent technical reports unequivocally demonstrate that beoutQ has been broadcast on Arabsat satellite frequencies. Qatar has also provided evidence that beIN and right holders, including the Union of European Football Associations ("UEFA"), LaLiga, and the English Premier League, have repeatedly notified Arabsat of the unauthorised beoutQ transmissions on Arabsat satellites and requested that Arabsat take down the beoutQ channels broadcasting on its frequencies, to no avail. Further, as the United States government itself has found, "Saudi Arabia has not taken sufficient steps to address the purported role of Arabsat in facilitating BeoutQ's piracy activities".[4]

[3] United States 2019 Special 301 Report, Office of the United States Trade Representative (April 2019) (Excerpts), **(Exhibit QAT-184)**.

[4] United States 2019 Special 301 Report, Office of the United States Trade Representative (April 2019) (Excerpts), **(Exhibit QAT-184)**, p. 57.

24. In particular, three expert reports detail that, during the course of these WTO proceedings, beoutQ has continued to be broadcast on Arabsat satellites. A June 2019 technical report confirms that, as of mid-April 2019, the 10 beoutQ channels continued to originate from Arabsat satellites. In the Cartesian Report from 10 September 2019, technical experts conclude that "beoutQ content was indisputably being transmitted via Arabsat's Badr-7 satellite, on satellite frequency 11270".[5] In the MarkMonitor Report, which was commissioned by seven football right holders—the Asian Football Confederation, the Bundesliga, FIFA, the English Premier League, Serie A, LaLiga, and UEFA—yet another independent expert investigation confirms that beoutQ channels are transmitted by Arabsat satellites.

25. Moreover, a June 2019 decision of the *Tribunal de Grande Instance de Paris* confirmed that testing by beIN's technical expert Nagra demonstrated that beoutQ channels were available in French territory in January 2019, and that this was sufficient to ground the jurisdiction of the court against Arabsat. The court also found that, in June 2018, testing demonstrated that the beoutQ channels were available on the 11919 and 12207 MHz frequencies via the Arabsat Badr-4 satellite.

26. Not only does Arabsat provide the satellite frequencies necessary for beoutQ's broadcasts, but, as the witness statement demonstrates, Arabsat has also been deeply involved in the beoutQ project itself, providing critical support as well as ongoing technical assistance.

4. Facilitation of beoutQ piracy by Saudi enterprises and individuals

27. Qatar provided ample evidence demonstrating the connection between beoutQ and a sophisticated Saudi-based company, Saudi Selevision Company LLC ("Selevision"), as well as its parent company, Khusheim Holdings Company. Qatar explained that (i) the CEO (and largest shareholder) of Selevision purchased content delivery network services for the beoutQ.se website using his personal credit card; (ii) Selevision's TV and video on-demand service is broadcast on the same Arabsat satellite frequency as the one beoutQ has used; and (iii) one of the individuals involved in hacking the legitimate beIN subscriptions for beoutQ's rebroadcast did so using a Selevision corporate email address.

28. The witness statement in Exhibit QAT-222 confirms and further clarifies the role of Selevision, Mr. Khusheim, and other Saudi individuals in the beoutQ piracy. In particular, beoutQ was jointly established and operated by Selevision and Saudi Media City; Selevision engineers installed and tested technical equipment for use in the beoutQ piracy operation; Selevision employees, including managers, administrative staff, and technicians, worked to support beoutQ's operations at the facility from which beoutQ was operating; Selevision operated a beoutQ call centre from its Dammam office; and Selevision CEO Mr. Khusheim oversaw the entire project and was acting as beoutQ's General Manager, operating from within Saudi Media City.

C. Obstacles to initiating copyright infringement action caused by Saudi Arabia's anti-sympathy measures and travel ban

29. The unchecked, rampant piracy at issue in this dispute has occurred due to certain obstacles that Saudi Arabia has created which prevent Qatari nationals from initiating copyright infringement actions in Saudi territory. Among such obstacles are the Saudi anti-sympathy measures that sanction expressions of sympathy (a term that is undefined) for Qatar or Qatari nationals with five years' imprisonment, or fines of up to three million Saudi riyals. Saudi Arabia has also closed "all land, sea and air ports" to "prevent{} Qatari citizens' entry to or transit through the Kingdom of Saudi Arabia".[6] The anti-sympathy measures, together with the travel ban (as it applies to IP enforcement) and other measures, have made it impossible for Qatari nationals to initiate and participate in civil copyright infringement proceedings against beoutQ piracy.

30. Indeed, due at least in part to Saudi Arabia's anti-sympathy measures, beIN has been unable to obtain legal representation from Saudi attorneys in order to enforce its IP rights. All Saudi law firms that have been approached to take action against beoutQ piracy have declined to act for beIN. The detailed evidence submitted by Qatar regarding the interactions between Saudi law firms and the Saudi government confirm the tremendous power of the Saudi government over determining whether a Saudi law firm will or will not work for a Qatari national. Such evidence demonstrates

[5] Cartesian: Technical Investigation of beoutQ Broadcasts, 10 September 2019, **(Exhibit QAT-239)**, para. 61.

[6] Announcement on the Saudi Embassy to the United States website, "*Kingdom of Saudi Arabia Cuts Off Diplomatic and Consular Relations with the State of Qatar*", 5 June 2017, **(Exhibit QAT-3)**.

that failure to follow the will of the Saudi government in such decisions can result in shutting down an entire law firm's operations, or worse.

31. Thus, beIN could conclude only that "it is the position of the Saudi government that beIN … cannot bring civil legal actions relating to beoutQ broadcast piracy before the KSA courts".[7] This understanding has been communicated to the Saudi government in multiple letters, with no responses whatsoever. beIN specifically noted in one of its letters that the lack of response from the Saudi government is to be understood as confirming beIN's understanding that "the Saudi Government has instructed lawyers in the KSA to refrain from representing beIN".[8] beIN has received no response. Qatar thus understood that Saudi Arabia has confirmed the inability of Qatari nationals, and beIN in particular, to secure legal representation and to access Saudi courts or administrative tribunals to bring a copyright infringement action.

32. beIN is not the only right holder that has been unable to engage Saudi counsel, or access Saudi courts and administrative tribunals, in connection with the beoutQ piracy. Seven major football right holders, namely FIFA, UEFA, AFC, the English Premier League, Bundesliga, LaLiga, and Lega Serie A, have issued a joint statement confirming that this has been the case for well over a year. In that statement, publicly issued on 31 July 2019, they explained as follows:

> {o}ver the past 15 months, we spoke to nine law firms in KSA, each of which either simply refused to act on our behalf or initially accepted the instruction, only later to recuse themselves. As copyright holders we have reached the conclusion, regrettably, that it is now not possible to retain legal counsel in KSA which is willing or able to act on our behalf in filing a copyright complaint against beoutQ.[9]

Joined by an additional sports league, the rights holders have confirmed this to be the case in the statement prepared specifically for these WTO proceedings.

33. The effect of the anti-sympathy measures on Saudi lawyers is further confirmed by a report from the UN Office of the High Commissioner for Human Rights. The report is critical of multiple aspects of Saudi Arabia's anti-sympathy measures. In particular, the report highlights that "lawyers in these countries {including Saudi Arabia} are unlikely to defend Qataris as this would likely be interpreted as an expression of sympathy towards Qatar".[10] Given this context, it comes as no surprise that Saudi lawyers do not want to risk their freedom to represent beIN and other right holders in copyright infringement proceedings against beoutQ piracy.

34. In addition to being unable to obtain legal representation due to the anti-sympathy measures, Qatari nationals are also unable to travel to Saudi Arabia for purposes of enforcing their intellectual property rights, as a result of the travel ban. As Qatar's expert, Professor Gervais, explained in his Second Supplemental Report, based on his understanding from a professor of law in the region, "it would be highly unusual for someone to be allowed to file a case and provide evidence without appearing in court".[11] Further, there appear to be no laws or regulations in Saudi Arabia allowing video evidence. Thus, the travel ban (as it applies to IP enforcement) further forecloses Qatari nationals' ability to access Saudi courts and administrative tribunals to bring a copyright infringement action.

35. To be clear, Qatar challenges the travel ban in this dispute only to the extent it limits—together with the other measures at issue—the ability of Qatari nationals to enforce their IP rights before Saudi courts or administrative tribunals. Importantly, even if the travel ban were removed, Qatar understands that our nationals would likewise continue to lack access to Saudi courts and administrative tribunals, as a result of the anti-sympathy measures, the Circular, and the political gatekeeping function obstructing the Copyright Committee process. Indeed, this has been the

[7] Letter from beIN to Saudi Ministry of Culture and Information, 6 March 2018, **(Exhibit QAT-120)**.
[8] Letter from beIN to Saudi Ministry of Culture and Information, 6 March 2018, **(Exhibit QAT-120)**.
[9] Joint statement by FIFA, the AFC, UEFA, the Bundesliga, LaLiga, the Premier League and Lega Serie A regarding the activities of beoutQ in Saudi Arabia, 31 July 2019, **(Exhibit QAT-227)**.
[10] Office of the United Nations High Commissioner for Human Rights, Technical Mission to the State of Qatar 17-24 November 2017, Report on the Impact of the Gulf Crisis on Human Rights, December 2017, **(Exhibit QAT-21)**, para. 40.
[11] Second Supplemental Expert Report of Professor Gervais, 19 August 2019, **(Exhibit QAT-223)**, para. 22.

experience for nationals from other Members that have licensed their rights to beIN—nationals that are not impacted by the travel ban.

D. Lack of criminal enforcement or other action by Saudi authorities

36. beIN repeatedly requested that Saudi authorities take immediate action against beoutQ piracy, and has provided ample evidence of beoutQ's illegal broadcast piracy in Saudi Arabia to these authorities. In addition, other right holders have also sent letters to Saudi authorities requesting immediate action to stop the unauthorised and illegal transmission of their proprietary media content.

37. The allegations of widespread commercial-scale piracy that beIN and other right holders have brought before Saudi authorities are well-founded and fully supported, as demonstrated by the extensive evidence before the Panel—evidence that was previously shared with or otherwise made available to Saudi authorities. Such evidence includes:

- Public condemnations against the beoutQ piracy by right holders, including UEFA, the Confédération Africaine de Football ("CAF"), the English Premier League, the World Tennis Governing Bodies, and the International Olympic Committee, among others.
- A joint statement dated 22 January 2019 from FIFA, UEFA, the AFC, LaLiga, the English Premier League and Bundesliga, condemning beoutQ and its "flagrant breach {of rights holders'} intellectual property rights".[12]
- An AFC statement concerning beoutQ dated 9 January 2019, condemning beoutQ's illegal broadcasting of the AFC Asian Cup 2019.
- Condemnations against the beoutQ piracy by international broadcasters, including NBC Universal (through their Telemundo subsidiary), BBC, and Sky.
- Publicly available submissions to the US Government under the 2019 Special 301 process from multiple right holders, including the Audiovisual Anti-Piracy Alliance, the International Intellectual Property Alliance, the National Basketball Association ("NBA"), the United States Tennis Association ("USTA"), Miramax, Sky UK Limited, and the Sports Coalition. In these submissions, the right holders detailed the harm that the beoutQ piracy has caused to their business.
- Multiple letters from beIN to the Ministry and GCAM, providing evidence of beoutQ's illegal broadcast piracy in Saudi Arabia.
- Letters from UEFA and the BBC to the Ministry and GCAM, requesting immediate action to stop the unauthorised and illegal transmission of their proprietary media content.
- A FIFA statement condemning beoutQ's unauthorised transmissions of the 2019 FIFA Women's World Cup.

38. The US Government's Special 301 Priority Watch List, which added Saudi Arabia this year as one of the worst state actors in the realm of IP protection and enforcement, has also been shared with Saudi Arabia. Moreover, the Office of the US Trade Representative's ("USTR") 2018 Notorious Markets List, which "highlights prominent and illustrative examples of online and physical marketplaces that reportedly engage in and facilitate substantial piracy and counterfeiting", cited beoutQ as "an illicit pirate operation that has been widely available in Saudi Arabia and throughout the Middle East region and Europe".[13]

39. The UK Government also indicated that it has been investigating beoutQ's theft of the English Premier League's content. In addition, the European Commission sent a letter to the Ministry of Foreign Affairs of Saudi Arabia in February 2018, detailing the harm European right holders have suffered as a result of the beoutQ piracy.[14]

40. Nevertheless, despite the extensive evidence of beoutQ's widespread, commercial-scale copyright piracy in Saudi Arabia, Saudi authorities have taken no criminal action against beoutQ or

[12] FIFA, "Joint Public Statement on behalf of FIFA, UEFA, AFC, The Premier League, LaLiga and Bundesliga on beoutQ", 22 January 2019, **(Exhibit QAT-54)**; UEFA, "Joint Statement on behalf of FIFA, UEFA, AFC, The Premier League, LaLiga and Bundesliga on beoutQ", 22 January 2019, **(Exhibit QAT-55)**.

[13] Excerpts of United States 2018 Out-of-Cycle Review of Notorious Markets, Office of the United States Trade Representative (April 2019) (Excerpts), **(Exhibit QAT-187)**, pp. 2, 15.

[14] European Union's Third Party Oral Statement, Exhibit EU-1.

its facilitators, including but not limited to Arabsat, Selevision, Raed R. Khusheim (the CEO of Selevision), and high-ranking Saudi government officials. Saudi Arabia admits this inaction in its responses to the Panel's post-hearing questions.

E. Gatekeeping function

41. beIN and other right holders are unable to obtain civil and criminal remedies for copyright infringement in Saudi Arabia for yet another reason—as a result of the gatekeeping function built into the Saudi legal system, which requires Ministerial approval of any decision of the Copyright Committee.

42. Article 25 of Saudi Arabia's Copyright Law establishes a "Copyright Committee" to examine copyright violations. Article 25(2) of the Copyright Law states that "Decisions of the Committee shall be made by majority vote, *which shall be endorsed by the Minister*".[15] Similarly, Article 25(6) of the Implementing Regulations provides that "Decisions of the committee shall be issued by majority vote and shall be referred by the chairman of the committee to the Minister, and said decisions *shall not be effective unless approved by the Minister*".[16] Article 25(7) of the Implementing Regulations states: "If the committee finds the violation committed grave and punishable with imprisonment or a fine exceeding one hundred thousand riyals, or closing the store permanently and canceling the license, *the matter shall be referred to the Minister for his approval to forward this violation to the Board of Grievances for review, and to determine the appropriate punishment against the infringer*".[17]

43. This gatekeeping function, which subjects the Copyright Committee decisions to mandatory ministerial approval, serves as an additional obstacle to accessing civil and criminal enforcement procedures in Saudi Arabia. The very existence of a political gatekeeper that can block the ruling of the Copyright Committee in a dispute over the beoutQ piracy means that, even at the initial point of considering whether to pursue copyright infringement action (whether civil or criminal), it is already clear that any such action would be futile.

44. Saudi Arabia has asserted—citing an amended Copyright Law and Copyright Regulation that are not publicly accessible and that have not been notified to TRIPS Council—that the decisions of the Copyright Committee now require approval by the Saudi Authority for Intellectual Property's ("SAIP") Board of Directors, instead of a single minister. Even if Saudi Arabia has transferred the gatekeeping function from the Minister to the Board of Directors, the Saudi government maintains similar—if not more—discretionary powers to authorize access to the Copyright Committee and to approve its decisions. A review of the complete SAIP Regulation further demonstrates the non-judicial and political nature of the SAIP Board of Directors. The Board of Directors' functions are those of an executive, and do not resemble the characteristics that one would expect to find in a judicial authority (or administrative adjudicator), which must be in place to review claims of copyright infringement pursuant to Part III of the TRIPS Agreement.

45. Regardless of the precise identity of the gatekeeper—the Ministry, or a Board of Directors consisting mostly of high-ranking government officials—the gatekeeper, in its capacity as a political actor, would never open the gates for copyright infringement actions against beoutQ piracy. As such, it is evident that the mere existence of the "gatekeeping function" had the effect of impeding the initiation of any civil or criminal copyright infringement proceedings.

III. SAUDI ARABIA VIOLATES MULTIPLE OBLIGATIONS UNDER THE TRIPS AGREEMENT

A. Saudi Arabia violates Article 3.1 of the TRIPS Agreement

1. Legal standard under Article 3.1 of the TRIPS Agreement

46. Article 3.1 of the TRIPS Agreement sets out a "national treatment obligation", which guarantees that the Member shall treat foreign nationals no less favourably than its own nationals

[15] Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, **(Exhibit QAT-112)** (emphasis added).

[16] Implementing Regulations of Copyright Law, Minister of Culture and Information's decision No. (1688/1), 29 May 2004 and amended by decision No. (1640), 22 June 2005, **(Exhibit QAT-113)** (emphasis added).

[17] Implementing Regulations of Copyright Law, Minister of Culture and Information's decision No. (1688/1), 29 May 2004 and amended by decision No. (1640), 22 June 2005, **(Exhibit QAT-113)** (emphasis added).

with respect to the protection of intellectual property. There are two elements to a successful claim under this provision: "(1) the measure at issue must apply with regard to the protection of intellectual property; and (2) the nationals of other Members must be accorded 'less favourable' treatment than the Member's own nationals".[18]

2. Saudi Arabia accords to Qatari nationals treatment less favourable than that accorded to Saudi nationals, with regard to the protection of intellectual property

47. Saudi Arabia's treatment of Qatari nationals violates Article 3.1 of the TRIPS Agreement because it is more difficult for Qatari nationals to enforce their intellectual property rights in Saudi Arabia than it is for Saudi nationals to do so.

48. First, Qatari nationals face significant difficulty in securing legal representation in Saudi Arabia because Saudi attorneys will not represent Qatari nationals in copyright infringement cases, due to the risk that they will be violating Saudi Arabia's anti-sympathy measures. Second, Qatari nationals are not permitted to travel to Saudi Arabia for the purpose of initiating or participating in civil judicial copyright enforcement procedures. Third, even if Qatari nationals had access to the Saudi civil legal system, it is highly unlikely that the gatekeeper—*i.e.*, the Minister (in his capacity as a political actor)—would open the gate with respect to adjudicating infringement of copyrights held by Qatari nationals. Fourth, despite having criminal procedures in its laws and regulations to counteract commercial scale copyright piracy, Saudi Arabia has not applied such procedures against beoutQ piracy because the most direct victim is a Qatari national. Finally, the 19 June 2017 Circular has effectively stripped Qatari nationals of copyright and other intellectual property protections.

49. Thus, the Panel should find that Saudi Arabia's measures, including the anti-sympathy and related measures (*e.g.*, travel restrictions), lack of criminal remedies, Ministerial political gatekeeping, and the 19 June 2017 Circular, violate Article 3.1 of the TRIPS Agreement, because Saudi Arabia accords to Qatari nationals treatment that is less favourable than that accorded to Saudi nationals with regard to the protection of intellectual property.

B. Saudi Arabia violates Article 4 of the TRIPS Agreement

1. Legal standard under Article 4 of the TRIPS Agreement

50. Article 4 of the TRIPS Agreement provides a most-favoured nation obligation, which, with regards to intellectual property rights, requires any advantage, favour, privilege, or immunity that a Member grants to the nationals of any country to be granted to the nationals of all WTO Members.

2. Saudi Arabia fails to accord to Qatari nationals advantages, favours, privileges and immunities that it grants to other Members' nationals

51. Saudi law generally provides owners and licensees of intellectual property rights, including those owned by or licensed to non-Saudi nationals, with the ability to access civil and criminal remedies to enforce their intellectual property rights. However, Qatari nationals are generally unable to access such remedies in respect of their intellectual property rights. Thus, Saudi Arabia accords to Qatari nationals treatment less favourable than it accords to nationals of other countries with regard to the protection of intellectual property.

52. First, nationals from other countries can generally engage Saudi attorneys to enforce their intellectual property rights in Saudi Arabia, and they can travel to Saudi Arabia to facilitate enforcement of those rights. By contrast, as discussed above, Qatari nationals are not afforded those benefits as a result of the measures at issue, including the anti-sympathy measures and the travel ban. Second, even if Qatari nationals had access to the Saudi civil legal system, it is highly unlikely that the gatekeeper (*i.e.*, the Minister) would open the gate with respect to disciplining infringement of copyrights held by Qatari nationals. Third, Saudi Arabia has not criminally prosecuted beoutQ piracy, in part, because the most direct victim is a Qatari national. Fourth, the 19 June 2017 Circular has effectively stripped Qatari nationals of copyright and other intellectual property protections.

[18] Panel Reports, EC – Trademarks and Geographical Indications, para. 7.175.

C. Saudi Arabia violates Articles 9, 11, 11*bis*, and 11*ter* of the Berne Convention (1971), as incorporated into Article 9 of the TRIPS Agreement

1. Legal standard under Articles 9, 11, 11bis, and 11ter of the Berne Convention (1971)

53. The obligations under Articles 9, 11, 11*bis*, and 11*ter* of the Berne Convention (1971) are incorporated into the TRIPS Agreement by virtue of Article 9 of the TRIPS Agreement.

54. Article 9 of the Berne Convention (1971) provides authors with the right to bar all others from reproduction, of any kind, of their literary and artistic works, whatever the mode or form. Article 11 of the Berne Convention (1971) provides authors of dramatic, dramatico-musical, and musical works with the exclusive right of authorizing live or recorded public performances, or any communication made available to the public of the performing of these works. Article 11*bis*(1) of the Berne Convention (1971) provides for three distinct rights relating to (i) broadcasting and other wireless communications; (ii) public communication of broadcast by wire or rebroadcast; and (iii) public communication of broadcast by loudspeaker or analogous instruments. And Article 11*ter* of the Berne Convention (1971) provides authors of literary works with the exclusive right (i) to relate, recount, or describe their literary works to the public by any means or process; and (ii) of authorizing any communication that relates, recounts, or describes an author's literary works when such communications are made available to the public.

55. Qatar and Saudi Arabia agree that professional sports broadcasts constitute protected "works" under the provisions of the Berne Contention (1971), as incorporated into the TRIPS Agreement. The phrase "literary and artistic works" is broadly defined by Article 2(1) of the Berne Convention (1971) as including "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression".

56. A WTO Member must do more than merely provide such rights in name only. Indeed, for such rights to be meaningful, they must be enjoyed. While Saudi Arabia provides certain rights on paper (*i.e.*, in the text of their copyright law and regulations), those rights effectively have been stripped from certain authors of works.

2. Saudi Arabia fails to provide authors of literary and artistic works with the exclusive rights that must be accorded pursuant to Articles 9, 11, 11*bis*, and 11*ter* of the Berne Convention (1971)

57. It is undisputed that beIN is the author of literary and artistic works, as defined by the Berne Convention. The commentary, text, visual charts, music, *etc*. in a typical sports match, as broadcasted by beIN, are generally literary and artistic works. Further, beIN is also the author of dramatico-musical and musical works. For example, the music used in a typical sports event, as broadcasted by beIN, is understood as a musical work.

58. In violation of Article 9 of the Berne Convention (1971), Saudi Arabia has stripped beIN (and its licensors) of the exclusive right of authorizing reproduction, of any kind, of its literary and artistic works. Specifically, the 19 June 2017 Circular precludes "the legal right to protect any related intellectual property rights".[19] As a result, beIN and its licensors have been stripped of the exclusive rights to prevent unauthorised rebroadcasts by beoutQ, which constitute "reproduction" under Article9 of the Berne Convention (1971). Moreover, due to Saudi Arabia's anti-sympathy and related measures (*e.g.*, travel restrictions), the Ministry's gatekeeping function, and the total lack of criminal actions, the right holders are effectively *completely* blocked from accessing civil and criminal remedies in Saudi Arabia, such that they cannot, in practice, enjoy their intellectual property rights. In an extreme situation such as this one, the inability of right holders to enforce their exclusive rights violates Saudi Arabia's substantive obligations under Article 9 of the Berne Convention (1971).

59. In violation of Article 11 of the Berne Convention (1971), Saudi Arabia fails to provide beIN and its licensors with the exclusive right of authorizing live or recorded performances or any communication made available to the public of their dramatic, dramatic-music, and musical works. Specifically, the 19 June 2017 Circular has stripped beIN and its licensors of the exclusive rights of authorizing live or recorded performances or any communication with respect to dramatic, dramatico-musical, and musical works. The inability of right holders to enforce their exclusive rights, in turn, effectively removes the ability to enjoy the intellectual property rights, in violation of Saudi

[19] Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, 19 June 2017, **(Exhibit QAT-1)**, p. 2 (emphasis added).

Arabia's substantive obligations under Article 11 of the Berne Convention (1971). In addition, the Saudi government itself has actively violated Article 11 of the Berne Convention (1971) by, for example, sponsoring the viewing of the 2018 FIFA World Cup on 294 screens, all showing beoutQ pirated broadcasts.

60. Further, in violation of Article 11*bis* of the Berne Convention (1971), Saudi Arabia fails to provide beIN and its licensors with the exclusive right of authorising (i) broadcasting and other wireless communications of their works; (ii) public communication of broadcast by wire or rebroadcast of their works; or (iii) public communication of broadcast by loudspeaker, or analogous instruments, of their works. Specifically, through the 19 June 2017 Circular, Saudi Arabia has stripped beIN and its licensors of the exclusive right of authorizing their literary and artistic works via broadcasting and other wireless communications and public communication of broadcast by wire or rebroadcast. The continuing inability of beIN and its licensors to take any action that would stop the beoutQ piracy also effectively removes the ability of the right holders to enjoy their intellectual property rights, reflecting a failure of Saudi Arabia to provide the exclusive rights in this respect. Finally, by sponsoring the viewing of the 2018 FIFA World Cup on 294 screens, all showing beoutQ pirated broadcasts, the Saudi government itself has actively violated Article 11*bis*(1)(iii) of the Berne Convention (1971).

61. In addition, in violation of Article 11*ter* of the Berne Convention (1971), Saudi Arabia fails to provide beIN and its licensors with the exclusive right of authorising the public recitation of their works, or any communication to the public of the recitation of their works. By stripping beIN and its licensors of their IP rights through the 19 June 2017 Circular, Saudi Arabia has allowed for communicating the recitation of literary works to the public, without authorization of the right holders, in violation of Article 11*ter* of the Berne Convention. Moreover, as discussed above, due to anti-sympathy and related measures (*e.g.*, travel restrictions) that foreclose access to counsel, the Ministry's denial of access to administrative tribunals and courts, and the total lack of criminal remedies, Saudi Arabia has effectively removed the ability of beIN and its licensors to enjoy their IP rights, and as a result, has violated its substantive obligations under Article 11*ter* of the Berne Convention (1971).

62. Saudi Arabia acknowledges in its own submissions that it fails to provide intellectual property protection to entities that broadcast content in Saudi Arabia without a Saudi-issued broadcast license. Based on this admission, alone, it is clear that Saudi Arabia violates multiple obligations of the TRIPS Agreement, including Articles 9, 11, 11*bis*, and 11*ter* of the Berne Convention (1971), as incorporated into Article 9 of the TRIPS Agreement. While international copyright rules allow WTO Members to censor content (pursuant to Article 17 of the Berne Convention (1971), as incorporated into the TRIPS Agreement by Article 9), that does not in any way allow a WTO Member to deny copyright protection to content that has not been the subject of a broadcast license.

D. Saudi Arabia violates Article 14.3 of the TRIPS Agreement

1. Legal standard under Article 14.3

63. Article 14.3, as a whole, provides that, at a minimum, radio and television organisations shall have the right to prohibit unauthorised fixations, the reproduction of fixations, and the wireless rebroadcasting, as well as communication of wireless television transmissions of the same, to the public. If a Member chooses not to grant such rights, it may nevertheless satisfy the terms of Article 14.3, pursuant to the second sentence, by providing the owners of the copyright (*i.e.*, right holders) "in the subject matter of broadcasts" the ability to prohibit "the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same".

2. Saudi Arabia has failed to provide broadcasting organisations with the right to prohibit the acts listed in Article 14.3

64. beIN is a broadcasting organisation within the meaning of Article 14.3 of the TRIPS Agreement, as it is an "organization that broadcasts works and objects of related rights".[20] beIN is entitled to any broadcasting rights in the MENA region, including Saudi Arabia, for broadcasts of its own original content as well as broadcasts of content licensed to it by certain right holders.

[20] WIPO, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, 2003 ("WIPO Copyright Guide"), **(Exhibit QAT-142)**, p. 271 (emphasis removed).

65. It is uncontested that Saudi Arabia provides, in the text of its Copyright Law and Implementing Regulations, related rights to broadcasting organisations in line with the first sentence of Article 14.3 of the TRIPS Agreement. Accordingly, there is no dispute that the last sentence of Article 14.3 of the TRIPS Agreement is irrelevant, as Saudi Arabia has chosen to "grant such {related} rights to broadcasting organizations".

66. Despite spelling out such rights in its Copyright Law and Implementing Regulations, however, Saudi Arabia has failed to provide beIN with the related right to prohibit unauthorised rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.

67. In particular, due to the anti-sympathy and related measures (*e.g.*, travel restrictions), Qatari nationals have been unable to engage counsel or travel to Saudi Arabia to initiate proceedings to prohibit beoutQ's unauthorised rebroadcasting of broadcasts by wireless means, as well as the communication to the public of television broadcasts of the same.

68. Further, the 19 June 2017 Circular has unduly stripped Qatari nationals of protection of copyrights and related rights (including broadcasting rights). As a result, beIN, in its role as a broadcasting organisation, has been unable to prohibit beoutQ's unauthorised rebroadcasting of broadcasts by wireless means, as well as the communication to the public of television broadcasts of the same.

69. In addition, the gatekeeping function, whether exercised by the Minister or by the Board of Directors, makes it impossible for beIN to protect its rights through a copyright (or related right) infringement cases, which further forecloses beIN's right to prohibit beoutQ's unauthorised rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.

70. Finally, Saudi Arabia admits that companies lacking a Saudi broadcasting license, such as beIN (and allegedly beoutQ), have no ability to protect their intellectual property, which Qatar understands to encompass related rights such as the broadcasting right in Article 14.3. This constitutes a clear violation of Article 14.3 of the TRIPS Agreement.

71. Thus, the Panel should find that Saudi Arabia's measures, including the anti-sympathy and related measures (*e.g.*, travel restrictions), the 19 June 2017 Circular, and the gatekeeping function violate Article 14.3 of the TRIPS Agreement.

E. Saudi Arabia violates Article 41.1 of the TRIPS Agreement

1. Legal standard under Article 41.1 of the TRIPS Agreement

72. Article 41.1 sets forth the general obligation of Members to make available enforcement procedures, as specified in Part III of the TRIPS Agreement, including both civil and criminal procedures. It further provides that such enforcement procedures must "permit effective action against any acts of infringement of intellectual property rights covered by this Agreement". Such procedures must include "expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements".

73. Importantly, Article 41.1 underlines the need for effectiveness of the remedies provided for in Part III. Where a Member makes available the remedies in Part III as a formal matter in its law, but places obstacles in the path of those seeking to access those remedies such that their effectiveness and deterrent effect on further infringement are undermined, the Member fails to comply with Article 41.1.

2. Saudi Arabia has failed to ensure that enforcement procedures are available against infringement of intellectual property rights

74. Saudi Arabia effectively deprives right holders from accessing civil judicial or criminal procedures for the enforcement of intellectual property rights. While Saudi Arabia's general legal regime on intellectual property rights does contain, on the books, provisions relating to enforcement procedures, Saudi Arabia has adopted measures that make it impossible, or unduly difficult, for certain right holders to access these procedures. The impacts of such measures extend not only to Qatari nationals but also to third party right holders that have licensed their rights to Qatari nationals, and who have also been unable to access civil and criminal remedies in Saudi Arabia.

75. Qatari nationals who own, or hold licenses over, copyrighted works are unable to meaningfully invoke the enforcement procedures set out in Part III of the TRIPS Agreement. IP right owners from third countries that have licensed their rights to Qatari nationals likewise are unable to initiate any such enforcement procedures. First, due to the anti-sympathy and related measures (*e.g.*, travel restrictions), Qatari nationals (and those that have licensed their rights to Qatari nationals) cannot engage lawyers or participate in IP-related proceedings in Saudi Arabia. Second, the 19 June 2017 Circular has unduly stripped beIN, and those who have licensed their rights to beIN, of copyright protections, including enforcement-related rights and remedies. Third, the Minister's gatekeeping function has been applied to prevent beIN and their licensors from effectively accessing enforcement procedures set out in Part III of the TRIPS Agreement. It is inconceivable that the Minister or the Board of Directors would open the gates to permit a successful IP infringement claim against a piracy scheme that (as demonstrated by the evidence of record) was directed by the Saudi government itself, let alone that the gatekeeper would do so for a Qatari right holder (or a licensor of a Qatari right holder), given the anti-sympathy measures.

76. In addition, Saudi Arabia admits in its own submissions that"{u}nlicensed distributors of illegally distributed content do not have a right to protect copyright in such illegally distributed content".[21] As such, Saudi Arabia admits to a clear violation of the TRIPS Agreement because it denies certain right holders protection of intellectual property rights, including the right to access civil and criminal enforcement procedures pursuant to Article 41.1 of the TRIPS Agreement. There is no exception found in the TRIPS Agreement, or the Berne Convention (1971), that would allow a WTO Member to deny copyright protection to content simply because that Member decides that that the broadcaster of that content should not be granted a broadcast license.

77. While Saudi Arabia appears to allege that right holders must initiate civil judicial proceedings against infringement through filing a complaint with SAIP authorities, no such role for the SAIP is reflected in the Saudi Copyright Law currently on the record, including the version submitted by Saudi Arabia. As is clear from the Saudi law, itself, the appropriate venue for initiating civil judicial proceedings in Saudi Arabia has been, and continues to be, the Copyright Committee. For the reasons detailed above, Qatari nationals and their licensors lacked access to the Copyright Committee. Based on Saudi Arabia's own Copyright Law and advice of Saudi counsel shared with third party right holders—and as also confirmed by publicly available Saudi government assertions outside the context of this dispute—neither beIN nor the third-party right holders understood the SAIP to be a proper forum for initiating civil judicial proceedings against copyright infringement. Indeed, Qatar submitted evidence confirming that the SAIP was not operational and did not "effectively launch its activities" until 2019[22]—after the establishment of the Panel in this proceeding on 18 December 2018.

F. Saudi Arabia violates Article 42 of the TRIPS Agreement

1. Legal standard under Article 42 of the TRIPS Agreement

78. Article 42, entitled "Fair and Equitable Procedures", requires that Members make "civil judicial procedures" "available to right holders" concerning "the enforcement of any intellectual property covered by" the TRIPS Agreement. In addition to this general requirement, it provides several specific instances of "fair and equitable procedures" that must be implemented by Members, including, *inter alia*, the right to be "represented by independent legal counsel" and the right to "substantiate … claims and to present all relevant evidence".

2. Saudi Arabia has failed to make civil judicial procedures available to enforce intellectual property rights

79. Qatari nationals who own, or hold licenses over, intellectual property rights face significant hurdles making them unable to invoke the enforcement procedures set out in Article 42 of the TRIPS Agreement. IP right owners from third countries that have licensed their rights to Qatari nationals likewise face many of the same hurdles. First, due to the anti-sympathy and related measures (*e.g.*, travel restrictions), Qatari nationals have been unable to obtain legal representation in Saudi Arabia, and have been precluded from personally attending legal proceedings to present evidence. Second, the 19 June 2017 Circular has unduly stripped beIN (and those who have licensed their rights to beIN) of IP protections, precluding them from "civil judicial proceedings concerning

[21] Responses of the KSA to the Panel's Post-Hearing Questions to the Parties Following the Second Substantive Meeting of the Panel, para. 25.

[22] Al Tamimi & Co., *Launch of Saudi IP Authority*, November 2018, **(Exhibit QAT-250)**.

the enforcement of any intellectual property right". Third, the Minister's gatekeeping function has been applied to prevent beIN and its licensors from effectively accessing civil judicial procedures set out in Article 42 of the TRIPS Agreement.

80. Saudi Arabia's measures have foreclosed not only the right to be "represented by independent legal counsel" for Qatari nationals, but also for certain right holders from third countries. As the major football right holders explained in their joint statement, "{o}ver the past 15 months, we spoke to nine law firms in KSA, each of which either simply refused to act on our behalf or initially accepted the instruction, only later to recuse themselves. As copyright holders we have reached the conclusion, regrettably, that it is now not possible to retain legal counsel in KSA which is willing or able to act on our behalf in filing a copyright complaint against beoutQ".[23] This provides further confirmation that beIN's understanding regarding its inability to obtain legal representation in Saudi Arabia is accurate.

G. Saudi Arabia violates Article 61 of the TRIPS Agreement

1. Legal standard under Article 61 of the TRIPS Agreement

81. Qatar has set out in detail the legal standard of Article 61 of the TRIPS Agreement, element by element. To recall, Article 61 requires that Members actually apply criminal procedures and penalties, at least in situations of egregious commercial scale trademark counterfeiting or copyright piracy.

82. Such an interpretation of Article 61 does not imply that Members are under an obligation to actively prosecute all cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Rather, Article 61 mandates that Members prosecute such counterfeiting or piracy at least in some situations, particularly in egregious cases of conduct that qualifies as a crime. This is because the criminal procedures and penalties that appear on the books must be understood by potential infringers (as well as right holders) as having some meaning. Otherwise, the "{r}emedies available" will not be "sufficient to provide a deterrent", within the meaning of the second sentence of Article 61.

83. Further, the use of the phrase "to be applied" in Article 61 can be contrasted with the use of the phrases, *e.g.*, "are available" (in Article 41.1), "shall make available" (in Article 42), and "shall have the authority" (in Articles 44, 45 and 46) in other enforcement-related provisions in Part III of the TRIPS Agreement, in a manner that clarifies the special nature of the obligation in Article 61. Unlike other provisions in Part III, Article 61 requires that criminal procedures are "to be applied", at least in situations of egregious commercial scale trademark counterfeiting or copyright piracy.

84. If a WTO Member were to systematically refuse to apply criminal procedures and penalties against widespread, open, egregious commercial scale piracy—or to even encourage and participate in such piracy—that Member could not be considered as providing criminal procedures and penalties "*to be applied* at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale", within the meaning of Article 61. Such a WTO Member could not be found to have in place a regime that provides remedies that would be "sufficient to provide a deterrent" with respect to commercial scale copyright piracy, within the meaning of the second sentence of Article 61.

2. Saudi Arabia fails to apply criminal procedures and penalties in cases of wilful copyright piracy on a commercial scale

85. Saudi Arabia has failed to apply criminal procedures and penalties even for the most widespread, sophisticated pattern of broadcast piracy that the world has ever seen. The egregious nature of the beoutQ piracy is reflected in the large number of right holders that have been impacted, the widespread international attention garnered by beoutQ's brazen actions, and the Saudi government's open support for, promotion of and participation in the piracy.

86. Indeed, rather than initiating any criminal proceedings against beoutQ or applying any penalties against the perpetrators, the Saudi government has actively promoted and even participated in the beoutQ piracy. One public example is the Saudi government's sponsoring of the viewing of the 2018 FIFA World Cup on 294 screens, all showing beoutQ pirated broadcasts. Such participation in the beoutQ piracy by the Saudi government highlights Saudi Arabia's failure to apply

[23] Joint statement by FIFA, the AFC, UEFA, the Bundesliga, LaLiga, the Premier League and Lega Serie A regarding the activities of beoutQ in Saudi Arabia, 31 July 2019, **(Exhibit QAT-227)** (emphasis added).

criminal procedures and penalties, and its failure to make available remedies "sufficient to provide a deterrent", within the meaning of Article 61.

87. As the European Union stated in its responses to the Panel's post-hearing questions:

> if it is proven that the Saudi government supported, facilitated or even participated in the alleged piracy, it could be argued that Saudi Arabia does not have an effective criminal procedure or even that {Saudi Arabia} *de facto* does not provide for criminal procedures and penalties for infringements in the case of the piracy of beIN's content.[24]

Qatar has demonstrated that the Saudi government supported, facilitated, and participated in the beoutQ piracy. As revealed in the witness statement in Exhibit QAT-222, beoutQ was established and operated under the direction and control of the Government of Saudi Arabia. Accordingly, Qatar submits that Saudi Arabia does not have, in the words of the European Union, "an effective criminal procedure", and indeed Saudi Arabia "*de facto* does not provide for criminal procedures and penalties for infringements" involving piracy of content broadcast by beIN.

IV. SAUDI ARABIA'S AFFIRMATIVE DEFENSE

88. Saudi Arabia seeks to shelter its actions from scrutiny through offering a novel argument under Article 73(b) of the TRIPS Agreement. Saudi Arabia submits that, regardless of the character of the measures at issue referred to the Panel by the Dispute Settlement Body ("DSB"), the relevant action for purposes of this dispute is its decision to sever diplomatic relations with Qatar. It asserts that action in this form is justified under Article 73(b)(iii).

89. Qatar has shown that Saudi Arabia fundamentally misunderstands the nature of the security defense in Article 73(b)(iii), and has failed to defend the *specific measures at issue* and *claims* that form the "matter" referred to the Panel.

A. The interpretation of Article 73(b)(iii) of the TRIPS Agreement

1. Affirmative defense

90. Article 73(b) begins with the clause "{n}othing in *this* Agreement shall be construed to prevent" certain actions. Like other provisions that use this formulation, the language establishes an *exception* and an *affirmative defense* to obligations found elsewhere in the TRIPS Agreement.

91. The nature of Article 73(b)(iii) as an exception and an affirmative defense dictates the order of analysis for the Panel. The Panel must first address Qatar's substantive claims under the TRIPS Agreement to determine if there are violations, and then, second, turn to the justification invoked by Saudi Arabia.

92. A further consequence of Article 73(b)(iii) being an affirmative defense is that the party invoking the defense bears the burden of proof to substantiate its elements. A respondent must actually invoke the defense in respect of measures alleged to violate substantive provisions of the TRIPS Agreement.

2. "any action which it considers necessary for the protection of its essential security interests"

93. The words "any action" refer to measures at issue in a dispute. Absent the exception, these measures would be "prevent{ed}" by the application of substantive rules in the TRIPS Agreement.

94. It follows that the respondent must invoke the defense in connection with specific measures at issue, claimed by the complainant to violate the TRIPS Agreement. In a case (like this one) where a respondent argues that the measures at issue are <u>not</u> considered necessary, the defense does not apply, even if the respondent considers some <u>other</u> measure necessary for protection of its security interests.

95. The words "which it considers necessary" confer a margin of discretion on a Member to decide what "action" is necessary. However, this margin of discretion is not unbounded, and is subject to review by a panel. It is a foundational obligation of international law that treaties must

[24] Responses by the European Union to the Questions to the Third Parties, para. 22 (emphasis omitted).

be interpreted and performed in good faith. The words immediately following "which it considers necessary"—*i.e.*, "for the protection of its essential security interests"—set out the purpose for which a Member may take "action" under Article 73. Actions taken for other purposes, or actions not considered "necessary" for the protection of essential security interests, cannot in good faith be justified under Article 73(b). Thus, a panel must review the exercise of discretion to ensure that an "action", otherwise inconsistent with the TRIPS Agreement, is exercised for the protection of essential security interests, and not in pursuit of different or ulterior objectives.

96. In the expression "essential security interests", the terms "essential" and "security" are adjectives modifying the noun "interests". Among all the "interests" that a State may validly hold and legally protect, it is only a sub-category which is accommodated by the phrase "essential security interests". The panel in *Russia – Traffic in Transit* defined essential security interests as "relating to the quintessential functions of the state".[25]

3. "{t}aken in time of … emergency in international relations"

97. For the defense under Article 73(b)(iii) to justify an otherwise TRIPS-inconsistent measure, the defended action must be "taken in time of war or other emergency in international relations". The question whether there is a "war or other emergency in international relations" is a matter of *fact* to be assessed objectively by the Panel under Article 11 of the Dispute Settlement Understanding ("DSU").

98. The panel in *Russia – Traffic in Transit* correctly held that, given its ordinary meaning, and when read in its context, an "emergency" refers to "situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state".[26] Such a situation is apt to threaten "defense or military interests, or maintenance of law and order interests",[27] thereby triggering the need for "protection" of its "essential security interests" in the sense of the chapeau to Article 73(b). A mere political or economic dispute does not amount to an emergency in international relations.

B. Application of Article 73(b)(iii) of the TRIPS Agreement to the measures at issue

99. Saudi Arabia attempts to invoke the security exception to defend its failure to protect IP rights. However, Saudi Arabia's reliance on the security exception in Article 73(b)(iii) of the TRIPS Agreement fails.

100. First and foremost, the defense fails because Saudi Arabia, itself, has repeatedly stated that it does not consider five of the six measures at issue to be necessary for the protection of its essential security interests. Indeed, Saudi Arabia argues that the measures are "unrelated" to matters bearing upon its security interests,[28] in particular its severance of diplomatic relations with Qatar in June 2017. Thus, as the defense under Article 73(b) applies solely in respect of measures that are considered by the respondent to be necessary to protect essential security interests, the defense simply does not apply to five of the six measures at issue.

101. As for Saudi Arabia's reliance on the security defense with respect to a measure that is not being challenged in this dispute—namely, the severance of relations with Qatar—this is simply an irrelevant distraction, because Qatar does not challenge, in these proceedings, the severance of relations. Such severance is not a measure at issue, is not subject to claims of violation, and there is no suggestion in these proceedings that the TRIPS Agreement would "prevent" Saudi Arabia from cutting off diplomatic relations with Qatar. Thus, although Saudi Arabia considers that Article 73(b) addresses "the real dispute" between the parties,[29] it nevertheless acknowledges that the measures at issue and Qatar's claims—the matter referred to the Panel—are unrelated to that distinct dispute.

[25] Panel Report, *Russia – Traffic in Transit*, para. 7.71.
[26] Panel Report, *Russia – Traffic in Transit*, para. 7.76.
[27] Panel Report, *Russia – Traffic in Transit*, para. 7.76.
[28] Saudi Arabia's Opening Statement at the First Substantive Meeting, paras. 3, 49; *see also* Saudi Arabia's Closing Statement at the First Substantive Meeting, para. 6; Responses of the KSA to the Panel's Post-Hearing Questions to the Parties Following the First Substantive Meeting of the Panel, para. 53; Saudi Arabia's Second Written Submission, paras. 43-45, 50.
[29] Saudi Arabia's Opening Statement at the First Substantive Meeting, paras. 3, 4, 5, 17.

102. With respect to the sixth measure—the travel ban as it applies to IP protection—Saudi Arabia asserts that it "potential{ly}" considers that measure to be necessary, because the ban is related to the severance of diplomatic relations.[30]

103. Qatar has clarified that it does not challenge the travel ban in itself, but only its operation in combination with other measures to prevent Qatari nationals from protecting their IP rights. In particular, the travel ban imposed against Qatari nationals results in their inability to protect IP rights when operating together with, among others, the anti-sympathy measures, the June 2017 Circular, and the political gatekeeping function of the Saudi government with respect to copyright infringement actions.

104. As Qatar has explained, and Saudi Arabia has not attempted to refute, it is simply implausible that the comprehensive deprivation of the opportunity to protect IP rights could be considered necessary to protect Saudi Arabia's essential security interests. Saudi Arabia has indicated that the travel ban is related to its severance of relations with Qatar, which it, in turn, asserts relates to security interests. However, Saudi Arabia does not argue that the travel ban as it applies to IP protection, in conjunction with the other measures at issue, is somehow necessary for its security.

105. Saudi Arabia claims that it has not, in bad faith, relabeled commercial interests as essential security interests in order to avoid its trade obligations. As Qatar has demonstrated, however, beoutQ was created and supported in order to develop Saudi Arabia's budding media industry by driving out beIN and other broadcasters in the region, while lowering the cost for Saudi consumers to access popular sports and entertainment. In this way, Saudi Arabia does pursue commercial interests through its support for beoutQ, and its failure to abide by basic TRIPS Agreement obligations that would allow beIN and other broadcasters to defend their commercial position.

106. Moreover, Saudi Arabia's affirmative defense fails for another reason: because Saudi Arabia fails to show that any of the measures at issue were "taken in time of war or other emergency in international relations" in the sense of Article 73(b)(iii).

107. In the period immediately preceding the adoption of the measures at issue, relations between Qatar and Saudi Arabia were cordial and cooperative. Saudi Arabia's Second Written Submission points to three factors that it says show an emergency. However, Saudi Arabia's contentions do not survive scrutiny.

108. First, Saudi Arabia refers to the severance of relations itself, saying this action triggered an emergency. However, inasmuch as Saudi Arabia tries to defend its decision to sever relations by reference to its severance of relations, the argument is tautological. Second, Saudi Arabia asserts that Qatar repudiated certain "Riyadh Agreements" through a letter in February 2017, triggering an emergency. However, the translation of the letter that Saudi Arabia relies upon to argue that Qatar moved to terminate the Agreements is incorrect and misleading. Saudi Arabia's own conduct, including through registering the Riyadh Agreements with the United Nations in 2019, shows that it does not actually consider that Qatar repudiated the Agreements in 2017. Third, Saudi Arabia's assertion that Qatar interferes in the affairs of other States is false. The broad and profound cooperation between Saudi Arabia and Qatar before and after the severance of relations, as well as the absence of any expression of concern prior to June 2017, belie the assertion that disagreements between Qatar and Saudi Arabia rise to the level of an "emergency" in international relations.

109. Because Saudi Arabia has pointed to no "war or other emergency", none of its actions can be qualified as "taken in time of" such circumstances. Accordingly, inasmuch as Saudi Arabia defends any relevant action under Article 73(b)(iii), such action does not fall within the scope of the defense.

V. CONCLUSION AND REQUEST FOR RELIEF

110. For the reasons set out in its submissions to date, Qatar respectfully requests that the Panel find that Saudi Arabia's measures violate:

- Article 3.1 of the TRIPS Agreement, because they accord to Qatari nationals treatment that is less favourable than that accorded to Saudi nationals with regard to the protection of intellectual property;

[30] Responses of the KSA to the Panel's Post-Hearing Questions to the Parties Following the First Substantive Meeting of the Panel, para. 53.

- Article 4 of the TRIPS Agreement, because, with regard to the protection of intellectual property, they fail to extend immediately and unconditionally to Qatari nationals advantages granted to nationals of other countries;
- Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention (1971), as incorporated into Article 9 of the TRIPS Agreement, because they fail to provide authors of works with the exclusive rights mandated therein;
- Article 14.3 of the TRIPS Agreement, because they fail to provide broadcasting organisations with the requisite exclusive rights;
- Article 41.1 of the TRIPS Agreement, because they fail to make available to Qatari nationals enforcement procedures, as specified in Part III of the TRIPS Agreement;
- Article 42 of the TRIPS Agreement, because they fail to make available to Qatari nationals civil judicial procedures concerning the enforcement of intellectual property rights, including *inter alia* the right to be represented by independent legal counsel; and
- Article 61 of the TRIPS Agreement, because they fail to apply criminal procedures and penalties to the wilful commercial scale piracy of beIN's copyrighted material and that of its licensors.

111. Based on these findings and conclusions, Qatar respectfully requests that, pursuant to Article 19.1 of the DSU, the Panel recommend that the DSB request Saudi Arabia to bring itself into conformity with its obligations under the TRIPS Agreement.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE KINGDOM OF SAUDI ARABIA

1. The Real Dispute Before the Panel Concerns Saudi Arabia's Essential Security Interests and Does Not Concern WTO Obligations

1. As the Panel is aware, since 5 June 2017, Saudi Arabia has had no diplomatic or consular relations with the complaining Party because the Saudi Government concluded that any direct or indirect interaction with the complaining Party would harm Saudi essential security interests. Saudi Arabia has limited its engagement in this dispute to submitting arguments on the application of *Security Exceptions* under Article 73 of the World Trade Organization ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), and providing the Panel with information regarding its *bona fide* invocation of the *Security Exception*.

2. The complaining Party's intent is using WTO proceedings to project the patently false impression to the international community, including third party participants in this dispute, that the complaining Party and Saudi Arabia interact on cordial terms. Nothing could be further from the truth. Saudi Arabia will not interact with the complaining Party until it conforms to international norms prohibiting state support for terrorism and rejects extremism, as it agreed to under the "Riyadh Agreements", as described below.

3. Based on Saudi Arabia's approach to protecting its essential security interests, we have avoided all direct or indirect interaction with the complaining Party throughout these proceedings. Once again, we appreciate the Panel's understanding in this regard.

4. Saudi Arabia profoundly regrets that a geopolitical confrontation with terrorism and extremism is unfolding before Panel in the guise of a dispute about WTO rules. As Saudi Arabia has made clear in all statements and submissions to the Panel, the real dispute behind this false "intellectual property" case is the diplomatic, political, and security crisis among the Cooperation Council for the Arab States of the Gulf (known as the "GCC"), involving Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates ("UAE"), and other countries in the region, regarding the complaining Party's State support for terrorism and promotion of extremism. The actions of the complaining Party violate its international obligations, including under the "Riyadh Agreements", that were entered into by the GCC Countries between 2013 and 2014 in a collective effort to address the dangers of terrorism and extremism based on a common definition and approach to protecting our shared essential security interests.[1]

5. As detailed in Saudi Arabia's statements and submissions to the Panel,[2] years of diplomatic effort to encourage the complaining Party to comply with its international obligations ended in February 2017 when the complaining Party repudiated the Riyadh Agreements,[3] which brought down the façade of its cooperation against terror and extremism. Between February and June 2017, and thereafter, the complaining Party continued to act against the essential security interests of Saudi Arabia and other countries in the region, in violation the explicit terms of the Riyadh Agreements.[4] As recent revelations continue to show, the acts of complaining Party continue to pose serious threats to the region and to the global community.[5]

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[1] Second Written Submission of the Kingdom of Saudi Arabia, 30 August 2019 ("KSA Second Written Submission"); Opening Statement of the Kingdom of Saudi Arabia at the First Substantive Meeting of the Panel, 9 July 2019, ("KSA Opening Statement, First Panel Meeting"), para. 5 and n. 3 (The First Riyadh Agreement, 23 and 24 November 2013 (Exhibit SAU-2)); the Mechanism Implementing the Riyadh Agreements (the "Implementing Mechanism"), 17 April 2014 (Exhibit SAU-3); and the Supplementary Riyadh Agreement, 16 November 2014 (Exhibit SAU-4), are collectively referenced as the "Riyadh Agreements"); *see also* KSA Opening Statement, First Panel Meeting, paras. 23-36.

[2] Ibid.

[3] *Ibid*, para. 34, citing Exhibit ARE-3.

[4] *Ibid*, para. 35.

[5] *See* KSA Second Written Submission, para. 8.

6. In response to Saudi Arabia's efforts to confront the complaining Party and to obtain compliance with the Riyadh Agreements, the complaining Party has reacted by taking ill-conceived actions against Saudi Arabia based on spurious claims in several domestic and international fora. The WTO is one of those fora where the complaining Party is exerting great efforts and resources to advance its agenda of unsubstantiated retaliation.

7. The facts and circumstances underlying the real dispute before the Panel complicate the Panel's task of making an objective assessment of "the matter before it" because the "matter" actually in dispute relates exclusively to measures taken to sever diplomatic and political relations in the context of the well-known political and geopolitical confrontation. In order for the Panel to discharge its obligation, it must recognize and take full consideration of the real geopolitical dispute that has been brought before the WTO as a trade dispute. In particular, the political, geopolitical, and national security elements of the real, non-trade dispute underlying this proceeding provide reasons for the Panel to question the good faith of the complaining Party in bringing this case to the WTO in the first place, and to consider carefully how the real dispute taints the arguments and evidence presented by the complaining Party.[6]

2. Jurisdictional Issues

2.1. The Matter Before the Panel

8. As established before the Panel, the terms of reference of the "matter" referred to the WTO Dispute Settlement Body ("DSB") in this case, as well as the relevant provisions of the TRIPS Agreement cited by Saudi Arabia, including Article 73(b)(iii), regarding the "action which [Saudi Arabia] considers necessary for the protection of its essential security interests."[7]

9. Therefore, the "matter" before the Panel necessarily covers the comprehensive "measures" taken by Saudi Arabia to sever diplomatic and consular relations, as included in the Panel's terms of reference , as well as the *Security Exceptions* cited by Saudi Arabia.[8]

10. The Panel's terms of reference are as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Qatar in document WT/DS567/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[9]

11. The Panel's terms of reference cover the "matter" referred to the DSB in this case, as well as the relevant provisions of the TRIPS Agreement cited by Saudi Arabia, including Article 73(b)(iii), regarding the "action which [Saudi Arabia] considers necessary for the protection of its essential security interests." (Emphasis added.)

12. The "matter" referred to the DSB by the complaining Party is characterized as having a direct relationship between the comprehensive "measures" taken by Saudi Arabia to sever diplomatic and consular relations, and the alleged impact of these measures on the protection of intellectual property in Saudi Arabia. The matter referred to the DSB in document WT/DS567/3 provides as follows:

> A. Measures at issue…
>
> In June 2017, Saudi Arabia imposed a scheme of diplomatic, political, and economic **measures** against Qatar. **Such measures** impacted,

[6] This applies in particular to evidence such as "witness statements" that cannot be substantiated under the procedures and resources available in WTO dispute proceedings.

[7] KSA Second Written Submission, paras. 22-30.

[8] Ibid.

[9] *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, Constitution of the Panel Established at the Request of Qatar, Note by the Secretariat, WT/DS567/4 (19 February 2019), para. 2 (emphasis added).

> inter alia, the ability of Qatari nationals to protect intellectual property rights in Saudi Arabia.[10]

13. Although the complaining Party's characterization of the measures is not accurate, the complaining Party emphasized that its companies had been "severely impacted by these measures",[11] and refers to the comprehensive "measures" as the basis for Saudi Arabia to apply additional, related measures identified by the complaining Party that allegedly impact the protection of intellectual property.

14. Notwithstanding the complaining Party's current focus on alleged acts and omissions based on additional related measures challenged as allegedly taken pursuant to and in connection with the comprehensive "measures" taken by Saudi Arabia, the complaining Party cannot deny Saudi Arabia the opportunity to raise defenses, especially based on *Security Exceptions*, with reference to a measure affirmatively included in the Panel's terms of reference. Even though Saudi Arabia's characterization of the measure's nature, scope, and application (*i.e.*, not related to intellectual property proportion) may not match the characterization by the complaining Party (*i.e.*, severely impacting the protection of its companies' intellectual property), the extension to and coverage of the very same comprehensive measures within the Panel's terms of reference has been asserted by the complaining Party since at least 19 November 2018 and cannot be disputed at this stage of the proceedings.

15. Second, consistent with the structure and meaning of Article 73 of the TRIPS Agreement, there is no requirement that actions necessary to protect essential security interests must match the substantive claims raised by the complainant. Although a complaining party must make claims concerning the "matter" referred to the DSB, this does not limit a panel's consideration of relevant defenses or arguments raised by a respondent, or a panel's competence to determine the actual subject matter of the dispute based on the arguments of both of the Parties.[12]

16. In any case, when a respondent Member raises a defense based on a measure that it has taken, especially based on *Security Exceptions* under Article 73, to protect its essential security interests, the panel must consider the arguments raised by the respondent, consistent with its Terms of Reference. The complainant in a WTO dispute cannot limit in any way the measures referenced or arguments made by the Member invoking *Security Exceptions*.

17. A panel should acknowledge that in the context of *Security Exceptions*, a *bona fide* emergency in international relations "involves a fundamental change in circumstances which radically alters the factual matrix in which the WTO-consistency of measures is to be considered."[13] Based on this "fundamental change in circumstances", the Panel here should recognize that, due to the political and security matters and stark differences at issue, measures referenced as the basis for *Security Exceptions* may not always directly match the measures identified by the complaining party in a WTO dispute.

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[10] *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, Request for the Establishment of a Panel by Qatar, WT/DS567/3 (19 November 2018), para. 6 (emphasis added).

[11] *Ibid,* para. 7 (emphasis added).

[12] The Rules of Court of the International Court of Justice (ICJ), similar to the DSU,

> require an applicant to indicate the 'subject of the dispute' in the application. The application shall also specify the "precise nature of the claim" (Art. 38, para. 2, of the Rules of Court; *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29).

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection Judgment of 24 September 2015, para 25. The ICJ has ruled that

> [i]t is for the Court itself, however, to determine on an objective basis the subject-matter of the dispute between the parties, that is, to "isolate the real issue in the case and to identify the object of the claim" (*Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 262, para. 29 ; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30).

Ibid, para. 26. The same inherent competence, together with the requirement to make an "objective assessment" of the matter under Article 11 of the DSU, requires that the Panel here "isolate the real issue in the case", and consider whether the "real issue" is limited to specific claims of intellectual property violation, or, as Saudi Arabia insists, relates to the comprehensive measures themselves, and not to intellectual property at all.

[13] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019, , ("*Russia – Traffic in Transit*"), para. 7.108.

18. Finally, an affirmative defense based on a non-trade measure that a Member considers necessary to protect its essential security interests requires no predicate violation of substantive WTO rules. The original intent behind the *Security Exceptions* was not focused on justifications for substantive violations, but rather on a "non-violation" approach, based on the understanding that non-trade, political or security actions falling under the agreed *Security Exceptions* should not be subject to dispute settlement provisions.[14] In this connection, Saudi Arabia notes that Article 64 of the TRIPS Agreement on *Dispute Settlement* establishes a direct reference to Article XXIII of the GATT (1994), under which "non-violation" claims can be brought, obviously without establishing a "violation" of substantive provisions of the TRIPS Agreement.

2.2. Limited Jurisdiction to Assess Essential Security Interests

19. Saudi Arabia's invocation of Article 73 of the TRIPS Agreement justifies our refusal to engage with the complaining Party at all, including with its claims, in this WTO dispute settlement proceeding. As Saudi Arabia has stressed throughout these proceedings, our refusal to engage with the complaining Party at all, including engaging with its claims in this dispute, is based on our sovereign determination that any such engagement would undermine our essential security interests. This is the very essence of severing diplomatic and consular relations, and this is why we emphasized in paragraph 2 of our First Written Submission that "[t]he severance of relations between the two countries and the publicly-stated reasons for the measures of Saudi Arabia constitute the only relevant facts in this dispute."

20. Article 73 of the TRIPS Agreement is very clear that

> **Nothing** in this Agreement shall be construed…
>
> (b) to prevent a Member from **taking any action** which **it considers necessary** for the protection of its **essential security interests**[.] (Emphasis added.)

21. Based on the explicit text of Article 73, the Panel may not construe any aspect of the TRIPS Agreement to prevent a Member from taking any action that it considers necessary for the protection of its essential security interests in time of an emergency in international relations.

22. Therefore, the Panel is prevented from making findings on any of the measures and claims as raised by the complaining Party because that would necessarily include direct engagement by Saudi Arabia, and the TRIPS Agreement cannot be construed to require this result in light of our invocation of the *Security Exceptions*.

23. Rather, the Panel must limit its determination to whether an emergency in international relations exists and whether Saudi Arabia invoked the Security Exceptions in good faith.

24. The evidence that Saudi Arabia has placed on the record before the Panel in good faith establishes the existence of an emergency in international relations and that Saudi Arabia has invoked the Security Exceptions in good faith. Therefore, the Panel should not make any other finding in this dispute.

2.3. Impossibility of Satisfactory Settlement

25. Article 3.7 of the Dispute Settlement Understanding ("DSU") requires that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful." Given the comprehensiveness of the diplomatic and economic measures imposed not just by Saudi Arabia but also by other WTO Members in the region, and the underlying rationale for

[14] Third Party Oral Statement of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), paras. 12 to 16; Third Party Submission of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 27.

those measures, it is clear that the complaining Member has not exercised sound judgement in taking action under the DSU.

26. The function of a panel under Article 11 of the DSU is to "assist the [Dispute Settlement Body" ("DSB")] in making the recommendations or in giving the rulings provided for in the covered agreements." Article 3.4 in turn requires that, "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter." Article 3.7 also provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." WTO dispute settlement thus has a limited and specific purpose: to help settle *trade* disputes. A panel is required to make findings and recommendations only where the findings help resolve a dispute. Indeed, panels are encouraged to exercise judicial economy in respect of issues that are not necessary for such settlement.

27. In the same vein, where the facts of a case are such that no findings or recommendations by a panel are capable of resolving, or even contributing to the settlement of a dispute, the panel should exercise considerable discretion before proceeding further. This dispute is such a case. Saudi Arabia has severed all diplomatic and economic ties with the complaining Member in a transparent manner, and it has done so in cooperation with other Members in the region. This case does not concern whether the WTO or some other forum is more appropriate for the settlement of a trade dispute. Rather, the only relevant issue is that this is not a trade dispute at all.

28. In light of the severity of the emergency arising from the complaining Member's actions and the resulting comprehensive severance of all diplomatic and economic relations between Saudi Arabia and the complaining Member, no finding or recommendation by the Panel, and no recommendation and ruling by the DSB, can be made that could secure a positive solution or achieve a satisfactory settlement in this matter. Therefore, no finding or recommendation should be made, and the Panel should refrain from proceeding further with this case in order to avoid further harm to the integrity of the WTO dispute settlement mechanism.

3. Saudi Arabia's *Bona Fide* Invocation of the *Security Exceptions*

29. To the extent the Panel decides that has jurisdiction to consider this dispute, it should recognize that Saudi Arabia has demonstrated that, under the facts and circumstances of its invocation of *Security Exceptions,* it has satisfied that the conditions for invoking Article 73 of the TRIPS Agreement.[15]

3.1. The Emergency in International Relations

30. Saudi Arabia considers that an "emergency in international relations" should be understood to mean "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."[16] Members may have differing perceptions of what constitutes an emergency in international relations, so deference must be accorded to each Member's characterization of situations as "emergencies".[17] Finally, Saudi Arabia notes the temporal relation that should exist between qualifying emergencies and related "actions" necessary to protect essential security interests.

31. Saudi Arabia has established the existence of an emergency in international relations arising from the complaining Party's support for terrorism and extremism. In particular, the complaining Party, as a signatory to the Riyadh Agreements and the Mechanism Implementing the Riyadh Agreements (known as the "Implementing Mechanism"), agreed that the Riyadh Agreements were

[15] KSA Opening Statement, First Panel Meeting; KSA Second Written Submission, paras 31-73.

[16] *Ibid*, paras. 7.76 and 7.111.

[17] *See Russia – Transit*, para. 7.76 ("Such situations 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." (Footnote omitted.)); European Union's Third Party Integrated Executive Summary, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 18 (While the party invoking *Security Exceptions* "should also provide sufficient explanations and evidence of the causes that motivated the severance of diplomatic relations. This does not imply a high evidentiary threshold.") and para. 29 ("Such situations 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."); Third Party Submission of the United Arab Emirates, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 9.

the basis for maintaining "security and stability of the GCC Countries" against terrorism and extremism affecting their internal and external political and security issues.[18]

32. The complaining Party's renunciation of the Riyadh Agreements and continuing, unabated support for terrorism and extremism created the current emergency in international relations,[19] which has persisted since June 2017 and has deepened based on recent developments.

33. The complaining Party has created an emergency in international relations by failing to abide by its international agreements to cease support for terrorism and extremism. Saudi Arabia considers that the only effective measure to address the emergency is the severance of all diplomatic and consular relations with the complaining Party.[20]

34. In order to find a solution to a profound, regional crisis arising from the complaining Party's support for terrorism and extremism, Saudi Arabia engaged in years of active diplomacy at the highest national levels as follows:

- In November 2013, Bahrain, Kuwait, Qatar, Saudi Arabia, and the UAE signed the "First Riyadh Agreement", which established a collective understanding of the causes for, and solutions to, instability and violence in the region, and included a collective commitment to oppose terrorism and extremism.[21]

- On 5 March 2014, due to Qatar's violations of the First Riyadh Agreement, and following the failure high-level diplomatic efforts to re-confirm the seriousness of the matter, Saudi Arabia, along with Bahrain and the UAE, recalled their Ambassadors from Qatar.[22]

- On 17 April 2014, following high-level, intensive diplomatic efforts to resolve the political dispute, all six countries of GCC, including Qatar, signed the Mechanism Implementing the Riyadh Agreements which identified the agreed "threats" to "security and stability" of GCC Countries, reaffirmed the obligations undertaken in the First Riyadh Agreement, and established specific procedures to ensure compliance with commitments already undertaken with regard to issues covered by the Riyadh Agreements.[23]

- In November 2014, based on Qatar's undertakings in the Supplementary Riyadh Agreement, Saudi Arabia, Bahrain, and the UAE returned their ambassadors to Qatar.[24]

- Between November of 2014 and June of 2017, Qatar continued to violate the explicitly agreed terms of the Riyadh Agreements by:

    - Supporting and harboring extremist individuals and organizations, many of whom had been designated as terrorists by the United Nations and by individual countries;

    - Supporting and allowing terrorist and extremist groups to use Qatar-based and Qatar-sponsored media platforms to spread their messages; and

    - Engaging in activities that threatened the security and stability of GCC Countries as detailed in reports by intelligence chiefs, including as mandated under the Riyadh Agreements, the details of which will not be presented in the context of this WTO dispute.[25]

[18] KSA Second Written Submission, para. 15; *see also* KSA Opening Statement, First Panel Meeting, para. 28.
[19] *Ibid,* para. 45.
[20] First Written Submission of the Kingdom of Saudi Arabia ("KSA First Written Submission"), paras. 1, 2 and 7; KSA Opening Statement, First Panel Meeting, para. 6.
[21] KSA, First Written Submission, para. 26.
[22] *Ibid,* para. 27.
[23] *Ibid,* para. 28.
[24] *Ibid,* para. 32.
[25] *Ibid,* para. 33.

- On 19 February 2017, Qatar requested the termination of the Riyadh Agreements.[26]

- Between 19 February and 5 June 2017, Qatar continued to act against Saudi Arabia's essential security interests, in violation of the explicit terms of the Riyadh Agreements.[27]

- On 5 June 2017, the Kingdom of Saudi Arabia severed diplomatic and consular relations with the complaining Party.[28]

35. Given that the complaining Party signed the Riyadh Agreements, Saudi Arabia had good reason to believe that the agreed solution would be implemented, but instead the complaining Party's request to terminate that framework gave rise to an emergency in international relations, during which Saudi Arabia took action to sever diplomatic and consular relations with the complaining Party.

36. In addition to confirming its unwillingness to abide by the terms of the Riyadh Agreements, the complaining Party continues to violate the explicitly agreed terms of the Riyadh Agreements by engaging in the following acts:

- **Financial support for instability, extremism, and terrorism;**

- **Harboring and allowing operations by extremists and terrorists;**

- **Supporting interference in other countries' internal affairs; and**

- **Disseminating propaganda in support of extremism and terrorism.[29]**

37. The increased material risk of these existential threats to peace and stability causes an emergency in international relations to which Saudi Arabia and other countries in the region reacted based on their sovereign responsibility to protect their people, territories, and governments from such existential dangers.

3.2. Saudi Arabia's Essential Security Interests

38. An "essential security interest" should be understood to mean an interest "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."[30] If a panel were to construe a provision of the TRIPS Agreement to require a Member to take action that it considered to subvert its essential security interests, this would violate the text of Article 73, and would not be acceptable.[31]

[26] *Ibid,* para. 34.
[27] *Ibid,* para. 35.
[28] *Ibid,* para. 1.
[29] *Ibid*, para 44.
[30] *Russia – Transit*, para. 7.130.
[31] *Russia – Transit*, para. 7.131 ("The 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, it is left, in general, to every Member to define what it considers to be its essential security interests.") and para. 132 ("However, this does not mean that a Member is 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."); Third Party Executive Summary of Australia, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 8 ("Australia agrees with the panel's finding in Russia – Traffic in Transit that it is for every Member to define for itself what it considers its essential security interests."); Executive Summary of Brazil, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 14 ("It stands out that the language of Article 73 – 'which it considers' – confers a great deal of discretion regarding the necessity of the measure."); European Union's Third Party Integrated Executive Summary, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567) ("EU Executive Summary"), paras. 31 ("The terms "its essential security interests" should be interpreted in such a way as to allow Members to identify their own security interests and the desired level of protection without having the Panel second-guess the value judgment as to the legitimacy of the interest."); Third Party Executive Summary of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 12 ("Accordingly Article 73(b)(iii) reflects a Member's

39. Saudi Arabia defines its relevant "essential security interest" in carrying out its central sovereign duty of protecting Saudi citizens and population, government institutions, and territory from the threats of terrorism and extremism,[32] which have led to war, instability, and general unrest in our region.

3.3. Measures that Saudi Arabia Considers Necessary to Protect its Essential Security Interests

40. An "essential security interest" should be understood to mean an interest "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."[33] If a panel were to construe a provision of the TRIPS Agreement to require a Member to take action that it considered to subvert its essential security interests, this would also be inconsistent with the broad agreement in interpretation that a panel may not review the "necessity" of measures taken by Members to protect their self-defined, *bona fide* essential security interests during an emergency in international relations.[34]

41. **The deference that a panel should accord to Members' determination of the necessity to take actions to protect their essential security interests during emergencies in international relations is limited only by the application of the principle of good faith.**[35] Saudi Arabia recalls that the obligation of good faith is a general principle of law as well as a principle of general international law that applies to all WTO treaty commitments. As recognized in WTO jurisprudence,[36] the obligation of good faith is codified under the Vienna Convention on the Law of Treaties, in Article 31(1): "[a] treaty shall be interpreted in good faith …"; and in Article 26:"[e]very treaty … must be performed [by the parties] in good faith"[37]. Therefore, the obligation of good faith applies to Members' application of *Security Exceptions*.

42. In light of the complaining Party's decisions and actions, and the developments described above prior to June 2017, and following Saudi Arabia's further consideration and consultation with other friendly countries in our region regarding the remaining viable options to protect our essential security interests in view of the complaining Party's failure to abide by its commitments under the Riyadh Agreements, Saudi Arabia determined that severing all diplomatic and consular relations was the only way to protect effectively its essential security interests.

43. In Saudi Arabia's 5 June 2017 announcement of the severance of diplomatic and consular relations with the complaining Party, it publicly articulated the rationale behind the measures as follows:

> the Government of the Kingdom of Saudi Arabia emanating from exercising its sovereign rights guaranteed by [] international law and protecting its national security from the dangers of terrorism and extremism has decided to sever diplomatic and consular relations with

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.").

[32] *Ibid*, paras. 21, 39.

[33] *Russia – Transit*, para. 7.130.

[34] See note 30 supra.

[35] *See Russia – Transit*, para. 7.132, stating that "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."

[36] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, ("US – Shrimp"), para. 158; Appellate Body Report, United States – Tax Treatment for "Foreign Sales Corporations", WT/DS108/AB/R, adopted 20 March 2000 ("US – FSC"), para. 166; Appellate Body Report, United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R, adopted 5 November 2001 ("US – Cotton Yarn"), para. 81; and Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001 ("US – Hot-Rolled Steel"), para. 101.

[37] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155.

> the State of Qatar, close all land, sea and air ports, prevent crossing into Saudi territories, airspace and territorial waters.[38]

44. Saudi Arabia has severed diplomatic and consular relations in order to avoid contact with the complaining Party in order to protect its essential security interests from terrorism and extremism. As Saudi Arabia has made clear again above, we consider avoiding state-to-state interactions under the extremely politicized circumstances of these WTO dispute settlement procedures as *"necessary"* to protect our essential security interests. Saudi Arabia considers that any interaction with the complaining party, including in WTO dispute settlement proceedings, will subvert our essential security interests.[39]

3.4. Respect for the Obligation of Good Faith

45. In applying the obligation of good faith to the *Security Exceptions* under Article XXI of the General Agreement on Tariffs and Trade ("GATT 1994"), the panel in *Russia – Transit* observed that

> [t]he obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system 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.[40]

46. While a panel must defer to Members' characterization of situations as emergencies in international relations, and to Members' determination of their own essential security interests and of the necessity of actions to protect such interests, a panel must limit its review to whether the Member invoking *Security Exceptions* is acting in good faith, as noted above. In order to assess compliance with the good faith obligation, a panel could assess whether the Member has re-labelled trade interests as essential security interests in order to avoid its trade obligations,[41] and could also consider the relationship between the measures and the essential security interests at issue, if it considers that these tests would support its assessment of the *bona fide* invocation of *Security Exceptions*.

47. Saudi Arabia has established in submissions to the Panel that no credible basis exists to find that Saudi Arabia took its comprehensive actions on 5 June 2017 for any other reason than because they are necessary to protect its essential security interests.[42] Saudi Arabia's comprehensive measures were a direct response to and remain strictly related to the emergency in international relations that was created by the actions of the complaining Party. Therefore, Saudi Arabia cannot be considered to have "re-labelled" its trade interests as essential security interests in order to avoid its trade obligations. In fact, the opposite is the case here: the complaining Party has "re-labelled" a dispute about essential security interests as a "trade" dispute.

48. In the course of these proceedings, the Panel "invite[d] Saudi Arabia to provide the information that it considers relevant to the Panel's assessment of Saudi Arabia's good faith conduct in connection with the invocation of the security exception in Article 73."[43] Saudi Arabia has provided to the Panel information responsive to the issues that it considered relevant to the Panel's assessment of our good faith conduct in connection with the invocation of the *Security Exceptions* in Article 73. Saudi Arabia provided the requested information in the framework of the six issues below that the Panel identified in Question 30 of the Post-Hearing Questions to the Parties Following the First Substantive Meeting of the Panel, as follows:

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[38] KSA First Written Submission, para. 1 and Exhibit SAU-1.
[39] *Ibid*, para. 37.
[40] *Russia – Transit*, para. 7.133 (footnote omitted).
[41] *Russia – Transit*, para. 7.133.
[42] *See, e.g.*, KSA Opening Statement, First Panel Meeting, para. 49.
[43] *See* Panel's Post-Hearing Questions to the Parties Following the First Substantive Meeting of the Parties, Question 29.

(a) Please elaborate further on whether Saudi Arabia is asserting that any of the following alleged acts or omissions are "action which it considers necessary for the protection of its essential security interests" for purposes of Article 73 of the TRIPS Agreement:

49. Before addressing the information provided in good faith by Saudi Arabia concerning the six alleged acts or omissions identified by the Panel, Saudi Arabia would like to re-confirm that, with the possible exception of certain travel restrictions, no action taken in June 2017 as part of the measures against the complaining Party was an "action which [Saudi Arabia] consider[ed] necessary for the protection of its essential security interests" for purposes of Article 73 of the TRIPS Agreement" in relation to intellectual property rights.[44]

50. As noted above, the relevant company of the complaining Party faced legal actions in Saudi Arabia before 2017 due to violations of Saudi competition law and its failure to satisfy Saudi Arabia's laws and regulations regarding broadcasting.[45] In connection with these legal actions, the relevant company's temporary license lapsed due to legal issues arising before and wholly unrelated to the comprehensive measures applied by Saudi Arabia on 5 June 2017.[46]

51. Notwithstanding the absence of the relevant company of the complaining Party from the Saudi market, third parties' interests will always be protected directly in Saudi Arabia by entities not found to have illegally distributed digital content, including original owners of copyright.[47] Alternatively, non-discriminatory distribution methods have been adopted to protect the interests of copyright owners, consistent with WTO rules.[48]

(1) the 19 June 2017 Circular (stating that distribution of beIN content would lead to penalties and fines and the loss of legal right to protect related IP rights)

52. Saudi Arabia would like to confirm that the heading above, as originally presented by the complaining Party, does not accurately reflect the text of the Circular. In no way does the Circular state that the legal distribution of content would lead to penalties and fines and the loss of the legal right to protect related IP rights. In response to the Panel's invitation to provide information regarding Saudi Arabia's good faith conduct, we provided to the Panel a detailed description of the relevant Saudi legal regime, as follows:

53. First, the Circular represents an accurate description of Saudi law, as explained further below, and as stated by Saudi Arabia in response to the Panel's previous questioning as follows:

> **Broadcasting Licensing Requirements**
>
> 28. Saudi Arabia welcomes the legal distribution in the Kingdom of copyright-protected broadcasts in accordance with Saudi law. In order to be licensed as a broadcaster, certain objective criteria must be satisfied specific to the broadcasting business, and then generally applicable Saudi law must be observed, including copyright law, publications law, competition law, criminal law, etc. Broadcasting approval requirements are set out in the regulations of the General Commission for Audiovisual Media.[11] A broadcasting license may not be renewed or can be cancelled if its holder does not comply with broadcasting laws and regulations or with any other general Saudi law.
>
> 29. There is no specific "applicable law" that penalizes an unlicensed entity with the loss of the legal right to protect any related intellectual property rights. However, for the sake of clarity and to remove any

[44] Responses of the Kingdom of Saudi Arabia to the Panel's Post-Hearing Questions to the Parties Following the First Substantive Meeting of the Parties, sent on 12 July 2019, dated 26 July 2019 ("KSA 26 July Responses"), para. 75.
[45] *Ibid*, para. 28.
[46] *Ibid*, para. 51; KSA Second Written Submission, para. 51.
[47] *Ibid*, paras. 48-49.
[48] *Ibid*, paras. 37-38.

> doubt, Saudi Arabia confirms that any such loss of the legal right to protect any related intellectual property rights would need to be limited to the relevant entity's own original content contained in its programming, and would not apply to content contained in its programming [licensed] to it by third parties, which can always be protected from illegal broadcasting by third party owners.[12]

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[11] A summary of GCAM's relevant regulations for broadcasters is attached at Exhibit SAU-19.

[12] See Exhibit SAU-21.[49]

54. Second, the Circular was informative in nature only and did not change the status of or revoke the legal rights of any entity. In June 2017, the relevant company of the complaining Party was not licensed and did not have the right to operate in Saudi Arabia. This has been the case since December of 2016, when the temporary license of the relevant company of the complaining Party lapsed due to the relevant company's failure to comply with the generally applicable licensing conditions set out in a letter from the General Commission for Audiovisual Media ("GCAM") dated 13 November 2016.[50] In addition, the relevant company of the complaining Party does not have the right to operate in Saudi Arabia due to its failure to comply with competition law of Saudi Arabia, as established on the record before the Panel.[51]

55. Third, as set out above in paragraph 29 of the Responses of the Kingdom of Saudi Arabia to the Panel's Post-Hearing Questions to the Parties Following the First Substantive Meeting of the Parties, unlicensed distributors of illegally distributed content do not have a right to protect copyright in such illegally distributed content. However, **third party content owners or other entities that have not been found to have engaged in illegal distribution never lose their right to protect and enforce their legal rights in Saudi Arabia.** Therefore, Saudi law as such and as applied is fully consistent with the TRIPS Agreement.[52]

56. Fourth, although Saudi authorities are keenly aware of efforts by unlicensed distributors to distribute digital content in Saudi Arabia, no evidence has been established to take action against such illegal distribution. Saudi Arabia described the situation in responses to the Panel's questions as follows:

> **Rights to Protect Intellectual Property**
>
> > 47. Saudi Arabia is aware that entities have been distributing unlicensed media content in Saudi Arabia after 19 June 2017. However, no credible evidence exists to link such distribution to the wilful conduct of companies of the complaining Party or related entities. Therefore, no entity has lost the legal right to protect any related IP rights in Saudi Arabia. beoutQ has not been licensed by Saudi authorities, so it has no right to protect its own copyright content distributed in Saudi Arabia.[53]

57. Therefore, based on the description above, Saudi law as applied in this situation is fully consistent with the TRIPS Agreement. Saudi Arabia hereby confirms to the Panel once again that no entity has lost the legal right to protect any related IP rights in Saudi Arabia.

58. Saudi Arabia would like to confirm once again on the record before the Panel that it affords copyright protection to all entities even if they are not licensed to broadcast in Saudi Arabia, with

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[49] KSA 26 July Responses.
[50] *See* Exhibit SAU-29.
[51] KSA 26 July Responses, para. 51.
[52] *See also*, KSA Second Written Submission, para. 54.
[53] KSA 26 July Responses (footnote omitted).

the exception of entities found to have distributed content illegally (*i.e.*, without a broadcasting license) in Saudi Arabia.

59. In response to the request made by the Panel during its Second Substantive meeting, Saudi Arabia recalls for the record its Oral Statement at the Second Substantive Meeting that:

- "In order to be licensed as a broadcaster, certain objective criteria must be satisfied specific to the broadcasting business, and then generally applicable Saudi law must be observed…." Therefore, broadcasting in Saudi Arabia without a license is illegal.

- "A broadcasting license may not be renewed or can be cancelled if its holder does not comply with broadcasting laws and regulations or with any other general Saudi law."

- "[U]nlicensed distributors of illegally distributed content do not have a right to protect copyright in such illegally distributed content."

- "[A]ny such loss of the legal right to protect any related intellectual property rights would need to be limited to the relevant entity's own original content contained in its programming, and would not apply to content contained in its programming [licensed] to it by third parties, which can always be protected from illegal broadcasting by third party owners."

- "[T]hird party content owners or other entities that have not been found to have engaged in illegal distribution never lose their right to protect and enforce their legal rights in Saudi Arabia."[54]

60. Further to the Panel's request at the Second Substantive Meeting, Saudi Arabia respectfully affirms regarding the relevant company of the complaining Party that:

- "In June 2017, the relevant company of the complaining Party was not licensed and did not have the right to operate in Saudi Arabia. This has been the case since December of 2016, when the temporary license of the relevant company of the complaining Party lapsed due to the relevant company's failure to comply with the generally applicable licensing conditions set out in a letter from the General Commission for Audiovisual Media ("GCAM") dated 13 November 2016."

- In addition, "the relevant company of the complaining Party does not have the right to operate in Saudi Arabia due to its failure to comply with competition law of Saudi Arabia, as established on the record before the Panel."

- Although "Saudi Arabia is aware that entities have been distributing unlicensed media content in Saudi Arabia after 19 June 2017", nevertheless, "no credible evidence exists to link such distribution to the wilful conduct of companies of the complaining Party or related entities. Therefore, no entity has lost the legal right to protect any related IP rights in Saudi Arabia."

61. The above statement of facts and definitive interpretation of Saudi Arabia's domestic law were officially endorsed by the head of the delegation of Saudi Arabia during the Second Substantive Meeting.[55] In particular, Saudi Arabia confirmed that

> the Kingdom of Saudi Arabia intends to be bound by the statements concerning its legal position as regards its domestic law as described in [Saudi Arabia's] Oral Statement with respect to the 17 June 2017 Circular.[56]

[54] Opening Statement of the Kingdom of Saudi Arabia at the Second Substantive Meeting of the Panel, 3 October 2019, paras. 11, 13.

[55] *See* Exhibit SAU-41.

[56] Ibid.

62. Saudi Arabia submits that the Panel should accept the above formal statement and definitive interpretation as a final clarification of existing Saudi law and practice and as a commitment to continue this regime.

(2) the anti-sympathy measures alleged taken by Saudi Arabia

63. Saudi Arabia has stated throughout the proceedings that it does not maintain any "anti-sympathy measures" or any other measures that restrict access to attorneys in Saudi Arabia for assistance in intellectual property matters.[57] The neutrality, impartiality, and independence of the judiciary in Saudi Arabia are based on fundamental principles. Saudi Arabia's systems are clear and strict regarding the independence of the judiciary, and the right to litigation is one of the fundamental rights guaranteed by the Basic Law of Governance in Saudi Arabia with respect to every right or interest.

64. In any case, as discussed in this submission, companies may directly access remedies to copyright infringement in Saudi Arabia by providing information and evidence to the Saudi Authority for Intellectual Property (the "SAIP") or to the Government in support of criminal prosecution without retaining counsel or other local support in Saudi Arabia.

65. In proceedings before the Saudi Board of Grievances the relevant company of the Complaining Party has been represented by Saudi national counsel, as confirmed on page 2 of the Ruling of the Board of Grievances, of 4/11/1949H (30 December 2017G).[58] In addition, relevant company of the complaining Party has signed Powers of Attorney for several Saudi national lawyers to represent its interests in a wide variety of legal and administrative proceedings in Saudi Arabia.[59] We consider that it would be both logical and effective for other companies seeking counsel in Saudi Arabia to retain counsel in the same manner. In any case, there are thousands of lawyers registered to practice in Saudi Arabia. Any entity seriously seeking to engage counsel in any country should look beyond the nine law firms allegedly approached by the relevant company of the complaining Party in this case.

66. Saudi Arabia has confirmed to the Panel that complaints may be filed directly and electronically with the SAIP by interested parties not present in Saudi Arabia and without the involvement of Saudi national counsel. Upon receipt of a communication, including by email, SAIP's IP Respect Department refers complaints to the Committee for the Examination of Violations of the Copyright Protection Law ("Copyright Committee") to take the appropriate decisions and where warranted to impose the penalties provided for in Article 22 of the Copyright Protection Law.[60]

67. No case has been raised with SAIP by the relevant company of the complaining Party or related third party entities that allegedly own rights to content distributed in Saudi Arabia.[61] Over the past two years, SAIP has worked successfully with interested parties to resolve 353 cases, including cases of copyright infringement regarding broadcasting of sports content.[62]

(3) the travel restrictions allegedly imposed by Saudi Arabia

68. As Saudi Arabia has confirmed in previous responses to the Panel, the actions that Saudi Arabia took on 5 June 2017 to protect its essential security interests do affect "crossing into Saudi territories" by persons of the complaining Party. Therefore, to the extent the Panel finds the "travel restrictions" to be relevant to the intellectual property-related claims in this case, and to find violations related to this measure, Saudi Arabia would consider that they relate to the actions that Saudi Arabia took to protect its essential security interests. However, Saudi Arabia does not believe

[57] *Ibid*, paras. 48-50 and 56.

[58] Responses of the Kingdom of Saudi Arabia to the Panel's Post-Hearing Questions to the Parties Following the Second Substantive Meeting of the Parties, sent on 8 October 2019, dated 29 October 2019 ("KSA 29 October Responses"), para. 8.

[59] *See* examples of powers of attorney at Exhibit SAU-36.

[60] KSA 29 October Responses, para. 12.

[61] KSA 26 July Responses, para. 37.

[62] *Ibid*, para. 35.

that travel restrictions relate to intellectual property and these restrictions not fall within the Panel's terms of reference in this case.[63]

69. Saudi Arabia re-confirms that, as of the date of the establishment of the Panel, the travel restrictions on citizens of the complaining Party referred to in the 5 June 2017 announcement still existed, but notes that certain exceptions apply as necessary, including for citizens of the complaining Party to perform the Hajj and Umrah.[64]

(4) the requirement for Ministerial approval of Copyright Committee decisions as allegedly applied to beIN

70. Ministerial approval of Copyright Committee decisions is not provided for in Saudi Arabia.[65]

71. Saudi Arabia's Council of Ministers' Resolution Nº. 536 in 2018 (19\10\1439 H) amended the Saudi Copyright Law, including Article 25/2, replacing the Minister with the Board of Directors of the Saudi Authority for Intellectual Property. As a result, the Article currently reads: "Decisions of the Committee shall be made by majority vote, which shall be endorsed by the Board of Directors".[66]

72. Thus, the adoption of the decisions issued by the Committee must be approved by the Board of Directors of the Saudi Authority for Intellectual Property, and no longer involve Ministerial approval. The Board is composed of a President and 15 members of both government and private sectors, further to Saudi Arabia's Council of Ministers' Resolutions Nº 410 in 2017 (28/06/1438 H) and 496 in 2018 (14/09/1439 H).[67]

(5) Saudi Arabia's alleged failure to apply criminal procedures and penalties against beoutQ

73. The TRIPS Agreement does not require the application of criminal procedures and penalties under the instant circumstances. First, intellectual property rights protected under WTO rules are "private rights" that generally require owners or "private" interested parties to assert their rights. Second, even in cases where the TRIPS Agreement generally provides for criminal procedures and penalties, Members are not required to apply these remedies in all cases. Rather, Members should provide legal fora and procedures to apply such remedies where warranted and where supported by evidence. In particular, Members cannot be expected to act on criminal allegations without evidence and without cooperation of concerned rights holders.[68]

74. As stated above, "Saudi Arabia is aware that entities have been distributing unlicensed media content in Saudi Arabia after 19 June 2017."[69] There is indeed evidence of digital piracy in Saudi Arabia, as in most countries, and the existence of this evidence is not at issue in this dispute. Exactly for this reason, Saudi Arabia has pursued a multi-prong enforcement approach, including public education,[70] deterrence by monitoring the market, investigating compliance, and seizing hardware,[71]

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[63] *Ibid*, para. 58.
[64] *Ibid*, para. 6.
[65] *Ibid*, paras. 26-27.
[66] *See* Copyright Law of Saudi Arabia (Exhibit SAU-32). For reference to Council of Ministers' Resolution Nº. 536 of 3 July 2018, and current Implementing Regulations of Saudi Arabia's Copyright Law, *see* KSA 29 October Responses, paras. 33 and 36, respectively, and Exhibits SAU-42 and SAU 45.
[67] For reference to Council of Ministers' Resolution Nº. 496 of 29 May 2018, and current Implementing Regulations of Saudi Arabia's Copyright Law, *see* KSA 29 October Responses, paras. 34 and 35, respectively, and Exhibits SAU-43 and SAU-44.
[68] *See* discussion in this section, *infra*; *see also* EU Executive Summary, para. 6, stating that
[t]he wording "to be applied" does not add an obligation to investigate and punish all cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. There are certain objective criteria which can justify if a WTO member does not investigate or prosecute in a given case (i.e. lack of evidence). In principle, the absence of initiation of investigations and the punishment of the alleged perpetrators alone cannot show a violation of Article 61.
And see Third Party Executive Summary of Singapore, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 19 ("Article 61 merely obliges Members to criminalise wilful trademark counterfeiting or copyright piracy on a commercial scale, and to provide for the availability of criminal procedures and penalties in such cases.")
[69] KSA 26 July Responses, para. 47.
[70] *Ibid*, para. 25.
[71] *Ibid*, para. 33.

as well as encouraging content providers to ensure that legal means of distribution are available.[72] Experts on digital copyright enforcement have emphasized that ensuring the availability of content through legal means is key to achieving compliance, together with public awareness campaigns and monitoring and enforcement activities in the market.

75. Where concerned rights holders come forward with evidence and cooperate with the Government, Saudi Arabia effectively addresses copyright infringement. The SAIP is responsible for enforcement under the Copyright Law, including through a Committee for the Consideration of Copyright Infringements, which reviews all infringement cases raised by interested parties within Saudi Arabia and from abroad. Over the past two years, SAIP has successfully resolved 353 cases, including cases of copyright infringement regarding broadcasting of sports content.[73] No case has been raised with SAIP by the relevant company of the complaining Party or related entities.[74]

76. Saudi Arabia has repeatedly committed to continue its efforts to identify the source and stop the copyright piracy of beoutQ, but requires cooperation from entities in the market to achieve compliance. Thus far, Saudi Arabia regrets, no cooperation has been forthcoming; it has only heard allegations without receiving supporting evidence concerning the operation of beoutQ.[75] Saudi Arabia has informed the Panel that

> [v]arious Saudi Arabian Government agencies have received communications from original rights holders based outside of Saudi Arabia in the context of the alleged distribution rights in Saudi Arabia of the relevant company of the complaining Party. These communications follow a pattern of relaying unfounded and unsupported allegations that beoutQ is distributing content in Saudi Arabia in violation of their copyright. In the context of each such communication Saudi Arabia has asked each entity to provide information substantiating their allegations; no relevant and credible information has been provided by such companies to Saudi authorities in order to support action against alleged infringing activity and companies.[76]

77. Saudi Arabia is aware that government entities of the complaining Party, the relevant company of the complaining Party, and associated entities and consultants, are responsible for funding, orchestrating, and implementing lobbying campaigns, especially in the United States and Europe, to encourage companies, trade associations, and especially licensors of digital content to the relevant company of the complaining Party, to complain to their governments based on "allegations" that provide no basis at all for Saudi Arabia to take criminal enforcement action.

78. Although several public statements have been made accusing Arabsat and the Government of Saudi Arabia of not doing enough to stop copyright piracy, Saudi Arabia notes that the complaining Party has joined with its instrumentality, the relevant company of the Complaining Party, to conduct a global, public campaign against Saudi Arabia for geostrategic reasons based on unsubstantiated and fabricated allegations of Saudi Government complicity in copyright violations.

79. In this disinformation campaign the Complaining Party and its relevant company have enlisted the support of lobbyists and lawyers, as well as content owners that have received significant compensation for distribution rights. The relevant company of the complaining Party has had some success at spinning its message by conditioning its continuing payments to content owners on their siding with the complaining Party against Saudi Arabia.[77] Although these content owners, in order to continue their lucrative contracts, have been willing in public to repeat groundless assertions against the Saudi Government regarding beoutQ's piracy, nevertheless, they "do not take 'the extra

[72] *Ibid*, para. 37.
[73] *Ibid*, para. 35.
[74] Ibid.
[75] *Ibid*, para. 42.
[76] *Ibid*, para. 41 (emphasis added).
[77] According to reports, Tom Keaveny, beIN MENA Managing Director, admitted in a statement that "[a] rights holder's stance on beoutQ's piracy — in other words whether they're taking legal action, making a public stand, and doing everything within their power to combat the industrial-scale theft of their rights — is a critical factor that we're now considering when bidding". Reuters, A. Baldwin, *Motor racing – Qatar's beIN says it is not renewing F1 deal*, 8 February 2019 (Exhibit SAU-37).

step of directly accusing the Saudi Arabian government' of supporting beoutQ", as the complaining Party and its relevant company have done.[78]

80. In addition, the public joint statement referenced in Panel question 39 is not consistent with communications received directly from individual entities by Arabsat. For example, in response to a request from Saudi Arabia, Arabsat provided recent correspondence between FIFA and Arabsat in which Arabsat asks

> that FIFA kindly and promptly provide us with the written results of the "third party on-site testing." In the meantime, FIFA has provided no proof or other basis that beoutQ is using Arabsat frequencies to transmit pirate broadcasts. As you know, we cannot act on unsupported factual allegations when similar accusations have in the past been proven false.[79]

81. In response, FIFA stated as follows:

> Our various letters to Arabsat have been drafted in the spirit of cooperation and we again reiterate that FIFA is simply requesting the support of Arabsat in addressing the unauthorised transmissions of beoutQ. FIFA is in no way implying that Arabsat is involved in, or complicit with, the illegal beoutQ operation.
>
> …
>
> Unfortunately, due to reasons of legal privilege, FIFA is presently unable to provide you with a copy of the third party report upon which FIFA is relying and which confirms that beoutQ's broadcasts are made available by way of certain Arabsat satellite frequencies.[80]

82. Based on the above, and in particular FIFA's refusal to provide available information based on dubious "reasons of legal privilege", "Saudi Arabia does not believe that unsubstantiated statements should be accorded weight in this dispute. Moreover, FIFA's confirmation that it "is in no way implying that Arabsat is involved in, or complicit with, the illegal beoutQ operation" directly undermines claims by the complaining Party that Saudi Arabia is involved in and complicit with beoutQ operations.

83. The same problem regarding unsubstantiated claims by the relevant company of the complaining Party has arisen in foreign court proceedings. As noted in Saudi Arabia's Second Written Submission to the Panel, the *Tribunal de Grande Instance de Paris* rendered a summary judgment order against claims of the relevant company of the complaining Party that its content was distributed by beoutQ on Arabsat satellite frequencies.[81] To the extent the Panel relies on the ruling of the Tribunal, it should review the actual ruling carefully, and not rely on misrepresentations made by the company of the complaining Party, which are described by the *Tribunal*, but not included in its ruling.

84. The Government of the Kingdom of Saudi Arabia re-confirms formally before the Panel that it will continue to investigate and remains prepared to prosecute criminal violations of its intellectual property laws, consistent with the TRIPS Agreement and Saudi law, pending the production of credible information on whom to prosecute and on what basis.

85. Therefore, as described above, resolution of copyright issues can be sought either by providing relevant information and supporting evidence:

[78] Variety, Qatar's beIN Rallies Support From U.S. Companies Against Pirate Broadcaster beoutQ, 15 February 2019 (Exhibit SAU-38).

[79] Letter from Arabsat to FIFA, dated 24 June 2019 (Exhibit SAU-39).

[80] Letter from FIFA to Arabsat, dated 26 June 2019 (Exhibit SAU-40) (emphasis added).

[81] KSA Second Written Submission, para. 63.

- to the SAIP for action through the Committee for the Consideration of Copyright Infringements; and/or

- to the Saudi Government to consider action under Saudi criminal law and procedure, including investigation and prosecution where warranted based on evidence of criminal violations.

86. Saudi Arabia regrets that no such information, evidence, or cooperation has been forthcoming on the part of the relevant company of the complaining Party.

(6) Saudi Arabia's alleged promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts.

87. Once again, the Government of Saudi Arabia has never promoted or authorized screenings of beoutQ broadcasts and has no relationship at all with beoutQ. Saudi Arabia is aware of an allegation that an illegal broadcast by beoutQ was made in 2018. Efforts to exaggerate the scope of such an illegal broadcast and to attribute it to the Government are unfounded, and must be rejected.[82]

88. Saudi Arabia maintains a vigilant watch over the enforcement of broadcast copyright violations at public gatherings. On 14 April 2019, the Saudi Ministry of Municipal and Rural Affairs issued Circular Nº 41898 which forwarded Royal Court Circular Nº 40752 to the Secretariats, the Agencies and the Public Administrations of the Ministry, including to all Saudi municipal administrations. Circular Nº. 41898 emphasized that the Royal Order must be followed and reminded all administrations "to provide the maximum possible protection of intellectual property rights", including copyright protection.[83]

4. Conclusion

89. The real dispute underlying this case concerns only essential security interests, which are non-trade interests that must be addressed following changes in behavior, and then only in the context of bilateral and regional political and diplomatic discussions.

90. Geopolitical disputes of this kind cannot be resolved at the WTO and should not be brought to the WTO disguised as trade disputes. As Saudi Arabia has suggested previously, the Panel has multiple means to end its work without addressing the substantive claims that have been raised in this case, including by

- recognizing that *Security Exceptions* have been invoked;

- confirming that Saudi Arabia's actions are justified under Article 73 of the TRIPS Agreement;

- referencing Article 3.4 of the DSU and the impossibility of issuing a recommendation or ruling "aimed at achieving a satisfactory settlement of the matter" or Article 3.7 of the DSU and the impossibility of securing a positive solution to the dispute;[84] and/or

- barring the claim because it has not been brought in good faith with the intention of addressing substantive WTO rules.

91. Even if the Panel decides to review the substantive claims in this case, nothing in the TRIPS Agreement can be construed by the Panel to prevent Saudi Arabia from protecting its essential

[82] Saudi Arabia notes that unofficial, non-government tweets should not be recognized by adjudicators or attributed to a government without explicit approval or formal attribution.

[83] Ministry of Municipal and Rural Affairs Circular Nº. 41898, 9/8/1440H / 14 April 2019G. (Exhibit SAU-35.)

[84] *See* KSA First Submission, paras. 4, 9-13; KSA Opening Statement, paras. 11-12, KSA Closing Statement, paras. 3-4.

security interests during the prevailing emergency in international relations because Saudi Arabia has satisfied the requirements of Article 73 of the TRIPS Agreement.

92. In addition, the information that Saudi Arabia has provided to support the Panel's "objective assessment"[85] of our good faith conduct in connection with the invocation of the *Security Exception* in Article 73 establishes the absence of any substantive violation of the TRIPS Agreement in any case.

93. Based on all of the statements above, and the supporting evidence provided on the record before the Panel, the Kingdom of Saudi Arabia respectfully requests that the Panel find that Saudi Arabia 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.

[85] Panel Report, United States – Certain Measures Affecting Imports of Poultry from China, WT/DS392/R, adopted 25 October 2010 ("U.S. – Poultry (China)"), paras. 7.445-7.446.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. As an exception to a Member's obligations, and in light of the sensitive interests that the provision seeks to accommodate, Australia submits that: Members have a responsibility to guard against undue use of the security exception; and each invocation of the security exception must be considered carefully, in light of the particular facts of the dispute.

II. JURISDICTION OF THE PANEL TO REVIEW

2. In invoking the security exception under Article 73(b)(iii) of the TRIPS Agreement in its first written submission, Saudi Arabia claims that the only relevant facts in this dispute are: (i) the severance of relations between Saudi Arabia and Qatar; and (ii) the publicly-stated reasons for the measures.[1] Saudi Arabia argues that, in light of the absence of relations between Saudi Arabia and Qatar, "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".[2] Furthermore, Saudi Arabia notes that, "the only relevant issue is that this is not a trade dispute at all".[3]

3. Similar to Norway and the European Union,[4] Australia disagrees with Saudi Arabia's submissions to the extent that it suggests that the matters raised under Article 73(b)(iii) are non-justiciable. In Australia's view, the panel in *Russia – Traffic in Transit* was correct to find that the invocation of the security exception was within the panel's terms of reference and, therefore, that the panel had jurisdiction to determine whether the security exception requirements were met. In particular, the panel was of the view that it would be entirely contrary to the security and predictability of the multilateral trading system established by the WTO Agreements to subject the existence of a Member's WTO obligations to a mere expression of the unilateral will of the invoking Member.[5]

4. Australia notes that the Panel in this dispute was established with the standard terms of reference.[6] Pursuant to Article 7.1 of the DSU,[7] a panel has the jurisdiction to examine, in light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to it by the complainant.

5. Furthermore, Article 7.2 of the DSU provides that panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". The Appellate Body has confirmed that the use of the words "shall address" indicates that panels are in fact "required" to undertake this task.[8] The Appellate Body has also clarified that, under the DSU, a panel "has no discretion to decline to exercise its jurisdiction in th[e] case that has been brought before it".[9]

6. In Australia's view, Saudi Arabia's invocation of Article 73(b)(iii) as a complete defence to Qatar's claims of violation places this provision squarely within the Panel's jurisdiction. Australia also considers that if the Panel were to decline to exercise its jurisdiction in this matter, this would deprive Qatar of its rights under Article 3.3 of the DSU to bring a dispute in order to remedy the benefits it

[1] Saudi Arabia's First Written Submission, para. 2.
[2] Saudi Arabia's First Written Submission, para. 4.
[3] Saudi Arabia's First Written Submission, para. 11.
[4] See Norway's Third Party Written Submission, paras. 6-14; European Union's Third Party Written Submission, paras. 47-48.
[5] Panel Report, *Russia – Traffic in Transit*, para. 7.79.
[6] WT/DS567/4.
[7] Understanding on Rules and Procedures Governing the Settlement of Disputes.
[8] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49.
[9] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 57. See also Appellate Body Report, *Canada – Aircraft*, para 187; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.

considers Saudi Arabia's measures are impairing. Accordingly, Australia submits that the Panel cannot decline to exercise its jurisdiction to address the matters before it.

III. SCOPE OF REVIEW

7. Australia highlights the extraordinary and exceptional nature of the security exceptions in WTO agreements. The negotiating history of Article XXI of the GATT 1994 – the text of which is almost identical to Article 73 of the TRIPS Agreement – demonstrates the challenge drafters faced in attempting to strike a delicate balance when dealing with issues of national security and sovereignty within the rules-based international trading system.[10] In exercising its jurisdiction to review a Member's invocation of the security exception, the Panel must respect the sensitivity and significance of the matters this provision deals with. Part of the provision explicitly accords deference to Members, and this text must be given proper effect.

8. To this end, Australia agrees with the panel's finding in *Russia – Traffic in Transit* that it is for every Member to define for itself what it considers its essential security interests.[11] Australia also agrees with that panel's finding that the specific terms "which it considers necessary" similarly empower a Member to decide for itself the "necessity" of its actions for the protection of those essential security interests.[12]

9. In Australia's view, the explicit deference accorded to Members in the text of Article 73(b) indicates that a panel's role is not to make its *own* determination of what "it considers necessary". Rather, Australia submits that a panel's task in reviewing the necessity aspect of the security exception is limited to determining whether the invoking Member *in fact* considered the action necessary (such as by having regard to the Member's statements and conduct).

10. However, Australia observes that this deference to a Member is not absolute; and does not preclude a panel from undertaking *any* review of a Member's invocation of the security exception. Specifically, the panel in *Russia – Traffic in Transit* found that the obligation of good faith applies to a Member's definition of its essential security interests and, "most importantly", to the connection of such interests with the measure at issue.[13]

11. That panel determined that a Member's general obligation to interpret and apply the security exception in good faith means that panels may review: (i) whether there is any evidence to suggest that a Member's designation of its essential security interests is not made in good faith; and (ii) whether the challenged measures have a plausible link with the claimed essential security interests.[14] As observed by the panel, "the obligations of good faith requires that Members not use the [security exceptions]…as a means to circumvent their [WTO] obligations".[15]

12. The panel also found that it was incumbent on the invoking Member to "articulate the essential security interests sufficiently enough to demonstrate their veracity";[16] and that what qualifies as a sufficient level of articulation will depend on the emergency at issue.[17]

13. Australia observes that the invocation of Article 73(b) as an exception to a Member's obligations under the TRIPS Agreement is also explicitly limited by the text of the provision – and this text must also be given proper effect. To this end, Australia submits that a panel must determine whether the relevant action was taken "*for the protection of*" the invoking Member's essential security interests. If there is not a "sufficient nexus"[18] between the action taken and the Member's

[10] The negotiating history of Article XXI of the GATT 1994 discussed in Panel Report, *Russia – Traffic in Transit*, paras. 7.83 - 7.100.
[11] Panel Report, *Russia – Traffic in Transit*, paras. 7.130-7.131.
[12] Panel Report, *Russia – Traffic in Transit*, paras. 7.146-7.147.
[13] Panel Report, *Russia – Traffic in Transit*, para. 7.138.
[14] Panel Report, *Russia – Traffic in Transit*, paras. 7.132-7.139.
[15] Panel Report, *Russia – Traffic in Transit,* para. 7.133.
[16] Panel Report, *Russia – Traffic in Transit*, para. 7.134.
[17] Panel Report, *Russia – Traffic in Transit*, para. 7.133.
[18] Appellate Body Report, *EC – Seal Products*, para. 5.169.

essential security interests, it would be reasonable for a panel to determine that the action was not in fact taken "for" this purpose, as is required by Article 73(b) of the TRIPS Agreement.[19]

14. Accordingly, in this dispute, Australia submits that it is for Saudi Arabia to determine for itself what action it considers "necessary for the protection of its essential security interests" under Article 73(b). However, this deference does not dispense with the Panel's obligation to undertake an objective assessment of the matter before it, by determining: (i) whether Saudi Arabia in fact considers the actions it has taken are necessary for the protection of its essential security interests (including by having regard to Saudi Arabia's statements and conduct); and (ii) whether those actions were in fact taken for the protection of those essential security interests.

[19] Appellate Body Report, *EC – Seal Products*, para. 5.228 (emphasis original), cited in Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE KINGDOM OF BAHRAIN

I. ARTICLE 73(B) OF THE TRIPS AGREEMENT IS FULLY SELF-JUDGING

1. The Kingdom of Saudi Arabia has invoked Article 73(b)(iii) of the TRIPS Agreement to justify its measures.[1] Article 73(b)(iii) provides that *"[n]othing in [the TRIPS Agreement] shall be construed … to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests … taken in time of war or other emergency in international relations…* " (emphasis added).

2. The use of the term "*it considers*" indicates that this provision has a self-judging character. The effect of a self-judging provision is that a panel is confined to ascertaining whether or not the invoking WTO Member has concluded that relevant conditions exist; the panel cannot itself assess whether those relevant conditions exist.

3. It is Bahrain's position that the term "*it considers*" applies to the entirety of Article 73(b), including sub-paragraphs (i), (ii) and (iii). These sub-paragraphs do not set out separate requirements, but rather represent a continuation and completion of the language used in the chapeau of Article 73(b). They are to be understood as parts of a single composite requirement.

4. In Bahrain's view, Article 73(b) must be read in a holistic and integrated manner and it is not tenable to dissect Article 73(b) into elements or components some of which are self-judging and some of which are not. This is because there is an inherent connection between the war or other emergency (described in Article 73(b)(iii)) and the measures taken in response to protect security (described in the chapeau of Article 73(b)). And there is no cogent policy justification for treating the decision to choose a particular security measure as necessary differently from the decision to characterise a particular situation as a threat to essential security interests arising from war or an emergency. All elements of the provision must be equally self-judging for Article 73(b) to operate coherently.

5. Bahrain notes that the panel in the recent *Russia – Traffic in Transit* dispute reached a different conclusion regarding the self-judging nature of Article XXI(b) of the GATT 1994 (which is equivalent to Article 73(b) of the TRIPS Agreement). However, the *Russia – Traffic in Transit* panel erred in several respects

(a) First, the panel erred in asserting that the sub-paragraphs of Article XXI(b) would serve no purpose or lack "*effet utile*" if Article XXI were fully self-judging.[2] But this assertion ignores the fact that the sub-paragraphs, along with the chapeau, serve the purpose of defining the issue that the invoking WTO Member must reach a judgment on in order to invoke the exception. In this sense the sub-paragraphs are no different from the chapeau. If the sub-paragraphs lack "*effet utile*" then, on the panel's logic, the chapeau must also lack "*effet utile*" for the same reason.

(b) Second, the panel erred in identifying the issue before it as "whether the subject-matter of each of the … sub-paragraphs of Article XXI(b) lends itself to purely subjective determination".[3] The issue before the panel was whether the term "it considers" qualifies the sub-paragraphs as well. The answer to that straightforward question of treaty interpretation does not depend on the quite different, and ill-defined, question of whether the sub-paragraphs "are amenable to objective determination"[4] or whether they "lend [themselves] to purely subjective determination".[5] Even if the issues in question are capable of objective determination nothing would prevent the drafters from treating such issues as self-judging issues.

[1] The KSA's First Written Submission, paras 3, 6, 7.
[2] Panel Report, *Russia – Traffic in Transit*, para. 7.65.
[3] Panel Report, *Russia – Traffic in Transit*, para. 7.66.
[4] Panel Report, *Russia – Traffic in Transit*, paras. 7.69, 7.70, 7.71, 7.77.
[5] Panel Report, *Russia – Traffic in Transit*, para. 7.66.

(c) Finally, the panel's assertion that the security and predictability of the multilateral trading system would be undermined if a fully self-judging interpretation were adopted fails to grapple with the fact that Article XXI(b)(iii) is self-balancing which, in turn, limits the scope for abuse and harm to the multilateral system. In addition, as the KSA points out in its submission, the multilateral system is also weakened if WTO panels second-guess highly sensitive decisions about security policy.[6]

II. RISK OF ABUSE

6. Bahrain understands that many of the arguments made against its interpretation of Article 73 are motivated by the desire to prevent abuse of the security exceptions.

7. There are two answers to this concern about abuse.

8. First, there are likely to be adverse reputational effects for WTO Members who abuse Article 73. This by itself acts as a safeguard against abuse. As Chairman Colban observed as far back as 1947, during the negotiations of the Havana Charter, ultimately it is the attitude of the Membership that is"*the only efficient guarantee against abuses…*".[7]

9. Second, Article 73(b)(iii) contains an intrinsic safeguard against abuse because it is self-balancing. Every invocation of Article 73(b)(iii) implies permission for the affected WTO Member to respond with counter-sanctions of its own. So, if there is an emergency in the relations between A and B, then both A and B can impose sanctions on each other. It follows that Article 73(b)(iii) has a self-balancing character. This self-balancing character implies that introducing objective panel review does not really change the position of the complaining WTO Member. At the end of a successful dispute settlement proceeding, the complaining WTO Member will only get the right to retaliate. But it already has this right under Article 73 because of its self-balancing character. It follows that allowing for objective panel review does not achieve anything new or additional in terms of deterring abuse.

III. CONCLUSION

10. Bahrain submits that all of the elements of Article 73(b) of the TRIPS Agreement are self-judging. It follows that, in light of the KSA's statement that the elements of Article 73(b) are met in this case, the Panel should dismiss the claims advanced by Qatar.

[6] The KSA's First Written Submission, para. 13.

[7] See discussion on 24 July 1947, E/PC/T/A/PV/33, p.21 (comment by Chairman Eric Colban, Chairman, Norway).

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

1. Brazil welcomes the opportunity to present its views on the issues raised in these panel proceedings. While it will generally not dwell on the particular facts presented by the Parties, Brazil acknowledges that the complainant has presented claims of inconsistency with a number of provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and that the respondent, by invoking a security exception, has not specifically addressed the factual evidence or legal arguments adduced by the claimant in support of its substantive claims.

II. ARGUMENTS

2. At the outset, Brazil would like to recall that there are no previous WTO Panel or Appellate Body reports interpreting the security exceptions in the TRIPS Agreement. However, as the language in Article 73 is identical to the corresponding provision in the GATT 1994, the determination recently made by the Panel in *Russia – Traffic in Transit* may provide guidance in the analysis of the present dispute. Brazil understands that this analysis must nevertheless be carried out in the context of the TRIPS Agreement. With that in mind, Brazil would like to elaborate on some of the elements it considers relevant for the interpretation of Article 73.

3. As the security exceptions provided for in Article XXI of the GATT 1994 and Article XIV *bis* of the GATS, Brazil understands that Article 73 of the TRIPS Agreement aims at striking an adequate balance between two competing interests. On the one hand, there is a Member's unquestionable right to protect its essential security interests; on the other, there is the need to prevent the abuses that could ensue if security exceptions were misused to exempt compliance with the obligations assumed under the agreed TRIPS disciplines. In light of this intrinsic dichotomy, Brazil would like to address three specific issues that might aid the Panel in its analysis of the matter before it.

a) justiciability of security exceptions

4. The Panel in *Russia – Traffic in Transit* indeed stated that "given the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purpose of the DSU."[1]

5. Accordingly, rather than excluding the Panel's jurisdiction, a party invoking a security exception obliges the Panel to examine the challenged measures in light of the relevant provisions and to make its own objective assessment of the matter. Article 7 of the DSU bestows upon the Panel the jurisdiction to examine and to make findings in relation to each of the "relevant provisions in the covered agreements" cited by the Parties. More specifically, Article 7(2) does even more than that, as it does not simply *allow* the Panel to address the provisions invoked by the parties, it *requires* the Panel to do so.

6. Moreover, an exclusion of jurisdiction would deprive the complainant of its right to a decision and would go against the letter of Article 3.3 of the DSU, according to which a Member that initiates a dispute "is entitled to a ruling by a WTO panel".

7. In light of the foregoing, Brazil considers that recourse to security exceptions does not have the effect of excluding the jurisdiction of a panel. In fact, unless otherwise justified by the exercise of true judicial economy, a panel is required by WTO law to examine and to make findings with respect to all provisions cited by the parties, which in the current proceedings include Article 73 of the TRIPS Agreement.

[1] Panel Report, *Russia – Traffic in Transit*, para. 7.56.

b) analytical framework for the examination under Article 73(b) of the TRIPS Agreement

8. The second issue that Brazil would like to address concerns the analytical framework to be adopted by the Panel when interpreting Article 73(b) of the TRIPS Agreement.

9. In its relevant part, Article 73(b) states that nothing in the TRIPS Agreement shall be construed to prevent a Member from taking any action *which it considers* necessary for the protection of its essential security interests under three specific sets of circumstances. In other words, Article 73(b) does not stop at the chapeau. It goes on to list an exhaustive number of circumstances under which the exceptions apply. The logical structure of this provision supports the interpretation that the circumstances under subparagraphs (i) to (iii) of Article 73(b) operate as limitative qualifying clauses, which means that they limit the exercise of the discretion accorded to Members under the chapeau.

10. Accordingly, Brazil understands that Article 73(b) contains both a subjective component – i.e., the judgment regarding the necessity of the measure – and an objective component – which relates to the presence of at least one of the circumstances exhaustively listed in subparagraphs (i) through (iii). This understanding seems to be confirmed by the Panel in *Russia – Transit.*

11. In Brazil's view, the analysis of Article 73(b) should begin at the level of the objective component. Accordingly, the Panel's first step should be the assessment of whether one or more of the circumstances in subparagraphs (i) through (iii) – as invoked by the party asserting the defense – are present. This approach seems logical because, if none of those circumstances is present in the case at hand, the Panel need not proceed with the remainder of the analysis.

12. Brazil considers that, since the recourse to exceptions is in the nature of an affirmative defense, it is the burden of the Member invoking Article 73(b)(iii) to adduce evidence of the fact that the challenged measures constitute actions "taken in time of war or other emergency in international relations". This means that it is not enough for a Member to simply *refer* to one of the circumstances in article 73; it must present evidence to *demonstrate* that the circumstance exists.

13. Once the presence of one of the circumstances provided for in subparagraph (iii) is verified, the Panel should then proceed to the analysis of the subjective component contained in literal (b) of Article 73.

14. It stands out that the language of Article 73 – "which it considers" – confers a great deal of discretion regarding the necessity of the measure. That, however, does not mean that the autonomy accorded by this provision is completely unfettered. Brazil understands that Members invoking Article 73 bear the burden of at least justifying their assertion of necessity for the protection of essential security interests.

15. In other words, it is not sufficient for Members to state *that* they consider certain measures necessary; they must also explain *why* they consider those measures necessary. In this respect, the burden of proof "will necessarily vary from measure to measure, provision to provision, and case to case".[2]

16. In addition, Brazil recalls that, in *Russia – Traffic in Transit*, the Panel asserted that although it is left, in general, to every Member to define what it considers to be its essential security interests, this does not mean that a Member is free to elevate any concern to that of an "essential security interest". Accordingly, the Panel determined that "it 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".[3]

17. With regard to this point, in its First Written Submission[4] Saudi Arabia made a reference to Article 73(a) of the TRIPS Agreement, according to which: "Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it

[2] Appellate Body Report, *US – Shirts and Blouses*, pg. 14.
[3] Panel Report, *Russia – Traffic in Transit*, para. 7.134.
[4] First Written Submission by the Kingdom of Saudi Arabia, para. 8.

considers contrary to its essential security interests." Saudi Arabia's understanding seems to be that a burden to justify the recourse to Article 73(b) would be contradictory with the non-disclosure exception of Article 73(a).

18. However, Brazil recalls that the Appellate Body stated that "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof"[5]. This understanding seems to also apply to exceptions, as the Appellate Body found that "[t]he general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case […] is not avoided by simply describing that same provision as an exception"[6].

19. It is not a provision of the TRIPS Agreement that requires a Member invoking a security exception under Article 73 to justify such recourse. Rather, it is a basic rule of any dispute settlement system – the burden of proof – that so requires. Article 73(a) is in the nature of an additional exception to the obligations under the TRIPS Agreement, it is not an exception to the application of the burden of proof.

20. Moreover, an overly broad interpretation of Article 73(a) could effectively render items (i) through (iii) of Article 73(b) *inutile*, as the Member resorting to a security exception would be exempt from adducing any evidence at all regarding the existence of the circumstances provided in those items.

21. In light of the foregoing, Brazil understands that Article 73(a) should not be interpreted as precluding the need for Members to *motivate* their recourse to the exceptions of Article 73(b).

c) plausibility and connection between the measure and the situation of emergency

22. In connection with the above reasoning, Brazil would like to address a third issue related to the interpretation of Article 73(b). Brazil considers that, once a Member has explained the reasons behind the invocation of the security exception, the Panel should exercise some degree of judicial review over the Member's motivation.

23. It is Brazil's understanding that, in the last step of the analysis under Article 73(b)(iii), the Panel should review the motivation provided by the Member invoking the security exception in light of two criteria. First, whether there is some degree of connection between the measure and the state of war or other emergency in international relations. Second, whether there is a plausible link between the measure the Member wishes to justify and the purpose stated in its motivation.

24. In relation to the first criterion, the Panel must be satisfied that the Member was able to prove that there is a connection between the challenged measure and the war or emergency deemed present pursuant to subparagraph (iii) of Article 73(b). Brazil believes that the need for this connection is justified in light of the object and purpose of the TRIPS Agreement, which should inform the interpretation of Article 73. In fact, precluding this analysis could lead to untenable results, as a Member would be allowed to disregard its obligations under the TRIPS Agreement in relation to *all* WTO members, in a manner that could be entirely unrelated to the particular situation of war or emergency.

25. With respect to the second criterion, the Panel should be satisfied that there is a plausible link between the measure and the purpose stated in its motivation.

26. Regarding the degree of connection and the plausible link between the measure and its motivation, the Panel in *Russia – Traffic in Transit* found an obligation of good faith.[7]. The Panel concluded that it must review whether the measures at issue are *so remote from*, or *unrelated to*, the alleged emergency in international relations that it is implausible that a Member implemented the measures for the protection of its essential security interests arising out of that emergency.[8]

[5] Appellate Body Report, *US – Shirts and Blouses*, pg. 14.
[6] Appellate Body Report, *EC – Hormones*, par. 104.
[7] Panel Report, *Russia – Traffic in Transit*, para. 7.138.
[8] Panel Report, *Russia – Traffic in Transit*, para. 7.139.

27. As mentioned before, Brazil will generally not dwell on the factual aspects of the present dispute. However, Brazil would like to direct the attention of the Panel to the analysis of the plausibility of one of those measures, described by Qatar as "Saudi Arabia's omission to prosecute, as a criminal violation, piracy on a commercial scale, of material in which copyright is owned by, or licensed to, Qatari nationals".[9]

28. Qatar appears to have made a *prima facie* case that Saudi Arabia not only permits, *but actively encourages and promotes* the widespread piracy of copyrighted works, in violation of the disciplines of the TRIPS Agreement, in particular Article 61, which provides that "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale […]".

29. In Brazil's view, the Panel's assessment on the plausibility and connection between Saudi Arabia's omission to prosecute piracy on a commercial scale and the emergency in international relations that it has invoked will set a precedent of systemic relevance for the interpretation of the security exceptions under the TRIPS Agreement. As mentioned before, the Panel Report in *Russia – Traffic in Transit* has applied a test of connection and plausibility of the measures at issue in light of Article XXI of the GATT 1994 and could provide guidance in the application of the same test under Article 73 of the TRIPS Agreement.

[9] Qatar's First Written Submission, para. 141(d).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. APPLICABILITY OF THE WTO AGREEMENT AND COVERED AGREEMENTS

1. Saudi Arabia appears to suggest, in its first written submission, that because its severance of diplomatic relations with Qatar is a critical element of the protection of Saudi Arabia's essential security interests, and that Saudi Arabia has invoked the essential security exception under Article 73 of the TRIPS Agreement in justification of its measures, Saudi Arabia is absolved of the legal obligations it owes under the TRIPS Agreement towards Qatar[1].

2. Pursuant to Article II(2) of the WTO Agreement, the TRIPS Agreement is an "integral part" of the WTO Agreement, and "binding on all Members". Customary international law, specifically Article 63 of the Vienna Convention on the Law of Treaties, also confirms that severance of diplomatic relations does not affect the legal obligations established between two parties to a treaty[2]. The only means by which a Member would be absolved of its legal obligations under the TRIPS Agreement would be if that Member withdrew from the WTO Agreement in accordance with the withdrawal procedure set out in Article XV of that Agreement.

II. CORRECT ORDER OF ANALYSIS

3. On the issue of the correct order of analysis, Canada disagrees with the panel's finding in *Russia – Traffic in Transit* that the nature of the General Agreement on Tariffs and Trade 1994 (GATT 1994) Article XXI essential security exception does not necessitate that the order of analysis begin with the examination of the consistency of measures with relevant substantive obligations[3]. In that dispute, the panel found that "only if the measures are found not to be taken in a time of war or other emergency in international relations" does it become necessary to determine the consistency of the measures with substantive obligations[4].

4. In Canada's view, it is incumbent upon a panel to address a Complainant's claims first before proceeding to examine the exceptions invoked by a Respondent. This order of analysis is required by virtue of the fact that the essential security exception is an *exception*, and the potential availability of an exception is ripe in law only when there is a finding of a violation. It is also required in order for a panel to fully address the "matter" at issue and to meet the objectives and requirements of the DSU, specifically a set out in Articles 3, 7, and 11 of that Agreement.

5. There is also value in potentially having a positive finding of inconsistency even if the panel ultimately finds that the essential security exception has been properly invoked. For instance, if the circumstances justifying the invocation of the essential security exception cease to exist, then a Complainant may wish to pursue further action under the DSU to seek the removal of the offending measures that the panel had found to be inconsistent. The objectives of the DSU may also be further frustrated if the analytical order advanced by the panel in *Russia – Traffic in Transit* is adopted, particularly if the panel in this dispute should find that the security exception can be successfully invoked, and if such finding was reversed on appeal. The Appellate Body would then be called upon to examine the claims made by the Complainant without those claims having been considered by the Panel and in the absence of legal interpretations and findings by the Panel that would normally form the basis for an appeal. In addition, the Appellate Body's examination would require a complex factual assessment and the weighing of evidence submitted by the parties - an exercise that could go beyond the jurisdiction of the Appellate Body and make it impossible for the DSB to provide recommendations and rulings on all legal claims.

6. In situations where a Respondent has not contested claims raised by the Complainant, a panel must also adopt this order of analysis, first satisfying itself that a Complainant has established a

[1] Saudi Arabia's first written submission, paras. 4-5 and 7.
[2] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
[3] Panel Report, *Russia – Traffic in Transit*, para. 7.108.
[4] Ibid., para. 7.109.

prima facie case of violation before proceeding to examine any invoked exceptions[5]. As in a case where a Respondent has contested claims raised by a Complainant, a panel's failure to consider the Complainant's claims would prevent the panel from fully addressing the "matter" at issue, as it is required to do under the DSU. It is solely in instances when a panel finds that a Member has explicitly conceded that its measure violates an obligation that a panel may begin the analysis with an invoked exception for that conceded violation[6]; even in those instances the panel must still make a finding of a violation before it proceeds to examine the invoked exception.

III. THE TEST AND STANDARD OF REVIEW FOR THE ESSENTIAL SECURITY EXCEPTION IN ARTICLE 73 OF THE TRIPS AGREEMENT

7. Given the text of the essential security exception in Article 73 of the TRIPS Agreement and the essential security exceptions contained in the GATT 1994 and the GATS, the negotiating history of those essential security exceptions, and the particularly sensitive nature of their subject matter, the test and standard of review for these exceptions must be interpreted in a manner that accords a high level of deference to an invoking Member while ensuring that the object and purpose of the covered agreements are not undermined.

8. In light of the recent panel report in *Russia – Traffic in Transit*, in which the panel made findings on the essential security exception in Article XXI(b)(iii) of the GATT 1994, Canada's view is that the correct test and standard of review for the essential security exception available under paragraph (b) of Article 73 of the TRIPS Agreement involves a combination of subjective and objective elements. Namely:

- The subjective element of the test is found in the chapeau of paragraph (b), such that the invoking Member need demonstrate only that it considered its measures to be necessary to protect its essential security interests.

- The objective element of the test is contained in the subparagraphs of paragraph (b) and in the relationship between the subparagraphs and the measures adopted by the invoking Member.

9. Canada agrees with the panel in *Russia – Traffic in Transit* that a panel must objectively determine that there is a "war or other emergency in international relations" for a measure to fall within the scope of the provision[7].

10. Further, it is Canada's view that a panel's assessment of whether the requirements of Article 73(b)(iii) have been met must include a determination of whether there is a "sufficient nexus" between the measure adopted by the invoking Member and the circumstances set out in subparagraph (iii). This is an objective assessment that goes beyond the "good faith" plausibility test set out by the panel in *Russia – Traffic in Transit*[8]. Examining whether there is a "sufficient nexus" involves, first, a determination that the measures were taken contemporaneously with the "war or other emergency in international relations". The words "taken in" in the text indicate the need for this temporal connection. Second, a panel must be satisfied that there is a sufficient nexus, or link, between the measures at issue and the war or other emergency. For example, this would include being satisfied that the design and scope of the measures pertain to the war or other emergency. In other words, a Member could not use an existing emergency as a pretext to implement a trade-restrictive measure completely unrelated to that emergency.

11. The standard of review for subparagraph (iii) cannot be satisfied with a mere assertion by the invoking Member that there is a "war or other emergency". This is because such an interpretation, if adopted, would result in reducing subparagraph (iii) to redundancy. That is, the subparagraph would serve no purpose as a Member could effectively take measures that it considered necessary for the protection of its essential security interests, without having to substantiate the existence of the circumstances in which the measures were taken. A meaning must be ascribed to the fact that

[5] See for example Panel Reports, *US – Shrimp (Ecuador)*, paras. 7.9 and 7.11 and *US – Poultry (China)*, paras. 7.445-7.446.

[6] For example, in *US – Shrimp* where the United States admitted that its measures were in violation of GATT 1994 Article XI:1. Panel Report, *US – Shrimp*, paras. 7.15 and 7.17.

[7] Panel Report, *Russia – Traffic in Transit*, paras. 7.77 and 7.83.

[8] Panel Report, *Russia – Traffic in Transit*, para. 7.139.

Members chose to specify circumstances in which the security exceptions could be invoked. An interpretation that fails to require a Member to demonstrate that such a circumstance objectively exists, and that there is a sufficient connection between the measures and that circumstance, would be at odds with the general rules of treaty interpretation that require meaning be given to each term and provision[9].

IV. TRIPS AGREEMENT PROVISIONS AT ISSUE

12. In addition to its submissions on the above-noted issues, Canada also responded to questions from the Panel regarding the correct order of analysis between Parts I, II, and III of the TRIPS Agreement, and on the relationship between specific provisions in each of those parts.

13. In Canada's view, the relationship between the various Parts of the TRIPS Agreement provides guidance as to the order of analysis that appears to be logical for a panel to follow in considering claims raised by a Complainant under each Part, beginning with the general obligations in Part I, followed by the minimum standards of protection under Part II and the obligations regarding enforcement procedures and remedies under Part III.

14. In response to questions from the panel regarding whether the same measure may be found to violate various provisions of the TRIPS Agreement, Canada took the position that it is possible that the same aspect of the same measure may concurrently violate obligations under Part II and Part III of the TRIPS Agreement. For example, a measure found to violate the civil enforcement requirements under TRIPS Article 42 on the basis of the measure discriminating against nationals of another Member may also be found to violate the general non-discrimination obligation in TRIPS Article 3.1. In response to a question from the Panel regarding whether a finding of inconsistency under any of TRIPS Articles 41.1, 42, or 61 would render a finding under another of those articles redundant, Canada shared its view that a finding of inconsistency with one of those enforcement provisions would not necessarily render a finding under another provision redundant, given that they are distinct obligations concerning, for example, civil and criminal enforcement. However, whether the same aspect of a measure will be found to be inconsistent with different obligations under the TRIPS Agreement, or whether the same measure will be found to violate multiple TRIPS provisions, is necessarily dependent on the measures and facts at issue.

[9] Appellate Body Report, *US – Gasoline*, para. 61.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA*

I. INTRODUCTORY COMMENTS

Distinguished Chair, members of the Panel, colleagues,

1. Good afternoon. China would like to express its appreciation to the Panel for this opportunity to state China's views and comments for this dispute.

2. China considers that this dispute raises significant issues regarding the invocation and interpretation of Article 73(b)(iii) of the TRIPS Agreement, as well as the rights and obligations of WTO Members. In this statement, China will offer its views on that should one Member "severed diplomatic and consular relations"[1] with another Member, whether Dispute Settlement Body (DSB) and its panel have the jurisdiction to settle the dispute raised by that Member, pursuant to the relevant provisions in Dispute Settlement Understanding (DSU). China will also explain the order of analysis that the Panel should apply to the dispute in which the defendant has invoked the security exception clause.

II. PANEL'S JURISDICTION TO REVIEW THE DISPUTE INVOKING ARTICLE 73(B)(III) OF THE TRIPS AGREEMENT

3. In its first written submission, Saudi Arabia alleged that the only relevant facts in this dispute is "the severance of relations" between itself and the complainant, and "the publicly-stated reasons" for the measures imposed by Saudi Arabia since that severance[2]. By recognizing such relevant facts, Saudi Arabia opined 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', pursuant to Articles 3.4, 3.7, and 11 of the DSU[3].

4. While China does not take position on the facts of this dispute, China is of the view that there is no textual basis for Saudi Arabia to reach such a conclusion. On the contrary, should the Panel decline to proceed further in this dispute, it will be erroneously released from its obligation set forth in the DSU.

5. It should be understood that, even if the diplomatic relations has been severed between two WTO Members, should one Member claim that its benefit under the TRIPS Agreement has been impaired by measures taken by another Member, and raise such a dispute to DSB, the DSU, which was listed as Annex 2 of the WTO Agreement, shall still apply to these Members, because Article 64 of TRIPS Agreement states that "the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein".

6. This is the case for the current dispute, where the complainant alleged that the measures at issue were inconsistent with Articles 3.1, 4, 14.3, 41.1, 42, and 62 of the TRIPS Agreement, and Articles 9, 11, 11bis, 11ter of the Berne Convention for the Protection of Literary and Artistic Works (1971), as incorporated into Article 9 of the TRIPS Agreement, and the defendant invoked Article 73(b)(iii) of the TRIPS Agreement to justified its measures at issue. None of these provisions provides special rules or procedures for dispute settlement. Therefore, the DSU shall apply to the current dispute.

7. Based on this understanding, China turns to notice that on 18 December 2018, the DSB meeting established a Panel for this dispute with the following terms of reference:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Qatar

* China requested its oral statement to be used as its executive summary.
[1] First Written Submission of Saudi Arabia, para. 1.
[2] First Written Submission of Saudi Arabia, para. 2.
[3] First Written Submission of Saudi Arabia, para. 4.

> in document WT/DS567/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements. " [4]

8. Therefore, pursuant to Article 7.2 of the DSU, China is convinced that the Panel is obliged to address the relevant provisions in TRIPS Agreement cited by the parties to the dispute. Additionally, the Panel should, as required by Article 11 of the DSU, make objective assessment of the matter before it, including an objective assessment of the facts of this dispute and the applicability of and conformity with the TRIPS Agreement.

9. In sum, China respectfully disagrees with Saudi Arabia that the Panel should restrain from proceeding further in this dispute. Oppositely, referring to the above observations, China is of the view that the Panel undoubtedly has jurisdiction to examine the matter before it.

III. ORDER OF ANALYSIS FOR DISPUTE WHICH THE DEFENDANT INVOKE THE SECURITY EXCEPTION CLAUSE

10. China is of the view that the 'matter' which the Panel is obligated to make objective assessment with, is the matter referred to the DSB by the complaining Member, pursuant to Article 7.1 of the DSU. Such matter contains the measures at issue and the claims of the complainant.

11. Therefore, in order to fulfill its obligations and assist the DSB to discharge the latter's responsibilities under the DSU, the Panel is expected to firstly address the complainant's claims that whether the measures at issue constitute violations of the covered agreements. Should the Panel find that such measures at issue do not exist or are not inconsistent with the relevant covered agreements, it shall restrain from proceed further in light of that finding.

12. Only when the Panel reaches a positive determination that the complainant has established a *prima facie* case, it may, if applicable, turn of examine whether exceptions invoked by the respondent could justify the measures at issue[5].

13. Should the Panel choose not to follow the order of analysis which China strongly advises, it would be "at odds with the requirement in DSU Article 11" in accordance with the observation made by the panel in *US – Poultry (China)* [6].

IV. CONCLUSION

14. China thanks the Panel for its attention and would like to answer any questions that Panel may raise.

[4] Constitution of the Panel established at the request of Qatar, WT/DS567/4, 19 February 2019.
[5] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.9 and 7.11.
[6] Panel Report, *US – Poultry (China)*, paras. 7.445-7.446.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. A panel has a certain discretion when it comes to the **order of analysis**, although it should ensure that the order of analysis does not inappropriately determine the outcome of the case. The European Union considers that in the present proceedings the Panel should **start first with the alleged violations** and only then proceed to the possible justifications under Article 73(b)(iii) of the TRIPS Agreement.

A. On the consistency of different measures at issue with various provisions of the TRIPS Agreement

2. If the alleged travel ban imposed on Qatari nationals were included in the notion of "protection" of intellectual property within the meaning of Articles 3.1 and 4 of the TRIPS Agreement, that conclusion would amount to finding that the TRIPS Agreement requires free movement of persons. The European Union would be concerned with the challenge under the TRIPS Agreement of measures whose core features are the regulation of movement of persons that fall outside the WTO Agreements.

3. The European Union considers that the alleged significant difficulties in securing legal representation by Qataris in Saudi Arabia, may be considered as falling under the "protection" of intellectual property within the meaning of Articles 3.1 and 4 and thus violate those provisions because they are likely to have an effect on the enforcement of intellectual property rights.

4. The alleged significant difficulties in securing legal representation, the Ministry's denial of access to the Copyright Committee, and the complete lack of criminal remedies, if proven, may violate of Articles 41.1, 42 and 61 of the TRIPS Agreement. These measures are less likely to violate Articles 9, 11, 11bis and 11ter of the Berne Convention and Article 14.3 of the TRIPS Agreement because these provisions do not cover enforcement of intellectual property rights.

5. In particular, the Ministry's alleged denial of access to the Copyright Committee, the sole entity responsible for copyright infringements and the approval of the latter's decisions by the same Ministry, if proven, may violate Articles 41.1 and 42 of the TRIPS Agreement. Such procedure may not constitute an enforcement procedure "so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement" as set out in Article 41.1 and does not appear to make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right as set out in Article 42.

6. Article 61 of the TRIPS Agreement requires that Members provide for criminal procedures and penalties. The wording "to be applied" **does not add an obligation to investigate and punish all cases** of wilful trademark counterfeiting or copyright piracy on a commercial scale. There are certain objective criteria which can justify if a WTO member does not investigate or prosecute in a given case (i.e. lack of evidence). In principle, the absence of initiation of investigations and the punishment of the alleged perpetrators alone cannot show a violation of Article 61.

7. However, Article 61 has to be read in the context of Article 41.1 that requires that WTO Members ensure enforcement procedures so as to permit effective action against any act of infringement of intellectual property. In this case, if it is proven that the Saudi government **supported, facilitated or even participated** in the alleged piracy, it could be argued that Saudi Arabia does not have an effective criminal procedure or even that de facto does not provide for criminal procedures and penalties for infringements in the case of the piracy of beIN's content. **Constant non-enforcement may amount to facilitating** IP rights infringement, against the spirit of Article 61. Indeed, **criminal procedures and penalties should not be provided only on paper**, but should be effective in practice, otherwise the obligation in Article 61 would be deprived of its meaning.

B. On Saudi Arabia's invocation of the security exceptions

Jurisdiction of the Panel

8. Saudi Arabia, with the support of the United States, alleges that panels do not have jurisdiction to deal with matters related to essential security interests. The European Union disagrees. Article 73 is an affirmative defence. It may be invoked to justify an otherwise WTO inconsistent measure. It does not provide for an exception to the rules of jurisdiction laid down in the DSU. Interpreting Article 73 as a non-justiciable provision would make it impossible for the Panel to fulfil its task under Article 11 of DSU. The "matter" before the panel includes Article 73 as raised by Saudi Arabia.

9. If Article 73 was interpreted as a non-justiciable provision, a WTO Member, rather than the DSB, would be deciding the outcome of a dispute unilaterally. This would question the "rules-based" approach to international trade. Non-justiciability of an international dispute amounts to a lack of jurisdiction. In the rules-based framework of the WTO, the legal operability of Article 73 of the TRIPS Agreement rather revolves around the concepts of standard of review and discretion.

10. Therefore, the concept of justiciability and the concept of discretion (linked to the Panel's standard of review) need to be distinguished. The rules of the TRIPS Agreement, including Article 73 are justiciable with the DSB being the ultimate arbiter. Some rules may grant WTO Members discretion. Article XX (a) as interpreted by the Appellate Body in *EC – Seal Products* is a ready example. Article XXI is another example. Yet, the jurisdiction over the question whether a Member remained within its discretion unequivocally rests with the DSB.

11. By way of illustration, the European Union would like to point out that there are fundamental differences in the way that security exceptions are drafted in the TRIPS Agreement and in the GATT, on the one hand, and in other international agreements, on the other hand. For instance, an express text that comes very close to the idea of non-justiciability can be found in the KORUS FTA (footnote 2).

12. The panel in *Russia – Traffic in Transit* confirmed the European Union's understanding, expressed as a third party in those proceedings, with regard to the jurisdiction of panels in cases where essential security exceptions are raised as defences.

Burden of proof

13. *First*, as a general comment, a WTO Member that invokes Article 73 (b) (iii) bears the burden of proof. Saudi Arabia has failed to meet its burden of making even a *prima facie* case. Neither has it explained the legal test that it deems appropriate, nor has it adduced any facts which would allow the Panel to make findings.

14. A party invoking an affirmative defence Saudi Arabia has the *onus probandi*. The required degree of specificity in identifying the essential security interests is linked to the standard of review applicable in respect of each of the elements of Article 73(b). The invoking Member is required to identify the invoked interest with the degree of specificity that is necessary for the Panel to ascertain whether it is plausible that the invoked interest is one of security as opposed to purely economic and whether it is important enough to qualify as essential.

15. This means adducing sufficient evidence to substantiate its defences. The party invoking a security exception cannot simply make some assertions and then expect that the Panel will make its case, by looking at the news and the information available to the public in order to establish the relevant facts. However, once a party has already presented evidence, the panel may ask for additional clarifications and evidence (e.g. from that party), as per Article 13 of the DSU.

16. Contrary to what Saudi Arabia maintains, the European Union fails to understand how Article 73(a) can exempt Saudi Arabia from meeting its burden of proof under Article 73(b). Like Article 73(b), Article 73(a) is also a justiciable provision. Discretion accorded under it is not unlimited.

17. The European Union acknowledges that information relating to essential security interests is of a highly sensitive nature, but the complainant is expected at a minimum to explain in sufficient detail why such information cannot be shared with the Panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article 73. At any rate, even if Saudi Arabia was justified in not providing

certain information pursuant to Article 73(a), that would not discharge Saudi Arabia from its burden of proof in relation to Article 73(b).

18. *Second*, with respect to proving the existence of 'other emergency in international relations', the European Union believes that the severance of diplomatic relations may be relevant, but not necessarily dispositive. Diplomatic relations are sometimes interrupted for reasons that stop short of an emergency in international relations. For that reason, the invoking party should also provide sufficient explanations and evidence of the causes that motivated the severance of diplomatic relations. This does not imply a high evidentiary threshold. Where, as claimed in this case, the emergency in international relations stems from reasons such as the alleged sponsorship of terrorism by the other party, proving the existence of an emergency should not require producing classified evidence the disclosure of which may compromise the security of the invoking party. The Riyad Agreement is a good example of the type of required evidence.

19. *Third*, similar considerations apply with respect to the 'essential security interests' that Saudi Arabia seeks to protect. In particular, the European Union would welcome a response to the clarifications pertinently sought by the Panel on whether the essential security interests of Saudi Arabia are "the risk […] arising from diplomatic and economic interaction with the complaining Member, including through media platforms and other tools that are being used to disseminate propaganda, to foment instability in the region, and to support terrorism and extremism".

20. *Fourth*, the European Union would also welcome an explanation of how the measures at issue can be considered **'for the protection of'** its essential security interest in so far as they affect rights of third parties- i.e the EU right holders. In other words, the European Union would like to understand how the infringement of the intellectual property rights of EU persons can be considered an action taken 'for the protection of' Saudi Arabia's essential security interests. The European Union has already conveyed to the Saudi authorities its concerns through diplomatic channels, but unfortunately we have received no response so far.

21. *Fifth*, the European Union considers that when assessing the necessity of the measure, and particularly the existence of reasonably available alternatives, the Panel should ascertain **whether the interests of third parties which may be affected were properly taken into consideration**. Thus, the European Union would appreciate 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.

Legal standard for the interpretation and application of Article 73(b)(iii) of the TRIPS Agreement

22. The analytical framework developed by the panel in *Russia — Traffic in Transit* for applying Article XXI of the GATT 1994 provides useful guidance for interpreting and applying Article 73 of the TRIPS Agreement. The text of Article 73(b)(iii) of the TRIPS Agreement is identical to that of Article XXI(b)(iii) of the GATT 1994.

23. The fact that Article 73 does not include language equivalent to the *chapeau* of Article XX suggests that the drafters intended to accord wider discretion to Members when adopting measures based on the security grounds cited in Article 73 of the TRIPS Agreement or in Article XXI of the GATT 1994. However, this does not mean that Members enjoy unfettered discretion under Article 73.

24. The Appellate Body has explained that the chapeau of Article XX is aimed at preventing that the right to invoke one of the exceptions included in that provision be abused or misused. The same rationale applies also in the case of Article 73. The chapeau is a specification of the requirements imposed by the customary international law principle of *pacta sunt servanda*, according to which obligations must be performed in good faith. That general principle applies in respect of all WTO provisions, including Article 73. Therefore, the various elements included in Article 73(b)(iii) must be applied in light of the principle of good faith.

25. To be clear, this does not mean that, in order to reject an Article 73 defence, a panel is obliged to find that the defending Member is not in good faith. An Article 73 defence can be rejected, just like any other defence, simply because the measure does not meet the conditions that must be satisfied in order for the defence to succeed. Nevertheless, it remains the case that, particularly with respect to those parts of Article 73 where the defending Member enjoys greater discretion and room

for manoeuvre, the principle of good faith may have an important role to play, depending on the facts of particular cases. With greater autonomy comes greater responsibility.

The first element of the analysis under Article 73(b)(iii)

26. Under the first element, the defending party has the burden of demonstrating that the measure is taken "in time of war or other emergency in international relations", that it has "essential security interests" with respect to the war or other emergency in international relations, and that the measure is designed "for" the protection of the relevant essential security interest. The panel has to ascertain whether a situation of "war" or of "other emergency in international relations" exists in a given case. Article 73 is different in this respect from, for example, Article 3 of OECD Code of Liberalisation of Capital Movements, which refers to "the protection of [a Member's] essential security interests", without any further specification.

27. The terms "which it considers" in Article 73(b) do not qualify the terms "war or other emergency in international relations" but only the term "necessary". Subparagraphs (i) to (iii) refer to "action" and not to "it considers". A different reading would lead to the absurd result that a Member could unilaterally define fissionable materials in paragraph (i).

28. Hence, the existence of a "war or other emergency in international relations" refers to objective factual situations that can be fully reviewed by panels, as the panel confirmed in *Russia - Traffic in Transit*. Both terms should be interpreted taking into account relevant international law.

29. As the panel noted in *Russia - Traffic in Transit*, an emergency in international relations would appear to refer 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 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.

30. The terms "taken in time" require a sufficient nexus between the action taken by the invoking Member and an ongoing situation of war or emergency in international relations. A mere temporal coincidence between both does not suffice, as it would allow for the adoption of measures entirely unrelated to the war or emergency. This would also be inconsistent with the term "protection" included in the *chapeau* of Article 73 (b), which implies the existence of a threat to which the action of the invoking Member responds.

31. The terms "its essential security interests" should be interpreted in such a way as to allow Members to identify their own security interests and the desired level of protection without having the Panel second-guess the value judgment as to the legitimacy of the interest. At the same time, not any interest will qualify under this exception. The interest must relate genuinely to "security" and be "essential". Purely economic interests or security interests of minor importance would not qualify.

32. "Essential security interests" is evidently a narrower concept than "security interests" and may generally be understood to refer to 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.

33. Attempts to circumvent WTO obligations or compliance obligations, or protectionist interests or security interests of minor importance, would not qualify under this exception. This is also confirmed and supported by the obligation to interpret and apply Article 73(b) or Article XXI(b) in good faith, as a Member is not free to elevate any concern to that of an "essential security interest".

34. Based on the reasons provided by the invoking Member, a panel should review whether the interests at stake can reasonably/plausibly be considered to be "essential security" interests, from that Member's perspective, so as to be able to detect abuses of this exception. Security interests may vary in time and space.

35. Finally, the invoking Member must show that the action is "designed" to protect the relevant essential security interest from the threat posed by the situation of war or other emergency in international relations.

The second element of the analysis under Article 73(b)(iii)

36. The second element in the analysis under Article 73 is whether the measure is "necessary", it pertains to the **connection** between the measure at issue and the essential security interests.

37. The terms "which it considers" imply that, in principle, it is for each Member to assess by itself whether a measure is "necessary". But this does not give the Member unfettered discretion. Under the necessity test in Article 73 a panel's review should give deference to the invoking Member. The review should be limited to assessing whether the invoking Member can plausibly consider the measure necessary and whether the measure is applied in good faith. Since the invoking Member bears the burden of proof, it must provide the panel with an explanation of why it has considered the measure necessary in light of the factors mentioned above.

38. Finally, the European Union recalls that when objectively assessing facts and evidence suggesting different possible outcomes the test is always one of **"plausibility" or "more likely than not"**.

39. Article 73 of the TRIPS Agreement does **not distinguish between "actions" and "measures".** There is no such general category called "actions" which somehow serves as an overall umbrella for the concrete "measures". Indeed, the French and Spanish versions are clear, referring to measures (mesures, medidas), in the same way that Articles XXI and XX of the GATT 1994 also refer to measures.

40. Thus, the European Union does not se any basis for the proposition that the required **connection** should be linked to a nebulous overall "action", while the concrete measures would escape scrutiny. In other words, the party invoking the security exceptions will have (1) to show each time that it fulfils one of the conditions in subparagraphs (i) to (iii), (2) explain which are its essential security interests and then (3) explain the connection between the concrete measures (in this case resulting in possible violations of several provisions of the TRIPS Agreement) and the protection of its essential security interests.

41. Accordingly, the example offered by the UAE in its third party submissions is misplaced: what Saudi Arabia, as the party invoking the security exceptions, has to demonstrate is not "consideration of whether there is a connection between the severance of relations as a whole and the security interests or emergency at issue", but rather whether it is a connection between each measure and each possible violation of the TRIPS Agreement and Saudi Arabia's essential security interests.

42. The **connection** between the measures and the essential security interests is found in two elements in Article 73(b): the **diluted necessity test, subject to good faith** ("it considers necessary") and **the objective "for the protection of"**.

43. For instance, as glasses are "for" reading and pens "for" writing, in the same way it cannot be argued that a prohibition on placing on the market of products resulting from the inhumane killing of seals is "for" the protection of essential security interests.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. The views expressed below address four issues of principles relating to the "essential security" exception in TRIPS Article 73: the consistent interpretation of the security exceptions in the TRIPS Agreement and the GATT 1994; the role of security exceptions within the structure of the WTO Agreement; the meaning and scope of the phrase "other emergency in international relations"; and whether TRIPS Article 73 has a self-balancing nature. Japan also comments on whether a panel or the Appellate Body can decline to make any findings on the ground that no satisfactory settlement was possible.

II. TRIPS ARTICLE 73 SHOULD BE INTERPRETED CONSISTENTLY WITH GATT ARTICLE XXI

2. The text of Article 73 of the TRIPS Agreement is virtually identical to the text of Article XXI of the GATT 1994, and the two provisions must be interpreted in a consistent and parallel manner. The drafters of the TRIPS Agreement sought to avoid the possibility that measures permitted under Article XXI could be contrary to the TRIPS Agreement, or vice versa. That is why from 1991 onward, Article 73 of the TRIPS text in 1991 was virtually identical to GATT Article XXI. The consistency in drafting between TRIPS Article 73 and GATT Article XXI indicates the will of the drafters that the two provisions be interpreted consistently. Accordingly, Japan suggests that the Panel interpret Article 73 in a manner that is generally consistent with GATT Article XXI, while taking into account the intellectual property context of Article 73.

III. CONTEXT OF THE INTERPRETATION OF TRIPS ARTICLE 73

3. First, it should be noted, that paragraph (b) of both of Article 73 of the TRIPS Agreement and Article XXI of the GATT 1994, notably its subparagraphs, specifically circumscribes the scope of subject products and situations that would allow a WTO Member to take measures for the purpose of protecting its "essential security interests". A Member's right to invoke the exceptions under paragraph (b) of those provisions is not unbound.

4. Second, the Panel's analysis should also identify and consider correctly the overall structure of the WTO Agreement, which is part of the context of Article 73 of the TRIPS Agreement in the sense of Article 31 (2) of the Vienna Convention. The Panel should also take into consideration the role of Article 73 within that structure.

5. The Panel in *Russia – Traffic in Transit*, in this regard, pointed out that "a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade."[1]

6. Japan understands that the WTO Agreement, like the GATT before it, is fundamentally an instrument setting out a stable global framework for economic relations based on a rule-based system, benefiting all Members as a result of application of the non-discrimination clauses. The preamble of the WTO Agreement expresses the Members' resolve to "develop an integrated, more viable and durable multilateral trading system encompassing [GATT], the results of past trade liberalization efforts, and all of the results of the Uruguay Round[.]" In other words, the GATT and WTO Agreement were built as codes of binding legal obligations, designed to establish such a legal framework.

7. The certainty and predictability provided by the WTO Agreement, including the TRIPS Agreement, provide an indispensable basis for traders and producers to make economic

[1] Panel Report, *Russia – Traffic in Transit*, para. 7.79 (citing Appellate Body Reports, *EC – Computer Equipment*, para. 82; *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para.433; *Argentina – Textiles and Apparel*, para. 47; and *EC – Chicken Cuts*, para. 243).

decisions about the future, to invest, and to increase trade, employment and economic growth. In a rules-based trading system, the ability to rely on the rules increases the stability of trade relationships. Stable, reliable trade relationships build economic interdependence and peace. The GATT and WTO have thus fostered global economic interdependence through a rules-based trading system, keeping in mind that growing trade relationships based on mutual economic dependence will contribute to peace. This was the outcome intended by those who, in the early years of World War II, planned for revival of free trade when peace would come, and in the Atlantic Charter called for "the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement, and social security."[2] Preserving the rule of law, and the ability of traders to rely on compliance with TRIPS/GATT/WTO rules, serves the national security interest of all Members. By ensuring secure and undisrupted trading relationships, certainty and predictability, the WTO Agreement contributes to peace.

8. In this sense, trading relations under the rule of law, through the expansion of global economic interdependence, are a key means of achieving security and economic growth for all participants in the multilateral trading system. It is under such an overreaching goal that national security is to be addressed.

9. To be consistent with the principles underlying the GATT and the WTO as explained above, Members should avoid trade restrictive measures. It might nevertheless not be possible to sufficiently address some types of national security risks within such an ideal framework. That is why Article 73(b) of the TRIPS Agreement and Article XXI(b) of the GATT 1994 permit a Member to take certain measures (e.g. trade embargos) that are not consistent with any obligation of the TRIPS Agreement and the GATT 1994 in order to address such risks. Imposition of a trade embargo in time of war is a typical example. There is at the same time a widely shared understanding that these exceptions have their limits. These Articles allow certain trade measures only relating to specific products or traffic in certain products, or in certain situations. As the panel in *Russia – Traffic in Transit* found, "[i]t would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, [ ] to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member."[3]

10. Article 73 permits a Member to take certain measures that are not otherwise consistent with its TRIPS obligations "if it considers" such measures are "necessary for the protection of its essential security interests[.]" In Japan's view, the term "consider" accords the invoking Member a broad discretion to take measures for the purpose of protecting its essential security interests in light of the nature of national security risks; however, the term "consider" does not signify that "national security" is more important than other non-trade interests that might justify TRIPS-inconsistent measures. The phrase "if it considers" explicitly states, and clarifies, that it is for the invoking Member to determine *whether* a particular measure is *"necessary for the protection of its essential security interests".* Without the term "consider", when panels and the Appellate Body review whether a measure is "necessary to protect its essential security interests", they might conclude in the negative on the ground that security interests would be better served by complying with GATT/WTO obligations and thus maintaining economic interdependence with other Members. The term "consider" eliminates such a possibility by explicitly recognizing the discretion of the Member taking the measure, although the term "consider" does not mean to accord Members an unlimited discretion to take national security measures.

IV. "OTHER EMERGENCY IN INTERNATIONAL RELATIONS"

11. The chapeau of TRIPS Article 73(b) states that nothing in the TRIPS Agreement shall be construed "to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests." As one of these actions, Article 73(b)(iii) lists actions "taken in time of war or other emergency in international relations."

12. The KSA invokes Article 73(b)(iii) and asserts that the Panel should therefore decline to rule in this dispute. The KSA claims that its severance of diplomatic and economic ties with Qatar is "the

[2] Atlantic Charter, signed on 14 August 1941, fifth clause; text in 1946-47 *Yearbook of the United Nations*, p. 2, available at http://cdn.un.org/unyearbook/yun/pdf/1946-47/1946-47_37.pdf

[3] *Russia – Traffic in Transit*, para. 7.79.

ultimate State expression of the existence of an emergency in international relations."[4] The KSA has not explained the connection between the alleged emergency in international relations and the measures at issue clearly.

13. While Japan takes no position on the underlying facts of this situation, in Japan's view, a mere assertion of severance of economic ties would not in itself constitute an "other emergency in international relations" under Article 73(b)(iii). Article 73(b) allows a Member to justify its severance or disruption of economic ties with other Members with regard to intellectual property rights. If the KSA argues that the act of disrupting ties with another Member with respect to intellectual property rights is itself an "other emergency in international relations" which justifies disrupting that other Member's intellectual property rights, this argument constitutes circular reasoning.

14. The core question is whether it can be objectively assessed, pursuant to DSU Article 11, that an emergency in international relations actually exists that would justify a measure that disrupts trade or breaches TRIPS obligations. A mere assertion of severance of economic and diplomatic ties by an invoking Member without any demonstration of relevant underlying facts might not establish a *prima facie* justification under Article 73.

15. The GATT 1994 does not define the term "other emergency in international relations". The Panel should apply the tools in Article 31 of the *Vienna Convention on the Law of Treaties*: interpreting this term in good faith, in accordance with the ordinary meaning to be given to it in the context of Article XXI, and in the light of its object and purpose. The dictionary definition of "emergency" includes a "situation, especially of danger or conflict, that arises unexpectedly and requires urgent action", and a "pressing need … a condition or danger or disaster throughout a region".[5] Further, the text of Article XXI(b)(iii) refers to "war or other emergency in international relations". Thus, the drafters first listed "war" as the example of an "emergency" where a Member can take action to protect its essential security. This textual structure must be given appropriate weight. In Japan's view, the Panel should accordingly give careful consideration to the extent and gravity of the situation in international relations that the Member invoking Article XXI(b)(iii) refers to as the "other emergency".

V. TRIPS ARTICLE 73 DOES NOT HAVE A SELF-BALANCING NATURE

16. Japan disagrees with the argument that any Member invoking Article 73 implicitly consents to having counter-measures imposed on it by the affected Member, and that this right of retaliation provides a complete solution to the dispute. Such an interpretation disregards the rule of law in international trade. Members invoke the WTO dispute settlement system not because they want authorization to suspend concessions, but because they and their stakeholders seek compliance with WTO rules. Counter-measures without limitation are only likely to lead to successive rounds of escalating trade restrictions. Moreover, relying on retaliation as the sole solution for Article 73 measures is inherently inequitable, as retaliation favors larger Members with more retaliation power, and leaves smaller Members with no remedy.

[4] KSA FWS, para. 6.

[5] Panel Report, *Russia – Traffic in Transit*, para. 7.72 (citing Shorter Oxford English Dictionary, 6th ed., A. Stevenson (ed.) (Oxford University Press 2007), Vol. 2, p. 819).

VI. PANELS SHOULD NOT DECLINE TO MAKE ANY FINDINGS ON THE GROUND THAT NO SATISFACTORY SETTLEMENT IS POSSIBLE

17. The chapeau of GATT Article XXIII:1, applied via TRIPS Article 64, provides: "*If any [Member] should consider* that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired…". It is clear that WTO dispute settlement is available for any Member that *considers* that a dispute exists. As the Appellate Body has stated, "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'."[6] Thus, it is for the parties to a dispute, not the panel, to determine whether a dispute exists. The Appellate Body has further underlined that a Member that initiates a dispute has a right to a panel ruling: "The fact that a Member may initiate a WTO dispute whenever it considers that 'any benefits accruing to [that Member] are being impaired by measures taken by another Member' implies that that Member is *entitled* to a ruling by a WTO panel."[7]

[6] Appellate Body Report, *EC – Bananas III,* para. 135.
[7] Appellate Body Report, *Mexico – Taxes on Soft Drinks,* para. 52.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. ORDER OF ANALYSIS

1. In Norway's view, the panel should only assess whether a measure is justified under Article 73 after it has assessed whether the measure violates the TRIPS Agreement. Article 73(b) operates to justify certain TRIPS-inconsistent action, using the same language as Article XX of the GATT 1994: "nothing in this Agreement shall be construed to prevent any Member from taking any action which…". Under Article XX of the GATT 1994, panels and the Appellate Body have, without exception, addressed first whether the complainant has made out its claims of WTO-inconsistency; and second whether the respondent has made out its affirmative defence that the measures are justified. This is because an affirmative defence is only relevant where a panel has found a violation. Just like Article XX is an affirmative defence to a violation of the GATT 1994, Article 73(b) of the TRIPS Agreement is also an affirmative defence to a violation of the TRIPS Agreement. If there is no violation, then Article 73(b) has no operative role; there is nothing to justify in the first place. Logically, therefore, where a respondent invokes Article 73(b), the panel should first confirm whether there is a violation; and second whether the violation is justified.

2. Moreover, it is well-accepted, from jurisprudence under Article XX of the GATT 1994, that it is the WTO-inconsistent aspect of the measure – and not the measure as a whole – which must be justified.[1] Of course, a panel cannot identify the WTO-inconsistent aspects of a measure until it has addressed the claims. Hence, in our view, it is clear that the same reasoning must apply with respect to the exceptions provisions applicable under the TRIPS Agreement. By contrast, if a panel were obliged to address Article 73(b) before addressing the claims, it would also have to assess whether the measures are justified in a vacuum, without yet having determined which aspects of the measures are WTO-inconsistent.[2]

3. Hence, the order of analysis in this dispute should be such that a panel should first assess the claims of violation, and second, the justification under Article 73(b). An assessment of whether the measures are justified under Article 73(b)(iii) before assessing whether the measures violated the covered agreement, is not an appropriate order of analysis.

II. "JUSTICIABILITY" OF ARTICLE 73 OF THE TRIPS AGREEMENT

4. Norway considers that an interpretation of the security exception in Article 73 of the TRIPS Agreement as "non-justiciable" finds no support in the rules of jurisdiction laid down in the covered agreements and the Dispute Settlement Understanding ("DSU"), and how the provisions therein have been practised.

5. Article 1.1 of the DSU provides that the DSU shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the covered agreements listed in Appendix 1. In addition, it follows from Article 1.2 that the rules and procedures of the DSU shall apply, subject to any special or additional rules of procedure in Appendix 2 of the DSU. The TRIPS Agreement is included as a covered agreement in Appendix 1. Neither Appendix 1 nor any special or additional procedure indicate that any provision of the covered agreements listed in the Appendix is carved out from the compulsory jurisdiction to which Members have agreed.

6. Furthermore, if mere invocation of Article 73(b) or equivalent security exceptions in the other covered agreements would render a claim "non-justiciable", this would allow easy circumvention of WTO obligations. To give a respondent the opportunity to effectively bar a panel's jurisdiction by mere invocation of a security exception, this would be a "carte blanche" for WTO Members to unilaterally set aside the rules that the legitimacy of the rule-based system rests on. A respondent could invoke a variety of protectionist interests under the guise of national security, and thereby avoid scrutiny of its WTO-inconsistent measures altogether. Such a measure could violate any of the

[1] Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.

[2] In our view, the panel in *Russia – Traffic in Transit* erred by departing from the accepted order of analysis under "exceptions provisions" in the GATT 1994.

Member's WTO obligations, and a WTO panel would be barred from making any findings of inconsistency. An interpretation of Article 73(b), which had this effect, would render all the obligations in the TRIPS Agreement effectively unenforceable.

7. Moreover, if the intentions of the negotiators were for the panel to have no jurisdiction to examine a dispute once a Member invokes a security exception provision, one would also have expected such an important and significant matter be expressly provided for.[3]

8. Based on the considerations above, Norway agrees with the panel's finding in *Russia - Traffic in Transit* that Article XXI of the GATT 1994 was properly within its "terms of reference". However, rather than appropriately ending its analysis of "justiciability" there, the panel went on to address Russia's argument that, nonetheless, the invocation of Article XXI(b)(iii) is "non-justiciable", because the terms of the provision are "self-judging".

9. Norway does not consider that the issue relates to the "justiciability" of the security exceptions. To recall, "justiciability" relates to whether the panel has the authority, or jurisdiction, to make an assessment under the relevant security exception provision, as a *threshold* issue. If the panel finds it has jurisdiction, it must exercise its jurisdiction by addressing the merits of the respondent`s invocation of the security exception provision at issue, in light of the legal standard.

10. Under this framework, a panel's interpretation of the subparagraphs of Article XXI(b) and the equivalent provision in the TRIPS Agreement, i.e. the subparagraphs of Article 73(b), is properly part of its assessment of the merits of the defence. It is not part of its assessment of whether it has jurisdiction in the first place.

11. Thus, in Norway's view, the assessment of "justiciability" of the security exception provision in the TRIPS Agreement should stop at the conclusion that nothing in the DSU or the TRIPS Agreement excludes Article 73 from the ordinary dispute settlement rules and procedures. If Article 73 is "within the Panel's terms of reference for the purpose of the DSU", then this, alone, grants the panel's jurisdiction over Article 73. Indeed, once the panel interprets the terms of Article 73, it is already exercising its jurisdiction over that provision.

12. Having regard to the above considerations, Norway finds that Article 73 is justiciable, which follows from relevant terms of the DSU. We consider that an interpretation of the terms of Article 73(b)(i)-(iii) properly belongs under the panel's substantive analysis of the merits, and not under the analysis of "justiciability".

III. BURDEN OF PROOF

13. The security exception in Article 73(b) justifies violations of the TRIPS agreement, under certain limited conditions. As mentioned above, this provision is properly understood as an *affirmative defence*. A respondent invoking an affirmative defence bears the burden of proving that the applicable conditions are met. If the respondent does not take on that burden, beyond invoking an exception, a panel should not proceed to consider the merits of the exception.

14. Hence, if the complainant establishes that a measure imposed by the respondent is inconsistent with the provisions of the TRIPS Agreement, and the respondent does not make a *prima facie* case that those measures are justified under Article 73, the panel must, as a matter of law, rule in favour of the complainant.

15. In our view, the panel in *Russia – Traffic in Transit* failed, in effect, to treat Article XXI(b) of the GATT 1994 as an affirmative defence. This resulted in reversing the burden of proof, obliging the complainant to adduce evidence and arguments that the measures were not plausibly connected to the articulated essential security interest. The panel found, however, that the measures were justified, but without requiring the respondent to make its case, either in presenting arguments or

[3] The "justiciability" of the security exceptions is also supported by the GATT Council Decision Concerning Article XXI of the General Agreement, 30 November 1982, L/5426, which states that "[w]hen action is taken under Article XXI, all [Members] affected by such action retain their full rights under the General Agreement", without carving out rights under Articles XXII and XXIII.

evidence. Norway finds that the panel in that dispute erred in not seeing the burden of proof as resting on the respondent.

16. Summing up, if a respondent invoking the security exception in Article 73(b) does not meet the burden to show that the conditions for justification under this provision are met, the panel must, by default, find that the measures are not justified.

ANNEX C-9

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION*

I. INTRODUCTORY

1. Distinguished Chair, members of the Panel, the Russian Federation appreciates the opportunity to present its views as a third party in this dispute.

2. Russia does not take a specific position on the measures at issue or on the particular facts presented by the parties. Rather, Russia will share its views on issue that is of systemic interest for it, i.e. correct and consistent interpretation and application of provisions of Article 73 of the Agreement on Trade Related Aspects of Intellectual Property Rights ("the TRIPS Agreement").

II. WHETHER THE PANEL SHOULD DECLINE TO PROCEED FURTHER

4. The task before the Panel is, in fact, not ordinary or easy one. Article 73 of the TRIPS Agreement has never been invoked by Members and interpreted by the panels before.

5. Russia considers that security exceptions under Article 73 of the TRIPS Agreement and XXI of the GATT 1994 have identical wording and, thus, similar consideration should be applied to them. Article XXI of the GATT 1994 was recently interpreted by the panel in *Russia – Traffic in Transit.*

6. The fact that security exceptions were analyzed only once in the past underlines the importance of these exceptions and shows that the Members/Contracting Parties had traditionally refrained from bringing challenges of the highly sensitive security-based political measures to the WTO adjudication.

7. On this occasion, we would like to caution that issues raised in the current dispute should be handled with great care considering potentially destabilizing consequences, while stressing the importance and sensitivity of the issues related to protection of national security.

8. Russia believes that the Panel in present dispute cannot decline to proceed further and consider the dispute based on the same considerations the panel in "Russia- Traffic in Transit" applied when rejecting the claims by the Russian Federation that the panel in that dipute lacks jurisdiction due to Russia's invocation of the provisions of the GATT Article XXI.

9. For the reasons put forward by the Panel in "Russia- Traffic in Transit" the invocation of security exceptions under Article 73 of the TRIPS Agreement is in the Panel's terms of reference and the Panel cannot avoid but proceed further in this dispute.

III. SECURITY EXCEPTIONS

12. Russia believes that nevertheless Article 73 of the TRIPS Agreement is in the Panel's terms of reference, the only issue the Panel is in a position to objectively establish is whether the measures at issue fall within the circumstances provided by this Article - a particular subparagraph of paragraph (b) of the said Article.

13. The text of Article 73 has following structure: chapeau ("nothing in this agreement shall be construed"), list of actions which "nothing in this agreement shall be construed" to prevent (in this case – "to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests") and circumstances under which actions could be taken (in this case – "taken in time of war or other emergency in international relations").

14. Chapeau of this Article completely differs from chapeau of any other exceptions, like Article XX of the GATT. In the wording of chapeau of Article 73.b of the TRIPS Agreement there is no limiting

* Russia requested its oral statement to be used as its executive summary.

conditions under which the measure applied shall fall. On the contrary, the chapeau provides that there could be no limitations in the Agreement for the specific purposes provided by that Article.

15. As previously noted, the words of the chapeau of Article 73 of the TRIPS Agreement are followed by the list of actions. In the present case the relevant action is under subparagraph b – to take any action which it considers necessary for the protection of its essentially security interests. Russia notes that the plain wording allows a Member to apply **any** action which **it considers** necessary for the protection of **its** essentially security interests. Therefore, establishing subjective standard of evaluation of the measures necessary for protection of its essentially security interests the wording in this part of the Article authorizes a Member to determine itself which actions are necessary for it to protect its essentially security interests and excludes any objective examination or evaluation by adjudicative body.

16. Therefore, Russia believes that it is within the discretion of the State alone to determine what the essential security interests for the State are and what measures are necessary for their protection. Should a Member consider certain actions necessary for the purpose of protection of its essential security interests, the declaration thereof by that Member is enough to satisfy the requirements of Article 73(b) of the TRIPS Agreement. Neither the WTO panels nor the organization itself has the right to consider, *inter alia*, what the essential security interests for the Member are and what measures are considered by the Member to be necessary to protect those security interests as these aspects are the issues of sovereignty of the States, which could not be reviewed under the organization created for the purposes of regulating international trade.

17. However, Article 73 of the TRIPS Agreement also contains three enumerated subparagraphs qualifying the circumstances under which the measures could be applied. The wording in this subparagraphs does not establish any subjective standard. On the contrary, it establishes situations that should be established by the adjudicative body in order the measures taken for security reasons could be justified by the provisions of this Article.

18. As was established by the panel in *Russia- Traffic in transit* "as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was "taken in time of" an "emergency in international relations" under subparagraph (iii) of GATT Article XXI(b) is that of an objective fact, subject to objective determination".[1]

19. "Taken in time of" establishes the connection between the actions and particular emergency in international relations. The Panel in *Russia- Traffic in transit* understands this phrase to require that the action be taken during the war or other emergency in international relations. This chronological concurrence is also an objective fact, amenable to objective determination.[2]

20. Therefore, Article 73 of the TRIPS Agreement provides certain circumstances, restrict application of the measures to three distinct settings, which should be met in order to justify the measures under specific exceptions.

21. To sum up, Russia considers that there are only two elements for the Panel to establish: 1) whether the action is taken "in time of war or other emergency in international relations"; 2) whether it is not implausible to consider that a WTO member indeed considers the action as necessary for the protection of its essential security interests. The second element refers to the discretion of the WTO member, which is taking action under Article 73 of the TRIPS.

IV. CONCLUDING REMARKS

29. Russia would like again notice that the Panel is in a difficult situation of striking a proper balance.

[1] Panel Report, *Russia – Traffic in transit*, paras. 7.77.
[2] Para. 7.70

ANNEX C-10

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE

I. INTRODUCTION

1. This dispute raises novel issues concerning the interpretation of Article 73 of the Agreement on Trade-Related Intellectual Property Rights (the TRIPS Agreement). Singapore attaches great importance to upholding an open, stable and predictable rules-based multilateral trading system. Singapore is also a hub for the protection and commercialisation of intellectual property. This Panel's decision on the interpretation of Article 73 of the TRIPS Agreement would also have a direct impact on the interpretation of WTO security exceptions provisions that are *in pari materia*, and may have broader implications for the multilateral trading system. Accordingly, Singapore has great interest in the interpretation and application of the treaty provisions at issue in this dispute, particularly Article 73 of the TRIPS Agreement.

2. Singapore has no comment on the merits of the claims and defences raised by the parties to the dispute, nor on any underlying political or security dispute. Singapore's third party participation in this dispute is strictly confined to the legal interpretation of the relevant treaty language.

II. EXECUTIVE SUMMARY OF SINGAPORE'S THIRD PARTY ORAL STATEMENT

3. In *Russia – Traffic in Transit*, the panel interpreted Article XXI(*b*)(*iii*) of the General Agreement on Tariffs and Trade 1994 (GATT 1994) in the context of certain prohibitions on goods traffic-in-transit. Singapore generally agrees with that panel's analysis of Article XXI(*b*)(*iii*) of the GATT 1994.

4. Article 73 of the TRIPS Agreement is virtually identical to Article XXI of the GATT 1994. While treaty provisions have to be interpreted in their context, the *Russia – Traffic in Transit* panel's approach leaves sufficient room for an interpretation of Article 73 that is sensitive to the context of the TRIPS Agreement. Accordingly, the approach in *Russia – Traffic in Transit* can be used to interpret Article 73 of the TRIPS Agreement.

5. In a case where Article 73 of TRIPS Agreement is invoked because Members have severed diplomatic and consular relations, the obligation of "good faith" in the *Russia – Traffic in Transit* panel's analysis of "essential security interest"— which encompasses the invoking Member's duty to "articulate" its essential security interests — may assume a particular importance. In Singapore's view, this element of the *Russia – Traffic in Transit* panel's approach preserves a balance between the reality that Members must have domestic policy space to safeguard essential security interests, and what is required for the WTO dispute settlement system to perform its function "in providing security and predictability to the multilateral trading system" under Article 3.2 of the Dispute Settlement Understanding (DSU). As the *Russia – Traffic in Transit* panel put it:

> The obligation of good faith requires that Members not use the exceptions in Article XXI [in pari materia *with Article 73 of the TRIPS Agreement*] as a means to circumvent their obligations under the GATT 1994 [*which, in the present dispute, would equate to the TRIPS Agreement*]. … It 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[1].

6. The severance of diplomatic and consular relations is not, in and of itself, "an emergency in international relations" within the meaning of Article 73(*b*)(*iii*) of the TRIPS Agreement. In that regard, the analysis at paragraph 7.76 of the Panel Report in *Russia – Traffic in Transit* is a useful way to think about the concept of "emergency in international relations[2]". It may be that there are

[1] Panel Report, *Russia – Traffic in Transit*, paras. 7.133-7.134. (emphasis added)

[2] "An emergency in international relations would, therefore, appear to refer 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 give rise to particular types of interests for the Member in question, i.e.

facts underlying or leading to such a severance in relations which could qualify as an "emergency in international relations". However, these facts, as well as the temporal relation between the Member's measure and that "emergency", need to be articulated, to facilitate proper consideration under Article 73 of the TRIPS Agreement, in the context of the dispute settlement system to which all WTO Members have agreed under the DSU.

III. EXECUTIVE SUMMARY OF SINGAPORE'S RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

A. Response to Question 1 (order of analysis)

7. In *Canada – Wheat Exports and Grain Imports*, the Appellate Body stated that "in each case it is the nature of the relationship between two provisions that will determine whether there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law[3]". Although the provision at issue in *Canada – Wheat Exports and Grain Imports* was Article XVII of the GATT 1994, the Appellate Body's statement was framed as having general application, and can consequently be applied in the present case. As such, the Panel must look to the provisions of the TRIPS Agreement underlying the substantive claims, on the one hand, and to Article 73 of the TRIPS Agreement, on the other, in order to ascertain the nature of their relationship, so as to determine if there exists a "mandatory sequence of analysis".

8. In the present dispute, the substantive provisions upon which Qatar bases its claims set out the substantive obligations under the TRIPS Agreement. Article 73, on the other hand, is an exceptions provision. The appropriate relationship between the two types of provisions would therefore be a "substantive provision – exceptions" relationship, where the exception constitutes an affirmative defence that is raised to justify an established violation of a substantive provision.

9. Accordingly, such a relationship would warrant analysing the complainant's substantive claims before analysing the defence: i.e., whether the security exception was rightly invoked. If there is no violation of the substantive provisions to begin with, it is not necessary to analyse the invocation of the security exception. Adopting this sequence of analysis would not, however, preclude a panel from proceeding, in an appropriate case, to assess whether a security exception has been rightly invoked, such as where it is clear that the security exception would have applied in the circumstances even if there was a violation of a substantive provision.

B. Response to Question 6 (Article 73 of the TRIPS Agreement)

10. There is no support for an automatic right of retaliation in the text of Article 73 of the TRIPS Agreement, or in any of the other security exceptions provisions of the WTO Agreements *in pari materia* with Article 73. Such a reading of Article 73, would, in effect, give Members a right to retaliate as long as that provision is invoked. This outcome would undermine the predictability afforded by the rules-based multilateral trading system of the WTO, and upset the balance of rights and obligations established under the WTO Agreements, including through the DSU. This is why it remains important to have a neutral arbiter, such as panels and the Appellate Body, including in cases where security exceptions are invoked.

11. Moreover, under the WTO framework, there is a range of remedies available under the DSU to a Member which has succeeded on its claim before a panel. DSU Article 19.1 provides for the panel or Appellate Body (a) to make recommendations to the Member found to have violated a covered agreement to bring the measure in conformity with the agreement, and (b) to suggest ways in which the Member could implement those recommendations. DSU Article 22 further provides for mechanisms such as negotiation and voluntary compensation from the non-compliant Member in specific situations. A wrongful invoking of Article 73 of the TRIPS Agreement is not necessarily remedied by retaliatory measures, which are, in any event, regulated under the WTO system.

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defence or military interests, or maintenance of law and public order interests" (Panel Report, *Russia – Traffic in Transit*, para. 7.76, footnotes omitted).

[3] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.

C. Response to Question 7 (connection between "action" and "essential security interests")

12. In *Russia – Traffic in Transit*, the panel explained how a Member's broad discretion to designate particular concerns as "essential security interests" is circumscribed, through the application of the obligation of good faith:

> The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system 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.
>
> *It 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.*
>
> *What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue*. In particular, the Panel considers that the less characteristic is the "emergency in international relations" invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict[4].

13. Implicit in this approach is that a panel should assess the invoking Member's articulation of its essential security interests in a logical and contextual way. What this entails is that, to the extent that it is required for a proper assessment of an invoking Member's measures, a panel may look at the measures in totality.

14. However, Singapore does not agree that the "overall action" to be assessed is the action of "severing diplomatic and economic relations". What is required in the present case is an articulation of how the various measures alleged to be substantive violations of the TRIPS Agreement, seen in totality, bear a connection with the "emergency in international relations".

D. Response to Question 8 (jurisdiction)

15. Before April 1989, the positive consensus rule applied to the establishment of dispute settlement panels, the setting of their terms of reference, and the adoption of panel reports. The *US – Nicaraguan Trade* GATT Panel Report must therefore be understood in that specific institutional context.[5] Moreover, and in any event, the panel's terms of reference in *US – Nicaraguan Trade* "stipulated that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI(*b*)(*iii*) [of the GATT 1947, *in pari materia* with Article 73(*b*)(*iii*) of the TRIPS Agreement" (citing GATT Panel Report, *US – Nicaraguan Trade*, paragraph 5.3).

16. In the present case, there have been no changes to the Panel's standard terms of reference applicable pursuant to DSU Article 7.1. In this regard, paragraph 51 of the Appellate Body Report in *Mexico – Taxes on Soft Drinks* is relevant to the Panel's assessment of this issue:

> Under Article 11 of the DSU, a panel is…charged with the *obligation* to "make an objective assessment of the matter before it, including an

[4] Panel Report, *Russia – Traffic in Transit*, paras. 7.132-5. (emphasis added)
[5] See also Panel Report, *Russia – Traffic in Transit*, fn 155.

> objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 11 also requires that a panel "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." It is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it[6].

In line with this reasoning, the Panel may not decline to exercise its jurisdiction in the present dispute.

17. Singapore is unaware of any prior GATT or WTO cases in which a panel or the Appellate Body declined to make any findings on the ground that there was no "trade dispute" or that "no satisfactory settlement" was possible. In any event, the present case would *prima facie* appear to involve a trade dispute, as one party has alleged substantive violations of the TRIPS Agreement.

E. Response to Question 5 (Article 61 of the TRIPS Agreement)

18. It was argued that the scope of the obligations conferred upon WTO Members in the first sentence of Article 61 of the TRIPS Agreement should be interpreted as requiring Members not only to "write down criminal procedures and penalties in their criminal laws", but "to actually *apply* those procedures and penalties, particularly in egregious cases of conduct that qualifies as a crime[7]".

19. Singapore's view is that Article 61 does not support this argument. Article 61 merely obliges Members to criminalise wilful trademark counterfeiting or copyright piracy on a commercial scale, and to provide for the availability of criminal procedures and penalties in such cases. In *China – Intellectual Property Rights*, the panel did not find a duty to prosecute. The panel's findings were expressly "confined to the issue of what acts of infringement must be criminalised and not those which must be prosecuted[8]". As a matter of logic, it follows that Article 61 does not require Members to actively prosecute *all* cases of wilful trademark counterfeiting and copyright piracy on a commercial scale. Members retain the discretion, under their respective national laws, to decide whether to proceed with prosecution in a particular case.

IV. CONCLUSION

20. The Panel has jurisdiction to consider a Member's invocation of Article 73 of the TRIPS Agreement. In this regard, the approach to WTO security exceptions language taken in *Russia – Traffic in Transit* is instructive, and may be applied in the present case. An invoking Member's discretion to designate particular concerns as "essential security interests" is broad, but it is also circumscribed through the obligation of good faith. Singapore does not agree that the severance of diplomatic and consular relations, in and of itself, constitutes "an emergency in international relations" within the meaning of Article 73(*b*)(*iii*) of the TRIPS Agreement.

21. Article 73 of the TRIPS Agreement does not give affected Members a right to retaliate as long as that provision is invoked. Under the WTO framework, there exists a range of remedies available under the DSU to a Member which has succeeded on its claim before a panel. In Singapore's view, this approach is what is required by the language of Article 73, which, in turn, reflects the balance that has been struck between maintaining the integrity of a rules-based multilateral trading system and preserving Members' ability to protect their essential security interests.

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[6] Appellate Body Report, *Mexico – Taxes on Soft Drinks,* para. 51. (emphasis original)
[7] Qatar's first written submission, paras. 419-424. (emphasis original)
[8] Panel Report, *China – Intellectual Property Rights*, paras. 7.596-7.

ANNEX C-11

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. JURISDICTION OF A PANEL TO REVIEW INVOCATION OF "SECURITY EXCEPTIONS" PROVISION

1. Ukraine wishes to note that the texts of Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") and of Article XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") (or the equivalent provision in Article XIV*bis* of the General Agreement on Trade in Services ("GATS")) use the same language.

2. In *Australia – Apples* the Appellate Body highlighted that, by virtue of Article II:2 of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"), all WTO provisions, regardless of what WTO agreement they are a part of, constitute context relevant to the interpretation of the other.[1]

3. Therefore, application of the provisions of Article 73 of the TRIPS Agreement are to be interpreted in the same manner as Article XXI of the GATT 1994 or Article XIV*bis* of the GATS.[2]

4. The Panel in *Russia – Traffic in Transit* concluded that it has jurisdiction to determine whether the requirements of Article XXI of the GATT 1994 are satisfied.[3] In particular, the Panel reasoned that due to the absence in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, respondent's invocation of "security exceptions" provision "is within the Panel's terms of reference for the purposes of the DSU"[4]. In Ukraine's view, this conclusion is constant.

5. The Panel in *Russia – Traffic in Transit* farther states that it follows from the Panel's interpretation of the "security exceptions" provision, as vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met, rather than leaving it to the unfettered discretion of the invoking Member, that such provision is not totally "self-judging".[5]

6. Besides, Article 3.2 of the DSU recognizes that the dispute settlement system: (i) is a "central element in providing security and predictability to the multilateral trading system"; and (ii) serves to preserve the rights and obligations of Members under the covered agreements. This is reinforced by Article 3.3 of the DSU, which highlights that the ability of Members to bring disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

7. In light of the above, Ukraine considers that to preserve the rights and obligations of Members under the WTO covered agreements the Panel has jurisdiction to examine and make findings and recommendations with respect to each of the provisions of the covered agreements cited by either party, including Article 73 of the TRIPS Agreement.

II. ORDER OF ANALYSIS, BURDEN OF PROOD AND THE PRINCIPLE OF "GOOD FAITH"

8. Ukraine fully recognizes the special nature of security interests covered by the "security exceptions" provision, and the need for a margin of discretion for the Member invoking these exceptions. However, such discretion cannot be unfettered, since that could give rise to abuse.

9. With respect to order of analysis, Ukraine's view is that what findings to address first – on the complainant's claims of violation or on the respondent's justifications under the "security exceptions" provision, is secondary matter. What constitutes a primary importance is that the Panel addresses both issues fully and objectively irrespectively of the order of analysis, at least to enable, for

[1] Appellate Body Report, *Australia – Apples*, para. 173, footnote 285.
[2] Panel Report, *Russia – Traffic in Transit,* para. 7.20.
[3] Ibid, paras. 7.104, 8.1.
[4] Ibid, para. 7.56.
[5] Ibid, para. 7.102.

instance, the Appellate Body to complete the legal analysis in case of the reversion of any findings during the Appellate review.

10. In Ukraine's view, a panel must examine whether (i) the interests or reasons advanced by a defendant WTO Member for imposing the measures fall within the scope of the phrase "its essential security interests"; and whether (ii) the measures are directed at safeguarding a defendant Member's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.

11. In order to prevent a Member from "releasing itself from the structure of "reciprocal and mutually advantageous system arrangements" that constitutes the multilateral trading system"[6], the Panel in *Russia – Traffic in Transit* refers to obligation to act in a good faith as one of the general principles of law and a principle of general international law in particular[7].

12. The Panel in *Russia – Traffic in Transit* further concludes that the obligation of good faith "applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue"[8].

13. Ukraine agrees with the panel on this approach. In Ukraine's view, the Panel in the present case has to examine, taking into account the structure, content and design of the measure, whether there is a rational relationship between the action taken and the protection of the essential security interest at issue.

14. Ukraine submits that what qualifies as a sufficient level of articulation will depend, for example, on the emergency in international relations at issue[9]. A Member would need to define connection of the essential security interests with the measures at issue, thus the measures at issue meet a minimum requirement of plausibility in relation to the essential security interests.[10]

15. Ukraine would also like to emphasize that Article 73 of the TRIPS Agreement lays down an affirmative defence of measures, which would otherwise be inconsistent with an obligation under the TRIPS Agreement. Accordingly, it is for the respondent to invoke the provision of "affirmative defence" and the respondent will bear the burden of proving that the applicable conditions are met.

16. It follows that a successful defence requires the respondent to justify each such aspect of each measure that is found to be inconsistent with the TRIPS Agreement. That means that every justification must be specific to the aspect of the measure giving rise to a specific finding of inconsistency with the TRIPS Agreement.

III. RELIANCE ON ARTICLE 73(A) OF THE TRIPS AGREEMENT

17. Ukraine would like to emphasize that reading paragraphs (a), (b) and (c) together shows that Article 73 of the TRIPS Agreement covers both measures taken unilaterally by a WTO Member and measures taken in accordance with the multilateral rules established in the UN Charter. Thus, on the one hand, in accordance with Article 73(a) and (b) of the TRIPS Agreement, a WTO Member may decide what information it considers to require protection from disclosure and what action to take for protecting its essential security interests. On the other hand, pursuant to Article 73(c) of the TRIPS Agreement, the obligations under the UN Charter determine what action must or may be taken. The use of the phrase "which it considers necessary" in paragraphs (a) and (b) makes that distinction explicit.

18. At the same time, Article 73(a) of the TRIPS Agreement addresses a situation distinct from that covered under Article 73(b) of the TRIPS Agreement. Article 73(a) of the TRIPS Agreement describes action that may not be required of a Member, and Article 73(b) of the TRIPS Agreement describes action which a Member may not be prevented from taking, notwithstanding that Member's

[6] Panel Report, *Russia – Traffic in Transit*, para. 7.133.
[7] Ibid, para. 7.132.
[8] Ibid, para. 7.138.
[9] Ibid, para. 7.135.
[10] Ibid, para. 7.138.

obligations under TRIPS Agreement.[11] Article 73(a) of the TRIPS Agreement may be invoked by a WTO Member in order to justify not complying with information and transparency obligations found in the TRIPS Agreement. However, Article 73(a) of the TRIPS Agreement may not be used to avoid burden of proof, set under Article 73(b) of the TRIPS Agreement. Such combination would lead to justifying deviation from a Member's obligations under the TRIPS Agreement without any possibility of reviewing such deviation under dispute settlement.

19. Therefore, Ukraine is of a view that reliance on Article 73(a) of the TRIPS Agreement in order to evade from burden of proof when invoking "security exceptions" provision pursuant to Article 73(b) of the TRIPS Agreement is ill-reasoned and distorts the meaning behind provisions, set out in Article 73 of the TRIPS Agreement.

[11] See Panel Report, *Russia – Traffic in Transit,* para. 7.61.

ANNEX C-12

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED ARAB EMIRATES

I. INTRODUCTION

1. The United Arab Emirates ("UAE") has an interest in the systemic legal issues at the core of this dispute, in particular, the interpretation and application of the security exception found in Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). The UAE, like the Kingdom of Saudi Arabia ("KSA"), terminated relations with Qatar on 5 June 2017. Eight other nations also severed ties with Qatar in mid-2017, and three others downgraded relations. Each made its own decision, and each implemented this action with different measures, but all were responding to a common emergency and threats posed by Qatar to them and to the international community—namely Qatar's support for extremist and terrorist groups, including but not limited to Hamas, Hezbollah, Al Qaeda, the Al Nusra Front, and the Muslim Brotherhood; its provision of safe haven for members of these groups and their financiers; its promotion of these groups and their ideology through its state-owned media outlets; and its interference in the internal affairs of other countries.

2. The UAE agrees with KSA that Qatar poses a grave threat to its essential security interests and agrees with the action taken by KSA. Like KSA, the UAE has invoked the security exception in Article 73 of the TRIPS Agreement, as well as its almost identical counterparts in the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the General Agreement on Trade in Services ("GATS"). This Panel's interpretation and application of Article 73 may weigh on the dispute between the UAE and Qatar as well as other security-related disputes that might come before the WTO

3. This submission summarizes the UAE's views on the following issues: (i) the appropriate order of analysis; (ii) the interpretation of Article 73 of the TRIPS Agreement; (iii) the principle of good faith and plausibility; and (iv) the applicability of Article 73 to KSA's action.

II. ORDER OF ANALYSIS

4. The UAE considers it appropriate for the Panel to examine first whether the security exception applies. If the Panel agrees, the Panel need not proceed further, as it may exercise judicial economy and end its work there. A panel is not required to consider or decide issues that are not "absolutely necessary to dispose of the particular dispute".[1] By addressing the all-encompassing security exception first, this Panel can avoid making findings that are ultimately unnecessary to resolve the dispute, and which engage sensitive matters of State sovereignty and security.

5. Such an approach would be consistent with the *Russia – Traffic in Transit* panel's approach. In that dispute, the panel chose to examine first whether the "security exception" under Article XXI of the GATT 1994—the GATT equivalent to Article 73 of the TRIPS Agreement—was satisfied before addressing the GATT violation claims made by the complaining party. Specifically, the panel reasoned that an evaluation of whether measures are covered by Article XXI(b)(iii), having been taken during a time of "war or other emergency in international relations", does not require a prior determination that they would be WTO-inconsistent had they been taken in normal times. As a result, the *Russia – Traffic in Transit* panel found that an analysis of the WTO-consistency of the challenged measures would be required only if it were to conclude, as a threshold matter, that the security exception had not been successfully invoked. In the UAE's view, this finding makes clear that the order of analysis taken by that panel was not simply a product of the jurisdictional manner in which Russia raised its Article XXI defence.

6. This order of analysis is also consistent with the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). While Articles 7.2 and 11 may define the scope of the "matter" before a panel, this does not mean that a panel must always begin its analysis with the claims of the complaining party or that it must resolve each and every one of those claims. Rather, it is well-established that panels may exercise judicial economy with respect to claims that are properly within the panels' terms of reference. The UAE agrees with the need to preserve parties'

[1] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

rights under the DSU in connection with a potential appeal. However, the UAE considers that these rights can be adequately preserved even if the Panel begins its analysis under Article 73. Therefore, the Panel would not act inconsistently with Article 7.2 or 11 if it were to begin its analysis with Article 73 of the TRIPS Agreement and if it were to eventually exercise judicial economy with respect to the complaining party's substantive claims.

7. A panel that confirms that Article 73 applies provides prompt resolution of the dispute in accordance with Article 3.3 of the DSU, even if it does not make findings on each of the claims of violation raised by the complaining party. The objective of providing security and predictability found in Article 3.2 of the DSU is also met because there is a determination that the action taken by the invoking Member is permissible under the circumstances and may continue while the emergency persists. Thus, a panel finding that Article 73 is applicable and, as a consequence, exercising judicial economy with respect to the claims of the complaining party would provide *less* security and predictability.

III. INTERPRETATION OF ARTICLE 73 OF THE TRIPS AGREEMENT

8. The essential security interests of WTO Members prevail over the trade interests protected by the WTO agreements. This hierarchy between security and trade interests is clearly reflected in Article 73 of the TRIPS Agreement, as well as in similar security exceptions in the GATT 1994 and the GATS. The UAE notes that some Members argue that mere invocation of a security exception is sufficient to preclude further review by a panel. If this Panel agrees with that position, it can end the matter there.

9. Should the Panel decide that it has a role in reviewing whether a Member invoking Article 73(b)(iii) "considers" the action in question to be "necessary for the protection of its essential security interests ... in a time of war or other emergency in international relations", then it must be mindful of the breadth and deference that Article 73 (as well as the parallel security exceptions in the GATT 1994 and GATS) afford an invoking Member. The breadth of these exceptions is reflected in their shared opening phrase: "[n]othing in this Agreement shall be construed ... to prevent any contracting party from taking any action...". This language is all-encompassing and makes clear that "any action" of a WTO Member that falls within its terms is permissible, notwithstanding all other provisions in the TRIPS Agreement.[2]

10. The unusual breadth of Article 73 is further confirmed by the phrase "it considers necessary" in paragraph (b), which requires a panel to assess whether a challenged "action" taken by a Member is "necessary" from the perspective of that Member. The words "it considers necessary" make plain that a panel cannot substitute its judgment for that of the invoking Member with regard to what might or might not have been "necessary". As the *Russia – Traffic in Transit* panel found, to give the clause "which it considers" legal effect, the panel must leave it to the implementing Member to determine whether the action was "necessary".[3]

11. Furthermore, Article 73 allows each WTO Member to define "essential security interests" for itself. As the *Russia – Traffic in Transit* panel found, what a State considers relevant in protecting itself from external or internal threats depends on the particular situation and perceptions of that State and will vary with changing circumstances. For these reasons, that panel found that the WTO allows each Member to define what it considers to be "its essential security interests".[4]

12. KSA has referred to subparagraph (iii) of Article 73, which provides that the exception applies to actions "taken in time of war or other emergency in international relations".[5] The terms "taken in time of" describe a temporal link between the "action" taken to protect essential security interests and the "other emergency in international relations". In this respect, the *Russia – Traffic in Transit* panel observed that the terms "taken in time of" require that the action be taken "during the war or other emergency in international relations".[6] This temporal requirement must be distinguished from

[2] See Panel Report, *Russia –Traffic in Transit*, para. 7.61.
[3] Panel Report, *Russia – Traffic in Transit*, para. 7.146.
[4] Panel Report, *Russia – Traffic in Transit*, para. 7.131.
[5] The Kingdom of Saudi Arabia's first written submission, para. 7.
[6] Panel Report, *Russia – Traffic in Transit*, paras. 7.69-7.70 (emphasis in original).

the narrower "relationship of ends and means" required by the terms "relating to", which are used in the other two subparagraphs of Article 73(b).[7]

13. The words "or other" in subparagraph (iii) confirm that the phrase "emergency in international relations" is broader than "war". The placement of the words "or other" before "emergency in international relations" make clear that "war" is one example of an "emergency in international relations", but it is not the only circumstance that constitutes such an "emergency". The French and Spanish versions of Article 73, which refer to "guerre ou grave tension internationale" and "guerra o grave tensión internacional", respectively, further confirm that an "emergency in international relations" is not confined to a war or other armed conflict and also applies to situations of grave tensions among nations which is related to essential security interests. The *Russia – Traffic in Transit* panel rejected the notion that such emergencies are limited to armed conflicts and instead found that such an emergency could also include a state of "heightened tension or crisis, or of general instability engulfing or surrounding a state" which can relate to "defence or military interests" as well as "maintenance of law and public order interests".[8]

14. The UAE considers that an "emergency in international relations" refers to a serious, unexpected and possibly dangerous situation involving the interactions of two or more countries or in how they regard and engage with each other, which is related to essential security interests. Thus, a panel should not apply a rigid, unbending standard in examining whether an "emergency in international relations" exists. Rather, a panel must take into account the perspective and position of one Member in light of its relationship with another, and must conduct its examination from the vantage point of the Member claiming the existence of an emergency and the impact on its essential security interests.

IV. THE PRINCIPLE OF GOOD FAITH AND PLAUSIBILITY

15. The UAE recognizes that the broad scope of the security exceptions creates a risk of abuse and could allow Members to attempt to justify impermissible trade protectionism in the guise of security. The *Russia – Traffic in Transit* panel, when acknowledging the deference afforded to Members in determining what actions they may take "for the protection" of their "essential security interests", qualified this deference by referring to the obligation of good faith as a general principle of international law.[9] In the words of the panel, "this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests."[10]

16. Insofar as the Panel were to consider the *Russia – Traffic in Transit* discussion of plausibility instructive here, the UAE would invite the Panel to consider that the plausibility formulation of the *Russia – Traffic in Transit* panel sets a very low bar—it merely must not be implausible that the challenged measures are protective of the relevant security interests. Moreover, as the Appellate Body has explained, Members are presumed to act in "good faith".[11] In the context of the security exceptions, the invoking Member would, at most, need to articulate how its action plausibly protects its essential security interests. If it does so, the complaining Member bears the burden of providing facts and arguments that sufficiently demonstrate the implausibility of the invoking Member's position and rebut the presumption of good faith. The invoking Member need not affirmatively prove the negative.

17. Additionally, the UAE recalls that the phrase used in the English version of the security exceptions is "any *action* which it considers necessary for the protection of its essential security interests" (emphasis added). As a result, the UAE considers that, in the current context, any plausibility connection should most appropriately be assessed between the overall "action" taken by the invoking Member and the protection of "its essential security interests". In the UAE's view, the term "action" in Article 73 refers to the response of the invoking Member to the war or other emergency in international relations. This response can be, and often is, multi-faceted. In such emergency circumstances, a Member cannot be expected to calibrate each individual element of its

[7] Panel Report, *Russia – Traffic in Transit*, para. 7.69 (citing Appellate Body Reports, US – Shrimp, para. 136; China – Raw Materials, para. 355; and China – Rare Earths, para. 5.90).
[8] Panel Report, *Russia –Traffic in Transit*, para. 7.76.
[9] Panel Report, *Russia –Traffic in Transit*, para. 7.132.
[10] Panel Report, *Russia – Traffic in Transit*, para. 7.138
[11] Appellate Body Report, *EC – Sardines*, para. 278.

response to the particular threat faced. Where a Member takes broad "action" that may be comprised of individual measures, the approach to plausibility must necessarily consider the overall action.

18. There is no textual basis in Article 73 to require a connection between individual measures, in isolation from and outside of the context of the overall action, and the emergency and associated security interests at issue. Doing so would also ignore the careful balance struck between the WTO's trade mission and the exceptional considerations of State sovereignty. Thus, for example, where the central action taken is the termination of diplomatic and economic relations, plausibility would involve consideration of whether there is a connection between the termination of relations as a whole and the security interests or emergency at issue. If the Panel applies the plausibility test to "measures" (e.g. limiting access to a port), as opposed to the overall "action" (i.e. the termination of relations), this can only be to consider a plausible connection between the "action" and "measures" – i.e. if limiting access to a port is plausibly connected to the termination of relations (which itself must be plausibly connected to the emergency).

V. THE UAE AGREES THAT KSA TOOK ACTION IT CONSIDERED NECESSARY FOR THE PROTECTION OF ITS ESSENTIAL SECURITY INTERESTS IN TIME OF AN OTHER EMERGENCY IN INTERNATIONAL RELATIONS

19. The UAE respectfully submits that the Panel has an ample basis to find that KSA has properly invoked Article 73 (b)(iii), which provides that the exception applies to actions "taken in time of war or other emergency in international relations".[12] Such an "emergency" exists in the present dispute, as is well-evidenced by the actions taken by KSA, the UAE, and other States. The genesis for KSA's and the UAE's termination of relations--Qatar's support of terrorists and extremists, its propagation of hate speech, and its meddling in the internal affairs of other nations—threatened the security of KSA and other nations in the region, including the UAE.

20. That action is a direct response to the threat to its essential security interests caused by Qatar's refusal to cease supporting terrorism, to prevent the propagation of hate speech, and to stop interfering in the internal affairs of its neighbors. These are matters that the international community agrees constitute serious security threats, and with respect to which Qatar has international obligations.[13] The UAE is firmly convinced that removing Qatar as a source of funding and support for terrorist groups, stopping the dissemination of hate speech by Qatari state-owned entities, and putting an end to Qatari impact on the internal affairs of its neighbours will improve security in the UAE and the region.

21. In November 2013, the UAE and other GCC States entered into the first of three agreements with Qatar, which came to be collectively known as the Riyadh Agreements.[14] In the first Riyadh Agreement, Qatar and the rest of the GCC States agreed to stop all support for extremist groups seeking to destabilise the region as well as the use of state media to spread extremist ideology and harm neighboring countries. When Qatar refused to comply with the Agreement, the UAE withdrew its Ambassador from Doha in 2014, and KSA and Bahrain did the same. The Ambassadors did not return until two more agreements were concluded later that year. The second Riyadh Agreement expressly identified the "threat" to security and stability posed to the GCC countries by the Muslim Brotherhood, and set forth detailed obligations amplifying the original prohibition against interfering in the internal affairs of other States. The third Riyadh Agreement provided that, in the event of a breach by one State party, the other State parties would be entitled to take appropriate action that they "deem necessary to protect the security and stability of their countries."[15] A breach would include any direct or indirect support to "any person or media apparatus that harbors inclinations harmful" to any GCC State. It also identified Al Jazeera as a state-owned media outlet whose propaganda was harming other GCC States' security and stability.

22. As a party to the Riyadh Agreements, Qatar was fully aware that its policies contributed to what all GCC States had previously agreed were serious threats in the region and for GCC Member States and that, if it continued, it could face severe consequences. Rather than correcting its

[12] The Kingdom of Saudi Arabia's first written submission, para. 7.

[13] Qatar is expressly bound by, *inter alia*, the Riyadh Agreements, the International Convention for the Suppression of the Financing of Terrorism, UN Security Council Resolutions (including Resolutions 1373 (2001), 2161 (2014), 2133 (2014), 2199 (2015) and 2368 (2017)),and the International Convention on the Elimination of All Forms of Racial Discrimination.

[14] Exhibit ARE-1.

[15] Third Riyadh Agreement, Article 4 (Exhibit ARE-1). (emphasis added)

misconduct, Qatar's Foreign Ministry moved to terminate the Riyadh Agreements in February 2017.[16] Qatar's effort to repudiate the agreements made clear that Qatar had no intention to comply with them.

23. Qatar's impact on the essential security interests of the UAE through its support for terrorist groups, its propagation of hate speech through its state-owned media, and its impact on the internal affairs of its neighbours are all well-documented. For present purposes, the UAE provides some illustrative examples:

- In 2014, the UAE declared al Islah a terrorist group.[17] Qatar is among al Islah's main supporters, having hosted meetings to support the group, provided training programs to its members, and provided members of the organisation shelter in Qatar.[18]

- In 2017, Mahmoud Al Jaidah, a member of the Muslim Brotherhood who was involved in plots against the UAE, disclosed his ties with Qatar, providing details of Qatar's role as an incubator of the Muslim Brotherhood and its support and financing of fugitive members of the organisation.[19]

- Internationally designated terror financiers, such as Khalifa Muhammad Turki al-Subaiy and Abd Al-Rahman al-Nu'aymi, continue to reside in Qatar and to raise funds with impunity in Qatar's borders.[20]

24. Qatar also has been repeatedly involved in multi-million dollar ransom payments to terrorists. This includes when, in April 2017, Qatari officials traveled to Iraq on a Qatar Airways plane, carrying with them hundreds of millions of dollars in ransom payments to deliver to a number of known terrorists.[21] The UN Security Council has condemned the role of ransom payments, stating that they "create[] more victims and perpetuate[]" terrorism and are "one of the sources of income which supports [terrorists'] recruitment efforts [and] strengthens [terrorists'] operational capability to organize and carry out terrorist attacks".[22] Indeed, terrorists' use of ransom payments as a fundraising strategy is "today's greatest source of terrorist funding and the most challenging terrorist financing threat" apart from explicit state sponsorship.[23] Accordingly, the UN has explicitly called upon "all Member States to prevent terrorists from benefiting directly or indirectly from ransom payments",[24] including by freezing assets of designated terrorists, and that these obligations apply regardless of how or by whom the ransom is paid.[25] Unfortunately, Qatar has failed to heed the UN's warnings.

25. For these reasons, the UAE concluded that it was necessary to protect its essential security interests by terminating relations with Qatar, including in order to induce Qatar to cease these unlawful activities. On 5 June 2017, the UAE issued a Declaration announcing that the UAE was terminating relations with Qatar. The Declaration indicates on its face that the UAE took its actions after determining that they were necessary for the security and stability of the UAE, the GCC, and the region.[26] The UAE specifically noted in the Declaration that the actions were a result of Qatar's failure to abide by the Riyadh Agreements, Qatar's continued support, funding and hosting of terror groups, and Qatar's sustained endeavors to promote terrorist ideologies across its direct and indirect media. The fact that the UAE, KSA and several other countries terminated relations with Qatar, in

[16] Exhibit ARE-3.

[17] Reuters, *UAE Lists Muslim Brotherhood as Terrorist Group* (15 November 2014) (Exhibit ARE-4).

[18] UAE Ministry Foreign Affairs & International Cooperation, *New Documentary Reveals Doha's Secret Files to Sabotage Gulf States* (29 July 2017) (Exhibit ARE-4).

[19] *Extra News: Documentary film reveals fQatar secret files*, English Transcript (28 July 2017) (Exhibit ARE-4).

[20] UN Sanctions Commmittee on ISIL (Da'esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, Listing QDi.253 and Listing QDi.334 (Exhibit ARE-4).

[21] Washington Post, *Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages* (28 April 2018) (Exhibit ARE-5).

[22] S/RES/2133 (Exhibit ARE-5); S/RES/2368, sec. 26 (Exhibit ARE-5).

[23] Cohen: Confronting New Threats ("Even so, the magnitude and scale of this crime-terror nexus has reached new heights with the spread of kidnapping-for-ransom (KFR) as a fundraising strategy. Apart from state sponsorship, KFR is today's greatest source of terrorist funding and the most challenging terrorist financing threat.") (Exhibit ARE-5).

[24] S/RES/2133 (Exhibit ARE-5).

[25] S/RES/2199 (Exhibit ARE-5).

[26] UAE 5 June Declaration (Exhibit ARE-6).

and of itself, indicates the gravity of the situation. There are few circumstances in international relations short of war that constitute a more serious state of affairs.[27]

[27] See Saudi Arabia's first written submission, paras. 3 and 6.

ANNEX C-13

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

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

1. 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.

2. 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.

3. 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.

4. 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. 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.

5. 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 another entity. 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.

6. 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. DSU Article 26.1 permits the institution of non-violation complaints, subject to requirements including that the panel or Appellate Body agree with the judgment of the complaining party. 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). This context is highly instructive. No such review of a Member's judgment is set out in TRIPS Article 73(b). Accordingly, Members did not agree to subject a Member's essential security judgment to review by a WTO panel.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENT

I. Proper Interpretation Of TRIPS Article 73(b)

7. Under DSU Article 3.2, a panel is to apply customary rules of interpretation of public international law to the text of the covered agreements; these rules establish that TRIPS Article 73(b) is self-judging. 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.

8. TRIPS Article 73(b) mirrors GATT 1994 Article XXI(b). The text and context of TRIPS Article 73(b) supports an understanding that the provision is self-judging. First, in the chapeau, the ordinary meaning of the terms "it considers" establishes the self-judging nature of this provision. The word "consider[]" means "[r]egard in a certain light or aspect; look upon as." Under Article 73(b), the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for the protection of the acting Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("consider[]") the action as having the aspect of being necessary for the protection of that Member's essential security interests.

9. 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.

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

11. Subparagraphs (i) and (ii) – which discuss fissionable materials and traffic in arms, respectively – both begin with the phrase "relating to" and directly follow the phrase "essential security interests." Subparagraphs (i) and (ii) thus illustrate the types of "essential security interests" that Members considered could lead to action under Article 73(b).

12. Subparagraph (iii) of Article 73(b), by contrast, begins with temporal language "taken in time of." This language echoes the reference to "taking any action" in the chapeau of Article 73(b), as it is *actions* that are "taken," and not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word "action," rather than the phrase "essential security interests." Accordingly Article 73(b)(iii) reflects a Member's right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations.

13. Subparagraphs (i) to (iii) of Article 73(b) thus reflect that Members wished to set out certain types of "essential security interests" and a temporal circumstance that Members considered could lead to action under Article 73(b). A Member taking action pursuant to Article 73(b) would consider its action to be necessary for the protection of the interests identified in subparagraphs (i) and (ii), or to be taken in time of war or other emergency in international relations as set forth in subparagraph (iii). In this way, the subparagraphs (i) to (iii) guide a Member's exercise of its rights under Article 73(b) while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

14. This interpretation of Article 73(b) is also established by the subsequent agreement of the parties in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia.

15. In brief, in that dispute Czechoslovakia requested the CONTRACTING PARTIES to find that certain U.S. actions were inconsistent with the GATT 1947. In discussing the decision to be made in the following GATT Council meeting, the Chairman opined that the question of whether U.S. measures conformed to GATT Article I "was not appropriately put" because the United States had defended its actions under the essential security exception, which "embodied exceptions" to Article I. 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.

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

II. Negotiating History Of TRIPS Article 73(b)

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

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

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

20. Negotiators also explicitly discussed that essential security actions would not be reviewable for consistency with the underlying agreement, and that the appropriate redress for a country affected by such actions would be a non-violation, nullification or impairment claim. For example, at a July 1947 meeting, the representative of Australia withdrew an objection to the essential security provision after receiving assurance that a member affected by essential security actions would have redress pursuant to a non-violation, nullification or impairment claim.

21. 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 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

22. The panel in *Russia – Traffic in Transit* found that it had authority to review multiple aspects of a responding party's invocation of the essential security provision at Article XXI of the GATT 1994. That panel's analysis is flawed for numerous reasons.

23. 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, however. 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.

24. Second, after reaching an initial conclusion based on the "logical structure" of the essential security exception – in only a few short paragraphs – the panel proceeded to examine "a similar logical query," that is "whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination." 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."

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

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

27. 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 that appropriate redress was considered by the negotiators to be a non-violation, nullification or impairment claim, not a claim that a Member has breached its trade obligations.

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

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

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

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

31. DSU Article 11 confirms this dual function of panels, and similarly provides that the function of panels is to "make an objective assessment of the matter" before it, and "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." As DSU Article 19.1 provides, these "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement."

32. The text of TRIPS Article 73(b), however, establishes that it is for a responding Member to determine whether the actions it has taken are necessary for the protection of its own essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member's determination. Accordingly, when a respondent has invoked its essential security interests under Article 73(b) as to a measure challenged before the DSB, a panel may make no findings that will assist the DSB in making recommendations or giving rulings as to a complaining Member's claims, within the meaning of DSU Articles 7.1 and 11.

33. This result is consistent with DSU Article 19.1 and 19.2 because an essential security measure cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement, and because it would diminish the "right" of a Member to take action it considers necessary for the protection of its essential security interests for a panel or the Appellate Body to purport to find such action inconsistent with a covered agreement.

34. If the Panel finds that Saudi Arabia has invoked Article 73(b) as to the measures challenged, the Panel should limit the findings in its report to a recognition that Saudi Arabia has invoked its essential security interests.