INTERNATIONAL TRADE LAW
THROUGH THE CASES

J.H.H. Weiler
NYU School of Law

Julian Arato
University of Michigan Law School

Sungjoon Cho
Chicago-Kent College of Law

Kathleen Claussen
Georgetown University Law Center

Unit VII: Security Exceptions

International Trade Law Through the Cases

Unit VII: Security Exceptions

Table of Contents

Supplementary Reading

Peter van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization, 5th ed, 2021, 591-688.

Michael J. Trebilcock, Robert Howse, & Antonia Eliasson, The Regulation of International Trade, 4th ed. 2013, 309-332.

John H. Jackson, William J. Davey, Alan O. Sykes, International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations, 7th ed. 2021, 229-232.

John H. Jackson, The World Trading System, 2nd ed. 1997, 221-224.

Articles:

Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VAA. J. INT'L L. 365, 378–402 (2003).

Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020), https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/05/Claussen-72-Stan.-L.-Rev.-1097.pdf.

J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 2162 (2020), https://www.yalelawjournal.org/pdf/HeathArticle_v21pzuqc.pdf.

1-2. Legal Texts

Several of the WTO Agreements provide special exceptions for measures relating to a member state's security interests. They typically closely follow the model of GATT (1947) Article XXI, reproduced below. Read GATT Article XXI carefully. What do you see as the key concepts? What are the critical interpretive questions? Can you detect any material differences between the drafting of Article XXI and that of Article XX? Similar security exceptions can be found in GATS Article XIV bis *and TRIPS Article 73. Can you detect any differences between either of them and GATT Article XXI? Consider why the states parties opted to adhere so closely to the GATT model in drafting the security exceptions of the GATS and the TRIPS nearly fifty years later.*

GATT Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

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

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

GATS Article XIV *bis*

Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

TRIPS Article 73

Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

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

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

* * *

2. Russia—Traffic in Transit

2-1. Report of the Panel, WT/DS512, 5 April 2019

Prior to the Panel Report in Russia—Traffic in Transit, *no panel (nor the Appellate Body) had been called to interpret GATT Article XXI. At least within the context of formal dispute settlement, disputing parties refrained from invoking this provision in the nearly sixty years since the enactment of the GATT (1947). Russia was the first to do so, in a dispute arising out of measures adopted in the context of its 2014 invasion of Ukraine,* inter alia *restricting the transit of Ukrainian goods through Russian territory. Before reading the following excerpt, consider what might explain member states' unwillingness to invoke Article XXI for so long. What legal and political problems did the Panel in* Russia—Traffic in Transit *face, and how did it try to navigate them? The Report should be read alongside the text of Article XXI, reproduced above.*

Note: most footnotes have been removed, and footnote numbering differs from the original.

Panel Report, WT/DS512/R, 5 April 2019

Abi-Saab, Chairperson; Araki, Member; Saeed, Member

1.1. On 14 September 2016, Ukraine requested consultations with the Russian Federation (Russia) pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.

1.2. Consultations were held on 10 November 2016 between Ukraine and Russia. These consultations failed to resolve the dispute.

(…)

7.3 Factual background

7.5. The issues that arise in this dispute must be understood in the context of the serious deterioration of relations between Ukraine and Russia that occurred following a change in government in Ukraine in February 2014. Both parties have avoided referring directly to this change in government and to the events that followed it. It is not this Panel's function to pass upon the parties' respective legal characterizations of those events, or to assign responsibility for them, as was done in other international fora. At the same time, the Panel considers it important to situate the dispute in the context of the existence of these events.

7.6. Ukraine had, since 18 October 2011, been a party to the Treaty on a Free Trade Area between the members of the Commonwealth of Independent States (CIS-FTA), with Russia, Belarus, Kazakhstan, the Kyrgyz Republic, Tajikistan, Moldova and Armenia. On 29 May 2014, Russia, Belarus and Kazakhstan signed the Treaty on the Establishment of the Eurasian Economic Union

(EaEU Treaty), with Armenia and the Kyrgyz Republic joining in January and August of 2015, respectively. The EaEU Treaty entered into force on 1 January 2015.

7.7. While it took part in the initial negotiations to establish the EaEU, Ukraine decided, following on the "*Euromaidan* events", not to join the EaEU Treaty. Instead, it elected to seek economic integration with the European Union. Accordingly, on 21 March 2014, the newly sworn-in Ukrainian Government signed the political part of the "Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part" (EU-Ukraine Association Agreement). The objectives of the EU-Ukraine Association Agreement are to facilitate Ukraine's closer political and economic integration with Europe. The economic part of the EU-Ukraine Association Agreement provides for a Deep and Comprehensive Free Trade Area (DCFTA) between the European Union and Ukraine. This part of the EU-Ukraine Association Agreement was signed on 27 June 2014.

7.8. In March 2014, Ukraine, along with certain other countries, introduced a resolution in the General Assembly of the United Nations (UN General Assembly), which welcomed the continued efforts by the UN Secretary-General and the Organization for Security and Cooperation in Europe, as well as other international and regional organizations, to support "de-escalation of the situation with respect to Ukraine". The UN General Assembly recalled "the obligations of all States under Article 2 of the Charter to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and to settle their international disputes by peaceful means". A subsequent UN General Assembly Resolution in December 2016 condemned the "temporary occupation of part of the territory of Ukraine", i.e. the "Autonomous Republic of Crimea and the city of Sevastopol" by the Russian Federation, and reaffirmed the non-recognition of its "annexation". This resolution makes explicit reference to the Geneva Conventions of 1949, which apply in cases of declared war or other armed conflict between High Contracting Parties.

7.9. The events in Ukraine in 2014 were followed by the imposition of economic sanctions against Russian entities and persons by certain countries.

(…)

7.16. (…) [As] of 1 January 2016, Russia:

(…)

c. imposed certain restrictions and bans on transit, namely: (i) restrictions on transit by road and rail from Ukraine, destined for Kazakhstan (and subsequently, for the Kyrgyz Republic), requiring that such transit from Ukraine across Russia may occur only from Belarus and subject to additional conditions related to identification seals and registration cards, both on entering and on leaving Russian territory, at specified control points on the Belarus-Russia border and the Russia-Kazakhstan border, respectively; and (ii) "temporary" bans on transit by road and rail from Ukraine of:

   i. goods which are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and

   ii. goods which fall within the scope of the import bans on agricultural products, raw materials and food imposed pursuant to Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic.

7.17. The 2016 transit restrictions and bans in item (c) above are among the measures that are challenged by Ukraine in this dispute [as violations of GATT Articles V and X, and related commitments in Russia's Accession Protocol].

(…)

7.4 Order of analysis

7.20. This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI of the GATT 1994 (or the equivalent provisions in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)).

7.21. Ukraine presents its case as an ordinary trade dispute in which Russia has imposed measures that are inconsistent with certain of its obligations under the GATT 1994 and commitments in Russia's Accession Protocol.

7.22. Russia, on the other hand, considers that the dispute involves obvious and serious national security matters that Members have acknowledged should be kept out of the WTO, an organization which is not designed or equipped to handle such matters. Russia cautions that involving the WTO in political and security matters will upset the very delicate balance of rights and obligations under the WTO Agreements and endanger the multilateral trading system.

7.23. Consistent with this position, Russia does not present arguments or evidence to rebut Ukraine's specific claims of inconsistency with Articles V and X of the GATT 1994, or commitments in Russia's Accession Protocol. Russia's case is confined to arguments that certain measures and claims are outside the Panel's terms of reference, and its overarching argument that the Panel lacks jurisdiction to address any of the issues in this dispute owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994.

7.24. The novel and exceptional features of this dispute, including Russia's argument that the Panel lacks jurisdiction to evaluate the WTO-consistency of the measures, owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994, require that the Panel first determine the order of analysis that it deems most appropriate for the present dispute. Accordingly, the Panel considers that it must address the jurisdictional issues first before going into the merits.

7.25. The Panel must therefore determine, first, whether it has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994. If the Panel finds that it does not, then it will be unable to make findings on Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and with commitments in Russia's Accession Protocol.

7.26. As the Panel explains in greater detail in Section 7.5.3 below, Russia's argument that the Panel lacks jurisdiction to address the matter is based on its interpretation of Article XXI(b)(iii) of the GATT 1994, i.e. as being totally "self-judging". Consequently, in order to address Russia's jurisdictional objection, the Panel must first interpret Article XXI(b)(iii) of the GATT 1994.

7.5 Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.5.1 Main arguments of the parties

7.27. Russia asserts that there was an emergency in international relations that arose in 2014, evolved between 2014 and 2018, and continues to exist. Russia asserts that this emergency presented threats to Russia's essential security interests. Russia argues that, under Article XXI(b)(iii), both the determination of a Member's essential security interests and the

determination of whether any action is necessary for the protection of a Member's essential security interests are at the sole discretion of the Member invoking the provision.

7.28. While Russia acknowledges that the Panel was established with standard terms of reference under Article 7.1 of the DSU, it argues that the Panel nevertheless lacks jurisdiction to evaluate measures taken pursuant to Article XXI of the GATT 1994. In Russia's view, the explicit wording of Article XXI confers sole discretion on the Member invoking this Article to determine the necessity, form, design and structure of the measures taken pursuant to Article XXI. Russia considers that the issues that arise from its invocation of Article XXI(b)(iii) go beyond the scope of trade and economic relations among Members and are outside the scope of the WTO:

> [T]he WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case.

7.29. Russia regards Article XXI(b) of the GATT 1994 as preserving the "right" of each Member to react to wars and other emergencies in international relations in the way that the Member itself considers necessary. Any other interpretation of Article XXI(b) would "result in interference in [the] internal and external affairs of a sovereign state". Accordingly, it is sufficient for a Member to state that the measures taken are actions that it considers necessary for the protection of its essential security interests, taken in time of war or other emergency in international relations. A Member's subjective assessment cannot be "doubted or re-evaluated by any other party" or judicial bodies as the measures in question are not ordinary trade measures regularly assessed by WTO panels.

7.30. Russia therefore submits that the Panel should limit its findings to recognizing that Russia has invoked Article XXI of the GATT 1994, "without engaging in any further exercise, given that this panel lacks jurisdiction to evaluate measures taken with a reference to Article XXI of the GATT".

7.31. Ukraine interprets Article XXI of the GATT 1994 as laying down an affirmative defence for measures that would otherwise be inconsistent with GATT obligations. Ukraine rejects the notion that Article XXI provides for an exception to the rules on jurisdiction laid down in the GATT 1994 or the DSU. Ukraine considers that 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 Ukraine or Russia, in keeping with the Panel's terms of reference under Article 7 of the DSU and the general standard of review under Article 11 of the DSU. Ukraine also considers that, if Article XXI of the GATT 1994 were non-justiciable, it would imply that in a dispute involving a measure that is WTO-inconsistent, the invoking Member, rather than a panel, would decide the outcome of the dispute by determining that the WTO-inconsistent measure is nonetheless justified. In Ukraine's view, such unilateral determination by an invoking Member would be contrary to Article 23.1 of the DSU.

7.32. Ukraine argues that Russia, by merely referring to an emergency in international relations that occurred in 2014, fails to discharge its burden to show the legal and factual elements of a defence under Article XXI(b)(iii) of the GATT 1994, namely, that there was a serious disruption in international relations constituting an emergency that is alike a war that is sufficiently connected to Russia so as to result in a genuine and sufficiently serious threat to its essential security interests and therefore to justify each and every measure at issue as being necessary to

protect those interests. (…) Finally, Ukraine argues that the determination of whether the action was taken in time of war or other emergency in international relations under subparagraph (iii) of Article XXI(b) is to be objectively made by the Panel.

7.33. Ukraine argues that, although the text of Article XXI(b) expressly states that it is for the invoking Member to decide what action it considers necessary for the protection of its essential security interests, this does not mean that the Member enjoys "total discretion". Had the standard been "total discretion", there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests that may be invoked in order to justify a measure that is otherwise inconsistent with the GATT 1994. Furthermore, a panel's objective assessment must include an examination of whether a Member invoking Article XXI has done so in good faith, notwithstanding the absence of an introductory paragraph similar to the chapeau to Article XX.

(…)

7.41. China argues that the Panel has jurisdiction to review Russia's invocation of Article XXI (…). China urges the Panel to exercise extreme caution in its assessment of Russia's invocation of Article XXI(b)(iii), in order to maintain the delicate balance between preventing abuse of Article XXI and evasion of WTO obligations, on the one hand, and not prejudicing a Member's right to protect its essential security interests, including a Member's "sole discretion" regarding its own security interests, on the other hand. China refers to the principle of good faith embodied in Article 26 of the Vienna Convention on the Law of Treaties and argues that Members invoking Article XXI(b) should adhere to the principle of good faith.

7.42. The European Union argues that Article XXI of the GATT 1994 does not provide for an exception to the rules on jurisdiction laid down in the DSU (…).

7.43. Given the absence in Article XXI of an equivalent to the chapeau in Article XX, the analysis of Article XXI should consider whether a measure addresses the particular interest specified, and that there is a sufficient nexus between the measure and the interest protected. The European Union argues that the terms "which it considers" in the first part of Article XXI(b) qualify only the term "necessary". Therefore, the existence of a war or other emergency in international relations in subparagraph (iii) should be interpreted to refer to objective factual circumstances which can be fully reviewed by panels. While "essential security interests" should be interpreted so as to allow Members to identify their own security interests and their desired level of protection, a panel should, on the basis of the reasons provided by the invoking Member, review whether the interests at stake can "reasonably" or "plausibly" be considered essential security interests. A panel must also review whether the action is "capable" of protecting a security interest from a threat. The European Union considers that the terms "which it considers" imply that "in principle" each Member may determine for itself whether a measure is "necessary" for the protection of its essential security interests. A panel should nevertheless review this determination, albeit with due deference, to assess whether the invoking Member can plausibly consider the measure necessary and whether the measure is "applied" in good faith. This requires the invoking Member to provide the panel with an explanation as to why it considered the measure necessary. Finally, the European Union argues that, when assessing the necessity of the measure and the existence of reasonably available alternatives, a panel should ascertain whether the interests of third parties which may be affected were properly taken into account.

(…)

7.51. The United States (…) argues that the Panel "lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute". The reason advanced is that every WTO Member retains the authority to determine for itself those matters that it considers necessary for the protection of its essential security interests, as "reflected" in the text of Article XXI of the GATT 1994. The United States describes this as an "inherent right" that has been repeatedly recognized by GATT contracting parties and WTO Members.[1]

7.52. In its subsequent submissions, the United States clarifies that it considers the Panel to have jurisdiction in the context of this dispute (…). However, it considers that the dispute is "non-justiciable" because there are no legal criteria by which the issue of a Member's consideration of its essential security interests can be judged. The United States bases its position on its interpretation of the text of Article XXI, specifically, the "self-judging" language of the chapeau in Article XXI(b) "*which it considers necessary for* the protection of its essential security interests". For the United States, the "self-judging" nature of Article XXI(b)(iii) establishes that its invocation by a Member is "non-justiciable", and "is therefore not capable of findings by a panel", obviating the possibility of making recommendations under Article 19.1 of the DSU in this dispute.

7.5.3 Whether the Panel has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.53. The Panel recalls that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives from the exercise of their adjudicative function.[2] One aspect of this inherent jurisdiction is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction.[3]

(…)

7.57. Russia argues (…) that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii). For Russia, the invocation of Article XXI(b)(iii) by a Member renders its actions immune from scrutiny by a WTO dispute settlement panel. Russia's argument is based on its interpretation of Article XXI(b)(iii) as "self-judging". According to this argument, Article XXI(b)(iii) carves out from a panel's jurisdiction *ratione materiae* actions that a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations. Russia's jurisdictional plea is that, based on its interpretation of Article XXI(b)(iii), it has met the conditions for invoking the provision.

(…)

---

[1] In addition, the United States asserts that "[i]ssues of national security are political matters not susceptible for review or capable of resolution by WTO dispute settlement." (Ibid.)

[2] See International Court of Justice, Questions of Jurisdiction and/or Admissibility, *Nuclear Tests Case* (Australia v. France) (1974) ICJ Reports, pp. 259-260; and International Court of Justice, Preliminary Objections, *Case Concerning the Northern Cameroons* (Cameroon v. United Kingdom) (1963) ICJ Reports, pp. 29-31. The Appellate Body has stated that WTO panels have certain powers that are inherent in their adjudicative function. (See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.)

[3] This is known as the principle of *Kompetenz-Kompetenz* in German, or *compétence de la compétence* in French. The Appellate Body has held that panels have the power to determine the extent of their jurisdiction. (See Appellate Body Reports, *US – 1916 Act*, fn 30 to para. 54; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.)

7.5.3.1 Meaning of Article XXI(b)(iii) of the GATT 1994

7.59. The Panel begins by recalling that Article 3.2 of the DSU recognizes that interpretive issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well established—including in previous WTO disputes—that these rules cover those codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 31(1) provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(…)

7.61. The introduction to Article XXI states that "[n]othing in this Agreement shall be construed" followed by three paragraphs that are separated by the conjunction "or". Paragraph (a) of Article XXI describes action that may not be required of a Member, and paragraphs (b) and (c) describe action which a Member may not be prevented from taking, notwithstanding that Member's obligations under the GATT 1994.

7.5.3.1.1 Whether the clause in the chapeau of Article XXI(b) qualifies the determination of the matters in the enumerated subparagraphs of that provision

7.62. Paragraph (b) of Article XXI includes an introductory part (chapeau), which qualifies action that a Member may not be prevented from taking as that "which [the Member] considers necessary for the protection of its essential security interests".

7.63. The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause "which it considers". The adjectival clause can be read to qualify only the word "necessary", i.e. the necessity of the measures for the protection of "its essential security interests"; or to qualify also the determination of these "essential security interests"; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well.

7.64. The Panel starts by testing this last, most extensive hypothesis, i.e. whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b). The Panel will leave for the moment the examination of the two other interpretive hypotheses, which bear exclusively on the chapeau.

7.65. As mentioned above, the mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the adjectival clause "which it considers" qualifies the determinations in the three enumerated subparagraphs. But if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances. Does it stand to reason, given their limitative function, to leave their determination exclusively to the discretion of the invoking Member? And what would be the use, or *effet utile*, and added value of these limitative qualifying clauses in the enumerated subparagraphs of Article XXI(b), under such an interpretation?

7.66. A similar logical query is whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination.

In answering this last question, the Panel will focus on the last set of circumstances, envisaged in subparagraph (iii), to 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.

7.67. As previously noted, the words of the chapeau of Article XXI(b) are followed by the three enumerated subparagraphs, which are relative clauses qualifying the sentence in the chapeau, separated from each other by semicolons. They provide that the action referred to in the chapeau must be:

i. "relating to fissionable materials or the materials from which they are derived";

ii. "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment";

iii. "taken in time of war or other emergency in international relations".

7.68. Given that these subject matters—i.e. the "fissionable materials …", "traffic in arms …", and situations of "war or other emergency in international relations" described in the enumerated subparagraphs—are substantially different, it is obvious that these subparagraphs establish alternative (rather than cumulative) requirements that the action in question must meet in order to fall within the ambit of Article XXI(b).

7.69. The connection between the action and the materials or the traffic described in subparagraphs (i) and (ii) is specified by the phrase "relating to". The phrase "relating to", as used in Article XX(g) of the GATT 1994, has been interpreted by the Appellate Body to require a "close and genuine relationship of ends and means" between the measure and the objective of the Member adopting the measure [*See* Appellate Body Report, *US – Shrimp*, para. 136]. This is an objective relationship between the ends and the means, subject to objective determination.

7.70. The phrase "taken in time of" in subparagraph (iii) describes the connection between the action and the events of war or other emergency in international relations in that subparagraph. The Panel 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.

7.71. Moreover, as for the circumstances referred to in subparagraph (iii), the existence of a war, as one characteristic example of a larger category of "emergency in international relations", is clearly capable of objective determination. Although the confines of an "emergency in international relations" are less clear than those of the matters addressed in subparagraphs (i) and (ii), and of "war" under subparagraph (iii), it is clear that an "emergency in international relations" can only be understood, in the context of the other matters addressed in the subparagraphs, as belonging to the same category of objective facts that are amenable to objective determination.

7.72. The use of the conjunction "or" with the adjective "other" in "war *or other* emergency in international relations" in subparagraph (iii) indicates that war is one example of the larger category of "emergency in international relations". War refers to armed conflict. Armed conflict may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict). The dictionary definition of "emergency" includes a "situation, esp. of danger or

conflict, that arises unexpectedly and requires urgent action", and a "pressing need … a condition or danger or disaster throughout a region".

7.73. "International relations" is defined generally to mean "world politics", or "global political interaction, primarily among sovereign states".

7.74. The Panel also takes into account, as context for the interpretation of an "emergency in international relations" in subparagraph (iii), the matters addressed by subparagraphs (i) and (ii) of Article XXI(b), which cover fissionable materials, and traffic in arms, ammunition and implements of war, as well as traffic in goods and materials for the purpose of supplying a military establishment. While the enumerated subparagraphs of Article XXI(b) establish alternative requirements, the matters addressed by those subparagraphs give rise to similar or convergent concerns, which can be formulated in terms of the specific security interests that arise from the matters addressed in each of them. Those interests, like the interests that arise from a situation of war in subparagraph (iii) itself, are all defence and military interests, as well as maintenance of law and public order interests. An "emergency in international relations" must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b).

7.75. Moreover, the reference to "war" in conjunction with "or other emergency in international relations" in subparagraph (iii), and the interests that generally arise during war, and from the matters addressed in subparagraphs (i) and (ii), suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii). Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be "emergencies in international relations" within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.

7.76. 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. defence or military interests, or maintenance of law and public order interests.

7.77. Therefore, 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 Article XXI(b) is that of an objective fact, subject to objective determination.

7.78. As a next step, the Panel considers whether the object and purpose of the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) also supports an interpretation of Article XXI(b)(iii) which mandates an objective review of the requirements of subparagraph (iii).

7.79. Previous panels and the Appellate Body have stated 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. At the same time, the GATT 1994 and the WTO Agreements provide that, in specific circumstances, Members may depart from their GATT and WTO obligations in order to protect other non-trade interests. For example, the general exceptions under Article XX of the GATT 1994 accord to Members a degree of autonomy to adopt measures that are otherwise

incompatible with their WTO obligations, in order to achieve particular non-trade legitimate objectives, provided such measures are not used merely as an excuse to circumvent their GATT and WTO obligations. These concessions, like other exceptions and escape clauses built into the GATT 1994 and the WTO Agreements, permit Members a degree of flexibility that was considered necessary to ensure the widest possible acceptance of the GATT 1994 and the WTO Agreements. It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, 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.

7.80. In the Appendix to this Report, the Panel surveys the pronouncements of the GATT contracting parties and WTO Members to determine whether the conduct of the GATT contracting parties and the WTO Members regarding the application of Article XXI reveals a common understanding of the parties as to the meaning of this provision. The Panel's survey reveals differences in positions and the absence of a common understanding regarding the meaning of Article XXI. In the Panel's view, this record does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention.

7.81. It is notable, however, that a significant majority of occasions on which Article XXI(b)(iii) was invoked concerned situations of armed conflict and acute international crisis, where heightened tensions could lead to armed conflict, rather than protectionism under the guise of a security issue. It therefore appears that Members have generally exercised restraint in their invocations of Article XXI(b)(iii), and have endeavoured to separate military and serious security-related conflicts from economic and trade disputes. The Panel does not assign any legal significance to this observation, but merely notes that the conduct of Members attests to the type of circumstance which has historically warranted the invocation of Article XXI(b)(iii).

7.82. In sum, the Panel considers that the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.

7.5.3.1.2 Negotiating history of Article XXI of the GATT 1947

7.83. This conclusion that the Panel has reached based on its textual and contextual interpretation of Article XXI(b)(iii), in the light of the object and purpose of the GATT 1994 and WTO Agreement, is confirmed by the negotiating history of Article XXI of the GATT 1947.[4]

7.84. The Panel recalls that the GATT 1947 arose out of a proposal by the United States to establish an International Trade Organization (ITO), an organization through which the United States and other countries would harmonize policies in respect of international trade and employment. The text of the ITO Charter was negotiated over four sessions between October 1946 and March 1948. Towards the end of the first negotiating session (held in London between

[4] The Appellate Body has previously had recourse to the preparatory work of the ITO Charter as a supplementary means of treaty interpretation in order to confirm the meaning of corresponding provisions in the GATT 1994. (See, e.g. Appellate Body Reports, *Japan –Alcoholic Beverages II,* fn 52, DSR 1996:I, 97, p. 104; *Canada – Periodicals,* p. 34, DSR 1997:I, p. 449; and *US – Line Pipe,* para. 175.)

October and November 1946), the Preparatory Committee decided to give prior effect to the tariff provisions of the ITO Charter by means of a general tariff agreement which would provisionally apply among a subset of ITO members until the ITO Charter entered into force. The provisions of the general tariff agreement were to be taken from the provisions of the ITO Charter then being negotiated. The texts of the ITO Charter and of the general tariff agreement were negotiated in parallel (…).

(…)

7.88. The specific language for the new security exceptions that would apply throughout the whole of the [ITO] Charter was developed from a proposal submitted by the United States delegation at the Geneva negotiating session in July 1947.

(…)

7.90. Those favouring the position that some elements of the security exceptions should be subject to review by the Organization considered that the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter. One delegate advocating this position stated that "it would be far better to abandon all work on the Charter" than to place a provision in it that would, "under the simple pretext that the action was taken to protect the national security of the particular country, provide a legal escape from compliance with the provisions of the Charter".

7.91. After a vote, those favouring the above position prevailed. Their position, that the scope of unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision, was reflected in the United States' proposal of 4 July 1947. The proposed Article 94 of the ITO Charter [used language identical to that eventually adopted in GATT Article XXI.] (…)

7.92. The United States delegation's interpretation of its proposal for the security exception is reflected in discussions of the provision during the Geneva negotiating session on 24 July 1947. In response to a question from the delegate for the Netherlands as to the meaning of the term "essential security interests" and "emergency in international relations", the delegate for the United States replied:

> I suppose I ought to try and answer that, because I think the provision [subparagraph (e) of Article 37 of the New York Draft] goes back to the original draft put forward by us and has not been changed since.
>
> We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests" because, that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real essential security interests and, *at the same time, so far as we could, to limit the exception* so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.
>
> With regard to subparagraph (e), the limitation, I think, is primarily in the time. First, "in time of war". I think no one would question the need of a Member, or the right of a Member, to take action relating to its security interests in time of

> war and to determine for itself—which I think we cannot deny—what its security interests are.
>
> As to the second provision, "or other emergency in international relations," we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on.

7.93. Ultimately, the delegate for the United States emphasized the importance of the draft security exceptions, which would allow ITO members to take measures for security reasons, but not as disguised restrictions on international trade:

> I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.
>
> We have given considerable thought to it and this is the best we could produce to preserve that proper balance.

(…)

7.97. By September 1947, these developments were also reflected in the draft text of the general tariff agreement in a separate provision entitled "Security Exceptions", which mirrored the language of Article 94 of the Geneva Draft of the ITO Charter.

7.98. The Panel considers that the foregoing negotiating history demonstrates that the drafters considered that:

a. the matters later reflected in Article XX and Article XXI of the GATT 1947 were considered to have a different character, as evident from their separation into two articles;

b. the "balance" that was struck by the security exceptions was that Members would have "some latitude" to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b); and

c. in the light of this balance, the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter.

(…)

7.100. The negotiating history therefore confirms the Panel's interpretation of Article XXI(b) of the GATT 1994 as requiring that the evaluation of whether the invoking Member has satisfied the

requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself. In other words, there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny.

(…)

7.5.3.2 Conclusion on whether the Panel has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.102. It follows from the Panel's interpretation of Article XXI(b), 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 Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia.

7.103. Consequently, Russia's argument that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii) must fail. The Panel's interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's invocation of Article XXI(b)(iii) is "non-justiciable", to the extent that this argument also relies on the alleged totally "self-judging" nature of the provision.

7.104. (…) [The] Panel finds that it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.

(…)

7.5.5 Whether the measures were "taken in time of war or other emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b)

7.111. The Panel recalls its interpretation of "emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b) as 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.

7.112. Russia, in its first written submission, refers to an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue. Russia affirms that the events constituting the emergency in international relations are well known to Ukraine and that this dispute raises issues concerning politics, national security and international peace and security. It also explains that one reason for formulating its invocation of Article XXI(b)(iii) in such general terms is that it is trying to "keep the issues such as wars, insurrections, unrests, international conflicts outside the scope of the WTO which is not designed for resolution of such crises and related matters".

7.113. Ukraine argues that Russia has not adequately identified or described the 2014 emergency, and has therefore not discharged its burden of proof.

7.114. In its opening statement at the second meeting of the Panel, Russia posed a "hypothetical question" as to whether circumstances similar to those listed would amount to an emergency in international relations under subparagraph (iii) of Article XXI(b). These hypothetical circumstances, as formulated by Russia, are:

a. Unrest within the territory of a country neighbouring a Member, occurring in the immediate vicinity of the Member's border;

b. The loss of control by that neighbouring country over its border;

c. Movement of refugees from that neighbouring country to the Member's territory; and

d. Unilateral measures and sanctions imposed by that neighbouring country or by other countries, which are not authorized by the United Nations, similar to those imposed against Russia by Ukraine

7.115. When asked by the Panel how closely the hypothetical situation described above reflected the actual situation on the ground, the Russian representative explained that Russia had referred to the hypothetical "in order not to introduce again some information that Russia cannot disclose". The Russian representative then referred to a paragraph from Ukraine's 2016 Trade Policy Review Report which, according to the Russian representative, explains, in Ukraine's words, "what is going on and how real these whole hypothetical questions are". The paragraph refers to "the annexation of the Autonomous Republic of Crimea and the military conflict in the east" as factors that had adversely affected Ukraine's economic performance in 2014 and 2015.

(…)

7.119. Accordingly, Russia has identified the situation that it considers to be an emergency in international relations by reference to the following factors: (a) the time-period in which it arose and continues to exist, (b) that the situation involves Ukraine, (c) that it affects the security of Russia's border with Ukraine in various ways, (d) that it has resulted in other countries imposing sanctions against Russia, and (e) that the situation in question is publicly known. The Panel regards this as sufficient, in the particular circumstances of this dispute, to clearly identify the situation to which Russia is referring, and which it argues is an emergency in international relations.

7.120. Therefore, the Panel must determine whether this situation between Ukraine and Russia that has existed since 2014 constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b).

7.121. The Panel notes that it is not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers. Nor is it necessary for the Panel to characterize the situation between Russia and Ukraine under international law in general.

7.122. There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community. By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict. Further evidence of the gravity of the situation is the fact that, since 2014, a number of countries have imposed sanctions against Russia in connection with this situation.

7.123. Consequently, the Panel is satisfied that the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

7.124. It thus remains for the Panel to determine whether the measures taken by Russia with respect to Ukraine were "taken in time of" the emergency in international relations. In this regard, the Panel notes that the 2016 Belarus Transit Requirements were introduced by Russia on 1 January 2016, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were introduced on 1 July 2016, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were introduced by Russia in November 2014. All of the measures

were therefore introduced during the emergency in international relations and thus were "taken in time of" such emergency for purposes of subparagraph (iii).

7.125. On the basis of the foregoing considerations, the Panel concludes that each of the measures at issue was "taken in time of" an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

(…)

7.5.6 Whether the conditions of the chapeau of Article XXI(b) of the GATT 1994 are satisfied

7.127. The Panel recalls that, in paragraph 7.63 above, it posited that the adjectival clause "which it considers" in the chapeau of Article XXI(b) can be read to qualify only the "necessity" of the measures for the protection of the invoking Member's essential security interests, or also the determination of these "essential security interests", or finally and maximally, to qualify as well the determination of the sets of circumstances described in each of the subparagraphs of Article XXI(b). In paragraph 7.101 above, the Panel rejected the last of these possible interpretations.

7.128. The Panel has yet to address the remaining two possible interpretations of Article XXI(b). In other words, the question remains whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies both the determination of the invoking Member's essential security interests *and* the necessity of the measures for the protection of those interests, or simply the determination of their necessity.

7.129. Russia argues that the adjectival clause means that both the determination of a Member's essential security interests, and the determination of the necessity of the action taken for the protection of those interests, is left entirely to the discretion of the invoking Member. Several of the third parties also consider that Members have wide discretion to identify for themselves their essential security interests. Ukraine argues that, while all Members have the right to determine their own level of protection of essential security interests, that does not mean that a Member may unilaterally define what are essential security interests. According to Ukraine, it is for panels, rather than for Members, to interpret the term "essential security interests", which forms part of the WTO covered agreements, in accordance with customary rules of interpretation of public international law. Consistent with its interpretation of Article XXI(b)(iii), Ukraine argues that Russia has failed to identify the essential security interests that are threatened by the 2014 emergency, and has not explained or demonstrated the connection between the measures and its essential security interests. (…)

7.130. "Essential security interests", which is evidently a narrower concept than "security interests", 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.

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.

7.132. 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. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ("[a] treaty shall be interpreted in good faith …") and Article 26 ("[e]very treaty … must be performed [by the parties] in good faith") of the Vienna Convention.

7.133. 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.

7.134. 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.

7.135. 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.

7.136. In the case at hand, the emergency in international relations is very close to the "hard core" of war or armed conflict. While Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border.

7.137. Given the character of the 2014 emergency, as one that has been recognized by the UN General Assembly as involving armed conflict, and which affects the security of the border with an adjacent country and exhibits the other features identified by Russia, the essential security interests that thereby arise for Russia cannot be considered obscure or indeterminate. Despite its allusiveness, Russia's articulation of its essential security interests is minimally satisfactory in these circumstances. Moreover, there is nothing in Russia's expression of those interests to suggest that Russia invokes Article XXI(b)(iii) simply as a means to circumvent its obligations under the GATT 1994.

7.138. The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, 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. Thus, as concerns the application of Article XXI(b)(iii), 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.

7.139. The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency.

7.140. The Panel recalls that the 2016 measures (i.e. the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods): (a) restrict transit by road and rail from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic from transiting directly across the Ukraine-Russia border, requiring instead that such traffic detour through Belarus, and meet additional conditions relating to identification seals and registration cards at specific control points; and (b) prohibit altogether such transit for certain classes of goods unless such transit is exceptionally authorized.

(…)

7.142. The Panel considers that there is a clear correlation between the change in government in Ukraine in early 2014, the newly sworn-in government's decision to sign the EU-Ukraine Association Agreement in March 2014, the deterioration in Ukraine's relations with Russia (as evidenced by the March 2014 UN General Assembly resolution concerning the territorial integrity of Ukraine), and the sanctions that have been imposed against Russia by several countries. In other words, Ukraine's decision to pursue economic integration with the European Union rather than with the EaEU cannot reasonably be seen as unrelated to the events that followed, and led to the emergency in international relations, during which Russia took a number of actions in respect of Ukraine, including the adoption of the 2016 measures.

7.143. The 2014 measures (i.e. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods) operate to ban transit of goods subject to Russian sanctions from transiting across Russia from its border with Belarus. These bans were imposed specifically to prevent circumvention of the import bans that Russia had imposed under Resolution No. 778. The Resolution No. 778 import bans were responses taken by Russia in August 2014 to the sanctions that other countries had imposed against it earlier in 2014 in response to the emergency in international relations.

7.144. Moreover, all of the measures at issue restrict the transit from Ukraine of goods across Russia, particularly across the Ukraine-Russia border, in circumstances in which there is an emergency in Russia's relations with Ukraine that affects the security of the Ukraine-Russia border and is recognized by the UN General Assembly as involving armed conflict.

7.145. In these circumstances, the measures at issue cannot be regarded as being so remote from, or unrelated to, the 2014 emergency, that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of that emergency. This conclusion is not undermined by evidence on the record that the general instability of the Ukraine-Russia border did not prevent some bilateral trade from taking place along parts of the border.

7.146. This being so, it is for Russia to determine the "necessity" of the measures for the protection of its essential security interests. This conclusion follows by logical necessity if the adjectival clause "which it considers" is to be given legal effect.

(…)

7.5.7 Overall conclusion

7.149. Accordingly, the Panel finds that Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994 in relation to the measures at issue, and therefore the measures are covered by Article XXI(b)(iii) of the GATT 1994.

* * *

2-2. Minutes of the Dispute Settlement Body (DSB) Meeting on the Adoption of the Panel Report in Russia—Traffic in Transit *DS512*, 26 April, 2019

Neither Russia nor Ukraine appealed the Report of the Panel in Russia—Traffic in Transit*, leading to its adoption by the DSB at its meeting of 26 April, 2019. Several governments made statements at that meeting expressing their views on the Panel's approach to Article XXI.*

8.1. The Chairman recalled that at its meeting of 21 March 2017, the DSB had established a Panel to examine the complaint by Ukraine pertaining to this dispute. (…) The Panel Report was before the DSB for adoption at the present meeting at the request of Russia. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report. (…)

8.2. The representative of the Russian Federation said that her country wished to thank the Panel and the Secretariat team for their fundamental work in this dispute. This undoubtedly landmark case clarified for the first time highly sensitive and systemically important issues of national security and the interpretation of Article XXI of the GATT 1994. (…) Russia found the outcome of the dispute to be well-balanced and of systemic importance. The conclusions of the Panel on GATT Article XXl(b) finally, for the first time in GATT/WTO history, provided guidance and clarity regarding the consequences of invoking this Article for dispute settlement purposes. The Panel had come to an important conclusion on the content of GATT Article XXl(b) regarding the objective conditions that justified application of measures pursuant to this Article, narrowing blanks in common understanding of the Membership on issues of national security that were within the ambit of the WTO. (…) This ruling, on the one hand, confirmed the discretion of Members to adopt any measures they considered necessary for protection of their essential security interests and, on the other hand, excluded the possibility of abusing provisions of Article XXI to justify measures introduced for the purposes of mere economic protectionism. In conclusion, Russia welcomed Ukraine's decision not to appeal the Panel Report and the adoption of the Panel Report.

8.3. The representative of Ukraine said that her country was grateful to the Members of the Panel for their work in this dispute and to the WTO Secretariat staff that had assisted them. The ruling in this dispute was important not only for the parties to the dispute, but for all WTO Members, observers and even the whole WTO dispute settlement system because of its great significance to the legal foundations of the WTO. Issues raised in this dispute were indeed of historic importance for future developments in multilateral trade relations and would have an important impact along the way. The adoption of this ruling would constitute the first WTO decision on the Members' right to take action to protect national security under Article XXI of the GATT 1994. Ukraine hoped that it would shed light on rights and obligations of WTO Members in this respect. The Panel had made a very important and welcome contribution by confirming that Article XXI of the GATT 1994 was within the Panel's terms of reference for the purposes of the DSU. Most importantly, the Panel had found the existence of appropriate circumstances to be a crucial element for justification under Article XXI of the GATT 1994. Thus, this WTO ruling set a narrow definition of instances when the security clause could be invoked. Moreover, the Panel had clarified what exactly could be treated as an "emergency in international relations" and correctly found that: "… there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny". Hence, this ruling provided greater clarity as to the legal boundaries of this provision, which should reduce the occurrence of protectionist and discriminatory trade measures that breached fundamental WTO principles being imposed and justified due to an "emergency in international relations".

Ukraine maintained its position that the transit restrictions imposed by the Russian Federation could not be justified by any logic. At the same time, Ukraine wished to thank the Panel for referring in its Report to the resolution of the General Assembly of the United Nations which had condemned the "temporary occupation of part of the territory of Ukraine" by the Russian Federation and had recalled "the obligations of all States under Article 2 of the Charter of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and to settle their international disputes by peaceful means".

(…)

8.6. The representative of the European Union (…) commended the Panel's conclusion that Russia's invocation of Article XXI(b)(iii) was within the Panel's terms of reference for the purposes of the DSU (at para. 7.56) and that the Panel had jurisdiction to determine whether the requirements of that provision were satisfied. (…) The contrary proposition that Article XXI of the GATT 1994 was totally "self-judging" had simply no basis in the WTO Agreements. (…) The EU also welcomed the Panel's interpretation of the relevant conditions that had to be met for the invocation of Article XXI(b)(iii) of the GATT to succeed. The Panel's interpretation was consistent with the text, object and purpose of the relevant provisions. Article XXI of the GATT struck a balance between the legitimate latitude for WTO Members to invoke the security exceptions for genuine security measures and the need to curtail potential abuse. This balance was also reflected in the Panel's interpretation. (…) The EU fully recognized the special nature of security interests covered by the security exceptions, and the need for a margin of discretion for the Member invoking these exceptions. However, (…) such discretion could not be unfettered, since that could give rise to abuse. As the Panel had illustrated, a glaring example of abuse would be where a Member would seek to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constituted 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 (…). [The] EU wished to welcome, once again, the Panel's interpretation of Article XXI (…).

8.7. The representative of Canada said that his country welcomed the Panel's thoughtful and well-reasoned interpretive approach to Article XXI in this dispute (...).

8.8. The representative of China said that his country (…) was grateful for the work undertaken in relation to this dispute by the Panelists and Secretariat staff for assisting them.

8.9. The representative of Turkey said that as (…) the Panel had correctly underlined, essential security interest was evidently a narrower concept than security interest. It had been designed specifically to prevent the abusive adoption of commercial measures under the guise of national security. (…) In this respect, Turkey hoped that this Panel Report provided guidance to the entire WTO Membership on the proper use of the national security exception. (…)

8.10. The representative of Australia said (…) Australia welcomed the Panel's finding that (…) [it] had jurisdiction to determine whether the requirements of Article XXI(b)(iii) were satisfied. (…) [W]hile acknowledging the Panel's finding that it had jurisdiction to review and make findings in relation to Article XXI, Australia emphasized that – in exercising this jurisdiction – the Panel had to fully respect the significance of the matters dealt with by Article XXI. The deference to a Member's determination of what action "it considers necessary" to protect its

essential security interests was explicit in the text of this provision and had to be given proper effect. However, Members should be conscious that this deference however was not absolute. (…). Finally, Australia recalled that, in over two decades of WTO jurisprudence, this was the first time a WTO panel had been called upon to consider a Member's invocation of Article XXI. Australia viewed the restraint demonstrated by Members positively and similarly recalled the responsibility of Members to guard against undue use of this exception.

8.11. The representative of the United States said that WTO Members had understood, from the very beginning of the international trading system, that each Member could judge for itself what actions it considered necessary to protect its essential security interests. This had been the position of the United States for over 70 years, since the negotiation of the GATT. That position had been shared by every WTO Member whose national security action had previously been the subject of complaint, including the European Union, Canada, Russia, and others. In its Report, the Panel had concluded that, despite the clear text of Article XXI, the Panel could review multiple aspects of a responding party's invocation of the essential security exception. The United States found the Panel's analysis unpersuasive. The United States was currently involved in litigation concerning these issues and, therefore, would not discuss the Panel's interpretation in detail at the present meeting. However, the United States called Members' attention to several issues with the Panel Report that the United States found problematic also for systemic reasons. First, in reviewing Russia's argument that Article XXI was "self-judging", the Panel failed to interpret the provision – Article XXI – as a whole. Instead, the Panel began by saying it would consider whether the phrase "it considers necessary" modified the three subparagraphs (i) through (iii). The Panel disposed of this inquiry a mere two sentences later in the very next paragraph (para. 7.65), hardly the objective examination the DSU called for. And later in the same section, the Panel said that it would be contrary to the GATT 1994 and WTO Agreements to interpret Article XXI as a "potestative" or subjective criterion. But in this section, the Panel was not interpreting Article XXI and had not looked at all of the text of Article XXI. Instead, the Panel drew its premature conclusions on Article XXI merely on the basis of subparagraph (iii). This was not consistent with Article 3.2 of the DSU and customary rules of interpretation of public international law. Second, having determined that it could review an invocation of Article XXI, the Panel's assessment of the security issues should have ended there. This was because while Russia invoked the exception, consistent with its interpretation that the Panel lacked the authority to review it, Russia had not substantiated a defence. In finding that Russia's actions were justified on the basis of essential security, the Panel had made Russia's case for it, concluding that the situation between the parties constituted an emergency in international relations. It was not the role of a WTO adjudicator to make the case for a party. The Panel's analysis of XXI(b) was purely advisory given that Russia had not presented arguments. (…) This Panel Report was, unfortunately, seriously flawed. (…)

8.12. The representative of Mexico said that her country (…) agreed with the notion that the Panel had jurisdiction to examine objective elements of Article XXI of the GATT 1994. Mexico also agreed that it was "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" and that "the less characteristic is the 'emergency in international relations' invoked by the Member (…) the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise".

8.13. The DSB took note of the statements and adopted the Panel Report contained in WT/DS512/R and Add.1.

3. Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights

3-1. Report of the Panel, WT/DS567/R, 16 June 2020

The following Panel Report is the second to interpret and apply a security exception, in this case TRIPS Article 73. It arose out of a diplomatic crisis between Saudi Arabia and Qatar, during which Saudi Arabia, the United Arab Emirates, Bahrain, and Egypt imposed a de facto *blockade on Qatar.* Inter alia*, Qatar alleged that Saudi Arabia was allowing beoutQ (a broadcasting entity operating in Saudi Arabia) to pirate content produced by beIN (a sports and entertainment company headquartered in Doha). As you read the following extract, consider how far the Panel hews to the approach of the Panel in* Russia—Traffic in Transit.

Editorial note: all footnotes have been omitted.

Panel Report, WT/DS567/R, 16 June 2020

McRae, Chairperson; Bennett, Member; Pereira, Member

1.1 Complaint by Qatar

1.1. On 1 October 2018, Qatar requested consultations with Saudi Arabia pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) with respect to the measures and claims set out below.

1.2. On 11 October 2018, Qatar received a communication from the Chairman of the Dispute Settlement Body (DSB) covering a communication from Saudi Arabia, stating that Saudi Arabia would not engage in consultations with Qatar.

(…)

1.3.2 Procedural issues arising from Saudi Arabia's refusal to interact with Qatar

1.10. Throughout the proceeding, Saudi Arabia took the position that, consistent with its severance of all relations with Qatar (including diplomatic and consular relations), and the essential security interests that motivated it to take that action, it would not interact, or have any direct or indirect engagement, with Qatar in any way in this dispute. Saudi Arabia took this position in the context of consultations, at the DSB meeting where the request for the establishment of this Panel was first considered, and in its comments on the Panel's draft Working Procedures and Timetable during the organizational phase. Saudi Arabia reiterated, in all of its subsequent submissions in this proceeding, its refusal to interact in any way, or have any direct or indirect engagement, with Qatar in this dispute.

1.11. Saudi Arabia's refusal to engage with Qatar in the manner described above raised the question of how the Panel ought to conduct the proceeding. (…)

(…)

1.13. In addition to dispensing with an organizational meeting, the Panel also modified the standard Working Procedures in several respects to reflect the special circumstances of this case. In particular, the Panel:

a. modified the normal requirement of direct service of documents by the parties on one another, so as to provide instead that "[e]ach party shall send all communications and documents directly to the Secretariat, which the Secretariat will then proceed to transmit promptly to the other party"; and

b. adjusted its Working Procedures to clarify that the purpose of the first and second substantive meetings with the Panel was to allow each party to address the Panel directly, and to provide that neither party was under any obligation to respond to questions posed by the other party at or following those meetings.

(…)

2.3 The measures at issue

2.46. According to Qatar, the measures at issue "include the following specific acts and/or omissions:

(i) Saudi Arabia's acts and omissions that result in Qatari nationals being unable to protect their intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property;

(ii) Saudi Arabia's acts and omissions that result in failure to accord Qatari nationals treatment no less favourable than that accorded to Saudi Arabia's own nationals or nationals of other countries, with regard to the protection of intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property;

(iii) Saudi Arabia's acts and omissions that make it unduly difficult, for Qatari nationals to access civil judicial remedies, or to seek remedies, in respect of enforcement of intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property rights; and,

(iv) 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."

2.47. Qatar submitted that the above "acts and omissions" are "reflected" in the following "evidence", which may also be analysed as specific "measures" at issue in this proceeding :

a. the 19 June 2017 Circular allegedly issued by the Ministry of Culture and Information and GCAM [(the General Commission for Audiovisual Media)] which, according to Qatar, served effectively to strip beIN of the legal right to protect any intellectual property rights related to the beIN channels;

b. so-called "anti-sympathy measures" allegedly imposed shortly after the severance of relations on 5 June 2017, and which allegedly subject lawyers based in Saudi Arabia to legal jeopardy if they express support for and/or provide assistance to Qatar and Qatari nationals, and thereby prevent beIN from securing legal representation needed to access civil enforcement procedures against the infringement of its intellectual property rights;

c. the travel restrictions, imposed on or shortly after 5 June 2017, to the extent that they, in combination with the anti-sympathy measures and other measures, allegedly prevent beIN from being able to access civil enforcement procedures against the infringement of its intellectual property rights by initiating procedures or testifying in person;

d. the Ministerial approval requirement of Copyright Committee decisions which, as applied to beIN, allegedly prevents beIN from being able to access civil and criminal enforcement procedures against the infringement of its intellectual property rights;

e. Saudi Arabia's alleged failure to apply criminal procedures and penalties against beoutQ, despite the evidence that beoutQ's activities constitute copyright piracy on a commercial scale and the evidence that it is directed and controlled by persons and entities subject to the criminal jurisdiction of Saudi Arabia; and

f. Saudi Arabia's alleged promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts.

2.48. Qatar asserted that certain of these measures "work together" to prevent beIN from accessing Saudi courts and tribunals to protect its intellectual property rights, and stresses that it challenges their "combined operation".

7 Findings

(…)

7.229. Saudi Arabia has invoked the security exception in Article 73(b)(iii) of the TRIPS Agreement. In the light of its findings in sections 7.2 and 7.3 above, the Panel will determine whether the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (i.e. the anti-sympathy measures), and/or Saudi Arabia's refusal to provide for criminal procedures and penalties to be applied to beoutQ, constitute "action which it considers necessary for the protection of its essential security interests … taken in time of war or other emergency in international relations".

(…)

7.231. In this dispute, both parties interpreted Article 73(b)(iii) of the TRIPS Agreement by reference to, and consistently with, the interpretation of Article XXI(b)(iii) of the GATT 1994 developed by the panel in *Russia – Traffic in Transit*. However, the parties' arguments reveal divergent views on three fundamental issues pertaining to the applicability of the security exception in Article 73(b)(iii) to the facts and measures at issue: (a) whether there is an "emergency in international relations" in the sense of subparagraph (iii) of Article 73(b); (b) whether Saudi Arabia has articulated its "essential security interests" with sufficient clarity and precision; and (c) whether—and, if so, how—the measures that Saudi Arabia characterizes as the "action which it considers necessary for the protection of its essential security interests" under the chapeau of Article 73(b) relate to any of the specific measures challenged by Qatar in this dispute.

7.4.2 Arguments

7.4.2.1 Saudi Arabia

7.232. Saudi Arabia submitted that the Panel should find that an "emergency in international relations" exists in the sense of Article 73(b)(iii) on the basis that it has "severed all diplomatic and economic ties with the complaining Member, which is the ultimate State expression of the existence of an emergency in international relations". Saudi Arabia also submitted that "[t]he existence of an emergency in international relations has been recognized by other countries which have applied similar measures against the complaining Party". It referenced Qatar's alleged repudiation of the Riyadh Agreements concluded between the GCC [(Gulf Cooperation Council)] members and alleged interference in other countries in the region. Saudi Arabia asserted that its action was taken "in time of" the emergency because (…) the emergency in international relations "has persisted since June 2017".

7.233. In its submissions, Saudi Arabia articulated its "essential security interests" generally in terms of protecting itself "from the dangers of terrorism and extremism". (…) In summarizing its earlier submissions, Saudi Arabia reiterated that it "has always defined its 'essential security interest' as carrying out its central sovereign duty of protecting Saudi citizens and population, government institutions, and territory from the threats of terrorism and extremism, which have led to war, instability, and general unrest in our region".

(…)

7.4.2.2 Qatar

7.235. Qatar disagreed with the arguments raised by Saudi Arabia concerning the existence of an "emergency in international relations" in this case, submitting that: Saudi Arabia's allegations regarding the events leading up to the severance of relations in June 2017 are unsupported, and also pointed to a "mere political or economic" dispute, which is not sufficient to constitute an emergency; to the extent that Saudi Arabia argued that the severance of all diplomatic and economic ties in June 2017 itself precipitated an "emergency" that justifies the same severance of all diplomatic and economic ties, the argument is illogical and would render the condition set forth in Article 73(b)(iii) redundant. In Qatar's view no "emergency" in international relations prevails today, and the two countries cooperate in various fora.

7.236. Qatar submitted that Saudi Arabia has not identified its "essential security interests" with sufficient clarity or precision, and that its articulation of its essential security interests "lacks veracity". In its view, Saudi Arabia's apparent interests "are communicated in the most abstract of terms". That is problematic, Qatar asserts, because the present dispute is distant from the "hard core" of war, and therefore the Member invoking Article 73(b) "must articulate its interest with an appropriate degree of clarity and precision to demonstrate their veracity, so as to demonstrate that they are true and not a disguise for pursuit of other objectives". Qatar doubted the veracity of any security interests in connection with the measures at issue, because in its view those measures bear no relation to such interests. Qatar asserted that Saudi Arabia's actions are in fact motivated by the objective of promoting the growth of its own media industry, and submitted that a Member is not permitted to invoke the security defence merely by labelling commercial interests as security interests.

(…)

7.4.2.3 Third parties

7.238. Brazil, Canada, the European Union, Japan and Russia agreed with the panel's finding in *Russia – Traffic in Transit* that the existence of an "emergency in international relations" is a factual circumstance subject to an objective determination by a panel. The UAE also agreed with the panel's finding in this respect, noting 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 each other, which is related to essential security interests. By contrast, both Bahrain and the United States considered that Article 73(b) is a self-judging provision, in part, because the words "which it considers necessary" in the chapeau apply to subparagraphs (i) to (iii). As regards whether an "emergency in international relations" exists in this dispute, Japan submitted that the assertion that the severance of economic and diplomatic ties constitutes in itself such an emergency under Article 73(b)(iii) is "circular reasoning" and should be rejected. The European Union and Singapore considered that the severance of diplomatic and consular relations is not necessarily dispositive of the existence of such an emergency, but facts underlying or leading to such a severance could qualify as an "emergency in international relations". The UAE concluded that its and other countries' termination of relations with Qatar "in and of itself" reflects the existence of an "emergency in international relations", and agreed with Saudi Arabia that the severance of diplomatic and economic ties is the "ultimate State expression" of the existence of an emergency in international relations.

7.239. Most of the third parties refrained from commenting on the manner in which Saudi Arabia has identified its "essential security interests". The European Union stated that, without taking a position on the facts of this case, Saudi Arabia should have better explained several elements of its defence, including the "essential security interests" that it claims to be at issue. However, several third parties commented on the issue of whether—and, if so, how—the measures at issue are plausibly connected to Saudi Arabia's essential security interests. Brazil "fail[ed] to see how the respondent's proffered essential security interests, or any country's essential security interests for that matter, could be protected by allowing the operation of a copyright pirate whose broadcasts have spread beyond the respondent's borders and encompass not only the copyrights held by the claimant's nationals but by other countries' nationals as well, including Brazil's". The European Union stated that, without taking a position on the facts of this case, it would "welcome a detailed explanation clarifying why, in order to protect its essential security interests, Saudi Arabia considers necessary to breach the rights of third party right-holders".

(…)

7.4.3 Assessment by the Panel

7.4.3.1 Applicable legal standard

7.241. As previously stated, the wording of Article 73(b)(iii) of the TRIPS Agreement is identical to that of Article XXI(b)(iii) of the GATT 1994, which was first interpreted by the panel in *Russia – Traffic in Transit*. The panel's interpretation of Article XXI(b)(iii) in that dispute gave rise to an analytical framework that can guide the assessment of whether a respondent has properly invoked Article XXI(b)(iii) of the GATT 1994, or, for the purposes of this dispute, Article 73(b)(iii) of the TRIPS Agreement.

7.242. Specifically, a panel may proceed by assessing:

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

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

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

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

7.243. The parties in this dispute and multiple third parties each express agreement with the general interpretation and analytical framework enunciated by the panel in *Russia – Traffic in Transit*. These parties and third parties therefore considered that both can be transposed to Article 73(b)(iii) of the TRIPS Agreement.

7.244. The first step in the analytical framework outlined above requires a panel to assess whether the existence of a "war or other emergency in international relations" has been established in the sense of subparagraph (iii) of Article 73(b). The panel in *Russia – Traffic in Transit* concluded that the circumstance in subparagraph (iii) is "an objective fact" that is "amenable to objective determination". In other words, the panel concluded that the adjectival clause "which it considers" in the chapeau of Article XXI(b)(iii) of the GATT 1994 "does not qualify the determination of the circumstance[]" in subparagraph (iii). In that panel's view, the evaluation of whether the respondent has satisfied the circumstance in subparagraph (iii) must "be made objectively rather than by the invoking Member itself".

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

7.246. Saudi Arabia and Qatar each appeared to generally agree with the interpretation of subparagraph (iii) provided above, as both referred to the interpretations of the panel in *Russia – Traffic in Transit*. Neither party stated any disagreement with any aspect of that panel's reasoning. Notably, Saudi Arabia agreed that the phrase "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." The Panel notes that the opinion of the majority of the third parties that expressed a view on this issue is consistent with that panel's interpretation.

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

7.248. Saudi Arabia and Qatar both appeared to generally agree, implicitly or expressly, with the panel's interpretation of the phrase "taken in time of". Notably, Saudi Arabia also referred to the "temporal relation" that should exist between qualifying emergencies and related "actions". None of the third parties expressed any disagreement with this aspect of the panel's interpretation.

7.249. Proceeding to the third step in the analytical framework, the panel in *Russia – Traffic in Transit* concluded that a panel would be required to assess whether a respondent has sufficiently articulated its "essential security interests" in the sense of the chapeau of paragraph (b). The panel noted that "essential security interests" is evidently a narrower concept than "security interests", with the former generally concerning "those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally". For the panel, "[t]he specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances". For these reasons, the panel considered that "it is left, in general, to every Member to define what it considers to be its essential security interests".

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

7.251. Qatar and Saudi Arabia each advanced arguments consistent with the *Russia – Traffic in Transit* panel's interpretation of the phrase "essential security interests". Notably, Saudi Arabia maintained that it "has clearly articulated its determination that the application of comprehensive measures is necessary [to] protect 'its national security from the dangers of terrorism and extremism', and … are [not] applied to circumvent its WTO obligations". Most if not all of the third parties that addressed this element of the security exception expressed their agreement with one or more elements of the panel's interpretation reviewed above.

7.252. Moving to the fourth and final step of the analytical framework set out above, the panel in *Russia – Traffic in Transit* considered the "obligation of good faith" to apply not only to the respondent's articulation of "its essential security interests", but also to the connection between the measures at issue and those interests. This obligation, for the panel, is "crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests". Specifically, a panel must determine "whether the measures are so remote from, or unrelated to, the … emergency that it is implausible that [the respondent] implemented the measures for the protection of its essential security interests arising out of the emergency".

7.253. Saudi Arabia and Qatar each expressed basic agreement with the interpretation of the chapeau of paragraph (b) as expressed above. Saudi Arabia stated that a panel could examine the relationship between the measures for which the security exception was invoked, and the essential security interests, where such an examination would support the panel's assessment of the *bona fide* invocation of the security exception. Saudi Arabia also sought to demonstrate its "respect for the obligation of good faith" with reference to "the relationship between the measures and the essential security interests at issue".

7.254. Qatar agreed that the phrase "which it considers" in the chapeau of Article 73(b) "confer[s] … discretion on the Member taking the actions at issue"; in addition, such discretion is not unfettered. For Qatar, this is because a panel must ensure that the invoking Member acts in good faith and does not exercise its discretion "in pursuit of different or ulterior objectives". Qatar submitted that the word "necessary" "denotes an action that contributes to the attainment of the relevant objective"; however, should a measure, in the light of the facts, be "manifestly incapable of making a contribution to the stated security interests, or actually undermine[] those interests", Qatar asserted that the invoking Member could not, in good faith, "consider[]" the measure "necessary for the protection of its essential security interests".

7.255. Australia, Brazil, the European Union, Russia and Ukraine considered that the language "which it considers" in the chapeau of Article 73(b) confers discretion on an invoking Member to determine the necessity of the measure, but that this discretion is not unfettered. Though these third parties expressed slightly different formulations of the "minimum requirement of plausibility", they all agree with this requirement and the role of the obligation of good faith in the application of Article 73(b)(iii). For example, the European Union considered that if a threshold analysis of the "design" of the measure reveals that it is "incapable" of addressing the purported objective of protecting essential security interests, (e.g. because it is designed to circumvent WTO obligations or compliance obligations or promote protectionist interests), then the measure cannot be justified under this exception. Nevertheless, the UAE considered that, to give the clause "which it considers" legal effect in the chapeau of Article 73(b), a panel must leave it to the implementing Member to determine whether the action was "necessary". The UAE also considered that the "minimum requirement of plausibility" enunciated by the panel in *Russia – Traffic in Transit* might have been appropriate in that dispute, but should not be applied "too mechanically" and that this Panel should proceed with "caution" in adopting a test that is not grounded in the text of the security exception. Regardless, in its view, the "plausibility formulation" sets "a very low bar".

7.4.3.2 "taken in time of war or other emergency in international relations"

7.256. The Panel will now proceed with the first prong of the test under Article 73(b)(iii) of the TRIPS Agreement, which entails consideration of two issues: (a) whether an "emergency in international relations" exists between the disputing parties; and (b) whether the anti-sympathy measures and non-application of criminal procedures and penalties to beoutQ were "taken in time of" this emergency. The Panel will address these two elements of Article 73(b)(iii) in turn.

7.257. For the reasons that follow, the Panel considers that "a situation … of heightened tension or crisis" exists in the circumstances in this dispute, and is related to Saudi Arabia's "defence or military interests, or maintenance of law and public order interests" (i.e. essential security interests), sufficient to establish the existence of an "emergency in international relations" that has persisted since at least 5 June 2017. The Panel notes at the outset that it is the combination of the considerations that follow which sustains this conclusion, rather than any one of them being necessarily decisive in its own right.

7.258. First, the Panel recalls that, on 5 June 2017, Saudi Arabia "severed diplomatic and consular relations with [Qatar], and imposed comprehensive measures putting an end to all economic and trade relations between [itself and Qatar]". On the same day, the Saudi Press Agency reported the actions and their underlying rationale as follows:

> An official source stated that the Government of the Kingdom of Saudi Arabia emanating from exercising its sovereign rights guaranteed by the international law and protecting its national security from the dangers of terrorism and

> extremism has decided to sever diplomatic and consular relations with the State of Qatar, close all land, sea and air ports, prevent crossing into Saudi territories, airspace and territorial waters.

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

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

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

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

7.263. Second, the Panel recalls the context in which Saudi Arabia's severance of relations with Qatar occurred. Saudi Arabia repeatedly alleged that Qatar had, *inter alia*, repudiated the Riyadh Agreements designed to address regional concerns of security and stability, supported terrorism and extremism, and interfered in the internal affairs of other countries. The Panel expresses or implies no position concerning any of these allegations, and recalls that Qatar strongly denied the various accusations made by Saudi Arabia. It suffices to observe that the nature of the allegations constitutes further evidence of the grave and serious nature of the deterioration and rupture in relations between these Members, and is also explicitly related to Saudi Arabia's security interests. In the Panel's view, when a group of States repeatedly accuses another of supporting terrorism and extremism, as described in greater detail earlier, that in and of itself reflects and contributes to a "situation … of heightened tension or crisis" between them that relates to their security interests. Thus, in the light of the reasons advanced by Saudi Arabia for its actions, the Panel does not accept Qatar's view that the events culminating in the severance of relations can be characterized as a "mere political or economic" dispute.

(…)

7.266. Finally, the Panel does not consider that various forms of cooperation between the disputing parties in the fora highlighted by Qatar call into question that the "emergency in international relations" between Saudi Arabia and Qatar persists. It is not in dispute that the complete severance of diplomatic, consular and economic relations has remained essentially unchanged between June 2017 and the present.

(…)

7.268. The Panel (…) has found, on the basis of the facts in this dispute, that an "emergency in international relations" exists in this case.

7.269. As to the second element of subparagraph (iii) of Article 73(b) of the TRIPS Agreement, it follows from the foregoing assessment, and in particular the Panel's conclusion that an "emergency in international relations" has persisted since at least 5 June 2017, that the two actions that the Panel must examine under the chapeau of Article 73(b) were "taken in time of" the "emergency in international relations". The measures at issue are of a continuing nature, as opposed to acts or omissions that occurred or were completed on a particular date, and neither party has suggested that the Panel must assign any dates to them for the purposes of examining the claims and defences before the Panel. In the Panel's view, it suffices to note that beoutQ did not commence operations until August 2017, and hence the actions to be examined under the chapeau were "taken in time of" the "emergency in international relations" that has persisted since at least 5 June 2017.

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

7.4.3.3 "action which it considers necessary for the protection of its essential security interests"

7.4.3.3.1 Introduction

7.271. The Panel will now proceed with the second prong of the test under Article 73(b)(iii) of the TRIPS Agreement, which entails the consideration of two further issues: (a) whether Saudi Arabia has sufficiently articulated the "essential security interests" that it considers the measures at issue are necessary to protect; and (b) whether the anti-sympathy measures and/or the non-application of criminal procedures or penalties are so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member implemented the measures for the protection of its "essential security interests" arising out of the emergency.

(…)

7.4.3.3.3 Saudi Arabia's articulation of its "essential security interests"

7.279. (…) [The] Panel will next examine whether Saudi Arabia has sufficiently articulated the "essential security interests" that it considers the measures at issue are necessary to protect.

7.280. First, Saudi Arabia has expressly articulated its "essential security interests", in terms of protecting itself "from the dangers of terrorism and extremism". Thus, the situation in this case contrasts to the situation that arose in *Russia – Traffic in Transit*, in which the respondent appeared not to expressly articulate its essential security interests at all. Second, the interests

identified by Saudi Arabia are ones that clearly "relat[e] to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally".

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

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

7.4.3.3.4 The connection between the measures and the essential security interests

7.283. The Panel notes that both parties have suggested that the Panel may and should assess the relationship (if any) between the relevant measures and the "emergency in international relations". Saudi Arabia stated that it has "no problem with the good faith test" in respect of the invocation of Article 73(b)(iii), and that "the Panel may assess compliance with Saudi Arabia's obligation of good faith". Saudi Arabia stated more generally that "consistent with Saudi Arabia's approach to this dispute, [it] will not address the facts presented by the complaining Party, and leave the assessment of the evidence to the Panel". (…)

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

7.285. The Panel turns to the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (anti-sympathy measures). The relevant question is whether the anti-sympathy measures "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". The panel must therefore review whether the anti-sympathy measures "are so remote from, or unrelated to, the ["emergency in international relations"] as to make it implausible that [Saudi Arabia] implemented the measures for the protection of its essential security interests arising out of the emergency".

7.286. The measures aimed at denying Qatari nationals access to civil remedies through Saudi courts may be viewed as an aspect of Saudi Arabia's umbrella policy of ending or

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

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

7.288. For these reasons, the Panel considers that the anti-sympathy measures "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".

7.289. In the Panel's view, however, the same conclusion cannot be reached regarding the connection between Saudi Arabia's stated essential security interests and its authorities' non-application of criminal procedures and penalties to beoutQ. In contrast to the anti-sympathy measures, which might be viewed as an aspect of Saudi Arabia's umbrella policy of ending or preventing any form of interaction with Qatari nationals, the Panel is unable to discern any basis for concluding that the application of criminal procedures or penalties to beoutQ would require any entity in Saudi Arabia to engage in any form of interaction with beIN or any other Qatari national.

7.290. Multiple third-party right holders submitted evidence directly to the Saudi authorities and have made such evidence available to these authorities in the course of this dispute. This third-party corroborating evidence includes, for example:

a. letters issued by UEFA and BBC Studios to the Ministry and GCAM containing evidence concerning beoutQ's operations and efforts to target the Saudi market, its use of Arabsat satellites and its sale of STBs and subscriptions in Saudi Arabia and elsewhere in the MENA region;

b. letters from UEFA, LaLiga and the Premier League to Arabsat reporting beoutQ's use of particular Arabsat satellite frequencies to transmit its pirated content, which

Arabsat's legal representative stated in letters to third-party right holders that Arabsat would take into account in its ongoing investigation;

c. FIFA's letter to Arabsat concerning the scope of its satellite coverage and its transmission of beoutQ's pirated content;

d. submissions made to the USTR concerning beoutQ's piracy, which were summarized in the USTR's 2019 Special 301 Report and have been submitted to the Panel and Saudi Arabia in this dispute;

e. a public joint statement made by seven major football right holders condemning beoutQ and requesting enforcement action by Saudi Arabia against beoutQ; and

f. a technical report produced by the anti-piracy and cybersecurity firm MarkMonitor, at the request of the seven football right holders, making specific findings concerning beoutQ's unauthorized re-streaming of copyrighted content, the transmission of beoutQ's pirated content on specific Arabsat satellites and frequencies, the design and operation of the hardware and software of beoutQ STBs to target Saudi Arabia, and the technically sophisticated and organized nature of beoutQ's operation.

7.291. The Panel recalls that the non-application of criminal procedures and penalties to beoutQ, a commercial-scale broadcast pirate, affects not only Qatar or Qatari nationals, but also a range of third-party right holders. The Panel recalls that several third parties commented on the question of whether—and, if so, how—the non-application of criminal procedures and penalties to beoutQ could plausibly be connected to Saudi Arabia's essential security interests. (…)

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

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

7.4.4 Conclusion

7.294. For these reasons, the Panel finds that the requirements for invoking Article 73(b)(iii) are met in relation to the inconsistency with Article 42 and Article 41.1 of the TRIPS Agreement arising from the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before

Saudi courts and tribunals. The Panel also finds that the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia's non-application of criminal procedures and penalties to beoutQ.

8 Conclusions and Recommendation

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

(…)

b. With respect to Qatar's claims under Parts I, II and III of the TRIPS Agreement:

i. Qatar has established that Saudi Arabia has taken measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals, and thus Saudi Arabia has acted in a manner inconsistent with Article 42 and Article 41.1 of the TRIPS Agreement;

ii. Qatar has established that Saudi Arabia has not provided for criminal procedures and penalties to be applied to beoutQ despite the evidence establishing *prima facie* that beoutQ is operated by individuals or entities under the jurisdiction of Saudi Arabia, and thus Saudi Arabia has acted inconsistently with Article 61 of the TRIPS Agreement;

(…)

c. With respect to Saudi Arabia's invocation of the security exception in Article 73(b)(iii) of the TRIPS Agreement:

i. the requirements for invoking Article 73(b)(iii) are met in relation to the inconsistency with Article 42 and Article 41.1 of the TRIPS Agreement arising from the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals; and

ii. the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia's non-application of criminal procedures and penalties to beoutQ.

(…)

* * *

Editors' note: unlike the report of the panel in Russia—Traffic in Transit, *this panel report was not adopted by the DSB. Saudi Arabia initially appealed the decision "to the void" (indefinitely postponing adoption of the panel report in the absence of a functioning Appellate Body). Diplomatic relations between Saudi Arabia and Qatar subsequently resumed, and the disputing parties agreed to settle their dispute. On April 21, 2022, Qatar notified the DSB that it had agreed to terminate this dispute and that it would not seek adoption of the panel report.*

4. Security Exceptions in Regional Agreements

Most bilateral and regional trade agreements incorporate a security exception. However, the drafting can vary considerably. Consider the following provisions. To what extent do these security exceptions differ materially from GATT Article XXI? What is the function of any such differences? What might explain the parties to these treaties' choice either to stick with the GATT model, or to stray from it?

4-1. CANADA—EUROPEAN UNION COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)

The CETA is a free trade agreement between Canada and the European Union. It was signed on 30 October, 2016, but has not yet been ratified by all EU member states. Much of the treaty has nevertheless been provisionally applied since 21 September, 2017.

CETA Article 28.6

National security

Nothing in this Agreement shall be construed:

a. to require a Party to furnish or allow access to information if that Party determines that the disclosure of this information would be contrary to its essential security interests; or

b. to prevent a Party from taking an action that it considers necessary to protect its essential security interests:

   i. connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment;[1]

   ii. taken in time of war or other emergency in international relations; or

   iii. relating to fissionable and fusionable materials or the materials from which they are derived; or

c. prevent a Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.

4-2. UNITED STATES—MEXICO—CANADA AGREEMENT (USMCA)

The trilateral USMCA replaced the North American Free Trade Agreement (NAFTA). It was signed on 10 December, 2018, and entered into force on 1 July, 2020.

USMCA Article 32.2

[1] The expression "traffic in arms, ammunition and implements of war" in this Article is equivalent to the expression "trade in arms, munitions and war material".

Essential Security

1. Nothing in this Agreement shall be construed to:

   (a) require a Party to furnish or allow access to information the disclosure of which it determines to be contrary to its essential security interests; or

   (b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

4-3. REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP)

The RCEP is an agreement among: Australia; Brunei; Cambodia; China; Indonesia; Japan; South Korea; Laos; Malaysia; Myanmar; New Zealand; the Philippines; Singapore; Thailand; and Vietnam. It was signed on 15 November, 2020, and entered into force on 1 January, 2022.

RCEP Article 17.13

Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require any Party to furnish any information the disclosure of which it considers contrary to its essential security interests;

(b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests:

   (i) relating to fissionable and fusionable materials or the materials from which they are derived;

   (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment;

   (iii) taken so as to protect critical public infrastructures[2] including communications, power, and water infrastructures;

   (iv) taken in time of national emergency or war or other emergency in international relations; or

(c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security

* * *

[2] For greater certainty, this includes critical public infrastructures whether publicly or privately owned.