WORLD TRADE ORGANIZATION

WT/DS567/R

16 June 2020

(20-4200)

Page: 1/123

Original: English

SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

REPORT OF THE PANEL

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

WTO CASES CITED IN THIS REPORT

Short title	Full case title and citation
Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Argentina – Financial Services	Panel Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R and Add.1, adopted 9 May 2016, as modified by Appellate Body Report WT/DS453/AB/R, DSR 2016:II, p. 599
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000 March 2000, DSR 2000:IV, p. 2031
Brazil – Retreaded Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, DSR 2013:I, p. 237
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
China – Intellectual Property Rights	Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, DSR 2009:V, p. 2097
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
China – TRQs	Panel Report, *China – Tariff Rate Quotas for Certain Agricultural Products*, WT/DS517/R and Add.1, adopted 28 May 2019
Colombia – Textiles	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R and Add.1, adopted 22 June 2016, as modified by Appellate Body Report WT/DS461/AB/R, DSR 2016:III, p. 1227
Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Colombia / Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Panama*, WT/DS461/RW and Add.1, circulated to WTO Members 5 October 2018 [appealed by Panama 20 November 2018 – the Division suspended its work on 10 December 2019]
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (US) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, DSR 1999:II, p. 725
EC – Commercial Vessels	Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, adopted 20 June 2005, DSR 2005:XV, p. 7713

Short title	Full case title and citation
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
India – Additional Import Duties	Panel Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/R, adopted 17 November 2008, as reversed by Appellate Body Report WT/DS360/AB/R, DSR 2008:XX, p. 8317
India – Agricultural Products	Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015, DSR 2015:V, p. 2459
India – Solar Cells	Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, p. 1827
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
Indonesia – Import Licensing Regimes	Panel Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/R, WT/DS478/R, Add.1 and Corr.1, adopted 22 November 2017, as modified by Appellate Body Report WT/DS477/AB/R, WT/DS478/AB/R, DSR 2017:VII, p. 3131
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
Russia – Pigs (EU)	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018 [appealed by Thailand 9 January 2019]
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4831

Short title	Full case title and citation
US – Carbon Steel (India) (Article 21.5 – India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Recourse to Article 21.5 of the DSU by India*, WT/DS436/RW and Add.1, circulated to WTO Members 15 November 2019 [adoption/appeal pending]
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
US – Nicaraguan Trade	GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986, unadopted
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
US – Section 211 Appropriations Act	Panel Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, adopted 1 February 2002, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, p. 683
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481
US – Shrimp (Article 21.5 – Malaysia)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report WT/DS58/AB/RW, DSR 2001:XIII, p. 6529
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, p. 425
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299

Short title	Full case title and citation
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911

EXHIBITS CITED IN THIS REPORT

Exhibit Number	Full Title
QAT-1	Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, 19 June 2017
QAT-2	Saudi Press Agency Website, "*Kingdom of Saudi Arabia severs diplomatic and consular relations with Qatar*", 5 June 2017
QAT-3	Announcement on the Saudi Embassy to the United States website, "*Kingdom of Saudi Arabia Cuts Off Diplomatic and Consular Relations with the State of Qatar*", 5 June 2017
QAT-7	@Saudi News 50, Tweet, 6 June 2017 (Arabic original and English translation)
QAT-8	XE Currency Converter, Saudi riyals to US dollar conversion, last accessed 8 April 2019
QAT-10	Al-Youm Al-Sabea, ''*Hashtag 'Cutting Ties with Qatar' tops the world list of trend on Twitter*'' (Arabic original and English translation)
QAT-11	Saudi Al-Marsd Online Newspaper, "*Legal figure: Anyone showing sympathy with Qatar on social media platforms will be sentenced to 5 years imprisonment and fined 3 million riyals*" (Arabic original and English translation), 8 June 2017
QAT-12	Amal Ruslan, *"Saudi Newspaper Okaz: Punishments include imprisonment for those who sympathize with Qatar on social media"*, 7 June 2017 (Arabic original and English translation)
QAT-13	Kingdom of Saudi Arabia, Anti-Cyber Crime Law, 26 March 2007 (English translation)
QAT-15	Amnesty International, "*Amnesty International Report 2017/18 – Saudi Arabia*", 22 February 2018
QAT-21	Office of the United Nations High Commissioner for Human Rights, Technical Mission to the State of Qatar 17-24 November 2017, Report on the Impact of the Gulf Crisis on Human Rights, December 2017
QAT-37	Declaration by beIN Media Group LLC, 15 April 2019
QAT-38	Letter from beIN to Saudi Ministry of Culture and Information, 15 June 2017 (Arabic original and English translation)
QAT-39	Saudi Monetary Authority, Confidential Circular, 11 July 2017 (Arabic original and English translation)
QAT-41	Promotion of beoutQ through Social Media
QAT-42	Images of beoutQ promotional material
QAT-43	beoutQ-pirated broadcast of Champions League, Video
QAT-44	beoutQ-pirated broadcast of Europa League, Video
QAT-45	beoutQ-pirated broadcast of FIFA World Cup game between Croatia and England of 2018, Video
QAT-46	beoutQ-pirated broadcast of Formula 1, Video
QAT-47	beoutQ-pirated broadcast of NBA final games between the Cleveland Cavaliers and the Golden State Warriors of 2018, Video
QAT-48	2017-2019 Sampling of Live and Replayed Content Broadcast on beoutQ
QAT-49	beoutQ Promotional, as shown on beoutQ, Video, 21 September 2018
QAT-50	SportsPro, *"Saudi Arabia, cartoon pirates and great TV sports rights robbery"*, 6 March 2019
QAT-51	Tweets about the sale of beoutQ STBs, 12 August 2017
QAT-52	Public statements from world sports organizations condemning beoutQ Piracy, as collected on beIN Media Group's Website Exposing beoutQ, 16 January 2019
QAT-53	SportsPro, "*ATP and ITF pile in on BeoutQ over pirate broadcasts*", 6 July 2018
QAT-54	FIFA, "*Joint Public Statement on behalf of FIFA, UEFA, AFC, The Premier League, LaLiga and Bundesliga on beoutQ*", 22 January 2019
QAT-55	UEFA, "*Joint Statement on behalf of FIFA, UEFA, AFC, The Premier League, LaLiga and Bundesliga on beoutQ*", 22 January 2019
QAT-56	Reuters, "*Soccer: Leagues and governing bodies condemn beoutQ TV piracy*", 22 January 2019
QAT-57	Asian Football Confederation Statement on beoutQ, 9 January 2019
QAT-58	Motion Picture Association of America, 2018 Notorious Markets Comments, 1 October 2018
QAT-59	The Guardian, "*BBC and Sky call for EU crackdown on Saudi pirate TV service*", 31 October 2018
QAT-60	Bloomberg, "*Telemundo Says Its World Cup Broadcasts Were Illegally Distributed*", 19 June 2018
QAT-62	Reuters "*NBA, U.S. Tennis, Sky, urge U.S. action on alleged Saudi TV piracy*", 16 February 2019

Exhibit Number	Full Title
QAT-63	Submission by Audiovisual Anti-Piracy Alliance for the 2019 Special 301 Review, 4 February 2019
QAT-64	Submission by Canal+ Group for the 2019 Special 301 Review, 7 February 2019
QAT-65	Submission by the International Intellectual Property Alliance for the 2019 Special 301 Review, 7 February 2019
QAT-66	Submission by the National Basketball Association and the United States Tennis Association for the 2019 Special 301 Review, 7 February 2019
QAT-67	Submission by beIN Media Group, LLC and Miramax, LLC for the 2019 Special 301 Review, 7 February 2019
QAT-68	Submission by Sky Limited for the 2019 Special Review, 7 February 2019
QAT-69	Submission by the Sport Coalition for the 2019 Special 301 Review, 7 February 2019
QAT-70	Submission by U.S. Chamber of Commerce for the 2019 Special 301 Review, 7 February 2019
QAT-71	Photographs of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia, October 2017 to September 2018
QAT-72	beoutQ-pirated broadcast of NFL Super Bowl LIII game between New England Patriots and Philadelphia Eagles, Video, 4 February 2018
QAT-73	Images of beoutQ-pirated broadcast of 4 February 2018 NFL Super Bowl Half-Time Show
QAT-74	Country-by-Country Examples of beoutQ-Pirated Content (2018)
QAT-75	beoutQ advertisements pricing rate cards Saudi riyals
QAT-76	beoutQ advertisements for Saudi brands
QAT-77	Bloomberg, "*Saudis Dismiss Piracy Claim as Soccer Rights' Spat Escalates*", 22 June 2018
QAT-78	Photographic Evidence of Screenings of beoutQ's Illegal Pirate Broadcasts of the FIFA 2018 World Cup at Cafés in Riyadh, Saudi Arabia, 11 July 2018
QAT-79	NAGRA, Kudelski Report, "*IPTV Piracy on BeoutQ STBs*", 25 November 2018
QAT-80	NAGRA, Kudelski Report, "*beoutQ Broadcast Piracy Further Update*", 15 August 2018
QAT-81	NAGRA Kudelski Group Website, "*The Group at a Glance*"
QAT-83	Social Media Evidence of Saudi Municipalities Organizing Public Screenings of beoutQ's Illegal Pirate Broadcasts of the FIFA 2018 World Cup, June 2018
QAT-84	Tweet from Margherita Stancati, Wall Street Journal reporter, 22 June 2018
QAT-85	Saudi Arabia, Ministry of Municipal and Rural Affairs Announcement of 294 screens to broadcast World Cup (Arabic original and English translation), 13 June 2018
QAT-86	Arabsat, About, last accessed 16 April 2019
QAT-87	Arabsat, "*League of Arab States Secretary-General honors Arabsat CEO*", 29 January 2018
QAT-89	Cartesian Report, "*Broadcast Piracy via Satellite Transmission*", 8 February 2019
QAT-90	NAGRA, Kudelski Report, "*beoutQ Piracy Overview*", 24 June 2018
QAT-91	Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018
QAT-92	UEFA Letter to Arabsat, 12 March 2018
QAT-93	Arabsat Letter to UEFA, 14 March 2018
QAT-94	UEFA Letter to Squire Patton Boggs LLP, 17 April 2018
QAT-96	LaLiga Letter to Arabsat, 4 April 2018
QAT-97	Arabsat Letter to LaLiga, 19 April 2018
QAT-98	Squire Patton Boggs LLP Letter to LaLiga, 13 June 2018
QAT-99	Premier League Letter to Arabsat, 11 April 2018
QAT-100	Squire Patton Boggs LLP Letter to FIFA, 5 June 2018
QAT-101	Arabsat Letter to beIN, 29 August 2017
QAT-102	Arabsat Letter to beIN, 14 December 2017
QAT-103	Cartesian website, "*Our Story*"
QAT-104	Nextv News, "*Selevision launches in MENA*", 18 March 2014
QAT-105	Videonet, "*Selevision uses Verimatrix to protect its new Seevi service, which combines IPTV and OTT*", 3 March 2016

Exhibit Number	Full Title
QAT-106	Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018
QAT-107	Declaration of Adam Jacob Muller, Beluga CDN LLC, 20 June 2018
QAT-112	Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003
QAT-113	Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004 and amended by decision No. (1640), 22 June 2005
QAT-116	Letter from beIN to Saudi Ministry of Culture and Information, 15 August 2017
QAT-117	Letter from Saudi General Commission for Audiovisual Media to beIN (Arabic original and English translation), 2 September 2017
QAT-118	Letter from beIN to Saudi Ministry of Culture and Information, 14 September 2017
QAT-119	Letter from beIN to Saudi Ministry of Culture and Information, 16 January 2018
QAT-120	Letter from beIN to Saudi Ministry of Culture and Information, 6 March 2018
QAT-121	Tweets about beIN and beoutQ STBs (Arabic original and English translation), 25 and 26 May 2018
QAT-122	UEFA Letter to KSA Ministry of Culture & Information, 8 June 2018
QAT-123	UEFA Letter to GCAM, 8 June 2018
QAT-124	BBC Letter to KSA Ministry of Culture & Information, 26 June 2018
QAT-125	BBC Letter to GCAM, 26 June 2018
QAT-175	The *New York Times*, "*The Brazen Bootlegging of a Multibillion-Dollar Sport Network*", 9 May 2018
QAT-184	United States 2019 Special 301 Report, Office of the United States Trade Representative (April 2019) (Excerpts)
QAT-187	Excerpts of United States 2018 Out-of-Cycle Review of Notorious Markets, Office of the United States Trade Representative (April 2019) (Excerpts)
QAT-188	SportsPro Media, "*UK government to investigate BeoutQ Premier League IP theft*", 25 April 2019
QAT-189	Broadband TV News, "*MPs call for 'robust attack' on pirate beoutQ*", 10 May 2019
QAT-190	Inside World Football, "*AFC streaming of ACL reaches 1m in Saudi Arabia but now Saudi 24 channel joins piracy*", 13 March 2019
QAT-191	Washington Post, "*FIFA wants Saudis to stop pirated Women's World Cup TV feeds*", 16 June 2019
QAT-217	Supplemental Declaration by beIN Media Group LLC, 24 July 2019
QAT-220	Email from GCAM to right holders, 13 July 2017
QAT-223	Second Supplemental Expert Report of Professor Gervais, 19 August 2019
QAT-224	NAGRA, Kudelski Report, "*Response to IGP Testing of 28 January and 1 February 2019 and beoutQ Frequency Changes*", 8 February 2019
QAT-226	Synamedia Report, "'*beoutQ' Service Analysis*", 6 June 2019
QAT-227	Joint statement by FIFA, the AFC, UEFA, the Bundesliga, LaLiga, the Premier League and Lega Serie A regarding the activities of beoutQ in Saudi Arabia, 31 July 2019
QAT-238	MarkMonitor beoutQ Investigation, April 2019 as attached as Exhibit 1 to Supplemental Declaration by Football Right Holders, 19 September 2019
QAT-248	Second Supplemental Declaration by beIN Media Group LLC, 24 October 2019
QAT-257	Declaration by beIN Media Group LLC Programming Director, dated 27 October 2019
SAU-1	Saudi Press Agency (SPA), Press Release, Kingdom of Saudi Arabia severs diplomatic and consular relations with Qatar, 5 June 2019; and Embassy of the Kingdom of Saudi Arabia, Washington, D.C., Press Release, Kingdom of Saudi Arabia Cuts Off Diplomatic and Consular Relations with the State of Qatar, 5 June 2017
SAU-2	First Riyadh Agreement
SAU-3	Implementing Mechanism
SAU-4	Supplementary Riyadh Agreement
SAU-5	Joint Statement of 5 March 2014
SAU-6	Saudi Arabia and Regional Security, Qatar's History of Funding Terrorism and Extremism, 27 June 2017
SAU-7	*Qatar's Al Jazeera, Counter Extremism Project, visited 7 July 2019; Al Jazeera faces criticism in Egypt over its coverage of Muslim Brotherhood*, The Washington Post, 5 January 2014

Exhibit Number	Full Title
SAU-19	General Commission for Audiovisual Media, Translation of Executive Regulations for Licensing Pay TV Service, Summary of Legal Requirements for Broadcasters
SAU-27	*"Press Release, Arabsat",* dated 15 June 2019
SAU-28	*S.A.R.L. beIN Media Group LLC et al v. Arab Satellite Communication Organization*, Summary Proceedings Order, Tribunal de Grande Instance de Paris, RG number 18/59094 – Portalis number 352J-W-B7C-CNOK, rendered 13 June 2019 (English translation available at https://www.degaullefleurance.com/wp-content/uploads/2019/06/20190613-Ordonnance-de-r%C3%A9f%C3%A9r%C3%A9-English-version.pdf accessed 21 July 2019)
SAU-32	Copyright Law
SAU-39	Arabsat Letter to FIFA, 24 June 2019
SAU-40	FIFA Letter to Arabsat, 26 June 2019
SAU-41	Statement Regarding Saudi Law as Expressed in the "17 June 2017 Circular", 3 October 2019
SAU-42	Council of Ministers' Resolution No. 536 in 2018 (19/10/1439 H)
SAU-43	Council of Ministers' Resolution No. 496 in 2018 (14/09/1439 H)
SAU-44	Council of Ministers' Resolution No. 410 in 2017 (28/06/1438 H)
SAU-45	Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004 as amended by Decision No. (1640), 22 June 2005 and Resolution of the Board of Directors of the Saudi Intellectual Property Authority No. (4/8/2019) dated 4/9/1440 AH
ARE-3	Letter from H.E. Mohammed Bin Abdulrahman Al-Thani, Minister of Foreign Affairs of Qatar, to H.E. Dr. Abdullatif Bin Rashid Al Zayani, Secretary-General of the GCC, 19 February 2017
ARE-6	United Arab Emirates' 5 June Declaration

1 INTRODUCTION

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]

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.[2]

1.2 Panel establishment and composition

1.3. On 9 November 2018, Qatar requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[3] At its meeting on 18 December 2018, the DSB established a panel pursuant to the request of Qatar in document WT/DS567/3, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference, as set forth in WT/DS567/4, are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Qatar in document WT/DS567/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 6 February 2019, Qatar requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 18 February 2019, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Donald McRae
Members:	Ms Annabelle Bennett Ms Beverley Pereira

1.6. Australia, the Kingdom of Bahrain, Brazil, Canada, China, the European Union, India, Japan, the Republic of Korea, Mexico, Norway, the Russian Federation, Singapore, Chinese Taipei, Turkey, Ukraine, the United Arab Emirates (UAE), the United States and Yemen notified their interest in participating in the Panel proceeding as third parties.

1.3 Panel proceeding

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[6] and partial Timetable on 27 March 2019.

1.8. The Panel held a first substantive meeting with the parties on 9-10 July 2019, and a session with the third parties took place on 10 July 2019. Following the first substantive meeting, the Panel sent a first set of written questions to the parties and third parties on 12 July 2019. The Panel then held a second substantive meeting with the parties on 3 October 2019, and sent a second set of written questions to the parties on 8 October 2019. After consultation with the parties, on 15 October 2019 the Panel adopted its Timetable for the rest of the proceeding. On

[1] See Request for consultations by Qatar, WT/DS567/1.
[2] See Request for the establishment of a panel by Qatar, WT/DS567/3 (Qatar's panel request), para. 2.
[3] See Qatar's panel request.
[4] See Minutes of the DSB meeting held on 18 December 2018, WT/DSB/M/423, para. 7.10.
[5] See Note by the Secretariat, Constitution of the Panel established at the request of Qatar, WT/DS567/4.
[6] See the Panel's Working Procedures in Annex A-1.

6 December 2019, the Panel issued the descriptive part of its Report to the parties. The Panel then issued its Interim Report to the parties on 16 March 2020, and issued its Final Report to the parties on 27 April 2020.

1.9. The remainder of this section provides an overview of the specific procedural issues that arose during this proceeding, which include: (a) issues arising from Saudi Arabia's refusal to interact with Qatar; (b) issues concerning certain English translations submitted by the UAE; (c) the Panel's request for information from the International Bureau of the World Intellectual Property Organization (WIPO); (d) Saudi Arabia's request that the Panel confirm the authenticity of an exhibit submitted by Qatar; and (e) issues arising from Qatar's submission of a witness statement.

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[7], at the DSB meeting where the request for the establishment of this Panel was first considered[8], and in its comments on the Panel's draft Working Procedures and Timetable during the organizational phase.[9] 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.[10]

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. In the light of the parties' comments on the draft Working Procedures and Timetable made at the organizational phase of the proceeding, the Panel did not consider it necessary to develop any special or additional working procedures in the circumstances of this case. However, the Panel did adjust certain aspects of the normal panel process, as well as certain aspects of the standard Working Procedures, to address this special circumstance. The Panel has been guided at all times by the prohibition against any *ex parte* communications between the Panel and either party.[11]

1.12. Regarding the organizational meeting, Articles 12.1 and 12.3 of the DSU provide for the adoption of the Panel's Working Procedures and Timetable for the panel process following consultation with the parties. While the normal practice is for a panel to hold an organizational meeting with the disputing parties to receive their comments on the draft Working Procedures and Timetable sent in advance, this particular means of consultation is not mandated by the text of Article 12 of the DSU. In the special circumstances of this case, and taking into account the views of the parties, the Panel decided to consult with the parties exclusively through a written procedure.

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

[7] See Qatar's panel request, para. 2.

[8] Minutes of the DSB meeting held on 4 December 2018, WT/DSB/M/422, para. 5.3 (stating that "[b]ecause rejecting formal State interaction was the defining element of severed diplomatic relations, the Saudi Government would not engage with the complaining party in connection with the referenced matter"). See also Minutes of the DSB meeting held on 18 December 2018, WT/DSB/M/423, para. 7.10.

[9] Saudi Arabia's communication to the Panel commenting on the draft Working Procedures and Timetable, dated 14 March 2019, p. 2 (stating that "the severance of relations means that any direct meetings and communications with the complainant are unacceptable").

[10] See, e.g. Saudi Arabia's first written submission, para. 7; opening statement at the first meeting of the Panel, para. 37; response to Panel question No. 28, paras. 22-23; second written submission, para. 19; oral statement at the second substantive meeting, para. 4; and response to Panel question No. 37, para. 1.

[11] Article 18.1 of the DSU provides that "[t]here shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body." This prohibition is reiterated in similar terms in paragraph VII:2 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.

documents directly to the Secretariat, which the Secretariat will then proceed to transmit promptly to the other party"[12]; 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.[13]

1.14. Neither party requested any separate or additional procedures to govern the conduct of the meetings with the Panel, which otherwise proceeded in the usual manner.

1.3.3 Issues concerning certain English translations submitted by the UAE

1.15. In its third-party submission, the UAE provided the Panel with several exhibits. On 2 July 2019, Qatar sent a letter to the Panel raising issues with the English translations of two of the exhibits that the UAE had provided with its third-party submission. First, Qatar maintained that the UAE's translation of a letter by Qatar's Foreign Minister created the "deeply misleading impression" that Qatar unilaterally renounced, and did not attempt to comply with, the Riyadh Agreements, which were concluded between Saudi Arabia, Qatar, the UAE and other countries in the Middle East and North Africa (MENA) region in respect of regional security matters.[14] Second, Qatar stated that the UAE translation of another exhibit that it had submitted contained several paragraphs omitted in the Arabic original.[15] In its letter, Qatar indicated that it had raised these same issues with the panel in another parallel proceeding between Qatar and the UAE, and was forwarding its objections "for the information of this Panel".[16]

1.16. The Panel invited the UAE to respond to Qatar's comments by 10 July 2019. In its response, the UAE expressed its disagreement with Qatar on some of the translation issues, but indicated that most of the issues raised by Qatar were immaterial.[17]

1.17. The Panel did not consider it necessary to take any further steps in relation to these translation issues.

1.3.4 The Panel's request for information from the International Bureau of WIPO

1.18. On 12 July 2019, the Panel sent a letter to the International Bureau of WIPO, which is responsible for the administration of the Berne Convention for the Protection of Literary and Artistic Works. In that letter, the Panel requested the assistance of the International Bureau of WIPO in the form of any factual information available to it that would be relevant to the interpretation of the provisions of the Paris Act of that Convention (Berne Convention (1971)) referenced by the parties. The Panel sought, in particular, any information reflected in the materials of diplomatic conferences and subsequent developments in the framework of the Berne Union.[18]

1.19. On 2 August 2019, the International Bureau of WIPO provided the requested information in a letter to the Panel.[19] In respect of the information provided, the parties were invited to provide any comments they wished to make in the context of their second written submissions due on 30 August

[12] Working Procedures, paragraph 30(e).
[13] Ibid. paragraph 15.
[14] For more information about the scope and content of the Riyadh Agreements, see paragraphs 2.20 to 2.26 of this Report.
[15] Qatar's communication to the Panel in DS526 *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, dated 1 July 2019, p. 3. For more information concerning the differences in translation of the letter in question, see footnote 117 of this Report.
[16] Qatar's communication to the Panel, dated 2 July 2019.
[17] United Arab Emirates' communication to the Panel, dated 10 July 2019, p. 1.
[18] Panel's communication to the International Bureau of WIPO, dated 12 July 2019. The "Berne Union" refers to the Union established under Article 1 of the Berne Convention by "[t]he countries to which [the Berne] Convention applies".
[19] International Bureau of WIPO's communication to the Panel, dated 2 August 2019.

2019.[20] Neither party made any comments on the letter from the International Bureau of WIPO to the Panel.

1.3.5 Saudi Arabia's request to confirm the authenticity of an exhibit submitted by Qatar

1.20. On 30 August 2019, the same day that the parties' second written submissions were to be filed, Saudi Arabia sent a separate letter to the Panel asking it to "certify the authenticity of the document" presented as Exhibit QAT-1, "Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, 19 June 2017". In its letter, Saudi Arabia recalled that it had previously indicated, in its responses to the questions from the Panel following the first substantive meeting, that the Ministry had conducted a full search for an "officially issued version" of the Circular.[21] Saudi Arabia also suggested that the Panel should be aware of the "dubious provenance" of the Circular, and "should not attribute the alleged 'Circular' to Saudi Arabia without authentication". While Saudi Arabia requested that the Panel "assure itself of the authenticity of the document in order to preserve the integrity of the proceedings", it did not specify any particular steps that the Panel should take to do so.[22]

1.21. Upon receipt of this letter, the Panel invited Qatar to provide its comments on this request by 13 September 2019.[23] In its comments, Qatar recalled that it had already refuted, in its second written submission filed on 30 August 2019, Saudi Arabia's claims that the Circular was "not issued", and that it had already demonstrated the authenticity of the Circular.[24] Additionally, Qatar submitted statements by four right holders who had attested to having received an email from the Ministry of Culture and Information of Saudi Arabia on 13 July 2017, to which the Circular was attached. The four right holders are Bundesliga, the International Tennis Federation, the Union of European Football Associations and Italia Film.[25]

1.22. On 16 September 2019, the Panel informed the parties that insofar as either party wished to make any further submissions on this matter, it could do so at the second substantive meeting in the context of its oral statement, in its oral responses to any questions from the Panel pertaining to the Circular, or on both occasions. The Panel stated its intention to reach a decision on this issue by the end of the second substantive meeting with the parties.[26]

1.23. In its opening oral statement at the second substantive meeting, Saudi Arabia confirmed "that there is no need for the Panel to certify the authenticity of the Circular".[27] In doing so, Saudi Arabia explained that "the Circular represents an accurate description of Saudi law".[28]

1.3.6 Procedural issues arising from Qatar's submission of a witness statement

1.24. On the afternoon of 30 August 2019, the same day that the parties' second written submissions were due to be filed, Qatar filed an "urgent request" for additional confidentiality procedures pursuant to paragraph 2(4) of the Working Procedures.[29] Qatar's stated purpose for requesting these additional procedures was to ensure the safety of an individual whose testimony would be filed as an exhibit to its second written submission later that same day.[30] Qatar requested,

[20] Panel's communication to the parties, dated 12 August 2019.
[21] Saudi Arabia's communication to the Panel, dated 30 August 2019, p. 1.
[22] Ibid. p. 2.
[23] Panel's communication to the parties, dated 2 September 2019.
[24] See Qatar's communication to the Panel, dated 13 September 2019, pp. 1-4.
[25] Ibid. pp. 7, 14, 21 and 27.
[26] Panel's communication to the parties, dated 16 September 2019.
[27] Saudi Arabia's opening statement at the second substantive meeting, para. 16.
[28] Ibid. para. 11. At the second meeting with the Panel, Saudi Arabia provided a statement indicating that it "intends to be bound by the statements concerning its legal position as regards its domestic law" as described in its opening statement, adding that its delegation "confirms formally and for the record that representatives of the Kingdom of Saudi Arabia have full powers to make legal representations concerning the application of Saudi law and that they are acting within the authority bestowed on them". (Statement Regarding Saudi Law as Expressed in the "17 June 2017 Circular", 3 October 2019, Exhibit SAU-41.)
[29] Qatar's communication to the Panel, dated 30 August 2019.
[30] Ibid. p. 1. According to Qatar, the individual previously worked for beoutQ (the entity described in section 2.2.4 below) and provided his signed testimony "at what he believes to be great risk to his personal safety and that of his family, on the condition that he would be provided safety under Qatar's witness protection program"; and Qatar considered that "it would be necessary to keep the name of the Witness and all

inter alia, that the identity of the witness be designated as confidential information, that it be redacted from the Report, and that it only be shared with a limited group of approved persons. Qatar did not offer any views on how the information contained in the exhibit or in its second written submission should be handled pending the resolution of this last-minute request for additional confidentiality procedures.[31]

1.25. The Panel informed the parties that they should each proceed to file their second written submissions with the Secretariat as scheduled for later that same day, and that the Secretariat would transmit each party's submission and accompanying exhibits to the other party only after the Panel had resolved Qatar's request for the adoption of additional confidentiality procedures. The Panel invited Saudi Arabia to provide its comments on Qatar's request by 3 September 2019.[32]

1.26. In its comments, Saudi Arabia objected to the adoption of any additional confidentiality procedures on the basis that the witness statement in question appeared to constitute new factual information that did not comply with the timing requirements of paragraph 5(1) of the Working Procedures or the principle of due process.[33] Saudi Arabia further submitted that, in any event, additional confidentiality procedures would be unnecessary in the light of the existing confidentiality requirements that apply under Article 18.2 of the DSU. Finally, Saudi Arabia emphasized that "[t]he premise of [Qatar's request], that a person's safety would be threatened by disclosing information of illegal activity in Saudi Arabia, is wholly unacceptable" and stated that "[n]o WTO Member should be expected to participate in dispute settlement proceeding where evidence is accepted based on such a false and malicious premise."[34]

1.27. Following the receipt of Saudi Arabia's objection on 3 September 2019, and pending the Panel's resolution of Qatar's request, the Panel requested Qatar to submit a version of its second written submission the following day, on 4 September 2019, without the witness statement attached as an exhibit, and with any references to the witness statement redacted from the body of Qatar's second written submission.[35] Qatar did so, and the Secretariat transmitted each party's second written submission and accompanying exhibits to the other party on 4 September 2019.

1.28. The Panel invited Qatar to provide its comments on Saudi Arabia's objections of 3 September 2019[36], and Qatar did so on 6 September 2019.[37] In its comments, Qatar argued that the new evidence in Exhibit QAT-222 was submitted as rebuttal evidence "in full accordance" with paragraph 5(1) of the Working Procedures.[38] Qatar also contended that Saudi Arabia's arguments failed to refute the need for, or the appropriateness of, the additional confidentiality requirements requested by Qatar. Among other things, Qatar argued that the adoption of such additional procedures requested in the present dispute "is based not on any 'premise' regarding the conduct of the responding Member, but instead on the level of sensitivity of the information and the risks that could arise from its public disclosure". Qatar noted that it refrained from asking for the full protections typically extended in cases involving Highly Sensitive Business Information to ensure that Saudi Arabia would have a full opportunity to review and engage with the evidence at issue.[39]

1.29. In a communication to the parties on 13 September 2019, the Panel attached a draft set of additional procedures for the protection of strictly confidential information (SCI) for additional comments from the parties. In this communication, the Panel observed that it is common practice in WTO dispute settlement proceedings for additional procedures for the protection of business confidential information (BCI) or SCI to be adopted if either of the parties so requests. The Panel also stressed "that the decision to adopt these SCI procedures does not imply any view of the Panel on whether certain information merits being designated as confidential information, and does not

identifying information confidential to help ensure his safety, and the safety of his family members." (Qatar's communication to the Panel, dated 30 August 2019, p. 1.)

[31] Qatar's communication to the Panel, dated 30 August 2019, pp. 1-2.
[32] Panel's communication to the parties, dated 30 August 2019.
[33] Saudi Arabia's communication to the Panel, dated 3 September 2019, paras. 3-11.
[34] Ibid. paras. 12-14. (emphasis original)
[35] Panel's communication to the parties, dated 3 September 2019.
[36] Ibid.
[37] Qatar's communication to the Panel, dated 6 September 2019.
[38] Ibid. p. 1.
[39] Ibid. pp. 3-4.

imply any view on the probative value, relevance or credibility of any evidence that a party designates as confidential".[40]

1.30. In the same communication, the Panel also noted that it was:

> mindful of the fact that the timing of Qatar's request for additional confidentiality procedures has resulted in an unavoidable delay in the transmission of the witness statement to Saudi Arabia, which may in turn limit Saudi Arabia's ability to conduct, in time for the second substantive meeting, an adequate review of the submitted information or its source, including but not limited to establishing the veracity of the information, vetting the source of the information, and assessing motivation and credibility through the application of appropriate resources.[41]

1.31. Accordingly, the Panel stated that:

> to ensure that Saudi Arabia's due process rights are fully respected, in the event that the Panel rules that the witness statement referenced by Qatar in the context of its request meets the timing requirements in paragraph 5(1) of the Working Procedures, the Panel will give sympathetic consideration to any subsequent request, from Saudi Arabia, to file a supplementary written submission specifically addressing this evidence if it so wishes.[42]

1.32. Qatar offered no further comments. However, on 16 September 2019, Saudi Arabia responded by strongly objecting to the proposed SCI procedures.[43] Saudi Arabia indicated that it could not accept these procedures for a number of reasons:

a. the proposal to have a list of "approved persons" was deemed unacceptable because the Saudi government officials, staff and contractors who may need access to information designated as SCI include persons located in Saudi Arabia's agencies responsible for matters such as national security and law enforcement, and the identity of many persons in the relevant agencies cannot be disclosed without violating its essential security interests[44];

b. the premise of the SCI procedures—that a person's safety would be threatened by disclosing information of illegal activity in Saudi Arabia—was regarded as wholly unacceptable[45];

c. the proposed definition of SCI, as information "the disclosure of which could, <u>in the submitting party's view</u>, cause harm to the originators of the information" reflected that premise, and was also inconsistent with Appellate Body guidance that procedures for granting enhanced protection for confidential or sensitive information must set out objective criteria that panels must apply[46];

d. while most requests to adopt procedures for additional protection are granted by WTO panels and the Appellate Body, if a party opposes the application of proposed BCI/SCI procedures, as in this case, a panel must exercise its control as adjudicator and require sound justification for the procedures[47];

e. any decision to open the door to sensitive witness evidence of this kind, and the establishment of related procedures and safeguards, should be based on input from the broader WTO Membership, at least including the third parties to the dispute[48]; and

[40] Panel's communication to the parties, dated 13 September 2019.
[41] Ibid.
[42] Ibid.
[43] Saudi Arabia's communication to the Panel, dated 16 September 2019.
[44] Ibid. para. 5.
[45] Ibid. para. 8.
[46] Ibid. para. 12. (emphasis original)
[47] Ibid. para. 15.
[48] Saudi Arabia's communication to the Panel, dated 16 September 2019, paras. 17-18.

f. the proposed SCI procedures would violate Saudi Arabia's due process rights, because the complaining party's last-minute request to submit unprecedented witness information under SCI procedures in the circumstances of this dispute would effectively deprive Saudi Arabia of its right to present arguments at the second substantive meeting concerning the veracity of the information and the source of the information based on an adequate review of the submitted information.[49]

1.33. The Panel invited Qatar to respond to Saudi Arabia's objections to the proposed SCI procedures by 20 September 2019, with a view to determining the next steps in the light of Qatar's response.[50] On 19 September 2019, Qatar responded that Saudi Arabia's objections went beyond the scope of the Panel's request to comment on the specific procedures proposed by the Panel on 13 September 2019, and that it was "inappropriate and inefficient for the parties to continue exchanging views on matters that the Panel has already decided". As such, Qatar stated that it would refrain from commenting further on the need for SCI procedures in this dispute, and offered no further comments on the SCI procedures proposed by the Panel.[51]

1.34. Qatar enclosed with its letter a copy of the relevant exhibit (i.e. Exhibit QAT-222) with certain confidential information blacked out and redacted, as well as Qatar's complete second written submission, also with certain confidential information blacked out and redacted. Qatar requested that these documents be made available promptly to Saudi Arabia, noting that it trusted that reviewing this document would convince Saudi Arabia to withdraw its objections regarding the timeliness and relevance of the exhibit. Qatar also indicated that, upon issuance of SCI procedures, it was prepared to submit to the Panel, for transmission to Saudi Arabia, the complete SCI versions of these documents. These versions would include the previously blacked-out text in its entirety, in unredacted form within square brackets.[52]

1.35. Following receipt of Qatar's comments, along with the redacted version of Exhibit QAT-222 and the revised version of Qatar's second written submission, the Panel informed the parties that it had instructed the Secretariat to hold these documents, without passing them on to Saudi Arabia, until the Panel had determined how it would proceed. The Panel indicated that it would finalize the issue of additional confidentiality procedures which it expected to do in the course of the second substantive meeting. The Panel also informed the parties that it had not seen any version of the material in question, redacted or unredacted.[53]

1.36. At the second substantive meeting with the parties held on 3 October 2019, the Panel informed the parties that, following further deliberations on this matter, it would not adopt the SCI procedures as requested by Qatar, and that it did not consider that there were alternative procedures that would be effective to achieve Qatar's stated objective. The Panel concluded, therefore, that it would not adopt any additional SCI procedures. The Panel then informed the parties that it had declined Saudi Arabia's request to declare the witness statement as inadmissible on the basis that it was not submitted in a timely manner in accordance with paragraph 5(1) of the Working Procedures. The Panel informed the parties that Qatar was free to submit the witness statement, but that if it elected to do so, Qatar must rely on the general confidentiality provisions set forth in the DSU and reflected in paragraph 2(1) of the Working Procedures. The Panel recalled that, according to Article 18.2 of the DSU, and paragraph 2(1) of the Working Procedures, "Members shall treat as confidential information submitted to the Panel which the submitting Member has designated as confidential".

1.37. In response, Qatar indicated that it would submit the witness statement pursuant to the general confidentiality provisions of Article 18.2 of the DSU. Qatar further indicated that its original, unredacted second written submission as filed on 30 August 2019, which referred to and quoted from Exhibit QAT-222, should be treated as the relevant version of the submission for purposes of the Panel record. However, upon Qatar's indication that it planned to re-file its second written submission and Exhibit QAT-222 in unredacted form relying on the general confidentiality provisions of Article 18.2 of the DSU, Saudi Arabia informed the Panel that it did not wish to receive this exhibit.

[49] Ibid. paras. 21-22.
[50] Panel's communication to the parties, dated 17 September 2019.
[51] Qatar's communication to the Panel, dated 19 September 2019, p. 1.
[52] Ibid. p. 2.
[53] Panel's communication to the parties, dated 23 September 2019.

1.38. The Panel informed the parties that in accordance with Article 18.2 of the DSU, Qatar's designation of the name and identifying information of the witness as confidential meant that such information would be treated as strictly confidential as far as the Panel was concerned, and as far as both parties were concerned. In response to Saudi Arabia's statement that it did not wish to receive the submission or witness statement, the Panel stated that, because the documents would be submitted to the Panel and would form part of the record, the Panel had no choice but to send the documents to Saudi Arabia. The Panel noted subsequently that whether Saudi Arabia would wish to consider, review, comment on, or treat the documents as not having been received was a matter for Saudi Arabia.

1.39. In response to the Panel's statements, Saudi Arabia stated that, as a matter of sovereignty, it had the right to accept or reject the submission of any document to it, and reiterated that it did not wish to receive the submissions containing the information designated as confidential by Qatar. Saudi Arabia explained that it was refusing to receive the submissions because the designation of the witness' name as confidential information was premised on the "totally unacceptable" allegation that Saudi Arabia potentially represented a risk to the individual or his family. Saudi Arabia stated that it would never accept such an allegation and that it would never accept receiving such information designated as confidential.

1.40. On 4 October 2019, the Panel informed the parties that Qatar had re-filed the unredacted version of its second written submission and Exhibit QAT-222, including its annexes. The Panel recalled that Saudi Arabia had stated at the second substantive meeting that it did not wish to receive a copy of this exhibit and informed the parties, notwithstanding what it had said earlier, that "[o]ut of respect for Saudi Arabia's position, the Panel will not forward this exhibit and its annexes to Saudi Arabia."[54]

1.41. On the evening of 20 December 2019, which was the date by which the parties were to submit their comments on the draft descriptive part of the Report, Saudi Arabia sent the Panel a communication that developed the assertion that the witness statement should not be given any weight because of the individual's employment relationship with Qatar. On 9 January 2020, the Panel received Qatar's comments. On 14 January 2020, the Panel acknowledged receipt of the parties' respective communications and indicated that it had no need for further submissions on the matter which would be addressed in the Panel Report.

2 FACTUAL ASPECTS

2.1 Introduction

2.1. This section provides an overview of the factual background to the case, and then briefly sets out the measures at issue. A more detailed review of the facts, and the Panel's findings on any disputed factual issues, will be set forth as necessary in the context of the Findings in Section 7 of this Report.

2.2 Factual background

2.2.1 The broadcasting and copyright regime in Saudi Arabia

2.2. The Saudi Ministry of Media (formerly the Ministry of Culture and Information) and the General Commission of Audio and Visual Media (GCAM) are the governmental entities "in charge of any broadcast, publication, and distribution of written, visual, or audio media content". This includes "the granting of media licences in … Saudi Arabia and [matters relating to] broadcast, publication, and distribution using media channels and multiplatform, which encompass broadcast signals via satellites".[55]

2.3. All television and media channels that are interested in operating in Saudi Arabia "must obtain all required licences from the relevant regulatory authorities which may permit operation in the media field and more specifically in relation to publishing and distributing media content or sale and

[54] Panel's communication to the parties, dated 4 October 2019.

[55] See Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, Exhibit QAT-1, p. 1.

importation of all required reception equipment for the provision thereof".[56] To be licensed as a broadcaster, an entity must satisfy certain objective criteria specific to the broadcasting business, and then generally applicable Saudi law must be observed, including, but not limited to, copyright law, publications law, competition law and criminal law.[57] Broadcasting approval requirements are set out in the regulations of GCAM.[58] These provide, among other things, that a Pay TV service shall not be operated in Saudi Arabia without a licence from GCAM.[59] A broadcasting licence may not be renewed or can be cancelled if its holder does not comply with broadcasting laws and regulations or with any other generally applicable Saudi law.

2.4. Saudi Arabia's domestic copyright regime is established through its Copyright Law[60] and Implementing Regulations.[61] These instruments are also administered by the Ministry of Media. Article 1 of the Copyright Law defines a "work" as "[a]ny literary, scientific or artistic work". Furthermore, it defines "audio-visual work" as "[a]ny work produced for simultaneous audio and visual use, consisting of a series of related images, accompanied by sound and recorded on an appropriate means and shown by suitable devices". Article 1 of the Copyright Law defines "broadcasting" to include transmissions via satellite.[62]

2.5. The list of various types of protected works in Article 2 of the Copyright Law includes, *inter alia*, "[w]orks which are especially prepared for broadcasting or are presented through broadcasting", and "audiovisual works".[63] Article 9 of the Copyright Law provides the author, or whoever she or he delegates, the right to, *inter alia*, "[c]ommunicat[e] the work to the public via any possible means, such as displaying, acting, broadcasting or data transmission networks".[64]

2.6. Both parties agreed with the premise that professional sports broadcasts constitute protected "works" under the provisions of the Berne Convention (1971) as incorporated into the TRIPS Agreement[65], and are covered by the definition of "Audio-Visual Work" under Article 1 of Saudi Arabia's Copyright Law, or otherwise protected under the Copyright Law.[66]

2.7. Article 13 of the Implementing Regulations provides that "[a]ny use beyond that specified by the owner of audio, visual and broadcasting works shall be deemed an infringement of copyright", including "communication [of] the work to the public without obtaining a prior license from the owners of the copyright" and "[b]reaking of protective barriers for the purpose of presenting broadcasting materials through illegal means".[67] The latter is understood to cover the sale and making available of illegal decoders, a prohibition that is reinforced by Articles 15 and 17 of the Implementing Regulations.[68] Article 11 of the Implementing Regulations on "Infringement Liability" extends to secondary liability by providing, *inter alia*, that "[a]ny person who obtains an original copy of any intellectual work and exploits it by means of renting, adaptation or permitting others to

[56] Ibid. para. 2.
[57] Saudi Arabia's response to Panel question No. 29, para. 28.
[58] Ibid. (referring to General Commission for Audiovisual Media, Translation of Executive Regulations for Licensing Pay TV Service, Summary of Legal Requirements for Broadcasters, Exhibit SAU-19).
[59] General Commission for Audiovisual Media, Translation of Executive Regulations for Licensing Pay TV Service, Summary of Legal Requirements for Broadcasters, Exhibit SAU-19, Article 5.1.
[60] Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, Exhibit QAT-112. See also Qatar's first written submission, para. 113.
[61] Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004 and amended by decision No. (1640), 22 June 2005, Exhibit QAT-113. See also Qatar's first written submission, para. 113.
[62] Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, Exhibit QAT-112, Article 1. See also Qatar's first written submission, para. 114.
[63] Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, Exhibit QAT-112, Article 2.
[64] Ibid. Article 9.
[65] Saudi Arabia's response to Panel question No. 47(a), para. 31; and Qatar's responses to Panel question No. 6(b)(iii), para. 48, and Panel question No. 9(a), para. 69.
[66] Saudi Arabia's response to Panel question No. 47(b), para. 32; and Qatar's response to Panel question No. 47(b), paras. 122-127.
[67] Qatar's first written submission, para. 116 (referring to Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004 and amended by decision No. (1640), 22 June 2005, Exhibit QAT-113, Article 13).
[68] Ibid. (referring to Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004 and amended by decision No. (1640), 22 June 2005, Exhibit QAT-113, Articles 15 and 17).

copy or reproduce it or any other acts which affect or obstruct the author from exercising his rights shall be deemed to have infringed the Copyright".[69]

2.8. With respect to broadcasting organizations, Article 18 of the Copyright Law provides that the scope of the Copyright Law shall cover "[w]orks of broadcasting organisations".[70] Article 7 of the Implementing Regulations provides broadcasting organizations with "the right to prohibit any of the following acts if undertaken without their authorisation: (1) [f]ixation and reproduction of broadcasts[;] (2) [r]etransmission by wireless means and communication of materials to the public[;] (3) [d]etermining the means of direct broadcast and reception or through receivers or by cable[; and] (4) [t]ransmission to the public of radio broadcast in public places or through internal wire broadcasts of closed compounds".[71]

2.9. Pursuant to Saudi law, several entities are involved in the initiation, investigation and adjudication of allegations of infringement of the above-mentioned copyrights and related rights. In certain cases, the initiation of such procedures and investigations could ultimately lead to the application by the Saudi government of criminal penalties. Under Article 20 of the Implementing Regulations, entitled "Detection Tasks", "officials of the General Department of Copyright in Riyadh and its branches in the Kingdom's provinces" are "responsible for the task of detecting violations and securing the evidence proving the existence of an infringement of copyright, such as equipment, works or commodities".[72] Article 21 of the Implementing Regulations then explains that, "upon receiving the evidence" resulting from the "detection tasks", the "General Department of Copyright or the competent branch shall" move forward with a number of procedures including "analyzing the content of evidence", after which it must then prepare a report (pursuant to Article 22).[73] Article 23 of the Implementing Regulations, entitled "Investigation of Violations", refers to a "competent investigating officer", and sets out procedures for the task of investigating.[74] After the Saudi government performs its investigation, and in accordance with Article 23(11) of the Implementing Regulations, the "General Department of Copyright shall refer the cases and violations along with all relevant documents to the Committee".[75]

2.10. The "Committee" referred to in Article 23(11) of the Implementing Regulations is established pursuant to Article 25 thereof, entitled "Violation Review Committee". Referred to as the "Copyright Committee" by Qatar, it is established to adjudicate any allegations of copyright infringement referred to it. Once the Copyright Committee takes a decision by majority vote with respect to any such allegations, its decision is subject to a subsequent layer of approval before it is made final.[76]

2.11. The elements of the operation of the Copyright Committee, insofar as they have been described generally above, do not appear to be contested by either party. Following the first substantive meeting with the Panel, however, Saudi Arabia indicated that three resolutions by the Council of Ministers had amended the Copyright Law or affected the manner in which the Copyright

[69] Ibid. (referring to Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004 and amended by decision No. (1640), 22 June 2005, Exhibit QAT-113, Article 11).

[70] Ibid. para. 117 (referring to Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, Exhibit QAT-112, Article 18).

[71] Ibid. (referring to Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004, as amended by Decision No. (1640), 22 June 2005, Exhibit QAT-113, Article 7).

[72] Qatar's response to Panel question No. 5, para. 28 (referring to Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004, as amended by Decision No. (1640), 22 June 2005, Exhibit QAT-113, Article 20 (First)).

[73] Ibid. (referring to Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004, as amended by Decision No. (1640), 22 June 2005, Exhibit QAT-113, Articles 21 and 22).

[74] Ibid. (referring to Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004, as amended by Decision No. (1640), 22 June 2005, Exhibit QAT-113, Article 23).

[75] Ibid. (referring to Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004, as amended by Decision No. (1640), 22 June 2005, Exhibit QAT-113, Article 23(11)).

[76] Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, Exhibit QAT-112, Article 25; and Copyright Law, Exhibit SAU-32, Article 25.

Committee would operate.[77] More specifically, these amendments concern the question of which governmental actor is tasked with approving the decisions taken by the Copyright Committee.

2.12. In its unamended form, Article 25(1) of the Copyright Law states that "[a] Committee to review the violation shall be formed by the Minister [of Culture and Information]'s decision" to review allegations of copyright infringement.[78] Then, under the unamended versions of Article 25(2) of the Copyright Law and Article 25(6) of the Implementing Regulations, the decisions taken by the Copyright Committee as to the allegations of copyright infringement referred to it:

a. "shall be endorsed by the Minister" (Article 25(2) of the Copyright Law)[79]; and, more specifically,

b. "shall be referred by the chairman of the committee to the Minister, and said decisions shall not be effective unless approved by the Minister" (Article 25(6) of the Implementing Regulations).[80]

Qatar thus read the unamended Copyright Law and Implementing Regulations as having required that the Minister approve or endorse the decisions taken by the Copyright Committee before such decisions are to have any legal effect.[81]

2.13. According to Saudi Arabia[82], however, the Copyright Law and Implementing Regulations were amended, such that, under Article 25(2) of the Copyright Law and Article 25(6) of the Implementing Regulations, the Board of Directors of the Saudi Authority for Intellectual Property (SAIP), not the Minister, would have the responsibility for endorsing or approving the decisions of the Copyright Committee.[83] The Board of Directors would be composed of 12 government representatives and three non-governmental stakeholders, appointed by a decision of the Council of Ministers on the proposal of the President of the Council.[84] The amendments to the Copyright Law and the Implementing Regulations would also replace, in Articles 1 and 24 of the Copyright Law and Article 1 of the Implementing Regulations, the terms "Ministry" (referring to the Ministry of Culture and Information) and "Minister" (referring to the Minister of Culture and Information), with the terms "Authority" (referring to the SAIP) and "Board of Directors" (referring to the SAIP's Board of

[77] Saudi Arabia's response to Panel question No. 29, paras. 26-28. See footnote 82 below for more information about the amending resolutions. Saudi Arabia addressed this and other factual aspects of the measures raised by Qatar for the purpose of demonstrating its "good faith conduct in connection with the invocation of the security exception" in Article 73 of the TRIPS Agreement, and asks that this be clearly reflected in the Report. (Saudi Arabia's comments on the draft descriptive part of the Report, p. 2.)

[78] Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, Exhibit QAT-112, Article 25(1).

[79] Qatar's second written submission, para. 105 (quoting Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, Exhibit QAT-112, Article 25(2)). (emphasis omitted)

[80] Qatar's second written submission, para. 105 (quoting Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004, as amended by Decision No. (1640), 22 June 2005, Exhibit QAT-113, Article 25(6)). (emphasis omitted)

[81] See, e.g. Qatar's first written submission, paras. 119, 121, 140, 152, 350, 381 and 401-402; and Qatar's second written submission, paras. 93-94, 104-105, 109, 191, 200 and 218.

[82] Saudi Arabia submitted the amended versions of its Copyright Law and its Implementing Regulations, as well as the three resolutions that either amended the text of the Copyright Law or defined the composition of the Board of Directors. (See Copyright Law, Exhibit SAU-32, Article 25(2); and Saudi Arabia's response to Panel question No. 48, paras. 33-36 (referring to Council of Ministers' Resolution No. 536 in 2018 (19/10/1439 H), Exhibit SAU-42; Council of Ministers' Resolution No. 496 in 2018 (14/09/1439 H), Exhibit SAU-43; Council of Ministers' Resolution No. 410 in 2017 (28/06/1438 H), Exhibit SAU-44; and Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004 as amended by Decision No. (1640), 22 June 2005 and Resolution of the Board of Directors of the Saudi Intellectual Property Authority No. (4/8/2019) dated 4/9/1440 AH, Exhibit SAU-45)).

[83] Saudi Arabia's response to Panel question No. 29, paras. 26 and 27 (referring to Copyright Law, Exhibit SAU-32, Article 25(2)); and Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004 as amended by Decision No. (1640), 22 June 2005 and Resolution of the Board of Directors of the Saudi Intellectual Property Authority No. (4/8/2019) dated 4/9/1440 AH, Exhibit SAU-45, Article 20). See also Council of Ministers' Resolution No. 536 in 2018 (19/10/1439 H), Exhibit SAU-42, p. 5 of PDF file.

[84] Saudi Arabia's response to Panel question No. 29, para. 27 (referring to Council of Ministers' Resolution No. 496 in 2018 (14/09/1439 H), Exhibit SAU-43, p. 13 of PDF file; and Council of Ministers' Resolution No. 410 in 2017 (28/06/1438 H), Exhibit SAU-44, p. 10 of PDF file).

Directors), respectively. The replacement of both sets of terms also appears to have taken place in Articles 16(1), 16(3), 22 and 26 of the Copyright Law.[85]

2.14. Qatar noted that the amended versions of the Copyright Law[86] and Implementing Regulations[87] do not appear to be publicly available, and thus it questioned whether these versions have entered into force. In particular, Qatar noted that the amended Implementing Regulations were not issued until 9 May 2019, approximately six months after the establishment of the Panel. Qatar requested the Panel to consider the Implementing Regulations at the time of the Panel's establishment (i.e. 18 December 2018)[88], but also noted that "[r]egardless of the precise identity of the gate keeper—the Ministry or a Board of Directors consisting mostly of high-ranking government officials … — Saudi Arabia's copyright regime requires mandatory political approval to make any enforcement of copyright effective for both civil and criminal remedies".[89]

2.15. Finally, Qatar stated that it understood that the Copyright Committee "is the sole entity responsible for copyright infringement"[90] and "has exclusive jurisdiction to adjudicate the existence of criminal piracy and to determine the resulting penalties".[91] However, Saudi Arabia submitted that the SAIP also has responsibilities relating to copyright enforcement.[92]

2.2.2 The June 2017 severance of relations and events leading up to it

2.16. The issues that arise in this dispute must be understood in the context of the serious deterioration of relations between Saudi Arabia, Qatar and certain other countries from the MENA region.[93] On 5 June 2017, Saudi Arabia, the UAE and other nations severed all relations with Qatar.[94] In their respective submissions to the Panel, the disputing parties (and the UAE as a third party) each referred to the 5 June 2017 severance and/or the events leading up to the severance and, as

[85] Compare Copyright Law, Royal Decree No. M-41 of 2 Rajab, 1424, 30 August 2003, Exhibit QAT-112, Articles 1, 16(1), 16 (3) 22, 24 and 26, with Copyright Law, Exhibit SAU-32, Articles 1, 16(1), 16 (3) 22, 24 and 26; and compare Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004, as amended by Decision No. (1640), 22 June 2005, Exhibit QAT-113, Article 1, with Implementing Regulations of Copyright Law, Minister of Culture and Information's Decision No. (1688/1), 29 May 2004, as amended by Decision No. (1640), 22 June 2005 and Resolution of the Board of Directors of the Saudi Intellectual Property Authority No. (4/8/2019) dated 4/9/1440 AH, Exhibit SAU-45, Article 1.

[86] Qatar indicated that the Arabic version of the Copyright Law available on the homepage of the website of the SAIP and the website of the Saudi Embassy to the United States reflects the Copyright Law prior to its amendment. The link to the English version of the Copyright Law on the SAIP website directed the user to a page from the "Bureau of Experts at the Council of Ministers" entitled "Page not found 404". (Qatar's second written submission, para. 111. See also Qatar's comments on Saudi Arabia's response to Panel question No. 49, para. 110.) Qatar also expressed concerns that the amended Copyright Law has not been notified to the TRIPS Council pursuant to Article 63.1 of the TRIPS Agreement. (Ibid. paras. 101 and 111.)

[87] Qatar noted that the publicly available version of the Implementing Regulations does not reflect the amendment made thereto, and that, presumably, the publicly available version remains in force. (Qatar's second written submission, paras. 106-108. See also Qatar's comments on Saudi Arabia's response to Panel question No. 49, para. 110.) Qatar also expressed concerns that the amended Implementing Regulations have not been notified to the TRIPS Council pursuant to Article 63.1 of the TRIPS Agreement. (Ibid. para. 111.)

[88] Qatar's response to Panel question No. 49, para. 108; and Qatar's comments on Saudi Arabia's response to Panel question No. 49, para. 108.

[89] Qatar's second written submission, paras. 93-94. See also, ibid. paras. 104-109, 191, 200 and 218.

[90] Qatar's first written submission, paras. 120, 152, 350, 381 and 401.

[91] Qatar's response to Panel question No. 5, para. 30. As described in paragraph 2.9 above, Qatar noted that, in addition to the adjudicative role of the Copyright Committee, "other elements of the Saudi government are, pursuant to Saudi law, allocated the role of initiating criminal procedures that would ultimately lead to criminal penalties". (See Qatar's response to Panel question No. 5, paras. 26-31.)

[92] Saudi Arabia's response to Panel question No. 29, para. 34.

[93] See Saudi Arabia's opening statement at the first meeting of the Panel, para. 2 ("There is no question that a significant dispute has arisen among the complaining Party, Saudi Arabia, Bahrain, Egypt, and the United Arab Emirates.")

[94] See, e.g. Saudi Arabia's first written submission, paras. 1-2; and United Arab Emirates' third-party submission, para. 24 (referring to the United Arab Emirates' 5 June Declaration, Exhibit ARE-6). See also Saudi Arabia's opening statement at the first meeting of the Panel, para. 46 (referring to United Arab Emirates' 5 June Declaration, Exhibit ARE-6; and Kingdom of Bahrain Ministry Foreign Affairs News Details, Statement of the Kingdom of Bahrain on the severance of diplomatic relations with the State of Qatar, 5 June 2017). Saudi Arabia states that the Panel "may also take judicial notice of the fact that other Members of the WTO have taken similar measures in response to the actions of the complaining Member". (Saudi Arabia's first written submission, para. 2.)

noted below, the disputing parties characterized the severance of relations as constituting relevant "background" to the measures at issue in this dispute.

2.17. Saudi Arabia characterized the events leading up to its severance of relations with Qatar as "relevant background information".[95] However, Saudi Arabia went further, submitting also that the "severance of relations between the two countries and the publicly-stated reasons for the measures of Saudi Arabia constitute the only relevant facts in this dispute".[96]

2.18. For its part, Qatar explained in its first written submission that the "rampant piracy at issue in this dispute has occurred against the background of Saudi Arabia having imposed, since 5 June 2017, a scheme of coercive economic measures against Qatar".[97] In its panel request, Qatar stated also that:

> In June 2017, Saudi Arabia imposed a scheme of diplomatic, political, and economic measures against Qatar. Such measures impacted, *inter alia*, the ability of Qatari nationals to protect intellectual property rights in Saudi Arabia. … The multiple Qatari companies severely impacted by these measures include beIN Media Group LLC and affiliates ("beIN").[98]

2.19. According to Saudi Arabia, especially since 2011, "the security situation in many countries in the [MENA] region has been unstable, with wars, terrorism, and instability prevailing in many places for many different reasons, causing a devastating effect on human life and on the stability of national governments and multiple crises in international relations".[99] Saudi Arabia provided the following summary of and perspective on the events leading up to the 5 June 2017 severance. The Panel expresses or implies no position concerning any of these allegations. The Panel further recalls that Qatar, while maintaining that many of Saudi Arabia's assertions about the events leading up to the severance of relations are irrelevant to the specific measures at issue, strongly denied certain accusations made by Saudi Arabia. Among other things, Qatar maintains that the period leading up to that date was characterized by cordial and cooperative relations between Qatar and Saudi Arabia.[100]

2.20. In the context of its discussion of the security situation, Saudi Arabia submitted that "years of active diplomacy at the highest national levels" took place within the Gulf Cooperation Council (GCC),[101] a regional council established by Saudi Arabia, Bahrain, Kuwait, Oman, Qatar and the UAE.[102] According to Saudi Arabia, it and other GCC Countries "have acted, individually where necessary and collectively wherever possible, to uproot the sources of instability in our region".[103] Saudi Arabia stated that "[c]onsistent with this commitment", in November 2013, Bahrain, Kuwait, Qatar and the UAE signed the "First Riyadh Agreement", which established a collective understanding of the causes for, and solutions to, instability and violence in the region.[104]

2.21. The First Riyadh Agreement included a collective commitment by signatories to refrain from taking certain actions that were identified as the cause of instability, and which are set out in the

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[95] Saudi Arabia's opening statement at the first meeting, para. 23.

[96] Saudi Arabia's first written submission, para. 2. In keeping with its view that these are the only relevant facts in this dispute, Saudi Arabia states that:

> Saudi Arabia's only comment regarding the substance of the complaint in this dispute, and regarding references to the relevant company of the complaining Party, is that issues with the company began in 2016, and there never was a relationship between the company, on the one hand, and any measures taken by Saudi Arabia in connection with the break in diplomatic and consular relations, on the other hand. Any issue that the company may have is unrelated to the real dispute between Saudi Arabia and the complaining Party. (Saudi Arabia's opening statement at the first meeting, para. 3.)

[97] Qatar's first written submission, para. 14.

[98] Qatar's panel request, paras. 6-7.

[99] Saudi Arabia's opening statement at the first meeting of the Panel, para. 24.

[100] Qatar's opening statement at the first meeting of the Panel, paras. 96-103.

[101] Saudi Arabia's closing statement at the first meeting of the Panel, para. 17.

[102] Saudi Arabia's opening statement at the first meeting of the Panel, para. 5. See also Implementing Mechanism, Exhibit SAU-3, p. 11.

[103] Saudi Arabia's opening statement at the first meeting of the Panel, para. 25.

[104] Ibid. para. 26. See First Riyadh Agreement, Exhibit SAU-2.

three paragraphs of the First Riyadh Agreement.[105] The First Riyadh Agreement set forth the following obligations:

> 1. No interference in the internal affairs of the Council's states, whether directly or indirectly. Not to give harbor or naturalize any citizen of the Council states that has an activity which opposes his country's regimes, except with the approval of his country; no support to deviant groups that oppose their states; and no support for antagonistic media.
>
> 2. No support to the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the Council States through direct security work or through political influence.
>
> 3. Not to present any support to any faction in Yemen that could pose a threat to countries neighboring Yemen.[106]

2.22. On 5 March 2014, Saudi Arabia, the UAE and Bahrain issued a statement withdrawing their ambassadors from Qatar. In the statement, Saudi Arabia, the UAE and Bahrain took the position that Qatar had not taken necessary actions to put into effect the commitments contained in the First Riyadh Agreement of 23 and 24 November 2013.[107] The statement referred, among other things, to the principle "not to support all of the actions that threaten the security and stability of the GCC Countries by organisations or individuals, either through direct security work or by attempting political influence as well as not supporting hostile media".[108]

2.23. The Mechanism Implementing the Riyadh Agreement was signed by all GCC Countries on 17 April 2014 and set forth implementation procedures regarding the obligations contained in the Riyadh Agreement. It identified certain agreed threats to the security and stability of GCC Countries, reaffirmed the obligations undertaken in the First Riyadh Agreement, and established specific procedures to ensure compliance with commitments undertaken. It also reiterated and expanded upon the obligations listed in the First Agreement relating to the "Internal Security" of GCC Countries, their "Foreign Policy" and their "Internal Affairs". The Implementing Mechanism further clarified that "[i]f any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take an[y] appropriate action to protect their security and stability".[109]

2.24. On 16 November 2014, the GCC Countries found it necessary to enter into the "Supplementary Riyadh Agreement".[110] Under the Supplementary Riyadh Agreement, GCC Countries undertook, among other things, "not to give refuge, employ, or support whether directly or indirectly, whether domestically or abroad, to any person or media apparatus that harbors inclinations harmful to any [GCC] state".[111] It further stated that all signatories were committed to "ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all the offenses broadcasted on Al Jazeera, Al-Jazeera Mubashir Masr, and to work to stop all offenses in Egyptian media".[112]

2.25. In connection with the Supplementary Riyadh Agreement, Saudi Arabia, Bahrain and the UAE returned their ambassadors to Qatar in November 2014.[113] However, Saudi Arabia asserted that, between November 2014 and June 2017, Qatar continued to violate the explicitly agreed terms of the Riyadh Agreements by supporting and harbouring extremist individuals and organizations, many of whom had been designated as terrorists by the United Nations and by individual countries[114]; supporting and allowing terrorist and extremist groups to use Qatar-based and Qatar-sponsored

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[105] Saudi Arabia's opening statement at the first meeting of the Panel, para. 26. See First Riyadh Agreement, Exhibit SAU-2.

[106] First Riyadh Agreement, Exhibit SAU-2, p. 5.

[107] Joint Statement of 5 March 2014, Exhibit SAU-5, p. 2 of PDF file.

[108] Ibid.

[109] Implementing Mechanism, Exhibit SAU-3, p. 11.

[110] Supplementary Riyadh Agreement, Exhibit SAU-4.

[111] Ibid. para. 3(c).

[112] Ibid. para. 3(d).

[113] Saudi Arabia's opening statement at the first meeting of the Panel, para. 32.

[114] Ibid. para. 33, first bullet (referring to Saudi Arabia and Regional Security, Qatar's History of Funding Terrorism and Extremism, 27 June 2017, Exhibit SAU-6)).

media platforms to spread their messages[115]; and "[e]ngaging in activities that threatened the security and stability of GCC Countries as detailed in reports by intelligence chiefs, including as mandated under the Riyadh Agreements, the details of which will not be presented in the context of this WTO dispute".[116]

2.26. On 19 February 2017, Qatar's Foreign Minister sent a letter to the Secretary General of the GCC calling upon the GCC Countries to "agree to terminate the Riyadh Agreement which has been overtaken by events at the international and regional levels."[117] Saudi Arabia said that it considered this letter to amount to "a repudiation by Qatar of its obligations under the Riyadh Agreements"[118] (to which Qatar responded that the letter could not reasonably be read in that manner[119]).

2.27. Saudi Arabia asserted that, between 19 February 2017 and 5 June 2017, Qatar continued to act against Saudi Arabia's essential security interests, in violation of the terms of the Riyadh Agreements. Saudi Arabia asserted that, in addition to continuing to harbour and support extremists and terrorists, Qatar had purportedly made ransom payments to secure the release of kidnapped members of the Qatari royal family.[120] (Qatar responded that these assertions should be rejected as having no basis in fact.[121])

2.28. According to Saudi Arabia, it was in the light of the above developments, and following Saudi Arabia's further consideration of remaining viable options to protect its essential security interests in view of Qatar's failure to abide by its commitments under the Riyadh Agreement, that Saudi Arabia determined that severing all diplomatic and consular relations would be the only way to protect effectively its sovereign interests.[122]

2.29. On 5 June 2017, Saudi Arabia severed relations with Qatar, including diplomatic and consular relations, the closure of all ports, the prevention of Qatari nationals from crossing into Saudi territory, and the expulsion within 14 days of Qatari residents and visitors in Saudi territories. On the same day, Saudi Arabia publicly articulated the rationale behind the measures in the following terms:

> [T]he Government of … Saudi Arabia emanating from exercising its sovereign rights guaranteed by [] international law and protecting its national security from the dangers of terrorism and extremism has decided to sever diplomatic and consular relations with the State of Qatar, close all land, sea and air ports, prevent crossing into Saudi territories, airspace and territorial waters.[123]

[115] Ibid. para. 33, second bullet (referring to *Qatar's Al Jazeera, Counter Extremism Project*, visited 7 July 2019; *Al Jazeera faces criticism in Egypt over its coverage of Muslim Brotherhood*, The Washington Post, 5 January 2014, Exhibit SAU-7).

[116] Saudi Arabia's opening statement at the first meeting of the Panel, para. 33, third bullet.

[117] Letter from H.E. Mohammed Bin Abdulrahman Al-Thani, Minister of Foreign Affairs of Qatar, to H.E. Dr. Abdullatif Bin Rashid Al Zayani, Secretary-General of the GCC, 19 February 2017, Exhibit ARE-3. According to the United Arab Emirates, the text should be translated as saying that "the *subject* of this agreement has been exhausted", that "this agreement *must* be terminated *since the purpose of it has been completed*", and that "the reliance on the Riyadh Agreement and the abandonment of the Charter and its other mechanisms *do not serve the interests and objectives* of the GCC"; according to Qatar, it should be translated as "the *subject matter* of this Agreement has been exhausted" and "this agreement *should* be terminated due to *the exhaustion of its purpose*", and "relying on the Riyadh Agreement and abandoning the GCC Charter and its other mechanisms *do not achieve the interests or goals* of the GCC". (See Qatar's communication to the Panel, dated 2 July 2019, and the United Arab Emirates' response, dated 10 July 2019. (emphasis added))

[118] Saudi Arabia's opening statement at the first meeting of the Panel, para. 34.

[119] Qatar's second written submission, paras. 301-305.

[120] Saudi Arabia's opening statement at the first meeting of the Panel, paras. 35-37.

[121] Qatar's second written submission, para. 298.

[122] Ibid. para. 37.

[123] Saudi Press Agency (SPA), Press Release, Kingdom of Saudi Arabia severs diplomatic and consular relations with Qatar, 5 June 2019; and Embassy of the Kingdom of Saudi Arabia, Washington, D.C., Press Release, Kingdom of Saudi Arabia Cuts Off Diplomatic and Consular Relations with the State of Qatar, 5 June 2017, Exhibit SAU-1. See also *S*audi Press Agency Website, "*Kingdom of Saudi Arabia severs diplomatic and consular relations with Qatar*", 5 June 2017, Exhibit QAT-2.

2.2.3 The broadcasting operations of the Qatari-based beIN Media Group

2.30. beIN Media Group LLC (beIN) is a global sports and entertainment company headquartered in Qatar.[124]

2.31. To build its business, beIN has made substantial investments in acquiring licences to broadcast content produced by major international right holders. To this end, it has obtained the exclusive rights to broadcast, and to authorize others to broadcast, prime sporting competitions in the MENA region, including in Saudi Arabia.[125] beIN's content includes, but is not limited to, broadcasts of: the major European football leagues, Major League Baseball, the National Basketball Association, the National Football League, the US Open Tennis Championships, the Fédération Internationale de Football Association (FIFA) World Cup, the Union of European Football Associations (UEFA) Champions League and many others.[126]

2.32. The rights to broadcast this content have been licensed on a territorial basis, and beIN holds exclusive rights to broadcast in the territory of Saudi Arabia.[127] As a licensor and commercial broadcaster of sports and entertainment content, beIN's revenues are largely generated from subscriptions to beIN's television packages. Saudi Arabia is the largest and most important market in the MENA region, and is strategically important to beIN and its right holders.[128]

2.33. beIN generally owns the copyright in: (a) any match/event commentary produced by beIN (for example, Arabic match commentary) on particular matches/events; (b) any studio programming produced in and around the relevant live matches/events (excluding any match/event footage included within such studio programming but including any beIN filmed player/manager interviews, and other beIN produced non-match footage); (c) beIN logos (including on-screen channel bugs) included within the relevant transmission; and (d) any beIN commissioned/owned musical works included within the relevant transmissions.[129]

2.34. In addition, beIN owns the related rights[130] conferred on broadcasting organizations[131], including the right to prohibit unauthorized fixations, reproductions of fixations and rebroadcasting by wireless means of broadcasts, as well as communications to the public of television broadcasts of the same.[132]

2.35. In some instances, beIN had the right to take action under the Saudi Copyright Law in respect of an infringed copyright work or related right where beIN is not the owner of that right.[133] For example, pursuant to beIN's media rights agreement with UEFA National Team Football, beIN may commence legal proceedings for infringement of the underlying copyright work belonging to UEFA, with UEFA's prior written consent. In general, given that beIN typically owns the copyright for multiple aspects of the works that it broadcasts, it would be expected that beIN and the relevant

[124] Qatar's first written submission, para. 29 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 2).
[125] Ibid. paras. 29 and 30 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 6).
[126] Ibid. para. 31 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 7).
[127] Ibid. para. 32 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 7).
[128] Ibid. para. 34 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 8).
[129] See Qatar's response to Panel question No. 6(b)(i), para. 34 (quoting Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217, para. 7). See also Supplemental Declaration, para. 16.
[130] Article 14 of the TRIPS Agreement covers three categories of "related rights", or rights related to copyright. These are the rights of performers, producers of phonograms and broadcasting organizations.
[131] Qatar's response to Panel question No. 6(b)(i), para. 34 (quoting Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217, paras. 10 and 16).
[132] See Qatar's first written submission, paras. 340-352; and Qatar's response to Panel question No. 6(b)(i), paras. 34-36. beIN provided examples from its contracts with various right holders demonstrating that beIN retains copyright in its own works and the related rights in its broadcasts. (See Qatar's response to Panel question No. 45, para. 105 (referring to the Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217, paras. 7-16).)
[133] beIN has to date not initiated civil enforcement procedures against beoutQ before Saudi tribunals, and neither has any other foreign right holder. See paragraph 7.37 of this Report.

sports league (e.g., UEFA) would ordinarily bring a copyright infringement action together, as co-plaintiffs.[134]

2.36. Following Saudi Arabia's severance of relations with Qatar on 5 June 2017, the Saudi Ministry of Culture and Information blocked access to beIN's website in Saudi Arabia since early June 2017.[135] Since that time, customers connecting from a Saudi internet protocol address have been redirected to a page stating that beIN websites violate Saudi law.[136]

2.37. On 19 June 2017, the Saudi Ministry of Culture and Information and GCAM issued a Circular, which stated that beIN was not licensed to distribute media content, and did not have the right to operate, in Saudi Arabia.[137] The Circular also provided that any distribution of media content either via satellites or through other means and platforms, and the charging and collection of related fees in Saudi Arabia without obtaining the necessary licences from the appropriate authorities:

> shall subject the distributors of such media content and content licensors, hardware suppliers, and their owners in their individual capacity to criminal prosecution and personal litigation and shall result in the imposition of penalties and fines and the loss of the legal right to protect any related intellectual property rights.[138]

2.38. On 11 July 2017, the Saudi Arabian Monetary Authority issued a Decision suspending and prohibiting "all monetary operations in all methods of payment either through credit cards, payment cards, transfers or any other method to the said company either for new subscriptions or any renewals in its channels or services".[139] The Decision referred directly to the Saudi Ministry of Culture and Information and GCAM's Circular of 19 June 2017, which Qatar says was to prohibit beIN sports channels in Saudi Arabia and to severely limit beIN's ability to operate in Saudi Arabia.[140]

2.39. The parties held different views as to the time periods during which beIN had a licence to operate in Saudi Arabia. According to Saudi Arabia, beIN was not licensed and did not have the right to operate in Saudi Arabia between December 2016 and June 2017 (or thereafter).[141] According to Qatar, beIN understood at all times until early June 2017 that it was operating with the approval of GCAM under a valid licence, pending the formal renewal of its pre-existing Pay TV Licence.[142]

2.2.4 The emergence of beoutQ

2.40. Qatar provided the following summary of and perspective on the emergence of the broadcasting entity known as beoutQ, and the following facts do not appear to be contested. In August 2017, beoutQ began the unauthorized distribution and streaming of media content that is

[134] Qatar's response to Panel question No. 6(b)(ii), paras. 37-38, and 6(b)(iii), para. 50 (referring to the Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217, para. 14).

[135] Qatar's first written submission, para. 39 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 12; and Letter from beIN to Saudi Ministry of Culture and Information, 15 June 2017 (Arabic original and English translation), Exhibit QAT-38).

[136] Ibid. (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 12).

[137] Qatar's first written submission, para. 40 (referring to Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, Exhibit QAT-1). Saudi Arabia confirmed that although the Circular was not "officially reflected" in the records of the Ministry of Media, or "officially issued" by the Government of Saudi Arabia, the text of the Circular accurately reflects Saudi law. Saudi Arabia added, *inter alia*, that the Circular was informative in nature only and did not change the status of or revoke the legal rights of any entity. (Saudi Arabia's opening statement at the second meeting of the Panel, paras. 10-12 and 33.) In response to a Panel question, Saudi Arabia stated that "[t]here is no specific 'applicable law' that penalizes an unlicensed entity with the loss of the legal right to protect any related intellectual property rights." (Saudi Arabia's response to Panel question Nos. 11(b) and 29, paras. 2 and 29.)

[138] Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, Exhibit QAT-1, p. 2.

[139] Qatar's first written submission, para. 42 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 15; and Saudi Monetary Authority, Confidential Circular, 11 July 2017 (Arabic original and English translation), Exhibit QAT-39).

[140] Ibid. (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 15).

[141] Letter from GCAM to beIN, Exhibit SAU-29; and Saudi Arabia's response to Panel question No. 41, para. 26 (referring to Saudi Arabia's opening statement at the second meeting of the Panel, para. 12).

[142] Qatar's response to Panel question No. 42, para. 43.

created by or licensed to beIN, and beIN continues to broadcast in the MENA region.[143] The name "beoutQ", i.e. "be out Qatar", is a play on the name beIN Sports.[144] beoutQ illegally streams and broadcasts the contents of beIN's sports channels, replacing beIN's logo with that of beoutQ.[145] It provides access to 10 beIN sports channels (both live and pre-recorded by beoutQ).[146] In addition to pirated versions of live broadcasts[147], beoutQ also creates unauthorized reproductions of those broadcasts for later replay as reruns.[148]

2.41. While beoutQ initially limited its activities to streaming pirated content online, it expanded to the retail sale of beoutQ-branded set-top boxes (STBs) throughout Saudi Arabia and other countries.[149] These STBs receive satellite broadcasts of pirated content and, as discussed further below, they also provide access to Internet Protocol Television (IPTV) applications offering thousands of pirated movies, TV shows and TV channels around the globe.[150] Web streaming appears to have been terminated in favour of beoutQ's satellite-based broadcasting to STBs.[151]

2.42. There are reports that beoutQ STBs and subscriptions have been widely available in Saudi retail outlets since the autumn of 2017.[152] The beoutQ STBs available in the above-referenced stores in November 2017 allegedly ranged in price from between Saudi Arabian Riyals (SAR) 360 – SAR 400 (approximately USD 95 – 110).[153] In September 2018, investigators reportedly found beoutQ STBs for sale in 16 electronics shops visited in Riyadh, Jeddah and Dammam.[154] These beoutQ STBs allegedly ranged in price from between SAR 330 – SAR 370 (approximately USD 89 – 99).[155]

2.43. In addition to generating revenue through sales of STBs and subscriptions, beoutQ allegedly sells advertising slots on its 10 pirated channels, and publishes its advertising rates in Saudi Riyals on its website (e.g., Premier League "gold packages" for advertising priced at SAR 2,500,000 or approximately USD 666,638).[156] Moreover, many of the advertisements shown on beoutQ channels are reportedly for Saudi products.[157]

2.44. beoutQ has promoted its pirated streams on a variety of social media platforms, including Facebook, Instagram and Twitter.[158] Additionally, beoutQ has circulated an anti-beIN cartoon encouraging Saudi citizens and beIN's licensors to replace beIN with beoutQ.[159] beoutQ packaging

[143] Qatar's first written submission, para. 47 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 17).
[144] Ibid. para. 35.
[145] Ibid. para. 48. See, e.g. beoutQ pirated broadcast of Champions League, Video, Exhibit QAT-43; beoutQ pirated broadcast of Europa League, Video, Exhibit QAT-44; beoutQ pirated broadcast of FIFA World Cup game between Croatia and England of 2018, Video, Exhibit QAT-45; beoutQ pirated broadcast of Formula 1, Video, Exhibit QAT-46; and beoutQ pirated broadcast of NBA final games between the Cleveland Cavaliers and the Golden State Warriors of 2018, Video, Exhibit QAT-47.
[146] Qatar's first written submission, para. 36.
[147] See, e.g. beoutQ-pirated broadcast of NFL Super Bowl LIII game between New England Patriots and Philadelphia Eagles, Video, 4 February 2018, Exhibit QAT-72; Images of beoutQ pirated broadcast of 4 February 2018 NFL Super Bowl Half-Time Show, Exhibit QAT-73; and Country-by-Country Examples of beoutQ Pirated Content (2018), Exhibit QAT-74.
[148] Qatar's first written submission. para. 48. See, e.g. 2017-2019 Sampling of Live and Replayed Content Broadcast on beoutQ, Exhibit QAT-48.
[149] Qatar's first written submission, para. 37.
[150] Ibid.
[151] Ibid. para. 78.
[152] Ibid. para. 61 (referring to Photographs of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia, October 2017 to September 2018, Exhibit QAT-71).
[153] Ibid. para. 62 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 39).
[154] Ibid. para. 63 (referring to Photographs of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia, October 2017 to September 2018, Exhibit QAT-71).
[155] Ibid. para. 64 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 37).
[156] Ibid. para. 67 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 47; beoutQ advertisements pricing rate cards Saudi Riyals, Exhibit QAT-75).
[157] Ibid. para. 67 (referring to beoutQ advertisements for Saudi brands, Exhibit QAT-76).
[158] Ibid. para. 49 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 21; and Promotion of beoutQ through Social Media, Exhibit QAT-41).
[159] Ibid. para. 50 (referring to beoutQ Promotional, as shown on beoutQ, Video, 21 September 2018, Exhibit QAT-49).

and promotional material in Saudi retail outlets explicitly advertises the availability of sports content exclusively licensed to beIN.[160]

2.45. While the focus of beoutQ's broadcasting activities was initially on sports content, it has expanded to cover the most popular movies and television programming in the world.[161] In addition to illegally providing access to beIN channels 1-10, the beoutQ STBs come pre-loaded with IPTV applications and portals that lead to other pirated content. Allegedly, the beoutQ custom app store, which comes pre-loaded on the device, contains 25 applications (apps), including 12 IPTV apps, which are used to watch live television and video-on-demand (VOD) content over the Internet. Some of these apps allegedly offer between 2,300 and 4,000 live or recorded television channels from all over the world with thousands of movies available in different languages, and up to 35,000 TV show episodes.[162] The Show Box application, which has come to be known as the "Netflix of piracy", provides free access to more than 4,700 movies, 700 TV-shows and 35,000 TV-show episodes via streaming or direct download to the STB. The other five IPTV applications tested by beIN offer thousands of live television channels in addition to VOD content and require activation codes (subscriptions) that can be purchased online. These applications offer all major US and European television channels, live US sports events and movies and TV shows in English and other languages. Some of these IPTV applications also broadcast the pirate beoutQ sports channels.[163]

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."[164]

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[165]:

a. the 19 June 2017 Circular allegedly issued by the Ministry of Culture and Information and GCAM 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

[160] Qatar's first written submission, para. 71 (referring to Images of beoutQ promotional material, Exhibit QAT-42).
[161] Ibid. paras. 72-77.
[162] Ibid. (referring to NAGRA, Kudelski Report, "*IPTV Piracy on BeoutQ STBs*", 25 November 2018, Exhibit QAT-79).
[163] Ibid.
[164] Qatar's panel request, para. 13; and Qatar's first written submission, para. 141.
[165] Qatar's first written submission, para. 142; and Qatar's response to Panel question No. 2(a), para. 18.

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[166] enforcement procedures against the infringement of its intellectual property rights;

e. Saudi Arabia's alleged failure to apply criminal procedures and penalties against beoutQ[167], 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"[168] to prevent beIN from accessing Saudi courts and tribunals to protect its intellectual property rights, and stresses that it challenges their "combined operation".[169]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Qatar claims that these measures, in different combinations, violate multiple obligations in Parts I, II and III of the TRIPS Agreement, as follows:

a. Part I of the TRIPS Agreement:

i. Article 3.1 of the TRIPS Agreement (national treatment), because they accord to Qatari nationals treatment that is less favourable than that accorded to Saudi nationals with regard to the protection of intellectual property; and

ii. Article 4 of the TRIPS Agreement (most-favoured-nation treatment), because, with regard to the protection of intellectual property, they fail to extend immediately and unconditionally to Qatari nationals advantages granted to nationals of other countries.

b. Part II of the TRIPS Agreement:

i. Articles 9(1); 11; 11*bis*(1)(i), (ii) and (iii); and 11*ter* of the Berne Convention (1971), as incorporated into Article 9 of the TRIPS Agreement, because they fail to provide authors of works with the exclusive rights mandated therein; and

[166] The Panel understands Qatar to argue that this measure prevents beIN from accessing criminal enforcement procedures insofar as access to the Copyright Committee could result in the application of criminal procedures and penalties. (Qatar's response to Panel question No. 5, para. 30.)

[167] The Panel understands this measure to extend beyond the effect of the Ministerial approval requirement of Copyright Committee decisions, as confirmed by Qatar's explanation to that effect. According to Qatar, this measure "goes beyond the omissions (and gatekeeping function) of the Copyright Committee to encompass omissions by *all* Saudi government agencies and authorities that have the authority to initiate criminal procedures and penalties that would ensure that Saudi Arabia complies with its obligation to 'provide for criminal procedures and penalties to be applied' against the beoutQ piracy." Thus, it is Qatar's view that "[b]eyond the Copyright Committee, however, other elements of the Saudi government are, pursuant to Saudi law, allocated the role of initiating criminal procedures that would ultimately lead to application of criminal penalties." (Qatar's response to Panel question No. 5, paras. 28-29.)

[168] Qatar's second written submission, para. 290.

[169] Ibid. para. 276.

ii. Article 14(3) of the TRIPS Agreement, because they fail to provide broadcasting organizations with the requisite exclusive rights specified therein.

c. Part III of the TRIPS Agreement:

i. Article 41.1 of the TRIPS Agreement, because they fail to make available to Qatari nationals enforcement procedures, as specified in Part III of the TRIPS Agreement;

ii. Article 42 of the TRIPS Agreement, because they fail to make available to Qatari nationals civil judicial procedures concerning the enforcement of intellectual property rights, including inter alia the right to be represented by independent legal counsel; and

iii. Article 61 of the TRIPS Agreement, because they fail to provide for the application of criminal procedures and penalties to the wilful commercial scale piracy of beIN's copyrighted material.[170]

3.2. Qatar requests that, pursuant to Article 19.1 of the DSU, the Panel recommend that Saudi Arabia bring its measures into conformity with the TRIPS Agreement.[171]

3.3. Saudi Arabia requests that the Panel reject Qatar's claims in this dispute in their entirety, and stated that "the Panel has multiple avenues to end its work without addressing the substantive claims that have been raised in this case, including by:

- recognizing that *Security Exceptions* have been invoked;
- confirming that Saudi Arabia's actions are justified under Article 73 of the TRIPS Agreement;
- referencing Article 3.4 of the DSU and the impossibility of issuing a recommendation or ruling 'aimed at achieving a satisfactory settlement of the matter' or Article 3.7 of the DSU and the impossibility of securing a positive solution to the dispute; and/or
- barring the claim because it has not been brought in good faith with the intention of addressing substantive WTO rules."[172]

3.4. Furthermore, Saudi Arabia submits that "the information that Saudi Arabia has provided to support the Panel's 'objective assessment' of [its] good faith conduct in connection with the invocation of the *Security Exception* in Article 73 establishes the absence of any substantive violation of the TRIPS Agreement".[173]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Bahrain, Brazil, Canada, China, the European Union, Japan, Norway, Russia, Singapore, Ukraine, the UAE and the United States are reflected in their executive summaries, provided in accordance with the Working Procedures adopted by the Panel (see Annex C). India, Korea, Mexico, Chinese Taipei, Turkey and Yemen did not submit written or oral arguments to the Panel.

[170] Qatar's first written submission, para. 443; and Qatar's second written submission, para. 310.
[171] Qatar's first written submission, para. 444; and Qatar's second written submission, para. 311.
[172] Saudi Arabia's second written submission, para. 70.
[173] Ibid. para. 72.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 16 March 2020, the Panel issued its Interim Report to the parties. On 30 March 2020, Qatar and Saudi Arabia each submitted written requests for the Panel to review aspects of the Interim Report. On 14 April 2020, Qatar submitted comments on Saudi Arabia's requests for review. Saudi Arabia did not submit any comments on Qatar's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel generally addresses the parties' requests individually and in sequence according to the sections and paragraphs to which such requests pertain. To avoid repetition, the Panel addresses related requests together where possible.

6.3. In addition to the requests for substantive modifications that are discussed below, various corrections or improvements of a typographical or minor editorial nature were made to the Report, including but not limited to those suggested by the parties in their interim review comments. The discussion below refers to the paragraph numbering in the Final Report.

6.2 General issues

Saudi Arabia's non-engagement with facts or arguments presented by Qatar

6.4. Saudi Arabia suggests that the Panel seems to attribute the establishment of certain facts and positions on arguments in both section 7.2 and section 7.3 of the Report to the lack of engagement by Saudi Arabia. Saudi Arabia requests that, in all instances where the Panel suggests that its findings are based in part on "uncontested", "unrebutted", or "unrefuted" facts, for example, the Panel add a sentence stating that: "The Panel recalls that Saudi Arabia did not engage with facts or arguments presented by Qatar in the dispute settlement proceedings consistent with its position under Article 73 of the TRIPS Agreement." Saudi Arabia specifically requests the addition of this sentence to body text or footnotes accompanying **paragraphs 7.6, 7.37, 7.40, 7.59, 7.64, 7.115, 7.154, 7.159, 7.160 and 7.174**. In its comments on some of these paragraphs, Saudi Arabia also requests that "the Panel confirm how it ensured an objective assessment of evidence given that Saudi Arabia did not address any claims or respond to any evidence submitted by [Qatar]".

6.5. Qatar offers several reasons why the Panel should reject these requests:

a. First, paragraph 1.10 of the Report already recognizes that "[t]hroughout the proceeding, Saudi Arabia *took the position that*, … it would not interact, or have any direct or indirect engagement, with Qatar in any way in this dispute".[174] Qatar considers that paragraphs 1.10 to 1.14 of the Report accurately summarize Saudi Arabia's position and its consequences, and that no modifications are required to any portion of the Report to reiterate these points.

b. Second, Qatar submits that although Saudi Arabia *asserted* throughout the proceedings that it was "not engaging" with Qatar, Saudi Arabia availed itself of all the available opportunities to present its case to the Panel. Specifically, Saudi Arabia responded to the facts and legal arguments presented by Qatar in multiple submissions and through presenting its own factual evidence and arguments concerning each of the six measures that Qatar challenged. Saudi Arabia submitted 44 exhibits in these proceedings, and participated actively in each of the two substantive meetings with the Panel. Qatar lists multiple key factual and legal assertions that Saudi Arabia placed on the record, as often highlighted in the Panel's own summary of Saudi Arabia's arguments in the Report. Even in Saudi Arabia's comments on the Interim Report, Saudi Arabia calls the Panel's attention to specific arguments that it made (and evidence that it submitted) to

[174] Emphasis added by Qatar.

the Panel, and Saudi Arabia asks that the Panel reflect these arguments and evidence in its Report.

c. Third, Qatar notes that, in paragraph 7.40 of the Report, the Panel already explained how it ensured an objective assessment insofar as Saudi Arabia did not contest one or more claims. The Panel recalled that, in those WTO cases where a responding party did not contest one or more claims raised by the complainant, panels have consistently proceeded on the basis that they were nonetheless required to satisfy themselves that the complainant had established a *prima facie* case of violation in order to rule in the complainant's favour. Accordingly, the Panel considered it important to confirm that, before considering any exceptions or lines of defence invoked by Saudi Arabia, the Panel must first satisfy itself that Qatar has established a *prima facie* case in relation to each of the measures and claims at issue, including through Qatar's written and oral submissions.

d. Finally, insofar as Saudi Arabia is challenging the merits of the Panel's analysis and findings, and asking the Panel to defend its analysis, Qatar contends that such a request would fall outside of the limited scope of interim review. Qatar states that the Panel should reject Saudi Arabia's proposed revisions to the Interim Report to the extent they seek to challenge the merits of the Panel's analysis and findings and to reargue the facts and law.

6.6. The Panel has revised paragraphs 7.2 and 7.40 in the light of the parties' comments.

6.7. In the context of making the above-mentioned requests, Saudi Arabia reiterates its argument that, in paragraphs 7.40, 7.59, 7.160 and 7.174 of the Interim Report, the Panel should take special care to ensure that it discharges its obligation to make an objective assessment of the matter, and "to consider how the real dispute taints the arguments and evidence presented by the complaining Party".[175]

6.8. Qatar responds that this is nothing but a repetition of a substantive argument which the Panel has fully considered and rejected. In paragraph 7.15 of the Interim Report, the Panel accurately summarized Qatar's position on Saudi Arabia's argument. In footnote 221 to the Interim Report, the Panel recognized that the "dispute" referred to in Article 3.7 of the DSU and the "matter" referred to in Article 11 of the DSU, like the "matter" referred to in Article 3.4 of the DSU, is the narrow one currently before the Panel, and not what Saudi Arabia referred to as the "real dispute". Qatar recalls that the Panel concluded that it had jurisdiction over the matter referred to it by the DSB, and that it could not refrain from exercising that jurisdiction on account of what Saudi Arabia characterized as the "real dispute". Qatar states that it fully agrees with the Panel's findings on this issue.

6.9. The Panel does not consider that there is any need to modify these paragraphs.

The absence of any evidence regarding beoutQ's operations before the Saudi authorities with exclusive jurisdiction for copyright enforcement at the time of the establishment of the Panel

6.10. Saudi Arabia makes a series of related requests, in connection with multiple paragraphs spanning sections 7.1, 7.2, 7.3 and 7.4 of the Report, that are aimed at having the Panel reach the conclusion that, as of the time of the Panel's establishment, there was no evidence regarding beoutQ's operations before the Saudi authorities with exclusive jurisdiction for copyright enforcement. Specifically, Saudi Arabia requests that the Panel add new text throughout its findings to establish the propositions that:

a. the Saudi authorities with exclusive jurisdiction for copyright enforcement are the Copyright Committee and, as reflected in Saudi Arabia's submissions, the SAIP;

b. a complaint or information can be filed with the SAIP directly by right holders by email, and hundreds of Saudi and foreign companies (including digital content providers) have

[175] Saudi Arabia's second written submission, para. 3.

initiated procedures through the SAIP and to the Copyright Committee, including by email and without legal representation;

c. at the time of the establishment of the Panel, no evidence or claim was filed with SAIP or the Copyright Committee by any right holder regarding copyright infringement by beoutQ to initiate civil or criminal enforcement procedures;

d. much of the "evidence" on which the Panel relied in its assessment did not exist at the time the Panel was established; and

e. therefore, the Panel should find that, as of the date of its establishment, the Saudi authorities that have exclusive jurisdiction to adjudicate the existence of criminal piracy and to determine the resulting penalties "never received any evidence regarding beoutQ operations".

6.11. Saudi Arabia requests the insertion of six paragraphs of new text, in six different places in the Report (following **paragraphs 7.155**, **7.175**, **7.218**, **7.219**, **7.221** and **7.291**), which would capture all of the propositions in bullet points (a) through (e) above. In its comments on **paragraphs 7.227** and **7.293**, Saudi Arabia refers back to these proposed insertions.

6.12. In addition to these insertions, Saudi Arabia proposes that additional text be added to a range of other paragraphs to reflect or establish one or more of the propositions listed in bullet points (a) through (e) above. Specifically, Saudi Arabia requests that the propositions reflected in bullet points (a), (b) and/or (c) above be reflected through additions to **paragraphs 7.37**, **7.45, 7.46, 7.52, 7.86, 7.92, 7.164**, **7.213** and **7.224**. In connection with the proposition reflected in bullet point (d) above, Saudi Arabia requests that, where certain evidence was not available to the Saudi officials responsible for copyright enforcement as of the date of establishment of the Panel, the Panel add a sentence stating that: "The Panel acknowledges that the evidence at issue here was not available to the Saudi officials responsible for copyright enforcement as of the date of establishment of the Panel." Saudi Arabia raises this issue primarily in connection with the evidentiary basis for the Panel's finding that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia, and Saudi Arabia requests the addition of the sentence above in a number of places in that part of the Report, including in the body text or footnotes accompanying **paragraphs 7.97, 7.110, 7.111, 7.112, 7.123, 7.125, 7.126, 7.128, 7.129, 7.130, 7.136** and **7.149**. However, Saudi Arabia reiterates the same point in the context of commenting on the Panels' review of the evidence relating to the anti-sympathy measures (**paragraphs 7.64, 7.65** and **7.66**) and the 19 June 2017 Circular, travel restrictions and Ministerial approval requirement (**paragraphs 7.74** and **7.80**).

6.13. Qatar responds generally that Saudi Arabia seeks to misuse this interim review process by re-arguing significant aspects of the dispute, and by effectively asking to draft for itself new, lengthy portions of the findings section of the Interim Report. Saudi Arabia's approach is inconsistent with the purpose of the interim review stage as set out in Article 15.2 of the DSU, which is for the Panel to consider "precise aspects" of the Interim Report raised by the parties. WTO panels have often explained that it is not appropriate to request a panel to revisit the merits of its analysis and findings at the interim review stage. According to Qatar, the purpose of the interim review stage is not to provide the parties with an opportunity to enter into a debate with the Panel.

6.14. Qatar requests that the Panel make no modifications to reflect any the propositions listed above as (a) through (e). Qatar's comments may be summarized as follows:

a. The statement about SAIP having "responsibilities relating to copyright enforcement" is a Saudi assertion that Qatar has explained is erroneous, and irrelevant to the current dispute. Qatar explained at length in its submissions that SAIP was not operational and did not "effectively launch its activities" until 2019—after the establishment of the Panel in this proceeding on 18 December 2018. While beIN and the third-party right holders have sent multiple letters to various Saudi government agencies informing them of the beoutQ piracy, beIN and the third-party right holders received no indication in response that SAIP would be the proper authority to evaluate the beoutQ piracy. Thus, the proposed references to SAIP would conflict with the facts established by extensive evidence on record. If the Panel were to include these additional references to

Saudi Arabia's evidence and argument on SAIP, then Qatar respectfully requests that the Panel likewise refer to additional SAIP-related evidence and arguments that Qatar submitted.

b. Saudi Arabia's request that the Panel refer to its assertion that "hundreds of other copyright holders" have initiated procedures through SAIP and to the Copyright Committee would not add anything of relevance to the paragraph, which is focused on the beoutQ piracy. The evidence to which Saudi Arabia requests that the Panel refer is not necessary for the Panel to resolve any particular claim in this proceeding, nor is it relevant to the paragraphs at issue. Prior panels have rejected requests for the insertion of lengthy recitations of arguments and evidence on the basis that panels need not refer explicitly to every argument made, or each piece of evidence adduced, by the parties.

c. Paragraph 7.37 of the Report already states the undisputed fact that beIN and third-party right holders have not initiated civil enforcement procedures against beoutQ before Saudi tribunals. It is not necessary for the Panel to repeat this fact throughout the findings, as requested by Saudi Arabia. As the Panel found, beIN and third-party right holders were not able to initiate civil enforcement procedures against beoutQ because of the anti-sympathy measures and other measures taken by Saudi Arabia. Furthermore, criminal enforcement procedures are initiated by a government, not by private parties, such that a reference to beIN or other right holders not having "initiated . . . criminal enforcement procedures" would be "nonsensical".

d. Qatar recalls that Saudi authorities were, in fact, on notice of the inability of third-party right holders to engage Saudi counsel to represent them in proceedings against beoutQ, as the Panel detailed earlier in the Interim Report. Saudi Arabia's suggested revisions would contradict the factual record of this dispute. Furthermore, Saudi Arabia fails to provide any explanation as to why the availability of the evidence to Saudi copyright enforcement officials is legally relevant here. It appears that Saudi Arabia may be conflating the concepts of measures within the scope of a panel's terms of reference, on the one hand, with evidence that can be used to support a claim regarding specific measures, on the other hand. Panels and the Appellate Body have endorsed the assessment of *post-establishment facts* in examining whether the maintenance of a measure violates a continuing obligation, including in disputes involving claims under the TRIPS Agreement. The evidence in question helps to confirm the right holders' claims of an ongoing problem that began well before panel establishment and continued throughout the course of the proceedings in this dispute. In this context, evidence available after panel establishment is particularly important for the Panel to examine Saudi Arabia's *omission* to take criminal actions against beoutQ, because such evidence demonstrates that this omission, having begun before the establishment of the Panel, also continued throughout the course of the panel proceedings.

e. While Saudi Arabia effectively asks the Panel to reconsider its finding regarding the attribution of certain acts and omissions to Saudi Arabia, it is not appropriate for Saudi Arabia to reargue the facts in the interim review stage.

6.15. The Panel considers that these requests by Saudi Arabia generally amount to rearguing the case, and the Panel does not consider it necessary to revisit the merits of its analysis and findings at the interim review stage. The Panel notes that while certain pieces of evidence referred to in the Panel's findings post-date the establishment of the Panel, it is clear from the Report that the Panel based its factual findings on information that was provided to the Saudi authorities prior to the establishment of the Panel. As already indicated in paragraph 7.155, the Panel considered that post-establishment evidence served to "corroborate" and "supplement" the information already provided to the Saudi authorities.

6.3 Factual aspects

The June 2017 severance of relations and events leading up to it

6.16. Qatar states that although it understands that the Panel's intention in **section 2.2.2** is to present a balanced account of the events leading up to Saudi Arabia's severance of relations with

Qatar on 5 June 2017 (as reflected in the Panel's reference to Qatar's explanation of one point in paragraph 2.18), Qatar observes that this section is drafted almost entirely according to the account provided by Saudi Arabia.[176] Although Qatar notes that the Panel states in paragraph 2.19 that it would recount Saudi Arabia's "perspective on the events leading up to the 5 June severance", the Panel does not set forth Qatar's perspective, which is markedly different from that of Saudi Arabia. Indeed, Qatar rejects a number of the factual assertions recounted by the Panel in this section. Qatar requests that the Panel seek to introduce greater balance into its telling of the circumstances leading up to 5 June 2017, in particular, by:

a. stating that Qatar contests many of the factual assertions that form part of the Panel's presentation of the factual background in **section 2.2.2**;

b. providing a fuller account of the positions of the parties in respect of the 19 February 2017 letter referenced in **paragraph 2.26** (i.e. Qatar reiterates that although Saudi Arabia said that it considered this letter to amount to "a repudiation by Qatar of its obligations under the Riyadh Agreements"[177], Qatar argued that the letter could not reasonably be read in that manner[178]); and

c. reflecting in the Report that Qatar rejects the Saudi assertions recounted in **paragraph 2.27** as having no basis in fact.

6.17. The Panel revised paragraphs 2.19, 2.26 and 2.27 in the light of the parties' comments.

6.18. Qatar makes two requests pertaining to its submissions that Qatar and Saudi Arabia cooperated extensively on, *inter alia*, counter-terrorism and related matters:

a. with reference to **section 2.2.2**, Qatar requests that the Panel seek to introduce greater balance into its account of the circumstances leading up to 5 June 2017, in particular, by referring in this section to Qatar's explanation that the period leading up to that date was characterized by cordial and cooperative relations between Qatar and Saudi Arabia, with deep economic integration within the GCC and other fora and, in particular, in the area of counter-terrorism (as highlighted by both countries' attendance at the Riyadh Summit of 20-21 May 2017 at which the GCC countries and the United States established the joint Terrorist Financing Targeting Center[179]);

b. in **paragraph 7.235**, first sentence, Qatar requests that the Panel reflect Qatar's view that no emergency prevailed when the measures at issue were taken, including because Qatar and Saudi Arabia cooperated extensively on, *inter alia*, counter-terrorism and related matters. Cooperation on such matters is detailed in paragraphs 101-102 of Qatar's opening oral statement at the first meeting of the Panel; and

c. in **paragraph 7.235**, final sentence, Qatar requests that the words "including cooperation on counter-terrorism and related matters" be included at the end of the sentence. Qatar states that cooperation on such matters is detailed in paragraph 103 of Qatar's opening oral statement at the first meeting of the Panel and paragraph 88 of Qatar's opening oral statement at the second meeting of the Panel. In the accompanying footnote to the final sentence of paragraph 7.235, Qatar requests that, in addition to citing Qatar's opening oral statement at the first meeting of the Panel, Qatar requests that the Panel also reference paragraph 88 of Qatar's opening oral statement at the second meeting of the Panel, which further substantiates the existence of ongoing security-related cooperation between Qatar and Saudi Arabia.

6.19. The Panel revised paragraph 2.19 in the light of Qatar's comments. The Panel does not consider it necessary to revise the text of paragraph 7.235.

6.20. Qatar requests that the Panel revise **paragraph 2.24**, third sentence, by including the remaining, underlined part of the existing quote from the Supplementary Riyadh Agreement, such

[176] Qatar refers, as examples, to the introductory clauses of paras. 2.17, 2.19, 2.20, 2.27 and 2.28.
[177] Saudi Arabia's opening statement at the first meeting of the Panel, para. 34.
[178] Qatar's second written submission, paras. 301-305.
[179] Qatar's opening statement at the first meeting of the Panel, paras. 96-100.

that it would read as follows: "ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all the offenses broadcasted on Al-Jazeera, Al-Jazeera Mubashir Masr, and to work to stop all offenses in Egyptian media." Qatar observes that this additional language is found in Exhibit SAU-4, paragraph 3(d), which is currently cited in the accompanying footnote to paragraph 2.24. Qatar considers that the full quote would provide a more accurate impression of the concerns with respect to Egyptian media, which went beyond Al-Jazeera.

6.21. The Panel revised paragraph 2.24 in the light of Qatar's comment.

6.4 Preliminary considerations

Overview and order of analysis

6.22. Qatar notes, with reference to **paragraph 7.3**, that it agrees with the Panel that, in general, panels have discretion in choosing the order of analysis to follow. Qatar also states that it agrees with the Panel's choice of order of analysis. However, Qatar recalls the Appellate Body's guidance that an order of analysis contrary to "the fundamental structure and logic" of a covered agreement would be an error of law, notwithstanding panels' general discretion regarding the order of analysis.[180] Qatar recalls that it argued that the structure and logic of the TRIPS Agreement *require* examination of the complainant's claims before a panel turns to consider whether any violations are justified by the defence in Article 73(b) thereof[181], and that several third parties agreed with that view.[182] Qatar requests that the Panel address the parties' and third parties' arguments on this point, as well as the relevant Appellate Body guidance, as it sets out its approach on this issue.

6.23. The Panel does not consider it necessary to modify or expand on the discussion in paragraph 7.3.

6.5 Acts and omissions claimed by Qatar to be attributable to Saudi Arabia

Introduction

6.24. Each party requests additions to **paragraph 7.37** to reflect what are, in their respective views, additional "undisputed factual circumstances".

6.25. Saudi Arabia requests that the second and third sentences of this paragraph be revised so as to add the underlined text: "First, beIN has not initiated civil or criminal enforcement procedures against beoutQ before Saudi tribunals, and neither has any other foreign right holder. Second, the Saudi authorities with exclusive jurisdiction over copyright infringement proceedings under Saudi law have not received any claim or information from beIN or any other right holder regarding beoutQ and have not applied criminal procedures or penalties against what Qatar has characterized as beoutQ's commercial-scale piracy."

6.26. Qatar responds that by requesting that the Panel insert the word "criminal" in the second sentence of paragraph 7.37, Saudi Arabia reveals an apparent misunderstanding of the fundamental difference between civil and criminal enforcement procedures: criminal enforcement procedures, unlike civil procedures, are initiated by the government, not by private parties. Qatar states that the Report already reflects the shared understanding that criminal procedures are to be initiated by a government, and not by private parties; for example, in finding that Saudi Arabia violates its obligations under Article 61 of the TRIPS Agreement, the Panel states in paragraph 7.209 of its Report that "[w]hile IP rights are 'private rights' that generally require right holders themselves to assert their rights, only States are entitled to enforce criminal law procedures and penalties". Furthermore, pursuant to Saudi law, several elements of the Saudi government are allocated the role of initiating criminal procedures. For example, Articles 20 to 23 of the Saudi Copyright

[180] Appellate Body Report, *Canada – Autos*, para. 151.

[181] Qatar's response to Panel question No. 1, paras. 1-14; and second written submission, paras. 232-239.

[182] Brazil's third-party statement, para. 5; Canada's third-party submission, paras. 8-19; Canada's third-party statement, paras. 2-5; China's third-party statement, paras. 10-13; European Union's third-party submission, paras. 36-39; Norway's third-party submission, paras. 4-5; Norway's third-party statement, paras. 3-4; and Ukraine's third-party submission, para. 19.

Regulations make clear that the authority to initiate criminal procedures falls on Saudi government agencies, rather than private individuals.[183]

6.27. Qatar adds that, contrary to what Saudi Arabia appears to suggest with its proposed changes to the third sentence of paragraph 7.37, Qatar has placed extensive evidence on the record demonstrating that various Saudi authorities received ample notice of beoutQ piracy, and its Saudi connections.[184] With respect to the proposed reference to the Saudi authority with "exclusive jurisdiction over copyright infringement proceedings under Saudi law", Qatar states that such a reference would be irrelevant in this context. Qatar notes that this paragraph provides a summary of the undisputed factual circumstances underlying Qatar's claims, as stated in the first sentence of paragraph 7.37, and Qatar submits that the Panel should reject the proposed language because Qatar disputes its veracity.

6.28. For its part, Qatar requests that the Panel add the following sentence and accompanying footnote at the end of the fourth sentence of paragraph 7.37: "Fourth, the pirate beoutQ has been operated by Saudi-based persons and promoted by prominent Saudi nationals. (Qatar's first written submission, paras. 51 and 106-111.)" According to Qatar, these facts have not been disputed by Saudi Arabia in this proceeding, as the Panel confirms in paragraphs 7.115 and 7.154 of its Report. Qatar states that, with this addition, this paragraph would provide a more complete account of the undisputed "factual circumstances underlying Qatar's claims".

6.29. The Panel does not consider it necessary or appropriate to revise paragraph 7.37 in the manner set forth in the parties' respective requests, as that would involve presenting as "undisputed circumstances" either contested positions or conclusions based on the review of evidence that follows.

Anti-sympathy measures

6.30. Qatar makes two related requests in connection with the Panel's statement, in the third sentence of **paragraph 7.58**, that the anti-sympathy measures appear to be directed at expressions of support for the State of Qatar, not necessarily to any and all Qatari nationals.

a. Qatar requests the addition of the following sentence after the third sentence in **paragraph 7.58**: "Nevertheless, in practice, the anti-sympathy measures appear to have a chilling effect that also discourages the expression of sympathy towards Qatari nationals, generally." In Qatar's view, this suggested addition is consistent with paragraph 7.287 of the Report, where the Panel recalls the connection between the anti-sympathy measures and the refusal of Saudi law firms to represent beIN (i.e. a Qatari national) against beoutQ piracy, and with paragraph 7.284 of the Report, where the Panel explains that the Saudi measures at issue, which sought to end "direct or indirect interaction between Saudi Arabia and Qatar", "extend[] to their respective populations and institutions", i.e. Qatari nationals.

b. Qatar requests that the Panel add "and Qatari nationals" at the end of the first sentence in **paragraph 7.59**. Qatar states that, for the reasons previously stated in its comment on paragraph 7.58 immediately above, this addition would make the Panel's findings consistent with its subsequent analysis in paragraphs 7.284 through 7.288 of its Report. Further, Qatar considers that this addition would also be supported by the evidence on the record, including the report from the UN Office of the High Commissioner for Human Rights which states: "[t]he Mission was informed by all interlocutors that the Quartet's unilateral measures have been accompanied by a widespread defamation and hatred campaign against Qatar and Qataris in various media linked to the four countries as well as on social media, and by the introduction of criminal sanctions in KSA, UAE and Bahrain against people expressing sympathy for Qatar and Qataris."[185]

[183] Qatar's response to Panel question No. 5, para. 28.
[184] See Qatar's second written submission, paras. 88-91.
[185] Office of the United Nations High Commissioner for Human Rights, Technical Mission to the State of Qatar 17-24 November 2017, Report on the Impact of the Gulf Crisis on Human Rights, December 2017, (Exhibit QAT-21), para. 14 (emphasis added).

6.31. The Panel is not persuaded that it is necessary or appropriate to revise the text of paragraph 7.58. The Panel has revised paragraph 7.59 in the light of Qatar's comment.

6.32. In addition to the foregoing, Saudi Arabia requests that the second sentence of **paragraph 7.59** be revised by making the following deletions and additions in that sentence: "It is uncontested that multiple Saudi news outlets ~~announced~~ published reports on the existence of general anti-sympathy measures on ~~nearly the same~~ three successive days." Saudi Arabia comments that, in its objective assessment of the facts, the Panel should have considered Saudi Arabia's confirmation that it "does not maintain any 'anti sympathy measures'" when assessing whether private news reports can be characterized as announcements of Saudi Government measures.

6.33. Qatar responds that, despite Saudi Arabia's assertion to the contrary, the Panel's statement that "[i]t is uncontested that multiple Saudi news outlets announced the existence of general anti-sympathy measures" is fully consistent with the evidentiary record. Qatar states that the fact is that Saudi Arabia never contested that the three Saudi news outlet reports cited by, and exhibited by, Qatar announced the existence of the anti-sympathy measures.[186] Qatar submits that the unsupported general assertions to which Saudi Arabia points do not qualify as rebuttals to specific pieces of evidence that Qatar provided. Furthermore, Qatar observes that the Interim Report already discusses Saudi Arabia's general assertion that it did not maintain any anti-sympathy measures, in paragraphs 7.45 and 7.58, and that there is no need for the Panel to discuss such an assertion here again.

6.34. The Panel has revised the second sentence of paragraph 7.59 in the manner proposed by Saudi Arabia.

6.35. Saudi Arabia notes that **paragraph 7.66** states that: "Saudi Arabia stated, *inter alia*, that the reason that no law firm would be able to proceed with a case against beoutQ in Saudi courts might be that the company does not have a location in Saudi Arabia. However, there has been no evidence to support this." Saudi Arabia makes two related requests:

a. that the Panel quote the entirety of paragraph 14 of Saudi Arabia's response to Panel question No. 39 in the footnote accompanying the first sentence quoted above; and

b. that the Panel clarify the evidence that it considers to be outstanding, and in particular, whether what is lacking is evidence that lawyers do not engage in matters that do not relate to their jurisdiction, or whether what is lacking is evidence that beoutQ does not exist in the jurisdiction of Saudi Arabia.

6.36. Qatar responds that when summarizing arguments put forward by Saudi Arabia, paragraph 7.45 of the Report previously referenced the quote that Saudi Arabia requests to be inserted, and that there is no need for the Panel to expand its reference to include the quote. Furthermore, Qatar states that what Saudi Arabia considers to be "outstanding evidence" is, in fact, a purely speculative assertion. The Panel has already addressed such assertions in this paragraph and concluded that "there has been no evidence to support [these assertions]". In Qatar's view, interim review is not an appropriate stage to reargue the facts.

6.37. The Panel declines to make any change to paragraph 7.66 for the reasons stated by Qatar.

6.38. Saudi Arabia repeats a series of comments and requests, in connection with the Panel's findings on the anti-sympathy measures, that are aimed at having the Panel reach the conclusion that, as of the time of the Panel's establishment, there was no evidence that Saudi Arabia took such measures. Specifically, Saudi Arabia requests that the Panel: (a) reflect Saudi Arabia's insistence that no measures exist in Saudi Arabia to limit the engagement of independent counsel in any way to support the enforcement of intellectual property rights;

[186] @Saudi News 50, Tweet, 6 June 2017 (Arabic original and English translation), (Exhibit QAT-7); Saudi Al-Marsd Online Newspaper, "*Legal figure: Anyone showing sympathy with Qatar on social media platforms will be sentenced to 5 years imprisonment and fined 3 million riyals*" (Arabic original and English translation), 8 June 2017, (Exhibit QAT-11); and Amal Ruslan, *"Saudi Newspaper Okaz: Punishments include imprisonment for those who sympathize with Qatar on social media"*, 7 June 2017 (Arabic original and English translation), (Exhibit QAT-12).

(b) reflect that beIN has signed Powers of Attorney for several Saudi national lawyers to represent its interests in a wide variety of legal and administrative proceedings in Saudi Arabia; and (c) conclude that, in light of the open, electronic line of communication for all Saudi and foreign right holders to submit complaints to SAIP, the Panel must conclude that it would not make any sense for Saudi Arabia to limit access to lawyers in Saudi Arabia, and that the only reason that a complaint is not submitted to SAIP is because a company chooses not to submit a complaint. Without proposing any specific textual changes, Saudi Arabia reiterates the requests reflected in subparagraphs (a), (b) and/or (c) above in relation to **paragraphs 7.60, 7.64, 7.70, 7.71, 7.72, 7.73, 7.95, 7.194, 7.197 and 7.199.**

6.39. Qatar responds that Saudi Arabia is rearguing a factual point that the Panel has ruled on in its Interim Report, and is effectively asking for a different result. Such a request goes beyond the proper scope of the interim review and constitutes an attempt to re-argue the case. Further, the Panel has already summarized elsewhere in the Interim Report most of the arguments and evidence Saudi Arabia enumerated here, and need not reference such arguments and evidence every single time it discusses relevant claims. The only evidence that the Panel did not address in the Interim Report is that related to beIN's signing of powers of attorney for Saudi lawyers to represent its interests in the competition proceedings. However, WTO panels need not refer explicitly to every argument made, or each piece of evidence adduced, by the parties, and the evidence Saudi Arabia submitted on the powers of attorney is not necessary for the Panel to resolve Qatar's claims because it does not add anything of relevance about the IP-related actions and omissions underlying Qatar's claims. Qatar recalls that it has responded, in its previous submissions, to each of the arguments and evidence that Saudi Arabia enumerated in its request, including the assertions regarding the power of attorney. If the Panel opts to reference any of Saudi Arabia's additional arguments or evidence, Qatar respectfully requests that the Panel reference Qatar's corresponding rebuttals as well.

6.40. The Panel does not consider it necessary or appropriate to make any changes to these paragraphs.

The 19 June 2017 Circular, travel restrictions and Ministerial approval requirement

6.41. Saudi Arabia asks the Panel to explain how the Circular is relevant to Qatar's claim in light of Saudi Arabia's "Statement Regarding Saudi Law as Expressed in the '17 June 2017 Circular', 3 October 2019", submitted as Exhibit SAU-41. Saudi Arabia reiterates this comment in relation to different paragraphs referencing the Circular, including **paragraphs 7.67, 7.76** and **7.226**.

6.42. Qatar responds that Exhibit SAU-41—which states that Saudi Arabia intends to be bound by statements made by Saudi representatives concerning the application of Saudi law—is "completely irrelevant" to the point being made in these paragraphs of the Report. Qatar contends that these paragraphs have nothing to do with Saudi representatives' interpretation of the text of the 19 June 2017 Circular. Qatar notes that the Panel has already summarized Exhibit SAU-41 in footnote 28 of its Report, and understands that the Panel's silence on this exhibit reflects an understanding, consistent with Qatar's arguments, that this exhibit is irrelevant, and would add nothing to the Panel's analysis.

6.43. The Panel does not consider Exhibit SAU-41 to be relevant to the discussion in these paragraphs, and has therefore made no revisions.

6.44. With reference to **paragraph 7.89**, Qatar requests that the Panel consider referencing paragraph 22 of the Second Supplemental Expert Report of Professor Gervais, 19 August 2019, (Exhibit QAT-223) in this discussion, which provides further evidence that witnesses must appear in person in judicial proceedings in Saudi Arabia.

6.45. The Panel does not consider it necessary to include a reference to or discussion of QAT-223 in the context of this paragraph.

6.46. Qatar notes that, in **paragraph 7.95**, the Panel refers to Saudi Arabia having taken "'anti-sympathy measures' that directly or indirectly have had the result of preventing beIN from securing legal representation to enforce its IP rights". Qatar understands that, by "anti--sympathy measures" in this paragraph, the Panel may intend to refer to the "measures that, directly or

indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights" referred to in paragraph 7.73. Given that Qatar understands that the "measures" addressed in paragraph 7.73 are not limited solely to the "anti-sympathy measures" described elsewhere in the Panel's factual analysis, Qatar requests the Panel to clarify the relationship between the measures covered in paragraph 7.73 and the scope of the finding in paragraph 7.95.

6.47. The Panel has revised paragraph 7.73.

Non-application of criminal procedures and penalties

6.48. Saudi Arabia requests that the Panel revise **paragraph 7.149** to read as follows: "Saudi Arabia did not ~~itself, nor through Arabsat,~~ provide sufficient evidence or argument to rebut the above mentioned technical reports." Saudi Arabia notes that the Panel has not suggested or established that Saudi Arabia communicates "through Arabsat".

6.49. Qatar responds that Saudi Arabia's request contradicts its own submissions in these proceedings. In its responses to Panel questions following the second substantive meeting, Saudi Arabia confirmed that Arabsat was sharing information with the Saudi government, and it submitted to the Panel a letter from Arabsat to FIFA as an exhibit.[187] Based on this fact alone, the Panel's phrase should remain, as Saudi Arabia was indeed providing evidence "through Arabsat". Furthermore, Saudi Arabia has acknowledged that Arabsat should effectively be viewed as an instrument of the Saudi government, at least with respect to beoutQ piracy.[188] In particular, Saudi Arabia has stated that "[m]oreover, FIFA's confirmation that it 'is in no way implying that Arabsat is involved in, or complicit with, the illegal beoutQ operation' directly undermines claims by the complaining Party that Saudi Arabia is involved in and complicit with beoutQ operations".[189] The only logical way to read this sentence is to understand that: if Arabsat is involved in or complicit with beoutQ, then this necessarily implies that Saudi Arabia is involved in or complicit with beoutQ. Qatar suggests that the Panel consider referring to this statement from Saudi Arabia in its Final Report so as to help clarify Saudi Arabia's position on its relationship with Arabsat.

6.50. The Panel has revised paragraph 7.149 in the light of Saudi Arabia's request.

6.51. Qatar observes that, in **paragraph 7.156**, the Panel states that "[i]n the light of the conclusion stated above on the basis of the evidence canvassed above, the Panel considers it unnecessary to review the witness statement submitted by Qatar". Qatar understands that the Panel does not wish to express, or imply, any views on Saudi Arabia's assertions regarding the credibility of the witness statement and its contents. In order to make that position clear, Qatar requests that the Panel expressly clarify that its treatment of the witness statement does not reflect agreement with Saudi Arabia's allegations about the reliability of the statement.

6.52. In the light of Qatar's stated understanding that this paragraph is drafted in a manner that avoids expressing or implying any views on Saudi Arabia's assertions, the Panel considers it unnecessary to make the addition proposed by Qatar.

Public screenings of beoutQ's broadcasts

6.53. Saudi Arabia requests that the Panel reference, in both **paragraphs 7.161** and **7.163**, its statement that:

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

[187] Letter from Arabsat to FIFA, dated 24 June 2019, (Exhibit SAU-39).
[188] Qatar's comments on Saudi Arabia's response to Panel question No.39, para. 59.
[189] Saudi Arabia's response to Panel question No. 39, para. 19.

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

6.54. Qatar recalls that the Panel has previously referenced Circular No. 41898, at paragraph 7.47 of the Interim Report, which pertains to the Saudi government's prior use of "non-genuine copies of computer software". This Circular has no relevance for paragraphs 7.161 or 7.163, which discuss evidence of beoutQ-related tweets originating from Saudi governmental accounts, as well as Saudi government promotions of public gatherings of beoutQ screenings. If the Panel were to opt to reference Circular No. 41898 in this paragraph, Qatar requests that the Panel recall Qatar's own discussion of this Circular, namely, that it provides additional evidence of the Saudi government's own history of active violation of copyright law.[190] In particular, by submitting this Circular, the Saudi government indicates that, at least through April 2019, its own government offices have been using counterfeit or pirated computer software.

6.55. The Panel does not consider Saudi Arabia's statement concerning Exhibit SAU-35 to be relevant to the discussion in these paragraphs, and has therefore made no revisions.

6.6 Claims under Parts I, II and III of the TRIPS Agreement

Introduction

6.56. Qatar suggests that the second sentence in the footnote to **paragraph 7.167** be deleted, as it is unclear to what Qatar ostensibly agrees. Qatar notes that the point appears to have been added in error.

6.57. The Panel has revised the footnote to paragraph 7.167 in the light of Qatar's request.

6.58. Saudi Arabia requests that the Panel add a longer quotation of the European Union's submission to the text of **paragraph 7.179** when summarizing the third parties' arguments on the interpretation of Article 61 of the TRIPS Agreement.

6.59. Qatar requests that if the Panel were to include the additional language from the European Union's submissions as proposed by Saudi Arabia, the Panel also include a more complete and balanced summary of the European Union's position on Article 61 of the TRIPS Agreement. In particular, Qatar requests that the Panel also recall the European Union's position that "[i]f … it is proven that the Saudi government supported, facilitated and even participated in the alleged piracy, it could be argued that de facto Saudi Arabia does not provide for criminal procedures and penalties in the case of the piracy of beIN's content."[191]

6.60. The Panel has added a new footnote to paragraph 7.179 in the light of the parties' comments.

6.7 Saudi Arabia's invocation of Article 73(b)(iii) of the TRIPS Agreement

The "actions" covered by Saudi Arabia's invocation of Article 73(b)(iii)

6.61. Qatar notes that, in **paragraph 7.273**, the Panel states that "Saudi Arabia's arguments under Article 73(b)(iii) of the TRIPS Agreement focus on its 'comprehensive measures', taken on 5 June 2017" and that "[t]his led Qatar to repeatedly state that these 'actions' are not the measures that it is challenging, and to argue that Saudi Arabia has therefore not actually invoked any defence under Article 73(b) with respect to the specific measures at issue in this dispute". Qatar considers that these sentences do not fully reflect either Saudi Arabia's or Qatar's arguments on the matter. Qatar states that, for its part, Saudi Arabia expressly clarified, including at the two substantive meetings with the Panel, that it "is not asserting that any of the [six measures described at paragraph 2.47 of the Panel's Interim Report] are 'action which it considers necessary for the protection of its essential security interests'". Indeed, Saudi Arabia underscored that such measures were "unrelated" to the "real dispute".[192] Faced with such a clear position by the respondent that it was not invoking the defence in respect of the measures at issue challenged by Qatar,

[190] Qatar's opening statement at the second meeting of the Panel, para. 27.
[191] European Union's third-party submission, para. 34.
[192] Saudi Arabia's opening statement at the first meeting of the Panel, paras. 3, 49.

Qatar's position was, and continues to be, that the defence must be invoked with respect to measures challenged by the complainant and that Saudi Arabia conceded that at least five of the six measures at issue did not meet one of the critical requirements for justification under Article 73(b) of the TRIPS Agreement. Qatar requests the Panel to reflect this argument more accurately and fully in its Report. Qatar also requests that the Panel reproduce or paraphrase paragraph 283 of Qatar's second written submission for this purpose. Moreover, in footnote 374 to its second written submission, Qatar identified several specific instances where Saudi Arabia's submissions stated that the specific actions of which Qatar complains were unrelated to considerations of security.[193] Qatar requests that the Panel reproduce footnote 374, along with the portions of the Saudi submissions to which Qatar cites, in a footnote in the Report.

6.62. The Panel notes paragraph 7.273 introduces the discussion that follows and is not meant to fully reflect either of Saudi Arabia's or Qatar's arguments on this matter. The Panel does not consider it necessary to provide an exhaustive recitation of either party's arguments insofar as they are already reflected in the paragraphs that follow, but has added additional references to the parties' submissions in footnotes, as suggested by Qatar's comment.

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

6.63. With reference to **paragraph 7.281,** Qatar recalls that, at paragraph 7.236, the Panel recounts Qatar's argument as to why Saudi Arabia's articulation of its essential security interests lacks veracity, specifically because Saudi Arabia is, in fact, motivated by ulterior considerations, such as promoting development of its own media industry in connection with sports broadcasting. In paragraph 7.281, the Panel recounts Qatar's argument that Saudi Arabia's articulation of its security interest was vague and general; however, the Panel does not engage with Qatar's argument that the stated security interests lacked veracity as motivations for the measures at issue in these proceedings. Qatar requests that the Panel address this element of Qatar's argument.

6.64. The Panel does not consider it necessary to expand on its discussion of Qatar's arguments relating to Saudi Arabia's articulation of its essential security interests.

The connection between the measures and the essential security interests

6.65. Qatar makes two related requests in connection with **paragraph 2.29** and **paragraph 7.286** concerning the expulsion of Qatari nationals from Saudi territories.

6.66. First, Qatar requests that the Panel include an additional phrase (as underlined) to **paragraph 2.29**, first sentence, so that it would read as follows: "On 5 June 2017, Saudi Arabia severed relations with Qatar, including diplomatic and consular relations, the closure of all ports, the prevention of Qatari nationals from crossing into Saudi territory, <u>and the expulsion within 14 days of Qatari residents and visitors in Saudi territories</u>." Qatar states that, with this addition, the summary would better reflect the full scale of Saudi Arabia's order of 5 June 2017. Qatar notes that the press release from the Embassy of the Kingdom of Saudi Arabia, which the Panel cites in the accompanying footnote, reflects this additional element of the comprehensive measures.[194] Second, Qatar requests that the Panel revise **paragraph 7.286**, second sentence, to include the following language as underlined:

> "Given that Saudi Arabia imposed a travel ban on all Qatari nationals from entering the territory of Saudi Arabia <u>and an expulsion order for all Qatari nationals in the territory of Saudi Arabia</u> 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."

6.67. The Panel has made the revisions proposed by Qatar.

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[193] Saudi Arabia's opening statement at the first meeting of the Panel, paras. 3, 49; and response to Panel question No. 30(a), para. 53.

[194] Saudi Press Agency (SPA), Press Release, Kingdom of Saudi Arabia severs diplomatic and consular relations with Qatar, 5 June 2019; and Embassy of the Kingdom of Saudi Arabia, Washington, D.C., Press Release, Kingdom of Saudi Arabia Cuts Off Diplomatic and Consular Relations with the State of Qatar, 5 June 2017, Exhibit SAU-1 (emphasis added).

6.8 Conclusions and recommendation

6.68. With respect to **paragraph 8.1(b)(ii)**, Qatar requests that the Panel insert an additional phrase, as underlined, so that the sentence would read as follows:

> 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, which has committed wilful copyright piracy on a commercial scale, 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.

6.69. In Qatar's view, this would provide a more fulsome description of Saudi Arabia's violation of Article 61 of the TRIPS Agreement, and is consistent with the Panel's findings in paragraphs 7.214 to 7.217 and paragraph 7.221.

6.70. The Panel does not consider it necessary to revise paragraph 8.1(b)(ii) in the manner proposed by Qatar.

7 FINDINGS

7.1 Preliminary considerations

7.1.1 Overview and order of analysis

7.1. In this dispute, Qatar challenged six different measures relating to beoutQ's piracy of beIN's proprietary content. Qatar claims that these measures, in different combinations, violate multiple distinct obligations of the TRIPS Agreement relating to non-discrimination, the availability of IP rights in Saudi Arabia, and the availability of civil and criminal IP enforcement procedures.[195] Qatar structured its first written submission by first seeking to establish the main facts underlying its claims, in relation to each of these six measures.[196] Qatar then presented each claim under the relevant provision of the TRIPS Agreement (and the Berne Convention (1971), as incorporated by reference into the TRIPS Agreement) in the sequence reflected in that agreement.[197] In response to Saudi Arabia's invocation of Article 73(b)(iii) of the TRIPS Agreement, Qatar submitted that the Panel should first make findings on whether the measures at issue violate the obligations of the TRIPS Agreement, and only then consider whether the affirmative defence under Article 73(b)(iii) applies and justifies any such violations.[198] Qatar also argued that the Panel should reject Saudi Arabia's invocation of Article 73(b)(iii)[199] and its request that the Panel decline to make any findings or a recommendation.[200]

7.2. In its first written submission, Saudi Arabia focused on its severance of all relations with Qatar on 5 June 2017, which it refers to as its "comprehensive measures".[201] Saudi Arabia submitted that its comprehensive measures of 5 June 2017, constitute action justified by the security exception in Article 73 of the TRIPS Agreement.[202] Saudi Arabia also presented the separate and additional argument that the Panel should exercise its discretion to decline to make any findings or a

[195] For a listing of the challenged measures and the legal claims, see Sections 2.3 and 3 above.
[196] See Qatar's first written submission, part III ("Factual Background").
[197] See ibid. part IV ("Saudi Arabia Violates its Obligations under the TRIPS Agreement"). Most of Qatar's claims under the various TRIPS and Berne Convention (1971) provisions invoked by Qatar involve the same combination of measures and factual premises, giving rise to a certain amount of repetition.
[198] Qatar's response to Panel question No. 1, para. 1; and second written submission, para. 234.
[199] Qatar's opening statement at the first meeting of the Panel, paras. 41-121.
[200] Ibid. paras. 122-124.
[201] In its first written submission, Saudi Arabia stated that "[o]n 5 June 2017, the Kingdom of Saudi Arabia … severed diplomatic and consular relations with the complaining Member, and imposed comprehensive measures putting an end to all economic and trade relations between the two countries", and that "from the outset, Saudi Arabia has clearly articulated its determination that the application of comprehensive measures is necessary protect 'its national security from the dangers of terrorism and extremism'". (Saudi Arabia's first written submission, paras. 1 and 6(c).)
[202] Saudi Arabia's first written submission, part II ("Essential Security Interests").

recommendation in this dispute.[203] In subsequent submissions, Saudi Arabia addressed the six measures challenged by Qatar more specifically (and some of the other facts underlying Qatar's claims), for the purposes of demonstrating its "good faith conduct in connection with the invocation" of the exception in Article 73.[204] Saudi Arabia, at the same time, stated that it would "not engage with facts or arguments presented by Qatar".[205]

7.3. In considering the most appropriate order of analysis in which to address these issues, the Panel has a wide margin of discretion to order and structure its analysis as it sees fit.[206] A panel may be guided by the manner in which the complainant has presented its claims, and equally, by the manner in which the respondent has presented its defences.[207] Furthermore, panel findings are often structured to avoid repetition and improves the readability of the Report.[208] A panel's choice on how to order and structure its analysis will often reflect, expressly or implicitly, one or more particular circumstances of the case at hand.[209]

7.4. The Panel will first address Saudi Arabia's request that the Panel decline to make any findings or a recommendation in this dispute. The Panel will then briefly address another set of preliminary questions concerning the scope of the measures challenged by Qatar.

7.5. After having addressed those preliminary questions, the Panel will consider the specific measures and legal claims raised by Qatar. The Panel structures that subsequent part of its analysis by first examining the six measures at issue as defined by Qatar and the facts asserted to support Qatar's claims[210], and then turning to Qatar's multiple legal claims under Parts I, II and III of the TRIPS Agreement.[211]

7.6. The Panel will next examine Saudi Arabia's invocation of the security exception in Article 73 of the TRIPS Agreement. In WTO dispute settlement proceedings, it is "common practice"[212] for panels to begin with an examination of the claims of inconsistency with the relevant covered agreement, to be followed, if any such inconsistency were found to exist, with an assessment of whether the aspect(s) of the measure(s) at issue would be covered by one or more exceptions. Qatar argued that the Panel should follow the traditional approach in this case[213], and Saudi Arabia expressed no

[203] Saudi Arabia's first written submission, part III ("No Satisfactory Settlement Possible at the WTO"). In its opening statement at the first meeting, Saudi Arabia reiterated these two lines of argument but presents them in reverse order. (See Saudi Arabia's opening statement at the first meeting of the Panel, paras. 16-17.)

[204] See Saudi Arabia's first written submission, para. 1; response to Panel question No. 29; and second written submission, section 4.2.4 ("Respect for the Obligation of Good Faith").

[205] See e.g. Saudi Arabia's request for review of the Interim Report.

[206] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[207] See Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277; and Panel Report, *US – Large Civil Aircraft (2nd complaint)*, fn 1005 to para. 7.9.

[208] See, e.g. Panel Reports, *Guatemala – Cement II*, para. 7.5; *Argentina – Financial Services*, para. 7.66; *Russia – Traffic in Transit*, para. 7.106; and *China – TRQs*, para. 7.13.

[209] See, e.g. Panel Reports, *Russia – Pigs (EU)*, para. 7.30; and *Russia – Traffic in Transit*, paras. 7.24-7.26. In the context of discussing the scope of a panel's discretion to structure its analysis within the examination of a given claim, the Appellate Body has stressed that the particular manner of sequencing the steps of an analysis is "adaptable", and "may be tailored to the specific claims, measures, facts, and arguments at issue in a given case". While stressing the importance of "the particular circumstances of a given case", the Appellate Body has stated that "an appellant challenging the sequence and order of analysis adopted by a panel in a given case must demonstrate why, by following a particular sequence, the panel committed an error in the specific circumstances of the case at hand. It is not sufficient for an appellant merely to claim that a panel erred by deviating from a certain sequence and order of analysis in the abstract." (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.229. See also Appellate Body Report, *India – Agricultural Products*, para. 5.26.)

[210] See section 7.2 of this Report ("Acts and omissions attributable to Saudi Arabia").

[211] See section 7.3 of this Report ("Claims under Parts I, II and III of the TRIPS Agreement"). The Panel begins with the claims under Part III, for reasons that are elaborated in section 7.3.3.1 of this Report.

[212] Panel Report, *Colombia – Textiles*, para. 7.16 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 173). In the referenced passage from *Thailand – Cigarettes (Philippines)*, the Appellate Body stated, in a different context, that "an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the 'further and separate' assessment of whether such measure is otherwise justified".

[213] See Qatar's response to Panel question No. 1, paras. 1-14; and second written submission, paras. 234-239.

disagreement.[214] In these circumstances[215], the Panel considers it unnecessary to address the arguments of the third parties any further, most of which take the position that a panel should follow the traditional order of analysis in cases involving security exceptions.[216]

7.1.2 Saudi Arabia's request that the Panel decline to make any findings or recommendation based on Articles 3.4, 3.7 and 11 of the DSU

7.7. Article 3.4 of the DSU provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Article 3.7 of the DSU provides, in a similar manner, that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Article 11 of the DSU provides that "a panel should … make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

7.8. Saudi Arabia requested that the Panel decline to make any findings or recommendation in the present case.[217] Saudi Arabia made that request on the basis that: (a) the current dispute is "not a trade dispute at all"[218], but a "political, geopolitical and essential security dispute"[219]; (b) certain DSU provisions—including, in particular, Article 3.4 of the DSU—raise a "legal impediment" precluding the Panel from ruling on the merits of the claims before it[220]; and (c) any Panel findings would be inconsequential, or a "meaningless step", in resolving this dispute because of the severance of economic relations between the parties, as was the case in the GATT dispute *US – Nicaraguan Trade*.[221]

7.9. While Saudi Arabia did not present the Panel with any arguments formulated in terms of the Panel's "jurisdiction" or the "justiciability" of the dispute[222], several third parties, including Australia[223] and the European Union[224], construed Saudi Arabia's arguments as implying that Saudi Arabia regarded the matter as "non-justiciable". Furthermore, the United States argued that

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[214] Saudi Arabia did not respond to Panel question No. 1, which invited the parties and third parties to provide their views on the proper order of analysis in this case.

[215] The different order of analysis followed by the panel in *Russia – Traffic in Transit* appears to have been influenced by circumstances that are distinguishable from the present dispute, most notably "the specific way Russia presented its arguments with regard to the jurisdiction of the panel". (European Union's third-party submission, para. 39.) In this case, neither Saudi Arabia nor any third party argued that its invocation of Article 73 deprives the Panel of jurisdiction.

[216] Brazil, Canada, China, the European Union, Japan, Norway and Singapore urged the Panel to follow the same order of analysis as that proposed by Qatar. (See Brazil's third-party statement, paras. 2-6; Canada's response to Panel question No. 1, para. 1 (referring to Canada's third-party submission, paras. 8-19; and Canada's third-party statement, paras. 2-5); European Union's third-party submission, paras. 37-39; European Union's response to Panel question No. 1, para. 2; Japan's response to Panel question No. 1, paras. 1-5; Norway's third-party submission, paras. 4-5; Norway's third-party statement, paras. 3-5; and Singapore's response to Panel question No. 1.) In contrast, the United States argued that the Panel should begin and end its analysis by taking note of a respondent's invocation of a security exception. (United States' response to Panel question No. 1 to third parties, paras. 1 and 7.)

[217] Saudi Arabia's first written submission, paras. 4, 9-13 and 15; opening statement at the first meeting of the Panel, paras. 10-16; closing statement at the first meeting of the Panel, paras. 3-5; response to Panel question No. 36, paras. 77-85; second written submission, paras. 1-13 and 69-70; opening statement at the second meeting of the Panel, paras. 2-8 and 49-50; and closing statement at the second meeting of the Panel, paras. 2-5 and 8-10.

[218] Saudi Arabia's first written submission, para. 11.

[219] Saudi Arabia's closing statement at the second meeting of the Panel, para. 1. See also opening statement at the first meeting of the Panel, paras. 7 and 14; closing statement at the first meeting of the Panel, para. 3; and second written submission, paras. 69-70.

[220] Saudi Arabia's response to Panel question No. 36(a), para. 79. See Saudi Arabia's first written submission, paras. 4, 9-13 and 15; opening statement at the first meeting of the Panel, paras. 7-8 and 11-15; closing statement at the first meeting of the Panel, paras. 3-4; response to Panel question No. 36(a), paras. 78-80; and second written submission, paras. 2-3 and 70.

[221] Saudi Arabia's response to Panel question No. 36(a) and (b), paras. 77-81.

[222] The Panel notes that Saudi Arabia's integrated executive summary presented its arguments concerning "The Matter Before the Panel", "Limited Jurisdiction to Assess Essential Security Interests", and "Impossibility of Satisfactory Settlement" under the heading of "Jurisdictional Issues". (See Saudi Arabia's integrated executive summary, p. 3.) According to Paragraph 22 of the Panel's Working Procedures, "executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case".

[223] Australia's third-party oral statement, para. 5.

[224] European Union's third-party submission, para. 45.

Saudi Arabia's invocation of the security exception in Article 73(b)(iii) of the TRIPS Agreement is not reviewable, and therefore, the matter is not "justiciable".[225] There is a degree of overlap between the third parties' arguments presented in terms of "justiciability", on the one hand, and the arguments presented by the parties and third parties in relation to Saudi Arabia's argument that the Panel should decline to make any findings or recommendation based on Articles 3.4, 3.7 and 11 of the DSU, on the other hand.

7.10. The Panel recalls that the issue of whether a panel has the discretion to decline to exercise jurisdiction that has been validly established, in circumstances where the WTO dispute forms only one element in a wider dispute between the parties, was directly addressed by the panel and Appellate Body in *Mexico – Taxes on Soft Drinks*. In that dispute, Mexico argued that the United States' WTO claims were inextricably linked to a larger dispute concerning compliance with its obligations under the North American Free Trade Agreement (NAFTA), and argued that although the WTO panel did have jurisdiction over the dispute, the panel also had the jurisdiction to decide whether or not to exercise its substantive jurisdiction.[226] Mexico argued that the panel should have declined to exercise jurisdiction, as the dispute involved predominant elements derived from rules of international law that were incapable of settlement at the WTO, namely, NAFTA rules.[227]

7.11. Examining its duty under Article 11 of the DSU to make an objective assessment of the matter, the panel in *Mexico – Taxes on Soft Drinks* found that, under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it.[228] The Appellate Body upheld the panel's finding[229], stating that it saw "no reason … to disagree with the Panel's statement that a WTO panel 'would seem … not to be in a position to choose freely whether or not to exercise its jurisdiction.'"[230] Regarding the duty in Article 11 of the DSU to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements", the Appellate Body stated that it "[i]s difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it".[231] The Appellate Body stated that "we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it."[232]

7.12. The panel in *Russia – Traffic in Transit* summarized some of the foregoing points when it observed that:

> The ICJ has rejected the "political question" argument, concluding that, as long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue.[233] … Moreover, the Panel notes that in *Mexico – Taxes on Soft Drinks*, the Appellate Body expressed the view that a panel's decision to decline to exercise validly established jurisdiction would not be consistent with its obligations under Articles 3.2 and 19.2 of the DSU, or the right of a Member to seek redress of a violation of obligations within the meaning of Article 23 of the DSU.[234]

[225] United States' response to Panel question No. 8 to third parties, paras. 25-28.
[226] Panel Report, *Mexico – Taxes on Soft Drinks*, para. 4.102.
[227] Ibid. para. 4.104.
[228] Ibid. para. 7.8. See ibid. para. 7.9.
[229] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 57.
[230] Ibid. para. 53 (quoting Panel Report, *Mexico – Taxes on Soft Drinks*, para. 7.8).
[231] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51.
[232] Ibid. paras. 44 and 54.
[233] Panel Report, *Russia – Traffic in Transit*, fn 183 to para. 7.103 (referring to International Court of Justice, Advisory Opinion, *Certain Expenses of the United Nations*, (United Nations) (1962) I.C.J. Reports, p. 155; International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić* (1995), Case No. IT-94-1-A, paras. 23-25).
[234] Panel Report, *Russia – Traffic in Transit*, fn 183 to para. 7.103 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53).

7.13. With these general considerations in mind, the Panel will now turn to the specific arguments presented by Saudi Arabia, beginning with its argument that the current dispute is "not a trade dispute at all"[235], but a "political, geopolitical, and essential security dispute".[236]

7.14. Saudi Arabia stated that it had severed all diplomatic and economic ties with the complaining Member, and emphasized that the "only relevant issue" in this dispute is that "this is not a 'trade dispute' at all".[237]Saudi Arabia contends that the underlying dispute concerns only non-trade interests that must be addressed following changes in behaviour, and only then in the context of bilateral and regional political discussions. For Saudi Arabia, political and essential security disputes of this kind cannot be resolved at the WTO, and should not be brought to the WTO disguised as trade disputes. If complainants bring political and security questions to the WTO inappropriately, panels should protect the integrity of the dispute settlement system and refuse to proceed with disputes that arise from non-trade-related political and security issues that cannot be resolved at the WTO.[238] According to Saudi Arabia, in the light of the total severance of diplomatic and consular relations between the parties, the Panel should consider whether any potential finding or ruling of the DSB could in any way address the underlying causes of the comprehensive rupture in diplomatic and consular relations between the parties.[239]

7.15. Qatar disagreed with Saudi Arabia's position that there is no "trade dispute", and that the "real dispute" lies elsewhere.[240] Qatar recalled that the Panel's terms of reference are to "examine, in light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Qatar in document WT/DS567/3", i.e. Qatar's panel request, which identifies the measures at issue and Qatar's claims.[241] Qatar submitted that Saudi Arabia had violated several provisions of the TRIPS Agreement, that it (Qatar) had framed its claims in its panel request accordingly, and that such claims circumscribe the Panel's terms of reference. Qatar contended that the matter referred to the Panel, as defined by Qatar's panel request, is, "by definition, a 'trade dispute' over which the Panel had validly been conferred jurisdiction" and, in Qatar's view, "[t]he Panel must exercise that jurisdiction".[242]

7.16. The Panel is not persuaded that it can decline to make any findings or a recommendation, i.e. "decline to exercise its jurisdiction" on the basis of Saudi Arabia's argument that the "real dispute"[243] between the parties is not a "trade dispute".[244] The Panel considers that it is evident from its terms of reference that it has not been asked by Qatar or the DSB to make any findings or recommendation on any wider dispute between the parties. The matter raised by Qatar in its panel request, which now forms the Panel's terms of reference, concerns alleged violations of the TRIPS Agreement. Accordingly, the matter before the Panel falls within the legal subject-matter jurisdiction of a WTO dispute settlement panel.

7.17. For similar reasons, the Panel is not persuaded that it can decline to exercise jurisdiction on the basis of Saudi Arabia's argument that it is impossible for any findings or recommendation to secure a positive solution to "the matter" and/or achieve a satisfactory settlement of "the dispute" under the DSU. The Panel considers that this argument, like Saudi Arabia's argument concerning the "real dispute" not being a "trade dispute", is directed at the wider political dispute between the parties that is not at issue before the Panel.[245] The Panel recalls that Article 3.4 of the DSU provides that recommendations or rulings made by the DSB are to be aimed at achieving a "satisfactory

[235] Saudi Arabia's first written submission, para. 11.

[236] Saudi Arabia's closing statement at the second meeting of the Panel, para. 1. See also opening statement at the first meeting of the Panel, paras. 7 and 14; closing statement at the first meeting of the Panel, para. 3; and second written submission, paras. 69-70.

[237] Saudi Arabia's first written submission, para. 11.

[238] Saudi Arabia's second written submission, paras. 69-70. See also first written submission, para. 12; opening statement at the first meeting of the Panel, para. 14; and closing statement at the first meeting of the Panel, para. 3.

[239] Saudi Arabia's opening statement at the first meeting of the Panel, para. 13.

[240] Qatar's response to Panel question No. 36, para. 219 (quoting Saudi Arabia's first written submission, para. 11; and closing statement at the first meeting of the Panel, para. 6).

[241] Qatar's closing statement at the first meeting of the Panel, paras. 3-4. (emphasis omitted)

[242] Qatar's response to Panel question No. 36, para. 219. (emphasis omitted)

[243] See paragraph 7.13 of this Report.

[244] Saudi Arabia's first written submission, para. 11.

[245] For instance, in its first written submission, Saudi Arabia stated that "no finding of the Panel and no ruling of the DSB will in any way address the underlying causes of the comprehensive rupture in relations between the complaining Member and Saudi Arabia". (Saudi Arabia's first written submission, para. 15.)

settlement of the matter in accordance with the rights and obligations under [the DSU] and under the covered agreements". The Panel considers that the "matter" referred to in Article 3.4 is the "matter referred to the DSB" by a complainant in its panel request, as provided under Article 7.1 of the DSU.[246] Thus, in this dispute, the matter for which a satisfactory settlement is to be achieved is the "matter referred to the DSB" by Qatar in its panel request, which, in turn, circumscribes the Panel's terms of reference. The Panel is therefore not persuaded by Saudi Arabia's arguments under Articles 3.7 and 11 of the DSU.[247]

7.18. In response to a question from the Panel inviting the parties and third parties to comment on the relevance of the Appellate Body's analysis in *Mexico – Taxes on Soft Drinks* to Saudi Arabia's request that the Panel decline to make any findings or recommendation[248], Saudi Arabia argued that "in the present dispute there exist stark legal impediments not present or considered in *Mexico – Taxes on Soft Drinks*". Specifically, Saudi Arabia stated that the implications of Article 3.4 of the DSU (which provides that "recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter") were not considered in that case and that, in its view, the provisions of Article 3.4 would amount to such a "legal impediment" that would preclude a panel from ruling on the merits of the claims before it.[249] However, the Panel notes that Saudi Arabia has identified no case in which a panel or the Appellate Body has found that the fairly general wording of Article 3.4 of the DSU can constitute a "legal impediment" that would preclude a panel from ruling on a particular measure or claim.

7.19. The Panel notes that Saudi Arabia further argues that, given the comprehensiveness of the diplomatic and economic measures imposed by Saudi Arabia and other Members in the region, and the underlying rationale for those measures, it is clear that Qatar has not exercised sound judgement in taking action under Article 3.7 of the DSU.[250] The Panel recalls the Appellate Body's statement in *Mexico – Taxes on Soft Drinks* that Article 3.3 of the DSU provides that the "prompt settlement of situations in which *a Member considers* that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO".[251] Thus, the Appellate Body stated that there is "little in the DSU that explicitly limits the rights of WTO Members to bring an action".[252] The Appellate Body then added that Article 3.7 of the DSU states that "[b]efore bringing a case, a Member shall exercise *its judgement* as to whether action under these procedures would be fruitful", and that Article 3.10 thereof stipulates that "if a dispute arises, *all Members will engage* in these procedures *in good faith in an effort to resolve the dispute*."[253] Given the discretion granted to complainants in deciding

[246] Article 7.1 of the DSU establishes the following standard terms of reference: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." (emphasis added)

[247] The Panel considers that the "dispute" referred to in Article 3.7 and the "matter" referred to in Article 11, like the "matter" referred to in Article 3.4, is the narrow one currently before the Panel, and not what Saudi Arabia referred to as the "real dispute".

[248] In its first written submission, Saudi Arabia referred to Articles 3.4, 3.7 and 11 of the DSU in support of its request that the Panel decline to make any findings or a recommendation. Saudi Arabia did not refer to any panel or Appellate Body reports interpreting or applying those provisions. However, the issues raised by Saudi Arabia's request, and the DSU provisions that it refers to, were addressed by the panel and the Appellate Body in *Mexico – Taxes on Soft Drinks.* Furthermore, without referring to any WTO cases dealing with these provisions, Saudi Arabia apparently sought to distinguish that case by arguing that "[t]his case does not concern whether the WTO or some other forum is more appropriate for the settlement of a trade dispute". (Saudi Arabia's first written submission, para. 11.)

[249] Saudi Arabia's response to Panel question No. 36(a), para. 79.

[250] Saudi Arabia's first written submission, paras. 9 and 13; and response to Panel question No. 36(b), para. 82.

[251] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52. (emphasis original) The Appellate Body in *EC – Bananas III* has made a similar observation with respect to Article XXIII:1 of the GATT 1994 and Article 3.7 of the DSU, stating that:

> a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful". (Appellate Body Report, *EC – Bananas III,* para. 135. See Japan's response to Panel question No. 8, para. 36.)

[252] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, fn 101 to para. 52 (quoting Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312).

[253] Ibid. (emphasis original)

whether to bring a dispute under the DSU, the Panel does not consider that Qatar failed to exercise its judgement within the meaning of Article 3.7 in bringing this case.

7.20. The present dispute involves claims of violation. Where a WTO panel finds a measure inconsistent with a covered agreement, Article 19.1 of the DSU mandates the panel to recommend that the Member concerned "bring the measure into conformity" with the covered agreement.[254] Once the DSB adopts the panel report, the panel's recommendation becomes part of the "recommendations and rulings of the DSB"[255], with which the respondent has a legal obligation to comply.

7.21. The Panel thus considers the present dispute distinguishable from *US – Nicaraguan Trade*, a GATT dispute in which the panel declined to make findings or a recommendation in the context of the invocation of Article XXI of the GATT 1947.[256] That panel did so in respect of a non-violation claim, in respect of which the GATT CONTRACTING PARTIES could only make a non-binding recommendation that the United States withdraw its embargo, or authorize Nicaragua to suspend the application of obligations toward the United States.[257] Given the two-way trade embargo between the United States and Nicaragua, the panel considered that any authorization permitting Nicaragua to suspend obligations to the United States "could not alter the balance of advantages accruing to the two contracting parties under the General Agreement in Nicaragua's favour".[258] In the present dispute, Qatar and Saudi Arabia have not imposed a two-way embargo on trade or mutually suspended IP rights, and Qatar indicated that the DSB's authorization of a complainant to suspend obligations would be valuable given the remedies outlined in the DSU.[259]

7.22. Before concluding its examination of this issue, the Panel observes that Saudi Arabia did not argue that the TRIPS Agreement did not apply, and the Panel sees no issue regarding the applicability of the TRIPS Agreement and the DSU to Saudi Arabia's relations with Qatar. Article 63 of the Vienna Convention on the Law of Treaties provides that "[t]he severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty." Likewise, Article XIII:1 of the WTO Agreement does not recognize the severance of relations between two Members as a circumstance resulting in the non-application of the multilateral agreements on trade in goods, the General Agreement on Trade in Services, or the TRIPS Agreement.[260] Saudi Arabia argued that the circumstances underlying and

[254] In contrast, Article 26.1(b) of the DSU provides that in a non-violation case, the panel or the Appellate Body shall recommend that the Member concerned "make a mutually satisfactory adjustment".

[255] See, e.g. Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.299 (stating that "once the Appellate Body's findings are adopted by the DSB, they become the 'recommendations or rulings *of the DSB*'"). (emphasis original)

[256] As noted earlier, Saudi Arabia's first written submission referred to Articles 3.4, 3.7 and 11 of the DSU in support of its request that the Panel decline to make any findings or a recommendation, and did not refer to any panel or Appellate Body reports interpreting or applying those provisions. However, its arguments broadly paralleled the arguments that the United States presented, and which the panel ultimately accepted, in *US – Nicaraguan Trade*. In response to a question from the Panel, Saudi Arabia stated that it concurs with the panel's approach in *US – Nicaraguan Trade*. (Saudi Arabia's response to Panel question No. 36(b).) In response to a question from the Panel inviting the parties' and third parties' views on the relevance of the GATT panel's findings in *US – Nicaraguan Trade*, the United States submitted that the panel's findings makes clear that "the question of whether an essential security action is inconsistent with a covered agreement is not justiciable", and that the GATT panel did not have the competence to address national security matters. (United States' response to Panel question No. 8, paras. 17 and 31.) The UAE commented that the GATT panel's special terms of reference could be read as implying that the parties recognized that the GATT CONTRACTING PARTIES could not play a useful role in the resolution of the dispute on matters of security between the parties. (United Arab Emirates' response to Panel question No. 8, para. 40.)

[257] GATT Panel Report, *US – Nicaraguan Trade,* para. 5.7. The panel was established with special terms of reference that precluded it from examining the validity of the invocation of Article XXI of the GATT 1947. (Ibid. paras. 1.4 and 5.3.)

[258] Ibid. para. 5.11. In this connection, the panel observed that Nicaragua accepted that it would be "a meaningless step". (Ibid.)

[259] Qatar's response to Panel question No. 36, paras. 213-214. Among other things, Qatar considered that the suspension of the protections of Saudi nationals' IP rights may provide some level of redress to Qatar for Saudi Arabia's TRIPS violations. (Qatar's response to Panel question No. 36, paras. 211-214.)

[260] Article XIII of the WTO Agreement is entitled "Non-Application of Multilateral Trade Agreements between Particular Members", and paragraph 1 thereof states that "[t]his Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application."

evidenced by its severance of relations with Qatar should be taken into account for purposes of applying the two sets of WTO provisions that it refers to, namely: (a) for purposes of establishing that the conditions of the security exception in Article 73(b)(iii) of the TRIPS Agreement are satisfied, and (b) for purposes of establishing that the conditions for a panel making findings and recommendations, as reflected in Articles 3.4, 3.7 and 11 of the DSU are not satisfied.

7.23. For all of these reasons, the Panel concludes that it cannot decline to exercise its jurisdiction over the claims of WTO-inconsistency that fall within its terms of reference and that the matter is justiciable.

7.1.3 The measures challenged by Qatar

7.24. The second set of preliminary questions concerns the scope of the matter before the Panel, and more precisely the scope of the measures that are properly before the Panel.

7.25. The specific measures at issue identified by Qatar are the six measures reflected in paragraph 2.47 of this Report. Qatar's submissions are directed to those measures individually and the extent to which they "work together"[261], in various combinations, to create the results enumerated in paragraph 2.46. These six specific measures are: (a) the 19 June 2017 Circular, (b) the anti-sympathy measures, (c) the travel restrictions, (d) the Ministerial approval requirement, (e) the non-application of criminal procedures and penalties, and (f) the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts. Qatar asserts that it is the "combined operation"[262] of the first four of these six measures that "make it unduly difficult for Qatari nationals to access civil judicial remedies" (in the sense of the third bullet in paragraph 2.46).[263] Thus, the Panel's findings are directed at the six specific measures as defined in paragraph 2.47 of this Report.

7.26. The Panel notes that Qatar's submissions referred to some of the six measures in more than one way. In its first written submission, Qatar repeatedly referred to the "targeted restrictions of intellectual property protections".[264] In response to a Panel question, Qatar clarified that it was correct to read any references to "targeted restrictions of intellectual property protections" in its first written submission to mean the 19 June 2017 Circular and not some broader category of measures.[265] As regards the requirement for Ministerial approval of Copyright Committee decisions as applied to beIN, Qatar variously referred to the Ministry's "denial of access to administrative tribunals and courts"[266], to the Ministry's having acted to close the "gates" with respect to adjudicating infringement of copyrights held by Qatari nationals[267], to the Ministry having barred beIN from accessing Saudi Arabia's administrative tribunals or courts to launch a copyright infringement case[268], or more simply to the "gatekeeping function".[269] In response to a Panel question, Qatar clarified that these various formulations are different ways of referring to the same measure.[270]

7.27. The Panel further notes that Qatar included extremely broad language in paragraph 5 of its panel request which may have introduced a further element of ambiguity with respect to the measures that it is challenging. The Panel recalls that Article 6.2 of the DSU requires a complainant to identify "the specific measures at issue" in its panel request. However, paragraph 5 of Qatar's panel request states that "[t]he measures at issue in this request include all written and unwritten, published and unpublished, measures (including omissions) that have resulted in Saudi Arabia's failure to protect IP rights, including with respect to IP rights held (or applied for) by, *inter alia*,

[261] Qatar's second written submission, para. 290. See Qatar's responses to Panel question No. 2(a), para. 15, and Panel question No. 5, para. 25.
[262] Qatar's second written submission, para. 276.
[263] See paragraph 2.46, third bullet, of this Report.
[264] Qatar's first written submission, paras. 156, 157 and 187, heading IV.A.2(c), paras. 205, 206, 207, 224, 225, 233, 234, 240, 326, 327, 328, 345, 352, 374 and 396.
[265] Qatar's response to Panel question No. 3, para. 22.
[266] Qatar's first written submission, paras. 252, 269, 322, 327, 328, 345, 352, 374 and 396.
[267] Ibid. paras. 148, 350, 381 and 401.
[268] Ibid. paras. 123, 350 and 381.
[269] Ibid. paras. 194 and 227.
[270] Qatar's response to Panel question No. 4, para. 23.

Qatari entities and Qatari individuals". In response to a question from the Panel, Qatar clarified that it is not challenging any measures other than those set out in paragraphs 2.46 and 2.47 above.[271]

7.28. Saudi Arabia observed that, in paragraph 6 of Qatar's panel request, Qatar noted that Saudi Arabia had "imposed a scheme of diplomatic, political, and economic measures against Qatar", and that "[s]uch measures impacted, *inter alia*, the ability of Qatari nationals to protect intellectual property rights in Saudi Arabia".[272] Saudi Arabia considered that this reference to the "scheme" of such measures, in paragraph 6 of Qatar's panel request, "refers to the comprehensive 'measures' as the *basis* for [the application of the] additional, related measures identified by the complaining Party that allegedly impact the protection of intellectual property".[273] As a result, Saudi Arabia emphasized that the comprehensive "measures" are "a measure affirmatively included in the Panel's terms of reference", and that "the complaining Party cannot deny Saudi Arabia the opportunity to raise defenses, especially based on *Security Exceptions*, with reference to [such a measure]".[274] According to Saudi Arabia, "the extension to and coverage of the very same comprehensive measures within the Panel's terms of reference has been asserted by the complaining Party since at least 19 November 2018 and cannot be disputed at this stage".[275]

7.29. Notwithstanding its reference to these "comprehensive measures" in its panel request, Qatar stated on several occasions that its claims do not pertain to such measures. In its opening statement at the first substantive meeting, Qatar stressed that it "does *not* challenge, in this dispute, Saudi Arabia's decision to sever diplomatic and economic ties".[276] In its closing statement at the same meeting, Qatar reiterated that "[t]his dispute does not include a challenge to Saudi Arabia's decision to cut off diplomatic and economic relations with Qatar".[277] In its second written submission, Qatar added that while it "recalls the scheme of coercive economic measures imposed by Saudi Arabia on 5 June 2017 as 'background' in Section III.A of its First Written Submission, Qatar pursue[d] no claims against that scheme"[278] and reiterated that it "has never pursued claims against Saudi Arabia's imposition of 'comprehensive measures' in this dispute".[279] Qatar considered that whether Saudi Arabia can justify *other* measures at issue—either individually or by grouping them into a "comprehensive measure" or "overall scheme"—is entirely irrelevant for the present dispute.[280] This leaves open whether the measures which are challenged individually and collectively fall within, or are a necessary consequence of, the comprehensive measures.

7.30. Qatar made certain statements in its submissions that might be construed as constituting "as such" claims in respect of two aspects of Saudi law. The Panel recalls that in WTO law, there is an important distinction between "as such" claims and "as applied" claims.[281] It is well established that any "as such" claim must be clearly stated in the panel request, and that certain thresholds must be satisfied to uphold any such claim (e.g. the law must mandate, not merely allow for, WTO-inconsistent conduct). Regarding the need to ensure that any "as such" claim is clearly stated in the panel request, the Appellate Body has stated that:

> We would therefore urge complaining parties to be *especially diligent* in setting out "as such" claims in their panel requests as clearly as possible. In particular, we would expect that "as such" claims state unambiguously the specific measures of municipal law challenged by the complaining party and the legal basis for the allegation that those

[271] Qatar's response to Panel question No. 2(b), para. 21.
[272] Saudi Arabia's response to Panel question No. 32(a), para. 68; and second written submission, para. 24 (referring to WT/DS567/3, para. 6).
[273] Saudi Arabia's second written submission, para. 25. (italics added, underlining original)
[274] Saudi Arabia's second written submission, para. 26; and response to Panel question No. 32(a), paras. 65 and 69-71. (underlining original)
[275] Saudi Arabia's second written submission, para. 26; and response to Panel question No. 32(a), paras. 65 and 69-71. (underlining original)
[276] Qatar's opening statement at the first meeting of the Panel, para. 84. (emphasis original)
[277] Qatar's closing statement at the first meeting of the Panel, para. 4. (emphasis original)
[278] Qatar's second written submission, para. 279. (fn omitted)
[279] Ibid. para. 280.
[280] Ibid. para. 281.
[281] "As such" claims are directed at a provision of a law or regulation that mandates WTO-inconsistent conduct as such, independent of any instances of its application. "As applied" claims are directed at the application of a law, regulation or other measure in certain instances, without claiming that any provision thereof is necessarily WTO-inconsistent in and of itself. (See generally Appellate Body Report, *US – 1916 Act*, paras. 60-61.)

> measures are not consistent with particular provisions of the covered agreements. Through such straightforward presentations of "as such" claims, panel requests should leave respondent parties in little doubt that, notwithstanding their own considered views on the WTO-consistency of their measures, another Member intends to challenge those measures, as such, in WTO dispute settlement proceedings.[282]

7.31. With the foregoing in mind, the Panel recalls that in its first written submission, Qatar repeatedly stated that the nature of the Ministerial approval requirement in the Copyright Law "highlights a fundamental flaw in Saudi Arabia's copyright regime"[283], namely, the lack of access to civil judicial procedures for copyright owners that the Minister disfavours, in his capacity as a political actor working under the direction of the Kingdom of Saudi Arabia.

7.32. However, Qatar's panel request and first written submission did not present any "as such" claim regarding the requirement for Ministerial approval of Copyright Committee decisions. In response to a question from the Panel, Qatar confirmed that it is not making an "as such" claim, and that its claim is that the requirement for Ministerial approval of Copyright Committee decisions "as applied" to beIN gives rise to violations of the specific provisions of the TRIPS Agreement and the Berne Convention (1971).[284] In the absence of an "as such" claim relating to the Ministerial approval requirement, the relevant question before the Panel is whether that requirement has, through its application or existence, worked alone or together with other measures to deny beIN access to civil and criminal enforcement procedures. The burden of proof rests on Qatar to provide sufficient evidence to substantiate its assertions to that effect.

7.33. A second aspect of Saudi law that Qatar discussed in terms that might be construed as constituting an "as such" claim relates to the 19 June 2017 Circular. In its first written submission, Qatar asserted that the 19 June 2017 Circular "served to effectively strip beIN of the legal right to protect any intellectual property rights related to the beIN channels"[285], and "precluded beIN's ability to operate in Saudi Arabia or enforce its intellectual property rights by stripping its legal right to protect its intellectual property rights".[286] Saudi Arabia countered that beIN had not lost the right to protect any related IP rights in Saudi Arabia by virtue of the 19 June 2017 Circular because, while it is true that, under Saudi law, "unlicensed distributors of illegally distributed content do not have a right to protect copyright in such illegally distributed content"[287], Saudi Arabia made no determination that beIN continued to distribute its content after 19 June 2017.[288]

7.34. Qatar responded that this "admission" by Saudi Arabia about its law, namely, that "beIN—or any other entity which Saudi Arabia considers is broadcasting illegally (*i.e.*, without a license or for other reasons)—could not protect copyright or related rights in its own content"[289], establishes another "deficiency" in Saudi Arabia's domestic "copyright regime".[290] In developing this argument, Qatar referred to "the violations of the TRIPS Agreement evident from Saudi law and practice".[291] Qatar also referred to the finding of the panel in *China – Intellectual Property Rights* that, although international copyright rules allow WTO Members to censor content, a WTO Member is not allowed to deny copyright protection to unlicensed content.[292]

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[282] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 173. (emphasis original)

[283] Qatar's first written submission, paras. 140, 195, 228 and 409.

[284] Qatar's response to Panel question No. 7, para. 56.

[285] Qatar's first written submission, para. 41.

[286] Ibid. para. 144.

[287] Saudi Arabia's opening statement at the second meeting of the Panel, para. 13.

[288] Saudi Arabia's response to Panel question No. 29, para. 47; and opening statement at the second meeting of the Panel, para. 14. Saudi Arabia clarified that "it affords copyright protection to all entities even if they are not licensed to broadcast in Saudi Arabia, with the exception of entities found to have distributed content illegally (*i.e.*, without a broadcasting license) in Saudi Arabia". (Saudi Arabia's response to Panel question No. 41, para. 24.)

[289] Qatar's second written submission, para. 172 (referring to Second Supplemental Expert Report of Professor Gervais, 19 August 2019, Exhibit QAT-223, para. 3).

[290] Qatar's response to Panel question No. 41, para. 20 (referring to Qatar's second written submission, paras. 169-173); and para. 24.

[291] Second Supplemental Expert Report of Professor Gervais, 19 August 2019, Exhibit QAT-223, para. 2.

[292] Qatar's response to Panel question No. 41, para. 20 (referring to Second Supplemental Expert Report of Professor Gervais, 19 August 2019, Exhibit QAT-223, para. 4 (referring, in turn, to Panel Report, *China –*

7.35. The Panel recalls the findings of the panel in *China – Intellectual Property Rights* that Article 4(1) of China's Copyright Law—which denied copyright protection to works whose publication and/or dissemination was prohibited by law—was inconsistent "as such" with Article 5(1) of the Berne Convention.[293] However, since Qatar's panel request did not include an "as such" claim against this alleged deficiency in Saudi law, Qatar cannot challenge this law independently of any instances of its application to beIN or any other entity. The Circular is mentioned by name in Qatar's panel request, where it is characterized in terms that focus on the "distribution of beIN media content".[294] Likewise, in Qatar's first written submission, all references to the effect of the 19 June 2017 Circular focus on "Qatari nationals" or "beIN" having been stripped of their right to protect their IP rights.[295] This narrow focus on how the Circular affected "Qatari nationals" (i.e. beIN) also aligns to the way in which Qatar formulated the measures, as set out in paragraph 2.46 of this Report.

7.36. Accordingly, since Qatar's claim in relation to the Circular is an "as applied" claim, Qatar bears the burden of substantiating its assertion that the 19 June 2017 Circular "served to effectively strip beIN of the legal right to protect any intellectual property rights related to the beIN channels".[296] To do so, Qatar would have to adduce evidence to show that beIN had actually taken action to protect its IP rights and that such action was barred or in some way hampered by the Saudi authorities.

7.2 Acts and omissions claimed by Qatar to be attributable to Saudi Arabia

7.2.1 Introduction

7.37. The following factual circumstances underlying Qatar's claims are undisputed. First, beIN has not initiated civil enforcement procedures against beoutQ before Saudi tribunals, and neither has any other foreign right holder.[297] Second, Saudi authorities have not applied criminal procedures or penalties against what Qatar has characterized as beoutQ's commercial-scale piracy.[298] Third, beoutQ's illegal broadcasts of some 2018 World Cup matches were publicly screened in Saudi Arabia.[299] However, the parties disagree about the extent to which any of these circumstances is the result of acts and omissions attributable to Saudi Arabia.

7.38. While Qatar asserted that Saudi Arabia had taken a number of measures (i.e. the 19 June 2017 Circular, anti-sympathy measures, travel restrictions and Ministerial approval requirement) whose "combined operation … deprive[s] Qatari nationals of access to civil judicial procedures and remedies in respect of intellectual property rights"[300], Saudi Arabia submitted that these alleged measures either do not exist or do not have the effects alleged by Qatar.[301] Similarly, Saudi Arabia stated that the reason for the absence of criminal procedures and penalties being applied against beoutQ is that beIN and other foreign right holders have not provided Saudi authorities with sufficient supporting evidence and cooperation.[302] Furthermore, Saudi Arabia suggested that any public

Intellectual Property Rights, paras. 7.120-7.139)). The right to censor content is recognized in Article 17 of the Berne Convention (1971), which, in turn, is incorporated into the TRIPS Agreement by Article 9.1.

[293] Panel Report, *China – Intellectual Property Rights*, paras. 7.28-7.143. That panel noted that "this claim challenges China's Copyright Law, in particular Article 4(1), not as it has been applied in any particular instance but 'as such'." (Ibid, para. 7.28.)

[294] Qatar's panel request, para. 8.

[295] Qatar's first written submission, paras. 202, 230, 251, 268, 300-301, 321, 347, 379 and 399.

[296] Ibid. para. 41.

[297] Qatar's response to Panel question No. 43, paras. 47 and 60; Saudi Arabia's response to Panel question No. 29, para. 35; Saudi Arabia's second written submission, para. 61; and Saudi Arabia's response to Panel question No. 39, para. 13.

[298] Qatar's first written submission, para. 131; and Saudi Arabia's response to Panel question No. 29, para. 45.

[299] Qatar's first written submission, paras. 86-94; Saudi Arabia's response to Panel question No. 30(a), paras. 61-62; and Saudi Arabia's second written submission, para. 67.

[300] Qatar's second written submission, para. 276. See also ibid. para. 290.

[301] See generally Saudi Arabia's response to Panel question No. 29, paras. 26-27, 35-36, and 47-50; and second written submission, paras. 53-58.

[302] See generally Saudi Arabia's response to Panel question No. 29, paras. 41-46; and second written submission, paras. 59-66.

screenings of beoutQ's illegal broadcasts were not endorsed by, and are not a measure attributable to, the Government of Saudi Arabia.[303]

7.39. It is for the complainant to make a *prima facie* case, which involves establishing the existence of the challenged measures and the other factual premises underlying its claims, as well as the breach of the legal provisions invoked by the complainant.[304] While WTO-inconsistent conduct may not be lightly presumed, and must always be supported by sufficient evidence, the applicable evidentiary standard of proof in WTO dispute settlement proceedings is closer to that of the balance of probabilities, and is not a standard of certainty or proof beyond a reasonable doubt.[305] As a consequence of the applicable evidentiary standard being closer to that of a balance of probabilities, panels may make findings of fact based on inferences and circumstantial evidence.[306]

7.40. In the light of Saudi Arabia's stated position that it would "not engage with the facts or arguments presented by Qatar", the Panel considers it important to confirm that, before considering any exceptions or lines of defence invoked by Saudi Arabia, it must first satisfy itself that Qatar has established a *prima facie* case in relation to each of the measures and claims at issue. In those WTO cases where a responding party did not contest one or more claims raised by the complainant, panels have consistently proceeded on the basis that they were nonetheless required to satisfy themselves that the complainant had established a *prima facie* case of violation in order to rule in the complainant's favour.[307] In this case, the Panel has sought to satisfy itself that Qatar's claims are well-founded in fact and in law through various means, including written and oral questions and undertaking a careful review of the evidentiary basis underlying Qatar's various factual assertions.[308] The Panel has not made any material factual findings merely on the basis that some of Qatar's assertions are uncontested by Saudi Arabia. If the Panel determines that a *prima facie* case has been established by Qatar in relation to any of the measures, it will then turn to consider the defences and arguments made by Saudi Arabia.

7.41. The Panel will address these disputed factual issues and consider the evidence in support before turning to Qatar's claims under Parts I, II and III of the TRIPS Agreement. The Panel will refer back to these factual findings later in the context of its analysis of Qatar's specific claims under the TRIPS Agreement.

7.2.2 Arguments

7.2.2.1 Qatar

7.42. Qatar argued that beIN "has faced numerous obstacles preventing it from initiating civil action in Saudi courts in order to enforce its IP rights".[309] First, it stated that the 19 June 2017 Circular stripped beIN of the right to protect its IP rights before Saudi courts and tribunals.[310] Qatar argued that it does not matter whether the Circular was "officially issued".[311] Second, it asserted that beIN has been unable to obtain legal representation from Saudi lawyers to enforce its IP rights, partly due to Saudi Arabia's anti-sympathy measures.[312] In Qatar's view, Saudi Arabia's "raw assertion" to the contrary "does not even attempt to refute the evidence on record".[313] Third, it submitted that the travel ban imposed on Qatari nationals makes it impossible for Qatari right holders to initiate, conduct or testify in proceedings for the enforcement of IP rights in Saudi Arabia.[314] Qatar contended

[303] Saudi Arabia's response to Panel question No. 30(a), paras. 61-62; and second written submission, paras. 67-68.
[304] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at p. 335.
[305] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.777.
[306] Ibid. para. 7.778.
[307] See, e.g. Panel Reports, *US – Shrimp (Ecuador)*, paras. 7.9 and 7.11; and *US – Poultry (China)*, paras. 7.445-7.446.
[308] For example, the Panel put questions to Qatar on a series of factual and legal issues relating to its claims, including but not limited to detailed questions to clarify the extent to which beIN holds copyright and related rights over the alleged pirated content and broadcasts. (See, e.g. Panel question Nos. 6(b)(i), (ii), (iii) and (iv); 6(c); 6(d); and 45 to the parties.)
[309] Qatar's first written submission, para. 132.
[310] Ibid. paras. 38-43.
[311] Qatar's second written submission, paras. 23-30.
[312] Qatar's first written submission, paras. 133-139.
[313] Qatar's second written submission para. 78. See ibid. paras. 77-82.
[314] Qatar's first written submission, paras. 15, 145 and 193.

that Saudi Arabia's "remarkable assertion" that foreign nationals may commence and participate in proceedings by email is unsubstantiated.[315] Fourth, there is a requirement for Ministerial approval of any decision of the Copyright Committee[316] and, Qatar stated, the Minister has not approved the initiation of proceedings before the Committee[317], and would never approve any decision in favour of beIN or its licensors (even if a case could be initiated).[318] According to Qatar, the alleged amendment to the Copyright Law replacing the Minister with a Board of Directors changes nothing in this regard[319], and it remains "utterly implausible" that a Board of Directors comprised of Saudi government officials and private citizens would permit a successful challenge before the Committee.[320]

7.43. Regarding the "total lack of criminal enforcement" or other action by Saudi authorities, Qatar submitted that beIN has repeatedly requested, along with other foreign right holders, that Saudi authorities take immediate action against beoutQ. Qatar asserted that it has provided ample evidence of beoutQ's illegal broadcast piracy in Saudi Arabia to these authorities.[321] Nevertheless, despite the extensive evidence of beoutQ's widespread, commercial-scale copyright piracy in Saudi Arabia, to date, Saudi authorities have taken no criminal action against beoutQ, Arabsat, or other Saudi facilitators.[322] In Qatar's view, Saudi Arabia's suggestion that the allegations that beIN and other right holders have brought before Saudi authorities are "unfounded" and "unsupported" is directly contradicted by the extensive evidence before the Panel—including evidence that was previously shared with or otherwise made available to Saudi authorities, and it is "hard to imagine what 'relevant and credible information' Saudi Arabia still needs".[323] Qatar asserted that "it could not be for lack of sufficient evidence" that Saudi Arabia has failed to initiate procedures and penalties against the beoutQ piracy.[324] For Qatar, the reason that criminal procedures and penalties have not been applied against beoutQ is that the Saudi government itself has supported, facilitated and participated in the beoutQ piracy.[325]

7.44. Regarding the alleged promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts, Qatar referred to "government-sponsored beoutQ piracy events"[326] during the 2018 FIFA World Cup, when beoutQ broadcasts were the only way for Saudi nationals to watch their own national team play.[327] Qatar referred to tweets by international journalists revealing that, on 22 June 2018, a government-sponsored event was broadcasting the beoutQ-pirated World Cup match between Saudi Arabia and Uruguay on a large public screen in Riyadh's main boulevard.[328] Qatar also asserted that the Ministry of Municipal and Rural Affairs of Saudi Arabia published flyers ahead of the 2018 FIFA World Cup, advertising 294 display screens allocated across the 13 regions of Saudi Arabia – all broadcasting beoutQ.[329] Qatar provided further

[315] Qatar's comments on Saudi Arabia's response to Panel question No. 40, paras. 65-71.
[316] Qatar's first written submission, paras. 119-121 and 140.
[317] Qatar's response to Panel question No. 18(a), paras. 114-115.
[318] Ibid. para. 116.
[319] Qatar's second written submission, para. 114. See ibid. paras. 106-114.
[320] Ibid. para. 114. In response to Saudi Arabia's assertion that beIN or other relevant right holders can directly access remedies for copyright infringement in Saudi Arabia through the SAIP, Qatar maintained that the SAIP is not the proper forum to adjudicate claims of copyright infringement, GCAM and the Ministry never provided any indication otherwise to beIN or other foreign holders, and the SAIP was not operational at the time of the establishment of the Panel. (Qatar's response to Panel question No. 43, paras. 56-77.)
[321] Qatar's first written submission, paras. 126-131 and 197-201; and second written submission, para. 85 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, paras. 58-61; Letter from beIN to Saudi Ministry of Culture and Information, 15 August 2017, Exhibit QAT-116; Letter from Saudi General Commission for Audiovisual Media to beIN (Arabic original and English translation), 2 September 2017, Exhibit QAT-117; Letter from beIN to Saudi Ministry of Culture and Information, 14 September 2017, Exhibit QAT-118; Letter from beIN to Saudi Ministry of Culture and Information, 16 January 2018, Exhibit QAT-119; Letter from beIN to Saudi Ministry of Culture and Information, 6 March 2018, Exhibit QAT-120; and Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106).
[322] Qatar's first written submission, para. 131; and second written submission, para. 86.
[323] Qatar's second written submission, paras. 88-92.
[324] Ibid. para. 214.
[325] Qatar's first written submission, para. 437; and second written submission, paras. 215-217. Qatar also suggests that such procedures have not been applied to the beoutQ piracy "because such piracy predominantly affects a Qatari national, beIN, and its licensors". (Qatar's first written submission, para. 200.)
[326] Qatar's first written submission, section III.B.4(b).
[327] Ibid. para. 86.
[328] Ibid. para. 87.
[329] Ibid. para. 88.

evidence in the form of tweets posted by various Saudi municipal governments that promoted various public screenings of beoutQ's broadcasts of the 2018 FIFA World Cup.[330] Qatar submitted that Saudi Arabia does not engage with or dispute any of this evidence, and invited the Panel to make an objective assessment of the facts based on the ample evidence provided by Qatar.[331] Qatar added that "public statements made by government officials in their official capacity via social media platforms can be attributed to a government, in the same way that such statements by officials to the press can be attributed to the government for which they work".[332] As regards Saudi Arabia's reference to an April 2019 Circular that was allegedly sent to various government offices, Qatar submitted that this Circular concerns pirated or counterfeit computer software and has "nothing whatsoever to do with pirated sports broadcasting".[333]

7.2.2.2 Saudi Arabia

7.45. As regards beIN's access to civil enforcement procedures, Saudi Arabia submitted that the alleged measures either do not exist or do not have the legal or practical effects asserted. First, beIN has not lost the right to protect any related IP rights in Saudi Arabia by virtue of the 19 June 2017 Circular or the rules of Saudi law that it reflects because, while it is true that "unlicensed distributors of illegally distributed content do not have a right to protect copyright in such illegally distributed content"[334], and while it is also true that certain "entities have been distributing unlicensed media content in Saudi Arabia after 19 June 2017", "no credible evidence exists to link such distribution to the wilful conduct of companies of the complaining Party or related entities".[335] Second, Saudi Arabia did not maintain any "anti-sympathy measures" or any other measures that restricted access to lawyers in Saudi Arabia for assistance in IP matters[336], and in any event companies may directly provide information and evidence to the SAIP or to the Government without retaining counsel or other local support in Saudi Arabia.[337] Furthermore, in Saudi Arabia's view, no law firm would be able to proceed with a case against beoutQ in Saudi courts "because the company does not have a location in Saudi Arabia, and its location outside Saudi Arabia cannot be ascertained".[338] Saudi Arabia states that "[t]his could explain why law firms in Saudi Arabia appear to be substantively and procedurally unable to establish a case against beoutQ, rather than unwilling to work with complainants to file cases against beoutQ."[339] Third, Saudi Arabia submitted that foreign nationals may avail themselves of all rights in Saudi Arabia without physically travelling to or being present in Saudi Arabia, and may commence and participate in proceedings or complaints before the Copyright Committee or SAIP by email from outside Saudi Arabia.[340] Fourth, regarding the Ministerial approval requirement, the Copyright Law was amended to replace the Minister with a Board of Directors.[341]

7.46. Regarding the non-application of criminal procedures or penalties to beoutQ's commercial-scale piracy, Saudi Arabia submitted that "in order to take action under Saudi criminal law and procedure, authorities require a reasonable level of evidence to facilitate follow up and prosecution".[342] However, the various communications it has received from original right holders outside of Saudi Arabia "follow a pattern of relaying unfounded and unsupported allegations that beoutQ is distributing content in Saudi Arabia in violation of their copyright".[343] It submitted that "no relevant and credible information has been provided by such companies to Saudi authorities in order to support action against alleged infringing activity and companies".[344] Saudi Arabia stated that it will "continue its efforts to identify the source and stop the copyright

[330] Ibid. paras. 89-94.
[331] Qatar's second written submission, paras. 38-39.
[332] Ibid. para. 39.
[333] Qatar's opening statement at the second meeting of the Panel, para. 27.
[334] Saudi Arabia's opening statement at the second meeting of the Panel, para. 13.
[335] Saudi Arabia's response to Panel question No. 29, para. 47; and opening statement at the second meeting of the Panel, para. 14. Saudi Arabia clarified that "it affords copyright protection to all entities even if they are not licensed to broadcast in Saudi Arabia, with the exception of entities found to have distributed content illegally (*i.e.*, without a broadcasting license) in Saudi Arabia". (Saudi Arabia's response to Panel question No. 41, para. 24.)
[336] Saudi Arabia's response to Panel question No. 29, paras. 48-49.
[337] Saudi Arabia's second written submission, para. 55.
[338] Saudi Arabia's response to Panel question No. 39, para. 14.
[339] Ibid.
[340] Saudi Arabia's response to Panel question No. 40, paras. 20-21.
[341] See paragraph 2.13 of this Report.
[342] Saudi Arabia's response to Panel question No. 29, para. 45.
[343] Ibid. para. 41.
[344] Ibid.

piracy of beoutQ but requires cooperation from entities in the market to achieve this goal".[345] It submitted that Arabsat had established that it did not distribute beoutQ content on its satellite frequencies.[346] Saudi Arabia maintained that Members "cannot be expected to act on criminal allegations without evidence and without cooperation of concerned right holders"[347], and submitted that "[w]here concerned right holders come forward with evidence and cooperate with the Government, Saudi Arabia effectively addresses copyright infringement issues".[348]

7.47. Regarding the alleged promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts, Saudi Arabia submitted that "[t]he Government of Saudi Arabia does not promote or authorize screenings of beoutQ broadcasts, and has no relationship at all with beoutQ."[349] It also "note[d] that unofficial, non-government tweets are not usually recognized by legal adjudicators or attributed to a government without explicit approval".[350] Saudi Arabia added that it "maintains a vigilant watch over the enforcement of broadcast copyright violations at public gatherings.[351] It explained that, on 14 April 2019, the Saudi Ministry of Municipal and Rural Affairs issued Circular No. 41898, which forwarded Royal Court Circular No. 40752 to the Secretariats, the Agencies and the Public Administrations of the Ministry, including to all Saudi municipal administrations. Circular No. 41898 emphasized that the Royal Order "must be followed and reminded all administrations 'to provide the maximum possible protection of intellectual property rights,' including copyright protection".[352]

7.2.3 Assessment by the Panel

7.2.3.1 Applicable legal standard

7.48. Article 3.3 of the DSU refers to "measures taken by another Member", without limitation as to the government agencies involved, and "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[353] The Panel is guided by the following legal considerations in its assessment of the existence of the measures at issue, and in its assessment of the other disputed factual issues underlying all of Qatar's various claims under Parts I, II and III of the TRIPS Agreement.

7.49. For the purposes of the DSU, the notion of "measures" is not restricted by requirements as to form. Although measures challenged in the WTO are often reflected in legal instruments such as enacted legislation, measures enacted or applied through other instruments that are legally binding in a Member's domestic legal framework (decrees, directives, regulations, notifications, judicial decisions[354], etc.) have also been subject to challenge. A determination of whether an instrument is a "measure" "must be based on [its] content and substance … and not merely on its form or nomenclature."[355] The legal status of an instrument within the domestic legal system of the Member concerned is not dispositive of whether that instrument is a measure for purposes of WTO dispute settlement.[356]

7.50. Only those acts or omissions attributable to a WTO Member are subject to WTO obligations. However, under Article 4(1) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Articles on State Responsibility), "[t]he conduct of any State organ shall be considered an act of that Member under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." As a consequence, a Member is responsible for actions at all levels of government (local,

[345] Ibid. para. 42.
[346] Ibid. para. 43.
[347] Saudi Arabia's second written submission, para. 59.
[348] Ibid. para. 61.
[349] Saudi Arabia's response to Panel question No. 30(a), para. 61.
[350] Ibid. para. 62.
[351] Saudi Arabia's second written submission, para. 68.
[352] Ibid.
[353] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Revie*w, para. 81.
[354] See, e.g. Appellate Body Report, *US – Shrimp*, para. 173 (citing Appellate Body Report, *US – Gasoline*, page 28; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450).
[355] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 87 to para. 87.
[356] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

municipal, federal) and for all actions taken by any agency within any level of government.[357] Thus, the responsibility of Members under international law applies irrespective of the branch of government at the origin of the action having international repercussions.[358]

7.51. Additionally, Article 8 of the ILC Articles on State Responsibility provides that the conduct of a person or group of persons shall be considered an act of a State under international law "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". As one panel observed, "what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions".[359] While there must be a sufficient nexus between the action of private entities and the action of a government (or other organ of the Member) for that government to be held responsible for that action, "it is necessary to take into account that there is a broad variety of forms of government of action that can be effective in influencing the conduct of private parties".[360] The fact that acts or omissions of private parties "may involve some element of private choice" does not negate the possibility of those acts or omissions being attributable to a Member insofar as they reflect decisions that are not independent of one or more measures taken by a government (or other organ of the Member).[361]

7.2.3.2 beIN's access to civil enforcement procedures

7.52. Qatar asserted that Saudi Arabia has taken a series of measures (i.e. the 19 June 2017 Circular, anti-sympathy measures, travel restrictions and Ministerial approval requirement) whose "combined operation … deprive[s] Qatari nationals of access to civil judicial procedures and remedies in respect of intellectual property rights".[362] Saudi Arabia submitted that these alleged measures either do not exist or do not have the legal or practical effects alleged by Qatar.[363] The Panel now turns to the question of whether sufficient evidence has been provided to establish that Qatari nationals have been unable to initiate civil enforcement procedures against beoutQ and that this is the result of acts and omissions attributable to Saudi Arabia.

7.2.3.2.1 Anti-sympathy measures

7.2.3.2.1.1 Introduction

7.53. According to Qatar, beIN's difficulty in securing legal representation in Saudi Arabia is partially attributable to the general ''anti-sympathy measures" announced the day after the severance of relations on 5 June 2017.[364] Qatar also argued that the Government of Saudi Arabia has "instructed lawyers in [Saudi Arabia] to refrain from representing beIN" in connection with the beoutQ matter.[365] In response to a question from the Panel regarding the relationship between these ways of characterizing the measure, 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".[366] Qatar added that "the anti-sympathy measures provide useful context to understand why such instructions are being provided ".[367]

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[357] See, e.g. Panel Reports, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.12; *Brazil – Retreaded Tyres*, para. 7.400; and *Canada – Renewable Energy / Canada – Feed-In Tariff Program*, fn 37 to para. 7.6.

[358] Panel Report, *US – 1916 Act (Japan)*, para. 5.10.

[359] Panel Report, *Japan – Film*, para. 10.52.

[360] Panel Report, *Canada – Autos*, para. 10.107.

[361] Appellate Body Report, *US – Tuna II (Mexico)*, para. 239 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.) See also Panel Reports, *Thailand – Cigarettes (Philippines)*, paras. 7.636-7.637; *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, paras. 7.197-7.198; and *Indonesia – Import Licensing Regimes*, para. 7.11.

[362] Qatar's second written submission, para. 276. See also ibid. para. 290.

[363] See generally Saudi Arabia's response to Panel question No. 29, paras. 26-27, 35-36 and 47-50; and second written submission, paras. 53-58.

[364] See, e.g. Qatar's first written submission, paras. 17-27, 143 and 188-192.

[365] See, e.g. ibid. para. 136 (quoting Letter from beIN to Saudi Ministry of Culture and Information, 6 March 2018, Exhibit QAT-120; and Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 62).

[366] Qatar's response to Panel question No. 13, para. 98.

[367] Ibid. para. 100.

7.54. In the light of Qatar's clarification that the "instruction" to lawyers in Saudi Arabia to refrain from representing beIN is "a natural application of" the general anti-sympathy measures, the Panel approaches the "general" anti-sympathy measures announced on 6 June 2017 as relevant context.[368] The Panel will begin by addressing the evidence concerning the general anti-sympathy measures. Then, the Panel will review the evidence regarding the alleged refusal of Saudi law firms to act in relation to the beoutQ matter and, thereafter, will review the evidence regarding Saudi authorities seeking to instruct or influence private entities in their arrangements with beIN. Finally, the Panel will state its overall conclusion as derived from examining the above-mentioned evidence in its totality.

7.2.3.2.1.2 Evidence regarding general anti-sympathy measures

7.55. Qatar asserted that, on 6 June 2017—the day after Saudi Arabia severed relations with Qatar—a Saudi news agency stated, via Twitter, that expressions of sympathy for Qatar could face certain penalties. The tweet, which Qatar submitted to the Panel[369], states that "[t]he person who sympathizes with #Doha on social networking sites after #cutting off_ relations_with_ Qatar shall be subject to imprisonment for 5 years and a fine of up to 3 million riyals". Qatar further observed that the tweet included the hashtag "Cut_ties_with_Qatar", or "BoycottQatar", and that, at around this time, the first hashtag was the most widely retweeted hashtag on Twitter worldwide.[370] Qatar stated that, concurrently with the issuance of the 6 June 2017 tweet, Saudi news outlets began widely reporting that the Saudi authorities would sanction expressions of sympathy for Qatar with five years' jail time, or a SAR 3 million fine, and has provided evidence of the same. Qatar provided the text of these news reports as exhibits.[371]

7.56. Qatar explained that this penalty corresponds to one that exists under Saudi law. Specifically, Qatar observed that the same penalties reported by these news outlets are provided for in the text of Article 6(1) of the 2007 Anti-Cyber Crime Law. Qatar provided the Panel with the text of this law, which refers to the "[p]roduction, preparation, transmission, or storage of material impinging on public order, religious values, public morals and privacy, through the information network or computers".[372]

7.57. In addition, Qatar provided evidence of international entities and organizations commenting on the existence of these general anti-sympathy measures. First, Qatar provided the Panel with a copy of a 2017/2018 report on Saudi Arabia by Amnesty International, which found that "[f]ollowing the announced decision to sever ties with Qatar, the Saudi authorities warned people against expressing sympathy towards Qatar or criticizing government actions, stating that this would be considered an offence punishable under Article 6 of the Anti-Cyber Crime [L]aw".[373] Second, Qatar provided the Panel with a copy of a report published by the UN Office of the High Commissioner for Human Rights (OHCHR), which comments on Saudi Arabia's anti-sympathy measures. According to that report, which reflects information provided by Qatari nationals who have property in Saudi Arabia, particularly commercial entities, "lawyers in these countries [(i.e. the UAE, Bahrain

[368] See Qatar's first written submission, para. 17. The Panel does not consider it necessary to enter into a discussion of all of the evidence submitted by Qatar in relation to what it terms ''a repressive climate in which mere expressions of support for Qatar, and Qatari nationals and companies, are harshly punished".

[369] Qatar's first written submission, para. 18 (referring to @Saudi News 50, Tweet, 6 June 2017 (Arabic original and English translation), Exhibit QAT-7). SAR 3 million is equivalent to approximately USD 800,000. (XE Currency Converter, Saudi riyals to US dollar conversion, last accessed 8 April 2019, Exhibit QAT-8.)

[370] Qatar's first written submission, para. 18 (referring to Al-Youm Al-Sabea, ''*Hashtag 'Cutting Ties with Qatar' tops the world list of trend on Twitter*'' (Arabic original and English translation), 5 June 2017, Exhibit QAT-10).

[371] Ibid. para. 19 (referring to Saudi Al-Marsd Online Newspaper, "*Legal figure: Anyone showing sympathy with Qatar on social media platforms will be sentenced to 5 years imprisonment and fined 3 million riyals*" (Arabic original and English translation), 8 June 2017, Exhibit QAT-11; and Amal Ruslan, *"Saudi Newspaper Okaz: Punishments include imprisonment for those who sympathize with Qatar on social media"*, 7 June 2017 (Arabic original and English translation), Exhibit QAT-12).

[372] Ibid. para. 20 (referring to Kingdom of Saudi Arabia, Anti-Cyber Crime Law, 26 March 2007 (English translation), Exhibit QAT-13, p. 9).

[373] Ibid. para. 21 (referring to Amnesty International, "*Amnesty International Report 2017/18 – Saudi Arabia*", 22 February 2018, Exhibit QAT-15, p. 3).

and Saudi Arabia)] are unlikely to defend Qataris as this would likely be interpreted as an expression of sympathy towards Qatar".[374]

7.58. With respect to Saudi Arabia's assertion that it "does not maintain any 'anti-sympathy measures'"[375], the Panel is aware that the evidence Qatar provided has several limitations in establishing that such measures would, in and of themselves, operate to prevent Saudi law firms from agreeing to represent beIN or other Qatari nationals. The scope of the general anti-sympathy measures, as described above, is limited to expressions of support on "social media" or online, as suggested by the very name of the law (i.e. the Anti-Cyber Crime Law) that, according to Qatar, serves as the basis for the penalties. Furthermore, the anti-sympathy measures appear to be directed at expressions of support for the State of Qatar, not necessarily to any and all Qatari nationals. Additionally, the Panel notes that Saudi Arabia did not enact any specific law or regulation establishing the general anti-sympathy measures, and the evidentiary basis for their existence is primarily statements by Saudi news outlets. Finally, the Panel is mindful that the OHCHR Report in question reflects information that Qatari nationals provided to the OHCHR team.

7.59. Despite the foregoing, and having carefully reviewed and considered the evidence provided by Qatar, the Panel concludes that the evidence establishes the existence of the general anti-sympathy measures that directly or indirectly fostered a climate of anti-sympathy against Qatar and Qatari nationals. It is uncontested that multiple Saudi news outlets published reports on the existence of general anti-sympathy measures on three successive days. Specifically, each of the three Saudi news outlets identified in the exhibits provided by Qatar reported the existence of the general anti-sympathy measures on 6, 7 and 8 June 2017, respectively.[376] Indeed, Saudi Arabia did not contest the authenticity of any of the evidence referred to above or challenged Qatar's characterization of this evidence.

7.2.3.2.1.3 Evidence regarding the refusal of Saudi law firms to act in relation to the beoutQ matter

7.60. Qatar asserted that, following the severance of relations and the emergence of beoutQ, beIN sought to engage legal counsel in Saudi Arabia to commence civil actions before the Saudi courts to seek injunctions, damages, or other legal remedies against the individuals and/or entities behind beoutQ. Qatar also asserted that, despite requests to several law firms based in Saudi Arabia, beIN has been unable to secure legal representation.[377] Qatar provided evidence to substantiate its account, including a Declaration provided by the CEO of the beIN Media Group LLC, dated 15 April 2019, and earlier correspondence between beIN and the Saudi authorities.

7.61. The Declaration by beIN states in relevant part:

> After the piracy became evident in Saudi Arabia, we reached out to various Saudi law firms to represent beIN in a potential copyright infringement case in Saudi Arabia. Those law firms, including but not limited to Al Fahad & Partners, Al Tamimi, the Qasir Al Motawee Law Firm, and TAG Legal, all declined to do so. Although the law firms did not explicitly indicate why they refused to take on the engagement against beoutQ, my colleagues and I understand that it was due to Saudi Arabia's measures (both written and unwritten) against supporting Qatari interests, as well as the statement in the

[374] Qatar's first written submission, para. 22 (referring to Office of the United Nations High Commissioner for Human Rights, Technical Mission to the State of Qatar 17-24 November 2017, Report on the Impact of the Gulf Crisis on Human Rights, December 2017, Exhibit QAT-21).

[375] Saudi Arabia's response to Panel question No. 29, para. 48.

[376] See, e.g. @Saudi News 50, Tweet, 6 June 2017 (Arabic original and English translation), Exhibit QAT-7; Saudi Al-Marsd Online Newspaper, "*Legal figure: Anyone showing sympathy with Qatar on social media platforms will be sentenced to 5 years imprisonment and fined 3 million riyals*" (Arabic original and English translation), 8 June 2017, Exhibit QAT-11; and Amal Ruslan, *"Saudi Newspaper Okaz: Punishments include imprisonment for those who sympathize with Qatar on social media"*, 7 June 2017 (Arabic original and English translation), Exhibit QAT-12.

[377] Qatar's first written submission, para. 133.

> 19 June 2017 Circular, which indicated that beIN would lose "the legal right to protect any related intellectual property rights".[378]

7.62. In a letter to the Ministry dated 16 January 2018, beIN explained the difficulties it was encountering in attempting to secure legal representation to initiate copyright infringement cases in Saudi courts. beIN asked the Ministry to detail any governmental restrictions in place that may be affecting beIN's ability to commence civil proceedings.[379] More specifically, beIN stated, in relevant part:

> Over the past weeks, beIN has contacted several KSA law firms to seek representation for such legal action before the KSA courts. None of these KSA law firms has been willing to represent either beIN or the Rights Holders in connection with beoutQ's broadcast piracy. Moreover, we have been advised that the KSA National Information Center has taken the position that it will not authorize any legal action to enforce beIN's rights in the KSA.
>
> We therefore request that the Ministry of Culture and Information please advise: (i) whether lawyers in the KSA are under any legal obligation or governmental instruction preventing them from representing beIN and/or the Rights Holders in civil legal actions before the KSA courts, including in matters relating to the piracy of beIN's media content; and (ii) whether beIN and/or the Rights Holders are required to seek any government authorizations or permissions in order to commence civil legal actions before the KSA courts, including in matters relating to the piracy of beIN's media content.[380]

7.63. In a 6 March 2018 letter to the Ministry, beIN set out its understanding of why it was unable to hire counsel to bring a copyright infringement case in Saudi courts. beIN stated that "the Saudi Government has instructed lawyers in the KSA to refrain from representing beIN … and that it is the position of the Saudi government that beIN … cannot bring civil legal actions relating to beoutQ broadcast piracy before the KSA courts."[381] beIN's letter indicated that "we will proceed on the basis" of this understanding "[i]n the event that the Ministry of Culture and Information fails to respond by 14 March 2018".[382] In its Declaration, beIN stated that it had received no response to either of the letters above.[383]

7.64. The Panel notes that, in response to Qatar's evidence about beIN's inability to secure legal representation, Saudi Arabia stated that the Lawyers' Guide issued by the Saudi Bar Association "gives lawyers the freedom to accept or not to accept the case of a client and the power of attorney".[384] In the Panel's view, the existence of such a freedom in the Lawyer's Guide, which was not provided as an exhibit, is not sufficient, in and of itself, to establish that beIN's inability to secure legal representation as described above is the result of a purely private choice by Saudi law firms. Among other things, Saudi Arabia did not address whether—and, if so, how—the freedom to accept the case of a client as expressed in the Lawyer's Guide would supersede any anti-sympathy measures that it had taken. As discussed in the next subsection, Qatar provided evidence that a Saudi law firm was not given this freedom in connection with its representation of beIN in the context of a criminal matter.[385]

7.65. With its second written submission, Qatar provided the Panel with a copy of a public joint statement made on 31 July 2019 by seven major football right holders (including FIFA, UEFA, AFC, the Premier League, Bundesliga, LaLiga and Lega Serie A). According to the joint statement, these right holders have also been unable to engage Saudi counsel or access Saudi courts and

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[378] Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 56 (referring to Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, dated 19 June 2017, Exhibit QAT-1, p. 2).

[379] Letter from beIN to Saudi Ministry of Culture and Information, 16 January 2018, Exhibit QAT-119, pp. 1-2.

[380] Ibid. p. 2.

[381] Letter from beIN to Saudi Ministry of Culture and Information, 6 March 2018, Exhibit QAT-120, p. 1.

[382] Ibid.

[383] Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 62.

[384] Saudi Arabia's response to Panel question No. 29(a), para. 49.

[385] See paragraph 7.70 of this Report.

administrative tribunals in connection with the beoutQ piracy.[386] The statement reads, in relevant part:

> Over the past 15 months, we spoke to nine law firms in KSA, each of which either simply refused to act on our behalf or initially accepted the instruction, only later to recuse themselves.
>
> As copyright holders we have reached the conclusion, regrettably, that it is now not possible to retain legal counsel in KSA which is willing or able to act on our behalf in filing a copyright complaint against beoutQ.[387]

7.66. In response to a Panel question asking Saudi Arabia to comment on the joint statement quoted above, Saudi Arabia stated, *inter alia*, that the reason that no law firm would be able to proceed with a case against beoutQ in Saudi courts might be that the company does not have a location in Saudi Arabia.[388] However, there has been no evidence to support this.

7.2.3.2.1.4 Evidence regarding other actions by Saudi authorities to direct private entities in their arrangements with beIN

7.67. Qatar provided evidence to support its submission that Saudi authorities have actively sought to direct private entities as to their arrangements with beIN through informal communications. As discussed below, this included evidence relating to the transmission of the 19 June 2017 Circular to 39 foreign right holders, and evidence that a Saudi law firm was pressured to act on behalf of beIN in relation to a criminal law matter.

7.68. On 19 June 2017, the Ministry and GCAM issued a Circular prohibiting the distribution of beIN media content.[389] The Circular states that all television and media channels that are interested in operating in Saudi Arabia "must obtain all required licences" and that "[a]ll beIN channels and Al-Jazeera channels are not licensed and [do] not have the legal right to operate in the Kingdom of Saudi Arabia and its presence and provision of entertainment and Sports programs and television services in the Kingdom violates the applicable laws in the Kingdom as of the date thereof."[390] This Circular further provides that:

> Any distribution of media content either via satellites or through other means and platforms and the charging and collection of related fees in the Kingdom without obtaining the necessary licenses from the appropriate authorities, including the Ministry of Culture and Information and the General Commission of Audio and Visual Media, shall subject the distributors of such media content and content licensors, hardware suppliers, and their owners in their individual capacity to criminal prosecution and personal litigation and shall result in the imposition of penalties and fines and the loss of the legal right to protect any related intellectual property rights in accordance with the applicable laws in the Kingdom.[391]

7.69. By itself, the content of the Circular does not purport to direct any private parties in their arrangements with beIN. However, the Panel considers that the transmission of the Circular alluding to the potential loss of "related intellectual property rights" to these foreign right holders was an action aimed at influencing these private entities in their arrangements with beIN. Qatar explained that it was transmitted as an email attachment from GCAM's official account directly to 39 right holders, including FIFA, UEFA, LaLiga, the Premier League and many others.[392] According to Saudi Arabia, this Circular was never "officially issued".[393] In the Panel's view, the "unofficial" status

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[386] Qatar's second written submission, para. 81 (referring to Joint statement by FIFA, the AFC, UEFA, the Bundesliga, LaLiga, the Premier League and Lega Serie A regarding the activities of beoutQ in Saudi Arabia, 31 July 2019, Exhibit QAT-227).

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

[388] Saudi Arabia's response to Panel question No. 39, para. 14.

[389] Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, Exhibit QAT-1.

[390] Ibid. para. 1.

[391] Ibid. para. 3.

[392] Email from GCAM to right holders, 13 July 2017, Exhibit QAT-220.

[393] Saudi Arabia's response to Panel question No. 29(a), fn 28 to para. 47 and fn 34 to para. 54.

of this document, sent to these 39 right holders who hold valuable IP rights related to beIN's broadcasts, in no way diminishes its impact.

7.70. Separately from the Circular, Qatar also provided evidence, in the form of additional email messages, in support of its assertion that a Saudi law firm was pressured to act on behalf of beIN in relation to a criminal law matter.[394] As explained in beIN's Second Supplemental Declaration, which was submitted together with Qatar's responses to the second set of questions in this proceeding, Qatar provided the Panel with several email messages from a Saudi law firm to beIN that document the following. On 1 July 2018, a Saudi law firm, representing beIN in relation to a competition law matter that had arisen prior to the severance of relations and the closing down of beIN's operations in Saudi Arabia, informed beIN via email that the Saudi Council of Competition (CCP) had called. The CCP had requested the law firm to "collect notice of a new 'criminal' case they are launching against Bein", "probably for imposing new penalties and/or administrative remedies".[395] The law firm told beIN that, '"[b]ecause of the sensitivities of these cases, if you ask us to decline accepting notice, we may be unable to accept representation on your behalf for the new case and you may have to find another lawyer"'.[396] When beIN did not immediately instruct the law firm to accept service of the new criminal complaint, the law firm sent another email message to beIN two days later, on 3 July 2018. This email message, which Qatar provided as an exhibit, states:

> We received a call from CCP that we must accept service on your behalf. We explained we have no authority. They threatened to stop the services of our office unless we accede to their demand. We do not believe that this course of action is correct but if they do go ahead and stop our services (that would paralyze our office) we will have no choice but to do so. Please take note.[397]

7.71. The Panel considers these email exchanges to be relevant to the inability of beIN and foreign right holders to retain Saudi counsel to commence actions against beoutQ. This exchange reflects the influence that the Government of Saudi Arabia has over the decisions of lawyers based in Saudi Arabia to accept particular cases for particular clients. Given that the Government of Saudi Arabia appears to have instructed a law firm in Saudi Arabia to act for beIN in respect of a particular matter, the Panel does not consider it implausible that the Government of Saudi Arabia would instruct, direct, or guide one or more law firms in Saudi Arabia not to act for beIN in a particular matter.

7.2.3.2.1.5 Conclusion

7.72. The Panel considers that the evidence before it sustains the conclusions that: (a) Saudi Arabia imposed general anti-sympathy measures banning expressions of support toward Qatar, at least on social media, on 6 June 2017; (b) all Saudi law firms that have been approached by beIN, and by seven major football right holders, have declined to act in relation to the beoutQ matter, and it is difficult to conceive of any plausible explanation of why beIN and foreign right holders would be unable to obtain any legal representation in Saudi Arabia in relation to beoutQ—an entity engaged in high-profile piracy that has been the subject of global condemnation—if not for some form of government instruction, direction or guidance; and (c) Qatar provided two other examples of Saudi authorities actively seeking to influence right holders or a law firm in their arrangements with beIN.

7.73. Examining the above-referenced evidence in its totality, and recalling the applicable standard of proof and evidentiary principles in WTO dispute settlement[398], the Panel considers that Qatar has demonstrated that Saudi Arabia has taken "anti-sympathy measures" that, directly or indirectly,

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[394] See Qatar's response to Panel question No. 38, paras. 1-15.

[395] Second Supplemental Declaration by beIN Media Group LLC, 24 October 2019, Exhibit QAT-248, para. 10 (referring to Email from Abdulaziz H. Al Fahad (Al Fahad & Partners) to beIN, dated 1 July 2018, Annex 3 to Second Supplemental Declaration by beIN Media Group LLC, 24 October 2019, Exhibit QAT-248).

[396] Ibid. (emphasis omitted)

[397] Ibid. para. 11 (referring to Email from Abdulaziz H. Al Fahad (Al Fahad & Partners) to beIN, dated 3 July 2018, Annex 4 to Second Supplemental Declaration by beIN Media Group LLC, 24 October 2019, Exhibit QAT-248).

[398] See paragraphs 7.39 and 7.40 of this Report.

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.

7.2.3.2.2 The 19 June 2017 Circular, travel restrictions and Ministerial approval requirement

7.74. The Panel will now consider the evidence provided by Qatar to establish that the non-initiation of civil enforcement procedures against beoutQ is the result of other acts or omissions attributable to Saudi Arabia, including, in particular, the 19 June 2017 Circular, the travel restrictions or the Ministerial approval requirement.

7.75. Qatar provided a copy of the 19 June Circular to the Panel as an exhibit.[399] By its terms, it prohibits the distribution of beIN (and Al Jazeera's) content in Saudi Arabia, and states that the penalty for contravening this prohibition includes "the loss of the legal right to protect any related intellectual property rights". The Panel notes that it was issued on an official Ministry letterhead, and signed by a Saudi government official.[400] Furthermore, it is undisputed that a copy of this document was circulated broadly by the "Office of the General Director of the President" of GCAM to 39 individual right holders.[401] Finally, the Saudi Arabian Monetary Authority Decision issued on 11 July 2017 directly referred to the 19 June 2017 Circular.[402]

7.76. The Panel therefore considers that the 19 June 2017 Circular exists, and that it is a government measure for purposes of WTO law regardless of whether it was "officially issued".[403] Furthermore, the Panel accepts that the Circular could also potentially impact on beIN's ability to access civil enforcement procedures.

7.77. Turning to the second of the three measures referred to above, i.e. the travel restrictions, there is no disagreement between the parties about this measure's existence. Both parties refer to press releases that Saudi Arabia issued on 5 June 2017, indicating that, as part of the severance of relations, Saudi Arabia was among other things "clos[ing] all land, sea and air ports, prevent[ing] crossing into Saudi territories, airspace and territorial waters".[404] According to an official statement by Saudi Arabia, this travel ban was intended to "prevent[] Qatari citizens' entry to or transit through the Kingdom of Saudi Arabia".[405] In response to a question from the Panel, Saudi Arabia confirmed that, as of the date of the establishment of the Panel, the travel restrictions on citizens of the complaining party referred to in the 5 June 2017 announcement still existed (but noted that certain limited exceptions apply as necessary, including for citizens of the complaining party to perform the Hajj and Umrah).[406]

7.78. The Panel is therefore satisfied that the travel restrictions exist, and that these constitute a government measure for purposes of WTO law. Furthermore, the Panel accepts that, by their nature, the travel restrictions could also impact beIN's ability to access civil enforcement procedures.

7.79. Turning to the third measure, the Ministerial approval requirement, the Panel observes that Qatar has provided the text of the relevant provisions of the Copyright Law and Implementing Regulations, which expressly refer to the role of the Minister in approving any Copyright Committee decisions regarding cases of copyright infringement and state that they "shall not be effective unless approved by the Minister".[407] The Panel recalls that Saudi Arabia asserts that the Copyright Law and

[399] Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, 19 June 2017, Exhibit QAT-1.
[400] Qatar's second written submission, paras. 24 and 27.
[401] Ibid. (referring to Email from GCAM to right holders, 13 July 2017, Exhibit QAT-220).
[402] See paragraph 2.38 of this Report.
[403] See paragraph 1.20 and footnote 137 of this Report. In this connection, the Panel recalls that the notion of "measures" for the purposes of the DSU is not restricted by any requirement as to form, and that the legal status of an instrument within the domestic legal system of the Member concerned is not dispositive of whether it is a measure for purposes of WTO dispute settlement. (See paragraph 7.49 of this Report.)
[404] Saudi Arabia's first written submission, para. 1 (referring to a report by the Saudi Press Agency).
[405] Qatar's first written submission, para. 15 (referring to Announcement on the Saudi Embassy to the United States website, "*Kingdom of Saudi Arabia Cuts Off Diplomatic and Consular Relations with the State of Qatar*", 5 June 2017, Exhibit QAT-3).
[406] See Saudi Arabia's response to Panel question No. 16. The Panel notes that this is consistent with Qatar's own responses to Panel question Nos. 15(a) and (b).
[407] See paragraph 2.12 of this Report.

Implementing Regulations were amended, such that the Board of Directors of the SAIP, not the Minister, would have the responsibility for endorsing or approving the decisions of the Copyright Committee.[408] However, as noted by Qatar, the amended Implementing Regulations were not issued until 9 May 2019, approximately six months after the establishment of the Panel.[409] Furthermore, it is undisputed that once the Copyright Committee takes a decision by majority vote with respect to any such allegations, its decision is subject to a subsequent layer of approval before it is made final.[410]

7.80. The Panel is therefore satisfied that the Ministerial approval requirement was provided for in Saudi law as of the date of the Panel's establishment.[411] Furthermore, the Panel accepts that, by its nature, the Ministerial approval requirement could, in the circumstances prevailing in Saudi Arabia since 5 June 2017, also impact beIN's ability to access civil enforcement procedures.

7.81. Thus, the Panel finds that there is sufficient evidence to establish the existence of each of these measures, and the Panel further accepts that each of these formal legal restrictions could impact beIN's ability to access civil enforcement procedures.

7.82. However, there is no evidence that any of these measures has yet been applied to beIN to prevent it from accessing civil enforcement procedures and the Panel considers that Qatar's arguments about how these measures would operate if beIN were able to retain counsel in Saudi Arabia involves speculation about future and hypothetical events. It is well established that a WTO dispute settlement panel should not make findings that would involve speculation either about future or hypothetical measures[412] and panels should refrain from making speculative findings on future measures. Panels must also refrain from making findings about existing measures in a manner that turns on speculation about future events, or events triggering the operation of a measure that have not yet arisen.[413] Such speculation would be contrary to the duty of the Panel under Article 11 of the DSU to make "an objective assessment of the facts of the case".

7.83. First, from the wording of the Circular[414], it is not clear that any loss of the right to enforce IP rights is automatic upon the conditions precedent being triggered. Those conditions precedent are stated to be "[a]ny distribution of media content" and "the charging and collection of related fees in the Kingdom without obtaining the necessary licences". Once triggered, according to the Circular's text, these two conditions precedent "shall subject" the certain entities prescribed in the Circular that fulfil these conditions "to criminal prosecution and personal litigation", "and shall result" in a penalty, namely, "the imposition of penalties and fines and the loss of the legal right to protect any related intellectual property rights in accordance with the applicable laws in the Kingdom".[415]

7.84. No evidence has been presented to the Panel to show that the Circular has been applied in the relevant circumstances. Specifically, Qatar provided no evidence to demonstrate that any Saudi tribunal or other Saudi authority has applied the penalty provision of the Circular to deny beIN standing to protect any IP rights. Additionally, there has been no indication that the Saudi authorities have applied any of the other penalties stated in the Circular, i.e. "criminal prosecution", "personal litigation", or "the imposition of penalties and fines".

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[408] See paragraph 2.13 of this Report.

[409] See paragraph 2.14 of this Report.

[410] See paragraphs 2.10 and 2.11 of this Report.

[411] A panel's terms of reference require it to assess the WTO-consistency of a challenged measure as it existed on the date of the Panel's establishment. (See Appellate Body Reports, *US – Clove Cigarettes,* para. 205; *China – Raw Materials*, para. 260; and *EC – Selected Customs Matters*, para. 187.) Several panels have rejected requests from a respondent to make findings on the changed situation, on the basis that the complainant had not requested such findings. (See, e.g. Panel Reports, *Russia – Tariff Treatment*, para. 7.84; *China – Raw Materials*, paras. 7.22-7.24; *India – Additional Import Duties*, paras. 7.58-7.60; and *India – Autos*, para. 8.27.)

[412] Panel Report, *EC – Commercial Vessels*, para. 7.30; Panel Report, *US – Upland Cotton,* para. 7.158; Panel Report, *India – Autos*, para. 7.34.

[413] Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 5.109; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 95; Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.602-7.603.

[414] See paragraph 7.68 of this Report.

[415] Saudi Ministry of Culture and Information and General Commission for Audiovisual Media, Circular, Exhibit QAT-1, para. 3.

7.85. Furthermore, the Panel notes that Saudi Arabia maintains that beIN has not actually taken the actions that would trigger the application of the penalty provisions in the Circular.[416] In the Panel's view, this highlights a lack of clarity regarding whether beIN continued to "distribute" its media content without having obtained a license after the Circular was sent to beIN via email on 13 July 2017, and/or charge and collect fees after that time.[417] The Panel also recalls that Qatar made no "as such" claim in connection with the aspect of Saudi law that is reflected in the Circular.[418] Without evidence relating to or demonstrating the application of the Circular, the Panel is unable to accept Qatar's assertion as to how the Circular would operate.

7.86. The Panel also notes that beIN has not yet initiated any civil enforcement proceeding with respect to its IP rights. The Panel has found 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. Thus, whether a Saudi tribunal or authority would apply the terms of the Circular to prevent beIN from enforcing its IP rights if beIN were able to secure legal representation to initiate civil proceedings is, for the Panel, a matter of speculation.

7.87. Second, turning to the travel restrictions, Qatar's arguments concern the manner in which such restrictions would operate in the hypothetical situation in which beIN was able to retain legal counsel. For example, Qatar argued that "even if Qatari nationals were somehow able to obtain legal representation, they would nevertheless have undue difficulties when attempting to meet with their lawyers to discuss any proceedings".[419] The extent to which the travel restrictions would obstruct Qatari nationals from accessing civil enforcement procedures, were they able to obtain legal representation, has been debated by the parties and third parties.[420]

7.88. The Panel emphasizes that Qatar's challenge in relation to the travel restrictions is directed at their practical consequences for beIN's ability to access civil enforcement procedures. Qatar clarified that, "[t]o be clear, in these proceedings, Qatar does not challenge, *per se*, Saudi Arabia's decision to close its borders, or to prevent Qatari nationals from entering its territory."[421] Qatar did not challenge the travel restrictions *per se*, but only the manner in which they might operate in combination with the anti-sympathy measures and other measures to deny beIN access to civil enforcement procedures. The Panel cannot make a determination about the consequences of retaining the travel restrictions while removing the anti-sympathy measures, as this would be speculative.

7.89. In the Panel's view, whether the travel restrictions would operate to prevent beIN from accessing civil enforcement procedures if beIN were able to secure legal representation to initiate civil proceedings is also a matter of speculation. The actions taken to prevent Saudi legal counsel from representing beIN in an action to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals require the Panel to speculate about how the travel restrictions would impact on beIN if it were able to secure legal representation. As Qatar put it:

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[416] Saudi Arabia's response to Panel question No. 11(a), para. 1, and Panel question No. 29, para. 47; and opening statement at the second meeting, para. 14. Saudi Arabia clarified that "it affords copyright protection to all entities even if they are not licensed to broadcast in Saudi Arabia, with the exception of entities found to have distributed content illegally (i.e., without a broadcasting license) in Saudi Arabia". (Saudi Arabia's response to Panel question No. 41, para. 24.)

[417] See Qatar's response to Panel question No. 51, paras. 129-131.

[418] See paragraphs 7.33 to 7.36 of this Report.

[419] Qatar's first written submission, para. 226.

[420] In its third-party submission, the European Union suggested, with respect to the effect of the travel restrictions, that "Qatari nationals could be represented in legal proceedings by their representatives, provide testimonies and discuss their cases with their lawyers via different means of communications" and thus "could exercise the rights … remotely". (European Union's third-party submission, paras. 14 and 22).
See Qatar's response to Panel question No. 17, paras. 109-113 (alleging that the travel ban and the other measures at issue foreclosed the ability of Qatari nationals to do so, whether in person or "remotely");
Saudi Arabia's response to Panel question No. 40, paras. 20-22 (asserting that foreign nationals may avail themselves of all rights in Saudi Arabia without physically travelling to or being present in Saudi Arabia, including by email or by visiting SAIP's public webpage); and Qatar's comments on Saudi Arabia's response to Panel question No. 40, paras. 61-71 (alleging that the travel ban, together with the other measures at issue, make it impossible for Qatari right holders to initiate, conduct, or testify in proceedings for the enforcement of intellectual property rights in Saudi Arabia, in violation of Articles 41.1 and 42 of the TRIPS Agreement).

[421] Qatar's second written submission, para. 290.

> Qatar has not asserted that Saudi Arabia *requires* Qatari nationals to initiate or conduct proceedings in person, or to testify or otherwise participate in these proceedings in person. Due to Saudi Arabia's anti-sympathy measures, and the resulting restrictions on the ability of Saudi attorneys to assist the Government of Qatar or Qatari nationals in this WTO dispute, Qatar is unable at this time to answer the Panel's specific question about what Saudi law *requires* with respect to in-person participation.[422]

7.90. Indeed, the Panel notes that Qatar contemplates that, if Saudi Arabia were to offer alternative means (*e.g.*, video testimony among other possibilities) that adequately provided for the rights of parties to "substantiate their claims and to present all relevant evidence" within the meaning of Article 42 of the TRIPS Agreement, together with the right to be represented by counsel (also in line with Article 42), then "its travel ban could potentially have little, if any, impact on the ability of Qatari nationals to access civil judicial procedures".[423]

7.91. Third, with respect to the Ministerial approval requirement, Qatar asserted that, were beIN able to secure legal representation, it "would nevertheless be blocked" from ultimately prevailing.[424] Qatar also referred to beIN's understanding that the Ministry "will not authorise" any legal action to enforce beIN's rights.[425] Qatar argued that beIN "has been barred" from initiating copyright proceedings as a consequence of the anti-sympathy measures, and that beIN "would be barred" from accessing the Copyright Committee by virtue of the Ministerial approval requirement.[426] Thus, by its terms, Qatar's arguments are directed at what the Minister would or would not do if beIN were able to secure legal representation and brought a case before the Copyright Committee.

7.92. However, to date, neither beIN nor any other foreign right holder has initiated civil enforcement procedures against beoutQ before Saudi tribunals.[427] In the Panel's view, the question of whether—and, if so, how—the Ministerial approval requirement (or replacement measures establishing a different layer of approval[428]) would be applied to beIN, were beIN able to retain legal counsel in Saudi Arabia and bring a case before the Copyright Committee, would also be an exercise in speculation. Again, it should be noted that Qatar did not make any "as such" claim in connection with the Ministerial approval requirement at issue.[429] In the absence of evidence of how these requirements have been applied, the Panel is unable to conclude that the Ministerial approval requirements would operate in the manner described by Qatar.

7.93. The Panel notes that Qatar also argued that "the absence of any copyright infringement actions being brought against beoutQ is, in and of itself, evidence that the 'gatekeeping function' has been applied to prevent beIN and other right holders from obtaining civil remedies for copyright infringement in Saudi Arabia".[430] However, this argument assumes that, in addition to the explicit Ministerial approval requirement regarding decisions issued by the Copyright Committee as set forth in the text of the Copyright Law and Implementing Regulations, there is an additional unwritten requirement for Ministerial approval of the *initiation* of proceedings before the Copyright Committee.[431] However, this additional alleged unwritten measure may simply be a different way of characterizing another measure that the Panel has already ruled upon, namely 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

[422] Qatar's response to Panel question No. 17, para. 111. (emphasis original)
[423] Qatar's response to Panel question No. 23, para. 152.
[424] Qatar's first written submission, para. 140.
[425] Ibid. paras. 194 and 227. See ibid. paras. 229, 350, 381 and 401.
[426] Qatar's response to Panel question No. 18(b), paras. 117-118.
[427] Qatar's response to Panel question No. 43; Saudi Arabia's response to Panel question No. 29, para. 35; Saudi Arabia's second written submission, para. 61; and Saudi Arabia's response to Panel question No. 39, para. 13. Furthermore, Qatar indicated that it does not have any example of Ministerial approval having been withheld in cases of advancing claims against copyright infringement. Qatar suggested that Saudi Arabia "is not a country where such information is easily available". (Qatar's response to Panel question No. 18(c), para. 121.)
[428] See paragraphs 2.11 to 2.14 of this Report.
[429] See paragraphs 7.31 to 7.32 of this Report.
[430] Qatar's response to Panel question No. 44, para. 103.
[431] Qatar's response to Panel question No. 18(a), para. 114. See also Qatar's response to Panel question No. 44, paras. 78-103.

tribunals. If it is a distinct measure, then Qatar has not provided sufficient evidence of the existence of such an unwritten measure.

7.94. For these reasons, the Panel finds that Saudi Arabia has imposed certain restrictions that could impact beIN's ability to access civil enforcement procedures. These include the 19 June 2017 Circular, the travel restrictions and the Ministerial approval requirement. However, there is no evidence that any of these measures has yet been applied to beIN to prevent it from accessing civil enforcement procedures. The Panel considers that it would be an exercise in speculation to predict how those requirements might be applied to restrict beIN's access to civil enforcement procedures.

7.95. The Panel concludes that Qatar has not discharged its burden of proving that the 19 June 2017 Circular, the travel restrictions and the Ministerial approval requirement, taken individually or collectively, have prevented, or would prevent, beIN from accessing civil enforcement procedures before Saudi courts and tribunals. However, the Panel concludes that Qatar has established that Saudi Arabia has taken "anti-sympathy measures" that, directly or indirectly, have had the result of preventing beIN from securing legal representation to enforce its IP rights.

7.2.3.3 Non-application of criminal procedures and penalties

7.2.3.3.1 Introduction

7.96. The Panel now turns to the question of whether sufficient evidence has been provided to establish that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. This issue is central to Qatar's claim under Article 61 of the TRIPS Agreement, and it is disputed between the parties. Saudi Arabia maintained that Members cannot be expected to act on criminal allegations without evidence and without the cooperation of concerned right holders.[432] Saudi Arabia reiterated that criminal procedures and penalties were not applied against beoutQ because beIN and other foreign right holders have not provided sufficient supporting evidence and cooperation.[433] Qatar asserted that "it could not be for lack of sufficient evidence that Saudi Arabia has failed to initiate procedures and penalties against the beoutQ piracy".[434]

7.97. The Panel will begin with an overview of the relevant correspondence between beIN and certain third-party right holders, on the one hand, and the Saudi Ministry of Culture and Information (Ministry), GCAM and Arabsat, on the other hand. The Panel will then examine the evidence presented by beIN and other right holders in detail, along with the additional corroborating evidence submitted to the Panel by Qatar. After reviewing the evidence in detail, the Panel will state its overall conclusion.

7.2.3.3.2 Overview of correspondence

7.98. The Panel begins by summarizing the correspondence between beIN and third-party right holders—particularly UEFA and BBC Studios—and the Ministry and GCAM. The Panel then summarizes the correspondence between beIN and third-party right holders—particularly UEFA, LaLiga, the Premier League and FIFA—and Arabsat.

7.99. In a letter to the Ministry dated 15 August 2017, beIN stated that it "recently learned that an entity operating under the name 'beoutQ' is currently broadcasting beIN's proprietary media content, without [beIN's] authorization, in … Saudi Arabia". beIN enclosed with its letter video recordings of beoutQ's pirated broadcasts of beIN's proprietary content in Saudi Arabia[435], and requested that the Ministry and GCAM "take immediate action to investigate and prevent the unauthorized use of beIN's media content by 'beoutQ' and/or any other unauthorized channels or means in … Saudi Arabia".[436] In a response to beIN dated 31 August 2017, GCAM stated that "it has not been proven to us that there are any unlicensed devices at all the regular sales outlets". GCAM added that it had not granted any licence for the broadcast of satellite channels in contravention of Saudi law, and

[432] Saudi Arabia's second written submission, para. 59.
[433] Saudi Arabia's response to Panel question No. 29, paras. 41-46; and second written submission, paras. 59-66.
[434] Qatar's second written submission, para. 214.
[435] Letter from beIN to Saudi Ministry of Culture and Information, 15 August 2017, Exhibit QAT-116, p. 1.
[436] Ibid. p. 2.

that it would "take the appropriate measures in the event that it becomes aware of any violation of the laws in this regard and the sanctions stipulated in the law in respect of the violators are applied."[437]

7.100. Two weeks after receiving this response from GCAM, beIN submitted a second letter to the Ministry, dated 14 September 2017, in which it stated that it had become aware of "further evidence indicating that persons in Saudi Arabia are actively promoting and/or involved in these illegal and unauthorized broadcasts". This evidence, enclosed with beIN's letter to the Ministry, consisted of: (a) tweets sent from the Twitter accounts of prominent Saudi persons and institutions endorsing or advertising beoutQ's pirated broadcasts, (b) beIN's assertion that the website of the beoutQ channel was originally geo-blocked to Saudi Arabia during the initial period of its operation, and (c) posts on social media, including Facebook, that advertised beoutQ STBs and indicated that these STBs would be on sale in Saudi Arabia. Considering that this evidence linked the piracy of beIN's proprietary content to persons subject to the Ministry's jurisdiction, beIN renewed its request that the Ministry and/or GCAM take action to investigate and prevent the illegal piracy by beoutQ.[438]

7.101. In a third letter to the Ministry, dated 16 January 2018, beIN asserted that beoutQ's broadcasts were available since August 2017 and had significantly expanded to include web streaming and satellite transmission. beIN noted that, since October 2017, beoutQ offers beIN channels, overlaid with the beoutQ logo, via satellite transmission to persons purchasing subscriptions and STBs from retail outlets in Saudi Arabia.[439] beIN enclosed images of such STBs on sale. beIN concluded that it "believe[s] that Saudi persons or entities own or control beoutQ, and/or are facilitating beoutQ's unauthorized and illegal transmission of beIN's proprietary media content".[440]

7.102. On 8 June 2018 and 26 June 2018, respectively, UEFA and BBC Studios also each sent letters to the Ministry and to GCAM concerning beoutQ's piracy. Both UEFA and BBC Studios stated that "a pirate operator using the name 'beoutQ' had been engaged in the unauthorised distribution of programming and channels licensed to and/or operated by beIN and by other authorised third parties operating in and outside of the MENA region." UEFA and BBC Studios each indicated that beoutQ was operating from Saudi Arabia, with UEFA further alleging that beoutQ was engaged in both illegal web streaming and satellite broadcasting using the Badr-4/Arabsat 4-B satellite and frequencies operated by Arabsat. UEFA and BBC Studios submitted that beoutQ was selling STBs and subscriptions for its satellite broadcasting in retail outlets across Saudi Arabia, that beoutQ's activity was spreading, and that beoutQ STBs became available for sale in countries in the MENA region other than Saudi Arabia.[441]

7.103. Finally, in a letter from beIN's legal representative to both the Ministry of Media (previously known as the Ministry of Culture and Information) and GCAM, dated 3 September 2018, beIN provided additional evidence of beoutQ's operations in Saudi Arabia and its expansion to other countries in the Middle East. Specifically, beIN stated that it had uncovered the sale—in other countries in the MENA region, including Morocco, Oman and Bahrain—of beoutQ STBs imported from Saudi Arabia. Furthermore, beIN considered that there was compelling evidence demonstrating that beoutQ is operated from and controlled by persons in Saudi Arabia, given that: (a) beoutQ's pirate operations are focused on the Saudi market; (b) beoutQ's pirate channels and related data are transmitted via Arabsat satellites and have moved at different times across different Arabsat frequencies; and (c) beoutQ is wholly, or in part, operated and/or controlled and directed by Saudi-based persons. beIN submitted extensive evidence, including newspaper articles describing beoutQ's piracy, photographic evidence advertising rate cards and subscriptions priced in Saudi Riyals, social media posts in support of beoutQ's piracy, declarations concerning the relationship between beoutQ and a Saudi content distributor, technical reports demonstrating the transmission

[437] Letter from Saudi General Commission for Audiovisual Media to beIN (Arabic original and English translation), 2 September 2017, Exhibit QAT-117.

[438] Letter from beIN to Saudi Ministry of Culture and Information, 14 September 2017, Exhibit QAT-118, pp. 1-2.

[439] Letter from beIN to Saudi Ministry of Culture and Information, 16 January 2018, Exhibit QAT-119, p. 2.

[440] Ibid. pp. 1-2.

[441] For UEFA's letters to the Saudi Ministry of Culture and Information and to GCAM, see UEFA Letter to KSA Ministry of Culture & Information, 8 June 2018, Exhibit QAT-122, and UEFA Letter to GCAM, 8 June 2018, Exhibit QAT-123. For BBC Studios' letters, see BBC Letter to KSA Ministry of Culture & Information, 26 June 2018, Exhibit QAT-124; and BBC Letter to GCAM, 26 June 2018, Exhibit QAT-125.

of beoutQ's pirated content on Arabsat satellite frequencies and social media posts and photographic evidence referring to public screenings of beoutQ's pirated content organized by municipalities across Saudi Arabia.[442]

7.104. In addition to corresponding with the Ministry and GCAM, beIN and third-party right holders wrote to Arabsat to convey their concerns about the transmission of beoutQ's pirated broadcasts using Arabsat satellite frequencies. In a letter to Arabsat dated 16 August 2017, beIN requested Arabsat to remove or disable access to any unauthorized broadcast of beIN's proprietary content on its satellite infrastructure.[443] In a response to beIN dated 29 August 2017, Arabsat stated that it would "forward[] any complaint of infringement received from beIN to the channel infringing its rights", and would "ask[] the channel to stop such infringement immediately". Arabsat stated that it refused to accept or bear any liability if this action does not stop the broadcast of such infringed content.[444]

7.105. In a subsequent letter to beIN dated 14 December 2017[445], Arabsat stated that it "ha[d] no legal & contractual relationship with the entity of beoutQ, and ha[d] no insights [or] information on the content broadcast[] on the said frequency since it is [an] encrypted signal". Arabsat alleged that the signal "[was] transmitted directly from the client's premises", and that, "[r]eferring to the mechanism agreed upon by beIN and Arabsat, and as the broadcast[] signal [was] encrypted, Arabsat ha[d] contacted the client operating the mentioned frequency to clarify [beIN's] claim." According to Arabsat, the client responded that it "ha[d] no relationship or cooperation with [the] beoutQ channel and its content" and was "fully complying with the laws relating to intellectual property, copy rights and [its] contract with Arabsat". Accordingly, Arabsat stated, it "[was] not in a position to deactivate the carrier as no solid evidence [was] furnished to Arabsat that beoutQ's content is transmitted on the said frequency". Arabsat "urge[d] beIN to provide tangible evidence proving technically that beoutQ is transmitted on the said frequency to enable Arabsat to take the required action".[446]

7.106. beIN's legal representative responded to Arabsat's legal representative in a letter dated 26 December 2017. With respect to Arabsat's request for tangible evidence, beIN attached a report prepared by its technical team finding that beoutQ was initially using Arabsat frequency 12207 MHz to broadcast beIN's content through beoutQ STBs and later used Arabsat frequency 11919 MHz.[447] beIN renewed its request that Arabsat, by no later than 30 December 2017: (a) identify its client(s) using frequencies 12207 MHz and 11919 MHz to broadcast beIN's proprietary content under the name beoutQ, (b) provide details of the uplinks used by Arabsat's client(s) using the name beoutQ for the transmission of signals to Arabsat's satellites, and (c) confirm that Arabsat would prevent access to frequencies 12207 MHz, 11919 MHz and any other Arabsat frequencies used by beoutQ.[448]

7.107. From mid-March 2018 to early June 2018, four third-party right holders—UEFA, LaLiga, the Premier League and FIFA—also engaged in correspondence with Arabsat concerning beoutQ's piracy. According to the Panel record, UEFA, LaLiga and the Premier League each issued letters to Arabsat, alleging that beoutQ had made unauthorized transmissions of their programming via Arabsat satellite frequencies. The Premier League identified the frequencies as 12207 MHz and 11919 MHz, carried on the Arabsat satellite located at the orbital position 26^{O}E. The right holders asked Arabsat to take steps available to it to prevent beoutQ's transmissions on Arabsat satellite frequencies and

[442] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106.

[443] Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, pp. 1-2.

[444] Arabsat Letter to beIN, 29 August 2017, Exhibit QAT-101.

[445] Arabsat states that it is responding to a letter from beIN dated 6 December 2017. While the 6 December 2017 letter has not been filed with the Panel, beIN's 26 December 2017 letter to Arabsat noted that the 6 December 2017 letter contains a request "that Arabsat take immediate action to stop the unauthorized and illegal transmission of beIN's proprietary media content via Arabsat's satellites by pirate entity 'beoutQ'". (Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, p. 3.)

[446] Arabsat Letter to beIN, 14 December 2017, Exhibit QAT-102.

[447] Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, p. 3.

[448] Ibid. p. 4.

to cease any collaboration with any clients or customers broadcasting beoutQ-pirated content using Arabsat satellites or services.[449]

7.108. Arabsat responded to the letters issued by UEFA and LaLiga, advising each to direct its correspondence to beIN's legal representative, which had already been engaging with Arabsat, or to Arabsat's legal representative.[450] UEFA subsequently wrote to Arabsat's legal representative to confirm beoutQ's unauthorized transmissions via Arabsat frequencies.[451] According to the Panel record, Arabsat's legal representative then issued two letters, one to LaLiga and one to FIFA. The legal representative informed LaLiga and FIFA that Arabsat was conducting an investigation concerning the use of Arabsat's satellite frequencies and would consider their input in the investigation. Arabsat's legal representative added that, once it completed its investigation, Arabsat would "carefully consider the findings and then weigh what action is appropriate under the circumstances".[452] Arabsat's legal representative also emphasized to FIFA[453] that Arabsat is not "collaborating" with any person or entity to commit IP piracy, and that Arabsat is not a Saudi entity and is not controlled by the Saudi government or by private Saudi entities.[454]

7.109. In a follow-up letter dated 13 July 2018 to Arabsat's legal representative, beIN alleged that beoutQ's commercial-scale piracy via Arabsat satellites had intensified.[455] beIN submitted evidence of a Saudi content distributor's active assistance of beoutQ's piracy and a technical report produced by anti-piracy expert Nagra asserting that beoutQ's pirated broadcasts are transmitted on Arabsat satellite frequencies.[456] beIN then "demands[ed] as a matter of urgency" that Arabsat: (a) disable and/or block the transmission of beoutQ's expected pirate transmission of the FIFA World Cup 2018 final game on 15 July 2018 on Arabsat satellite frequencies, including those listed in the present letter; (b) disable and/or block any further access by beoutQ, and affiliated entities, to Arabsat satellites and frequencies; (c) cancel any contracts that facilitate beoutQ broadcasts on Arabsat satellite frequencies; and (d) disclose the identities of any and all persons or entities paying for, contracting for, or using the Arabsat satellite frequencies used by beoutQ, and any other frequency on which beoutQ transmissions are broadcast on Arabsat's satellites.[457] beIN concluded that "it is plain that Arabsat has more than enough evidence to finally take 'the problem of piracy seriously'".[458]

7.110. In a letter from Arabsat to FIFA, dated 24 June 2019, Arabsat stated that it was responding to a 28 May 2019 letter from FIFA[459], as well as the "daily notices" it had received from FIFA. Specifically, Arabsat contended that FIFA was ignoring two issues.[460] First, FIFA neglected to discuss the conclusion of Arabsat's prior investigations performed by six experts, reflected in Arabsat's 15 July 2018 letter, that Arabsat frequencies are not being used by beoutQ. Arabsat also noted that the *Tribunal de Grande Instance de Paris*, France (TGI) fully vindicated Arabsat, rejected

[449] UEFA Letter to Arabsat, 12 March 2018, Exhibit QAT-92; LaLiga Letter to Arabsat, 4 April 2018, Exhibit QAT-96; and Premier League Letter to Arabsat, 11 April 2018, Exhibit QAT-99.

[450] Arabsat Letter to UEFA, 14 March 2018, Exhibit QAT-93; and Arabsat Letter to LaLiga, 19 April 2018, Exhibit QAT-97.

[451] UEFA Letter to Squire Patton Boggs LLP, 17 April 2018, Exhibit QAT-94.

[452] Squire Patton Boggs LLP Letter to LaLiga, 13 June 2018, Exhibit QAT-98; and Squire Patton Boggs LLP Letter to FIFA, 5 June 2018, Exhibit QAT-100.

[453] The Panel has not been provided with a copy of FIFA's 28 May 2018 letter to Arabsat, to which Arabsat's legal representative responds, but the key points in the letter are reproduced in the response of Arabsat's legal representative to FIFA.

[454] Squire Patton Boggs LLP Letter to FIFA, 5 June 2018, Exhibit QAT-100. Arabsat's legal representative submitted that Arabsat is "a quasi-governmental entity of the Arab League, established by 22 of its members". The General Assembly is Arabsat's main organ, and its membership consists of the communication ministers in the Arab member states or their duly authorized representatives. (Ibid.)

[455] Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, p. 5. In this letter to Arabsat, beIN referred to previous letters from 1 May 2018, 1 June 2018 and 12 July 2018, and laments that, "[d]espite numerous notices … Arabsat has failed to take any action to stop the transmission of beoutQ's illegally pirated content, which constitutes direct infringement of beIN's copyrights and trademarks." (Ibid.)

[456] Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, p. 6.

[457] Ibid. p. 8.

[458] Ibid.

[459] While FIFA's 28 May 2019 letter has not been submitted to the Panel, Arabsat noted that this letter "claims to have 'procured third party on-site testing' and to 'have received independent confirmation that beoutQ is engage[d] in illegal satellite broadcasting' through Arabsat satellites". (Arabsat Letter to FIFA, 24 June 2019, Exhibit SAU-39, p. 3.)

[460] Arabsat Letter to FIFA, 24 June 2019, Exhibit SAU-39, pp. 1-2.

all claims and awarded Arabsat substantial costs. Arabsat asked FIFA to provide Arabsat with the written results of the "third party on-site testing", and in the meantime, considered that FIFA had provided no proof that beoutQ was using Arabsat frequencies to transmit pirate broadcasts.[461] Second, Arabsat stated that "disabling" frequencies is a permanent, radical action that it could not undertake "absent an incontrovertible showing that a frequency has been hijacked or otherwise misused by a third party", and that "no other means exist for precluding such activity". Disabling such frequencies, in Arabsat's view, would only terminate legitimate programming and interfere with the contractual rights of Arabsat customers, and would not affect beoutQ's broadcasts. Moreover, satellites involve "very sensitive technology, to which no human technician has physical access to correct malfunctions". Unlike "'flipping' a switch on land", Arabsat noted, doing so on a satellite involves a substantial risk that the frequency might not be re-enabled. Accordingly, Arabsat stated that it cannot "disable any frequencies used to transmit beoutQ's unauthorized broadcasts".[462]

7.111. In its response to Arabsat, dated 26 June 2019, FIFA stated that it was simply requesting the support of Arabsat in addressing the unauthorized transmissions of beoutQ, and was not "implying that Arabsat is involved in, or complicit with, the illegal beoutQ operation". In the absence of Arabsat being in a position to disable its satellite frequencies, FIFA requested that Arabsat employ any means necessary to investigate the use of its frequencies, notably 11270 MHz Horizontal polarization (11270 MHz H) (on the Arabsat Badr-6 satellite) during the live transmissions of the remaining matches of the FIFA Women's World Cup 2019. FIFA encouraged Arabsat to help identify the source of the signals being uplinked and to provide feedback on such investigations. FIFA reiterated its request for a copy of the test results referred to in Arabsat's letter dated 15 July 2018, and noted that the TGI did not find that beoutQ was not carried by Arabsat's satellite frequencies. Rather, in FIFA's view, the TGI simply dismissed the case on the basis that beoutQ's transmissions were not widely available in France.[463]

7.112. The Panel will now examine, in greater detail, the evidence presented to Saudi authorities by beIN and other right holders, together with certain additional corroborating evidence submitted to the Panel by Qatar.

7.2.3.3.3 Evidence regarding the promotion of beoutQ by prominent Saudi nationals

7.113. In its 14 September 2017 and 3 September 2018 letters to the Ministry and GCAM, beIN provided evidence of tweets sent from the Twitter accounts of prominent Saudi nationals.[464] These Twitter accounts belong to Mr Saoud Al-Qahtani, counsel for the Saudi Royal Courts[465]; Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper; and the Al Riyadh newspaper itself. beIN alleged that the tweets from these accounts "provide reason to believe that the conspiracy to pirate beIN's proprietary media content has occurred within or has connections to the territorial jurisdiction of Saudi Arabia".

7.114. beIN provided copies of these tweets to the Ministry[466], which Qatar subsequently submitted to the Panel.[467] These tweets are reproduced below.

No.	Time and date of tweet	Author of tweet	Content of tweet
1	12 June 2017	Mr Saoud Al-Qahtani, counsel for the Saudi Royal Courts	"The alternative solutions are coming soon and they are going to be free or for a low price.

[461] Ibid. p. 2.
[462] Ibid. pp. 2-3.
[463] FIFA Letter to Arabsat, 26 June 2019, Exhibit SAU-40.
[464] Letter from beIN to Saudi Ministry of Culture and Information, 14 September 2017, Exhibit QAT-118, pp. 1-2; and Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, p. 5. See also Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 22.
[465] According to Qatar, as early as 12 June 2017, Saud Al-Qahtani was a consultant to the Saudi Royal Court holding the rank of Minister, and Chairman of the Board of the Saudi Union for Cyber and Programming Security. (Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 22.)
[466] Letter from beIN to Saudi Ministry of Culture and Information, 14 September 2017, Exhibit QAT-118, pp. 1-2.
[467] Promotion of beoutQ through Social Media, Exhibit QAT-41.

No.	Time and date of tweet	Author of tweet	Content of tweet
			#Blocking_Qatari_beIN_Sport #Oh_Dulim_Greet_them_back It was their plan after buying the broadcasting rights five times the real value to insert political bulletins and programmes to damage international stability. There is a big hole in the law in their monopoly to broadcast in the region. Revise the situation in Britain and France, for example…that is enough indication."[468]
2	6 August 2017	Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper	"Saudi heroes will entirely pirate beIN sport channel [sic] and satellite-broadcast the full content on beoutQ channel #Launching_beoutQ_Sport_Channels2"[469]
3	6 August 2017	Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper	"This streaming will be through the channel's special receiver and the subscription will be for a very low price because it does not mainly aim at getting profits #Launching_beoutQ_Sport_Channels2"[470]
4	6 August 2017	Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper	"After two weeks from now, beoutQ receivers will be available in the market. It will be satellite broadcasting, not a streaming via internet #Launching_beoutQ_Sport_Channels2"[471]
5	6 August 2017	Mr Abdulaziz al-Mriseul, general manager of the Al Riyadh Newspaper	"As for me, I will strongly support beoutQ channels, and I will never feel satisfied until the full piracy of beIN sport channels. Let's wait and see who is the strongest. #Launching_beoutQ_Sport_Channels2"[472] [This tweet was accompanied by a cartoon showing beoutQ "kicking" beIN out of the market.][473]
6	N/A	Al Riyadh Newspaper	"Launching 10 sport channels broadcasting European Leagues, for low prices…Soon…marking the end of 'beIN sport' era." [This tweet contains the logos of various sports leagues, including Barclays Premier League, Ind Liga, Serie A, and LFP.][474]

7.115. All of the tweets above foreshadow that a substitute for beIN's operations would enter the Saudi market, and some of the tweets support the establishment of a pirate channel, beoutQ, to circumvent beIN's exclusive licences from third-party right holders. Saudi Arabia did not contest the content of these tweets.

7.116. In addition to these tweets, Qatar provided the Panel with other social media evidence, including a cartoon commercial produced by beoutQ, showing strong support for beoutQ and antipathy toward beIN. Specifically, Qatar submitted tweets that were posted in August 2017 from the Twitter account of the general manager of the Al Riyadh newspaper, the same Twitter account that authored tweets 2 to 5 above.[475] These additional tweets further clarify the rationale of beoutQ's piracy and the apparent origins of beoutQ in Saudi Arabia. In these tweets, the author: (a) conducts lotteries or giveaways offering beoutQ STBs to viewers[476], which, based on the text of the tweets, appear to have drawn complaints from beIN itself[477]; (b) states that beoutQ STBs will

[468] Ibid. pp. 15-16; and SportsPro, *"Saudi Arabia, cartoon pirates and great TV sports rights robbery"*, 6 March 2019, Exhibit QAT-50. See also Qatar's first written submission, para. 46; opening statement at the first meeting of the Panel, para. 26; and second written submission, para. 36.
[469] Promotion of beoutQ through Social Media, Exhibit QAT-41, p. 1. See also Qatar's first written submission, para. 51.
[470] Promotion of beoutQ through Social Media, Exhibit QAT-41, p. 3. See also Qatar's first written submission, para. 51.
[471] Promotion of beoutQ through Social Media, Exhibit QAT-41, p. 7.
[472] Ibid. p. 9. See also Qatar's first written submission, para. 51.
[473] Qatar's first written submission, para. 51.
[474] Promotion of beoutQ through Social Media, Exhibit QAT-41, p. 13.
[475] See tweets 2 to 5 in the table following paragraph 7.114 of this Report.
[476] Promotion of beoutQ through Social Media, Exhibit QAT-41, pp. 17-18.
[477] Ibid. p. 21.

be available in two weeks[478]; (c) stresses that "[t]he main purpose is to give a serious blow to the Qatari media, invalidate their scheme, and make content available to the followers, away from their channels … #Launching_beoutQ_Sport_Channels2"; and (d) invites readers to "spoil their scheme and quickly subscribe in beoutQ for a very low price, and trust what the national heroes are doing".[479] Qatar also submitted an anti-beIN cartoon, circulated by beoutQ, encouraging Saudi citizens and beIN's licensors to replace beIN with beoutQ.[480]

7.117. The Panel recalls that, in the context of denying its promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts, Saudi Arabia noted "that unofficial, non-government tweets are not usually recognized by legal adjudicators or attributed to a government without explicit approval".[481] The Panel discusses these tweets, not because they are attributable to the Government of Saudi Arabia, but because they are evidence that beoutQ was promoted by prominent individuals and newspapers within Saudi Arabia, which is relevant to the question of whether beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia.

7.2.3.3.4 Evidence regarding the targeting of the Saudi market by beoutQ

7.118. Qatar indicated that beIN has provided evidence to the Saudi authorities demonstrating that beoutQ targets the Saudi market by: (a) allowing only persons in Saudi Arabia to access its websites, (b) making its STBs widely available for sale at retail stores in Saudi Arabia, and (c) advertising its subscriptions and rate cards to viewers using prices in Saudi riyals.

7.119. First, beIN asserted, in a letter to the Ministry and GCAM, that only web users in Saudi Arabia can access beoutQ's websites, or that such websites are "geo-blocked" to Saudi Arabia.[482] In support of this assertion, beIN referred to a technical report by Nagra[483] indicating that, as of the date of its report, beoutQ channels could be watched for free on two websites, http://beoutq.se and http://beoutq.sx, accessible only to web users in Saudi Arabia. Nagra confirmed that it could only access these websites with an IP address from Saudi Arabia.[484] beIN considered that this finding "provides [a] strong reason to believe that this act of piracy was mainly targeted to the Saudi market".[485]

7.120. Second, in a letter to the Ministry, beIN submitted extensive photographic evidence showing beoutQ STBs on sale at retail stores in Saudi Arabia.[486] beIN submitted this evidence to the Ministry under the file name "Images of the beoutQ set-top boxes on sale in retail stores in the KSA". A similarly titled exhibit, "Photographs of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia, October 2017 to September 2018" has been submitted to the Panel.[487] An examination of the photographs in this exhibit from November 2017, for example, reveals that beoutQ STBs were available for sale, and were ultimately purchased by investigators in Saudi Arabia, at multiple electronics retail stores in Jeddah, Riyadh and Al Dammam. The photographic evidence shows the

[478] Ibid. p. 19.
[479] Ibid. p. 11.
[480] Qatar's first written submission, para. 50 (referring to beoutQ Promotional, as shown on beoutQ, Video, 21 September 2018, Exhibit QAT-49 and SportsPro, *"Saudi Arabia, cartoon pirates and great TV sports rights robbery"*, 6 March 2019, Exhibit QAT-50). In this cartoon, Saudi citizens protest outside of what appears to be beIN's headquarters, which is adorned by a dollar sign and has a control room in which the CEO of beIN is surrounded by piles of US dollars. The CEO of beIN appears to become enraged at the sight of the protests, and visits the headquarters of numerous football leagues. He leaves the headquarters of each football league, appearing to be disappointed, and walks home. At the end of the commercial, he enters the TV room of his home with his family and sits down to a match televised by beoutQ. (Ibid.)
[481] Saudi Arabia's response to Panel question No. 29(a), para. 62.
[482] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106.
[483] Ibid. p. 4 (referring to Appendix 9: Nagra Report, "beoutQ Piracy Overview," dated 24 June 2018, section 3.1, p. 4). See also Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 26.
[484] NAGRA, Kudelski Report, "*beoutQ Piracy Overview*", dated 24 June 2018, Exhibit QAT-90, section 3.1, p. 4.
[485] Letter from beIN to Saudi Ministry of Culture and Information, 14 September 2017, Exhibit QAT-118, pp. 1-2.
[486] Letter from beIN to Saudi Ministry of Culture and Information, 16 January 2018, Exhibit QAT-119.
[487] Ibid. p. 5 (referring to Appendix 7: Images of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia). See Photographs of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia, October 2017 to September 2018, Exhibit QAT-71.

store front at which each beoutQ STB was purchased; the receipt and business card from each store detailing the cost and date of the purchase of each beoutQ STB, as well as the name and address of each store; and, for certain STBs, the card containing an activation code and instructions for activation. As demonstrated by beIN's photographic evidence, in November 2017, investigators purchased beoutQ STBs from seven stores in Riyadh, nine stores in Jeddah and eight stores in Al Dammam.[488]

7.121. beIN also pointed out that international journalists had reported on the wide availability of beoutQ STBs in Saudi retail stores. On 22 June 2018, Bloomberg's managing editor for the MENA region reported that:

> Many Saudis say it was easy to buy the devices in shops across the kingdom in the lead up to the World Cup, generally for as much as 400 [R]iyals ($107), including a year-long subscription. It's now common to see BeoutQ playing in homes, restaurants and cafes that purchased receivers. The channel was playing on big screens at a government-sponsored event in the Saudi capital on Wednesday showing the national team's game against Uruguay. It was also playing on a large public screen on the side of a building on Tahlia Street, the city's main commercial boulevard.[489]

7.122. Third, beIN also submitted additional photographic and social media evidence, in its 3 September 2018 letter to the Ministry and GCAM, showing the extent to which beoutQ targets the Saudi market. beIN submitted photographic evidence in which beoutQ appears to advertise and price, in Saudi riyals, subscriptions[490] to its pirated content, rate cards that list the prices for advertising spots in various football matches and at various points in those matches[491], and Saudi brands and products.[492]

7.123. In addition to the evidence above, submitted by beIN to the Ministry and GCAM, Qatar provided the Panel with additional evidence supporting the conclusion that beoutQ appears to target the Saudi market. This evidence consists of: (a) a declaration made by the CEO of beIN concerning beoutQ's operations and the predominant use of beoutQ's websites by persons in Saudi Arabia; (b) photographic evidence demonstrating that beoutQ STBs were "visibly displayed, promoted, and sold" at electronics stores in at least three major Saudi cities as recently as May 2019; (c) photographic evidence that numerous restaurants and cafés, as well as a Saudi television channel, openly showed beoutQ channels as recently as June 2019; and (d) statements, reports and submissions made by governmental authorities in the United States and the United Kingdom, as well as third-party right holders, expressing concern about beoutQ's piracy in Saudi Arabia. The Panel will discuss each of these categories of evidence in turn.

7.124. First, according to a 15 April 2019 Declaration made by beIN's CEO, between January 2018 and August 2018, the beoutq.sx website was accessed primarily and overwhelmingly by users in Saudi Arabia (71.99%), followed by users in Egypt (5.68%), Morocco (3.68%), Algeria (3.06%), the United States (2.04%), Tunisia (1.81%), the United Kingdom (1.19%), the UAE (1.04%) and Germany (0.93%).[493] This information supports the finding made by Nagra above that beoutQ's websites are geo-blocked and cannot be accessed by web users physically located outside

[488] Photographs of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia, October 2017 to September 2018, Exhibit QAT-71, pp. 51-63.

[489] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, p. 8 (referring to Appendix 15: Bloomberg, "Saudis Dismiss Piracy Claim as Soccer Rights' Spat Escalates," dated 22 June 2018). See also Qatar's first written submission, para. 69 (quoting Bloomberg, "*Saudis Dismiss Piracy Claim as Soccer Rights' Spat Escalates*", 22 June 2018, Exhibit QAT-77).

[490] Ibid. p. 5 (referring to Appendix 4: Evidence of beoutQ Subscriptions Priced in Saudi Riyals).

[491] Ibid. p.5 (referring to Appendix 5: Evidence of beoutQ Advertising Rate Cards Priced in Saudi Riyals). Qatar submitted evidence to the Panel showing, for example, that beoutQ has advertised Premier League "gold packages" for SAR 2,500,000 (or approximately USD 666,638). (See also Qatar's first written submission, para. 67 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 47; and beoutQ advertisements pricing rate cards Saudi Riyals, Exhibit QAT-75).)

[492] Ibid. p. 5 (referring to Appendix 6: Evidence of beoutQ Carrying Advertising for Saudi Brands).

[493] Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 27; and Qatar's first written submission, para. 80 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 27).

Saudi Arabia unless such users subscribed to a virtual private network that registers the user's location as being in Saudi Arabia.[494]

7.125. Second, Qatar provided the Panel with additional photographic evidence demonstrating that beoutQ STBs were "visibly displayed, promoted, and sold" at multiple Saudi electronics stores in November 2017, September 2018, October 2018, April 2019 and May 2019. This photographic evidence further supports the similar evidence submitted by beIN that beoutQ STBs were available for sale in retail stores in November 2017.[495] In November 2017, investigators found that, in Jeddah's Sahary Centre, 20 of the approximately 25 electronics stores had posted leaflets for beoutQ or had beoutQ STBs visibly on display. Similarly, in Jeddah's Nazir Center, at least 20 of 40 electronics stores offered beoutQ STBs for sale.[496] The beoutQ STBs available in stores in November 2017 ranged in price from SAR 360 to 400 (approximately USD 95-110). In September 2018, beoutQ STBs available for sale in 26 electronics stores in the above-mentioned cities ranged in price from SAR 330 and 370 (approximately USD 89-99).[497] Investigators were able to purchase beoutQ STBs in September 2018 and October 2018 at multiple stores.[498] Finally, beoutQ STBs were also available for purchase in 15 Saudi electronics stores in late April 2019 and May 2019 at prices ranging from SAR 600 to 720 (approximately USD 160-192). Qatar provided a picture of the store front and a business card for "beout Q 2", one such store in the Al Fakhriyah District of Al Dammam that distributed beoutQ in May 2019.[499] Saudi retail stores appear to have regularly exchanged tweets with customers regarding the sale of beoutQ STBs.[500]

7.126. Third, Qatar submitted evidence to the Panel showing that numerous restaurants and cafes, as well as Saudi television channels, have broadcast beoutQ's pirated content to the public. Photographic evidence from July 2018, April 2019, May 2019 and June 2019 reflects that restaurants and cafes openly showed beoutQ channels on televisions on their premises.[501] This evidence supplements and expands upon beIN's earlier evidence showing that Saudi municipalities had posted tweets to organize public screenings of 2018 World Cup matches on beoutQ channels in many cities in Saudi Arabia.[502] The prominent Saudi-owned and Saudi-based channel Saudi 24 has also broadcast beoutQ's pirated content on occasion, including the Al Hilal v Al Duhail AFC Champions League match on 12 March 2019. Saudi 24 added graphics to the screen, including its own logo and

[494] See paragraph 7.119 of this Report.

[495] See paragraphs 7.120 to 7.122 of this Report.

[496] Qatar's second written submission, para. 49 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, paras. 34-40; Photographs of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia, October 2017 to September 2018, Exhibit QAT-71; Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217, paras. 24-25; and Photographic Evidence of Screenings of beoutQ's Illegal Pirate Broadcasts of the FIFA 2018 World Cup at Cafes in Riyadh, Saudi Arabia, 11 July 2018, Exhibit QAT-78). See also Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, pp. 125-188. The beoutQ packaging and promotional material in such stores explicitly advertises the availability of sports content exclusively licensed to beIN. (Qatar's first written submission, para. 71 (referring to Images of beoutQ promotional material, Exhibit QAT-42).)

[497] Qatar's second written submission, para. 63 (referring to Photographs of beoutQ Set-Top Boxes on Sale in Retail Stores in Saudi Arabia, October 2017 to September 2018, Exhibit QAT-71). See also Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, paras. 34 and 37.

[498] Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, paras. 36 and 38.

[499] Qatar's response to Panel question No. 21(a), para. 134; and Qatar's opening statement at the second meeting of the Panel, para. 45 (referring to Photographic Evidence and Documentation of beoutQ Set-Top Boxes on Sale in Saudi Arabia, April-May 2019, attached as Annex 1 to Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217, pp. 22-23).

[500] Qatar's first written submission, para. 52 (referring to Tweets about the sale of beoutQ STBs, 12 August 2017, Exhibit QAT-51). A New York Times article also quoted from an employee at an electronics shop in Jeddah, Saudi Arabia in May 2018. The employee stated that a one-year subscription to a beoutQ STB costs USD 100, and that his shop had been selling beoutQ STBs since February 2018. (The New York Times, "*The Brazen Bootlegging of a Multibillion-Dollar Sport Network*", 9 May 2018, Exhibit QAT-175.)

[501] Qatar's second written submission, para. 49 (referring to Photographic Evidence of Screenings of beoutQ's Illegal Pirate Broadcasts of the FIFA 2018 World Cup at Cafes in Riyadh, Saudi Arabia, 11 July 2018, Exhibit QAT-78; and Photographic Evidence of Screenings of beoutQ's Illegal Broadcasts at Restaurants and Cafés in Saudi Arabia, April-June 2019, attached as Annex 2 to Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217); and Qatar's response to Panel question No. 21(a), para. 134.

[502] See section 7.2.3.4 ("Public screenings of beoutQ's broadcasts") of this Report.

an image of Saudi Arabia's leaders apparently watching the game or otherwise overseeing the broadcast.[503]

7.127. Fourth, and finally, Qatar provided the Panel with reports, statements, or submissions produced by the United States, the United Kingdom and third-party right holders expressing concern about beoutQ's piracy in Saudi Arabia.

7.128. For example, in its 2019 Special 301 Report, the Office of the United States Trade Representative (USTR) placed Saudi Arabia on its Priority Watch List, citing "[r]ampant satellite and online piracy" propagated by beoutQ. The USTR explained that the beoutQ STBs "continue to be widely available and are generally unregulated in Saudi Arabia"[504] and that Saudi Arabia "has not taken sufficient steps to address the purported role of Arabsat in facilitating [b]eoutQ's piracy activities".[505] In a series of submissions to the US Government under the 2019 Special 301 process in February 2019, multiple right holders and coalitions from around the world detailed the harm that the beoutQ piracy has caused to their business.[506] The USTR's 2018 Notorious Markets List, which "highlights prominent and illustrative examples of online and physical marketplaces that reportedly engage in and facilitate substantial piracy and counterfeiting", cited beoutQ as "an illicit pirate operation that has been widely available in Saudi Arabia and throughout the Middle East region and Europe".[507]

7.129. The UK Government similarly indicated that it is investigating beoutQ's IP theft of the English Premier League's content.[508] In testimony before the UK's Digital, Culture, Media and Sport Select Committee in mid-May 2019, "secretary of state [for Culture, Media and Sport] Jeremy Wright QC, confirmed that UK Government departments are 'pursuing this matter' and 'the [UK] embassy in Riyadh is speaking to the Saudis on this subject'".[509] Secretary Wright went on to highlight the threat that this piracy causes to the future of sports and sports broadcasting, including in the UK.[510]

7.130. Qatar also provided the Panel with a copy of a public joint statement by seven major football right holders (including FIFA, UEFA, AFC, the Premier League, Bundesliga, LaLiga and Lega Serie A).[511] The statement provides that:

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[503] Qatar's opening statement at the first meeting of the Panel, para. 20 (referring to Inside World Football, "*AFC streaming of ACL reaches 1m in Saudi Arabia but now Saudi 24 channel joins piracy*", 13 March 2019, Exhibit QAT-190).

[504] Qatar's response to Panel question No. 21(a), para. 136 (quoting United States 2019 Special 301 Report, Office of the United States Trade Representative (April 2019) (Excerpts), Exhibit QAT-184).

[505] Ibid. para. 11 (quoting United States 2019 Special 301 Report, Office of the United States Trade Representative (April 2019) (Excerpts), Exhibit QAT-184, p. 57); and Qatar's second written submission, para. 59 (quoting United States 2019 Special 301 Report, Office of the United States Trade Representative (April 2019) (Excerpts), Exhibit QAT-184, p. 57).

[506] See, e.g. Reuters "*NBA, U.S. Tennis, Sky, urge U.S. action on alleged Saudi TV piracy*", 16 February 2019, Exhibit QAT-62; Submission by Audiovisual Anti-Piracy Alliance for the 2019 Special 301 Review, 4 February 2019, Exhibit QAT-63; Submission by Canal+ Group for the 2019 Special 301 Review, 7 February 2019, Exhibit QAT-64; Submission by the International Intellectual Property Alliance for the 2019 Special 301 Review, 7 February 2019, Exhibit QAT-65, p. 14; Submission by the National Basketball Association and the United States Tennis Association for the 2019 Special 301 Review, 7 February 2019, Exhibit QAT-66; Submission by beIN Media Group, LLC and Miramax, LLC for the 2019 Special 301 Review, 7 February 2019, Exhibit QAT-67; Submission by Sky Limited for the 2019 Special Review, 7 February 2019, Exhibit QAT-68; Submission by the Sport Coalition for the 2019 Special 301 Review, 7 February 2019, Exhibit QAT-69; Submission by U.S. Chamber of Commerce for the 2019 Special 301 Review, 7 February 2019, Exhibit QAT-70, p. 27; and Reuters "*NBA, U.S. Tennis, Sky, urge U.S. action on alleged Saudi TV piracy*", 16 February 2019, Exhibit QAT-62.

[507] Qatar's opening statement at the first meeting of the Panel, para. 11 (quoting Excerpts of United States 2018 Out-of-Cycle Review of Notorious Markets, Office of the United States Trade Representative (April 2019) (Excerpts), Exhibit QAT-187, pp. 2 and 15).

[508] Ibid. para. 13 (referring to SportsPro Media, "*UK government to investigate BeoutQ Premier League IP theft*", 25 April 2019, Exhibit QAT-188).

[509] Ibid. (referring to Broadband TV News, "*MPs call for 'robust attack' on pirate beoutQ*", 10 May 2019, Exhibit QAT-189).

[510] Ibid.

[511] Qatar's second written submission, para. 88 (referring to Public statements from world sports organizations condemning beoutQ Piracy, as collected on beIN Media Group's Website Exposing beoutQ, 16 January 2019, Exhibit QAT-52; SportsPro, "*ATP and ITF pile in on BeoutQ over pirate broadcasts*",

> We, the rights holders of various football competitions, collectively condemn in the strongest possible terms the ongoing theft of our intellectual property by the pirate broadcaster known as 'beoutQ' and call on the authorities in Saudi Arabia (KSA) to support us in ending the widespread and flagrant breaches of our intellectual property rights taking place in the country.[512]

7.2.3.3.5 Evidence regarding the transmission of beoutQ's broadcasts via Arabsat

7.131. Headquartered in Riyadh, Saudi Arabia, Arabsat is an intergovernmental organization and satellite operator whose largest shareholder is the Government of Saudi Arabia (with a stake of 36.6%)[513] and whose CEO is a Saudi national.[514] beIN alleged that the frequencies of this satellite operator transmit beoutQ's pirate channels and related data (firmware updates, decryption keys and signaling data) to beoutQ STBs in Saudi Arabia, according to technical reports that it has submitted to the Ministry, GCAM and Arabsat. Two of the four technical reports submitted to the Ministry, GCAM and Arabsat were also submitted to the Panel[515], and will be discussed below.

7.132. Cybersecurity expert Nagra[516] determined that beoutQ's pirate transmissions have moved at different times across four Arabsat frequencies: 12207 MHz Vertical polarization (12207 MHz V), 11919 MHz Horizontal polarization (11919 MHz H), 12380 MHz Horizontal polarization (12380 MHz H) and 12341 MHz Horizontal polarization (12341 MHz H). These frequencies operate on Arabsat satellites Badr-4 and Badr-6, directed at the orbital location 26^{O}East, which covers the MENA region and parts of Europe.[517] According to Nagra, beoutQ channels can be moved at will across these frequencies without upgrades to a beoutQ STB's firmware and without interruption of beoutQ's pirate service for end-users.[518]

7.133. Following initial tests conducted by Nagra leading to the findings above, Arabsat instructed its outside experts to test "certain specific Arabsat frequencies at certain specific times" to detect whether beoutQ pirate broadcasts were being transmitted on these frequencies. Arabsat's outside experts found no such broadcasts on these Arabsat frequencies as tested at specific times. In Nagra's view, however, the findings of Arabsat's outside experts establish only that beoutQ repeatedly switches between the four Arabsat frequencies. Nagra noted that none of Arabsat's outside experts was asked to conduct simultaneous or systematic testing of all four Arabsat frequencies, and that "systematic testing would be the most obvious and straightforward way to determine whether … beoutQ was … transmitting on any Arabsat frequency."[519] Based on its

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6 July 2018, Exhibit QAT-53; FIFA, "*Joint Public Statement on behalf of FIFA, UEFA, AFC, The Premier League, LaLiga and Bundesliga on beoutQ*", 22 January 2019, Exhibit QAT-54; UEFA, "*Joint Statement on behalf of FIFA, UEFA, AFC, The Premier League, LaLiga and Bundesliga on beoutQ*", 22 January 2019, Exhibit QAT-55; Reuters, "*Soccer: Leagues and governing bodies condemn beoutQ TV piracy*", 22 January 2019, Exhibit QAT-56; Asian Football Confederation Statement on beoutQ, 9 January 2019, Exhibit QAT-57; Motion Picture Association of America, 2018 Notorious Markets Comments, 1 October 2018, Exhibit QAT-58, p. 10; The Guardian, "*BBC and Sky call for EU crackdown on Saudi pirate TV service*", 31 October 2018, Exhibit QAT-59; and Bloomberg, "*Telemundo Says Its World Cup Broadcasts Were Illegally Distributed*", 19 June 2018, Exhibit QAT-60).

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

[513] Arabsat, About, last accessed 16 April 2019, Exhibit QAT-86.

[514] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, p. 5 (referring to Appendix 10: Nagra Report, "beoutQ Broadcast Piracy – Further Update," dated 15 August 2018). See also Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 29; and Arabsat, "*League of Arab States Secretary-General honors Arabsat CEO*", 29 January 2018, Exhibit QAT-87.

[515] See NAGRA, Kudelski Report, "*beoutQ Piracy Overview*", 24 June 2018, Exhibit QAT-90; NAGRA, Kudelski Report, "*beoutQ Broadcast Piracy Further Update*", 15 August 2018, Exhibit QAT-80; and Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106. The other two reports were submitted to Arabsat. (See Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, p. 4.)

[516] See NAGRA Kudelski Group Website, "*The Group at a Glance*", Exhibit QAT-81.

[517] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, p. 5 (referring to Appendix 10: Nagra Report, "beoutQ Broadcast Piracy – Further Update," dated 15 August 2018); and NAGRA, Kudelski Report, "*beoutQ Piracy Overview*", 24 June 2018, Exhibit QAT-90, pp. 4 and 6-8.

[518] NAGRA, Kudelski Report, "*beoutQ Broadcast Piracy Further Update*", 15 August 2018, Exhibit QAT-80, p. 6.

[519] Ibid. pp. 6-9.

experience in combating piracy, Nagra considered it "no surprise whatsoever that a pirate operation would seek to arrange its activities in such a way", and noted that Arabsat had "no legitimate technical or practical reason to instruct its outside experts to engage in such selective testing". Nagra emphasized that it is "a simple exercise to turn on a beoutQ STB and determine which frequency is transmitting the beoutQ pirate channels", and that any satellite operator has the technical capability to determine exactly which customers are broadcasting on its frequencies.[520]

7.134. Noting the regularity with which beoutQ's frequency switches occur, Nagra reported that beoutQ made three such switches in 10 days, between 9 June 2018 and 19 June 2018, and that all such switches occurred immediately before or after Arabsat's outside experts tested a particular Arabsat frequency. For example, on 20 June 2018, Arabsat's outside experts tested Arabsat frequencies 11919 MHz H and 12207 MHz V. During the night of 19 June 2018 to 20 June 2018, however, beoutQ's pirate channels had switched off of these frequencies and onto Arabsat frequencies 12341 MHz H and 12380 MHz H. Once Arabsat's outside experts completed their tests of frequency 11919 MHz H, beoutQ's pirate channels moved back to that frequency. Then, while beoutQ continued to broadcast on Arabsat frequency 11919 MHz H, Arabsat mandated two other experts to test Arabsat frequency 12341 MHz H.[521] Arabsat's outside experts did not find any beoutQ transmissions on frequency 12341 MHz H, but on 26 June 2018, Nagra found that beoutQ's pirate channels, signaling data and STB firmware updates were all being transmitted on frequency 11919 MHz H.[522] The specific frequencies used frequently changed, often before or after testing conducted by Arabsat's outside experts, but Nagra consistently found beoutQ's pirated broadcasts to be carried on Arabsat satellite frequencies.[523]

7.135. Nagra also referred to "two unusual technical features" concerning the four Arabsat satellite frequencies that should have attracted Arabsat's attention and prompted further enquiries.[524] First, the four Arabsat frequencies contain "unusual custom obfuscated data", encoded in the Time Offset Table (TOT), which is used by the beoutQ STB to discover where and how the beoutQ channels, decryption keys and firmware updates are broadcast. Nagra emphasizes that "[n]o legitimate broadcaster would include this information in the TOT, which is intended to carry the [Coordinated Universal Time] and local date and time information". Second, the Arabsat frequencies carrying beoutQ audio and video signals are missing the standard Digital Video Broadcasting (DVB) / Moving Picture Experts Group tables that are commonly used in satellite television broadcasts, such as the names of the television channels, the available audio languages, the television operator, the specific satellite frequency being used to transmit the television signal in question, the audio and video compression methods, or the electronic programme guide describing current and future events.

7.136. In addition to the two Nagra technical reports discussed above, Qatar provided the Panel with four other technical reports and statements noting that beoutQ's pirated content is broadcast on Arabsat satellite frequencies. Specifically, Qatar submitted: (a) a report from anti-piracy expert Cartesian dated 8 February 2019[525], (b) an additional report from Nagra dated 8 February 2019[526], (c) a report from cybersecurity expert Synamedia dated 6 June 2019[527], and (d) a report produced by MarkMonitor dated April 2019.[528] Qatar also submitted statements made by the European Union and references to a report commissioned by third-party right holders whose content has been affected by beoutQ's piracy.

[520] Ibid. p. 5.
[521] NAGRA, Kudelski Report, "*beoutQ Broadcast Piracy Further Update*", 15 August 2018, Exhibit QAT-80, p. 5. See also ibid. pp. 16-17; and NAGRA, Kudelski Report, "*Response to IGP Testing of 28 January and 1 February 2019 and beoutQ Frequency Changes*", 8 February 2019, Exhibit QAT-224, p. 16.
[522] NAGRA, Kudelski Report, "*beoutQ Broadcast Piracy Further Update*", 15 August 2018, Exhibit QAT-80, p. 5.
[523] Ibid. p. 9.
[524] Ibid. p. 13.
[525] Cartesian Report, "*Broadcast Piracy via Satellite Transmission*", 8 February 2019, Exhibit QAT-89.
[526] NAGRA, Kudelski Report, "*Response to IGP Testing of 28 January and 1 February 2019 and beoutQ Frequency Changes*", 8 February 2019, Exhibit QAT-224.
[527] Synamedia Report, "'*beoutQ' Service Analysis*", 6 June 2019, Exhibit QAT-226.
[528] MarkMonitor beoutQ Investigation, April 2019 as attached as Exhibit 1 to Supplemental Declaration by Football Right Holders, 19 September 2019, Exhibit QAT-238.

7.137. In its 8 February 2019 technical report, anti-piracy expert Cartesian[529] agreed with Nagra's conclusion[530] that Arabsat had "no legitimate technical or practical reason" to instruct its outside experts to test specific Arabsat frequencies on specific dates, as opposed to engaging in systematic or sequential testing of all Arabsat frequencies. The fact that beoutQ's changes in frequencies occur immediately before and after Arabsat's outside experts' "selective testing" is, for Cartesian, "a strong indication that Arabsat is seeking to conceal the broadcast of beoutQ's illegal content on its satellites, if not actively colluding with the originator of beoutQ's illegal content".[531] Cartesian arrived at a similar conclusion when noting Arabsat's failure to take any decisive action concerning beoutQ's piracy. Cartesian considered that Arabsat is able to determine whether an allegedly illegal signal is transmitted over one of its frequencies, and has the technical and contractual means to stop any such transmission. For Cartesian, Arabsat's inaction thus "provides a strong indication that Arabsat either is directly involved in this piracy or, at a minimum, is colluding with beoutQ".[532]

7.138. According to Cartesian, changes of frequencies may happen over the lifetime of a TV channel, but typically only once every few years, and "always for very good reasons".[533] Numerous frequency changes of the kind occurring on Arabsat satellite frequencies and the implementation of "advanced and unusual signaling mechanisms" necessary to do so are, in Cartesian's view, "certainly … difficult, costly and time-consuming". The only plausible explanation for such conduct is "an intention to conceal the transmission of illegal content", which "should have alerted Arabsat, as the satellite operator, to the need to carry out a full independent investigation of the suspected illegal use of its satellites" and to take "immediate action … to stop such illegal conduct".[534] Cartesian noted that shutting down a frequency[535] is "extremely easy for a satellite operator", "is not an unusual action for a satellite operator", is part of the "very basic supervision operations" that a satellite operator can perform remotely on its satellite, is "very straightforward to do" and can be done at "virtually no cost". Satellite operators conduct this action "on a regular basis for various reasons".[536] According to Cartesian, each frequency may be transmitting several TV channels, meaning that shutting down a frequency will interrupt the broadcast of each TV channel carried on the frequency. Nevertheless, if all channels on a particular frequency are part of the illegal service, the satellite operator can shut down the frequency without impairing a legitimate service.[537]

[529] Cartesian website, "*Our Story*", Exhibit QAT-103.

[530] See paragraph 7.133 of this Report.

[531] Cartesian Report, "*Broadcast Piracy via Satellite Transmission*", 8 February 2019, Exhibit QAT-89, pp. 8-9 and 18.

[532] Ibid. pp. 18-19.

[533] Ibid. pp. 9-10. These reasons include a technical issue with a frequency, the decommissioning of a frequency or a satellite, a migration to a newer (more cost-effective) technology, the addition of new channels, or material changes in channels' encoding bit rates, which would cause channels to be re-distributed among available frequencies. Furthermore, STBs do not have the capability to dynamically follow channels across changes of frequencies, which significantly inconvenience end-users. (Ibid.)

[534] Cartesian Report, "*Broadcast Piracy via Satellite Transmission*", 8 February 2019, Exhibit QAT-89, pp. 10-11. See also ibid. p. 18. Cartesian also noted Nagra's findings that the Network Information Table, Program Map Table and the Service Description Table are missing from beoutQ's signals. Broadcasting channels without this mandatory information therefore constitutes "major non-compliance" with DVB/MPEG regulations. Such a violation can easily be observed with any stream analyser available on the market, and a satellite operator would immediately recognize this violation to be abnormal and extremely suspicious behavior. (Cartesian Report, "*Broadcast Piracy via Satellite Transmission*", 8 February 2019, Exhibit QAT-89, pp. 11-12.) Cartesian considered it "very unusual—possibly unknown—in the TV satellite broadcast industry to observe TV channels repeatedly changing from one … frequency to another on numerous occasions over a period of only several months". (Ibid. p. 10.)

[535] Cartesian used the term "transponder", rather than the term "frequency", in its technical report. Nevertheless, based on Cartesian's discussion of these terms, these two terms appear to be nearly synonymous. Cartesian explained that each satellite has a set of transponders, and that each transponder corresponds to a single frequency. Thus, when Cartesian referred to a particular "transponder" in use on an Arabsat satellite and the conclusions to be drawn from beoutQ's switches to other transponders, in line with other technical reports, Cartesian was actually referring to the frequency carried on each transponder. (Cartesian Report, "*Broadcast Piracy via Satellite Transmission*", 8 February 2019, Exhibit QAT-89, p. 4.) For this reason, the Panel has used the terms "frequency" or "frequencies", rather than "transponder" or "transponders", when summarizing Cartesian's report.

[536] Cartesian Report, "*Broadcast Piracy via Satellite Transmission*", 8 February 2019, Exhibit QAT-89, p. 17. The two examples provided by Cartesian for switching off a customer's satellite service are: (a) when the customer fails to pay its bills to the satellite operator, and (b) for ethical or legal reasons. (Ibid.)

[537] Ibid.

7.139. The Panel considers that Cartesian's statements in the previous paragraph address two concerns presented by Arabsat in its 24 June 2019 letter to FIFA. Arabsat contended that disabling one of its satellite frequencies would only terminate legitimate programming and interfere with the contractual rights of Arabsat customers, and would not affect beoutQ's broadcasts. Arabsat also contended that unlike "'flipping' a switch on land", doing so on a satellite involves a substantial risk that the frequency might not be re-enabled.[538] Cartesian agreed that shutting down a frequency will have the effect of interrupting the broadcast of any legitimate TV channels on that frequency. However, Cartesian also noted that if all channels on a particular frequency are part of the illegal service and are not mixed with legitimate channels, the satellite operator can shut down the whole frequency, without any risk of impairing a legitimate service.[539] Above all, Cartesian emphasized that shutting down a frequency is an easy, basic, straightforward, common action taken by satellite operators, which appears to address Arabsat's statements about the technical difficulties that one might encounter in deactivating a satellite frequency.

7.140. In its third technical report, dated 8 February 2019, Nagra documented additional suspicious frequency changes that took place between 27 and 28 January 2019. On these dates, beoutQ channels were broadcast: (a) first, on Arabsat frequency 12341 MHz H, accessible in Europe and North Africa on various non-beoutQ STBs; (b) next, on Arabsat frequency 11270 MHz H; (c) then, on Arabsat frequency 12341 MHz H once more; and (d) finally, on Arabsat frequency 11270 MHz H, but no longer available in North Africa or in Southern Europe.[540] These switches in frequencies occurred two days before Arabsat's outside expert tested frequency 12341 MHz H in connection with the litigation before the TGI in France. Arabsat's outside experts did not find beoutQ channels to be transmitted on frequency 12341 MHz H, and in Nagra's view, the frequency switches catalogued above explain why the outside experts arrived at such findings.[541] A technical report subsequently produced by Synamedia found that, as of mid-April 2019, the 10 beoutQ channels tested by Nagra continued to be broadcast on the Arabsat frequency 11270 MHz H via the Arabsat Badr-4/5/6/7 satellite constellation.[542] For the duration of Synamedia's tests, the beoutQ content was transmitted via one of the four Badr satellites at orbital position 26^{O}E.[543]

7.141. In a video on its official Facebook page, beoutQ confirmed that the change to Arabsat frequency 11270 MHz H occurred due to "problems related to … the coverage area". beoutQ stated that the new frequency could only be received from the Middle East, Egypt and Eastern Libya and would be broadcast from "Badr26", which likely refers to the Arabsat Badr satellite constellation at 26^{O}East. beoutQ also posted a message to its users in North Africa to assure them that the loss of coverage was only temporary, and that beoutQ would either return to a previous Arabsat frequency or use new frequencies providing coverage in North Africa. A separate posting confirmed this plan, announcing "good surprises soon" for beoutQ customers in North Africa. On 30 January 2019, the "BeoutQsports" Facebook page confirmed that: (a) other frequency changes had taken place as a result of "Qatari attacks"; and (b) the frequency changes and resulting loss of coverage in North Africa and Southern Europe were only temporary and would be reversed after the end of the 2019 Asian Cup; and beoutQ would "return to the whole Arab world with better quality".[544] A technical report from Cartesian dated 10 September 2019 confirmed that, on 3 and 4 July 2019 in Southeast Europe, beoutQ channels returned to frequency 11270 MHz H on Arabsat's Badr-7 satellite.[545]

7.142. An additional technical report that was publicly released with a Supplemental Declaration by football right holders dated 16 September 2019, known as the MarkMonitor Report, confirms the

[538] Arabsat Letter to FIFA, 24 June 2019, Exhibit SAU-39, pp. 2-3.

[539] Cartesian Report, "*Broadcast Piracy via Satellite Transmission*", 8 February 2019, Exhibit QAT-89, p. 17.

[540] Ibid. pp. 10-14.

[541] NAGRA, Kudelski Report, "*Response to IGP Testing of 28 January and 1 February 2019 and beoutQ Frequency Changes*", 8 February 2019, Exhibit QAT-224, pp. 16-17.

[542] Synamedia Report, "'*beoutQ' Service Analysis*", 6 June 2019, Exhibit QAT-226, pp. 4-6. See also ibid. pp. 9-10.

[543] Ibid. p. 6.

[544] Ibid. pp. 18-21.

[545] Cartesian Report, "*Technical Investigation of beoutQ Broadcasts*", 10 September 2019, Exhibit QAT-89, paras. 6-17, 21-26, 51-53 and 56. Using broadcast analysis tools, Cartesian also determined that certain mandatory metadata tables were missing from the broadcast. Cartesian considered the missing mandatory information "highly suspicious", noting that any satellite operator transmitting it can observe this fact and suspect that it is used for unusual or illegal purposes. (Ibid. paras. 58-61. See also Qatar's opening statement at the second meeting of the Panel, para. 30.)

findings above.[546] This report, which Qatar asserts only became available to it upon its public release in mid-September 2019, is the report that Arabsat requested from FIFA in its 24 June 2019 letter.[547] Since this report was published, it has not been contested by Saudi Arabia or Arabsat.

7.143. According to this report, several sports leagues or federations (claimants)[548] asked the anti-piracy and cybersecurity firm MarkMonitor to conduct an independent technical investigation into beoutQ. MarkMonitor's investigation concluded that: (a) beoutQ re-streams the claimants' copyrighted content without their authorization; and (b) the beoutQ "Live Sports" satellite service is transmitted on Arabsat's Badr constellation satellites (Badr-4, 5 and 6) at 26°East over frequency 11270 MHz H (video component) and frequency 11919 MHz H (signalization for the STB to decode the video channel); and (c) the hardware and software in the beoutQ STBs "has been designed and operates in such a way so as to make the beoutQ channels available primarily in Saudi Arabia through sophisticated geo-fencing and virtual private networks technology". MarkMonitor found the beoutQ pirate service to be a highly technically sophisticated and organized operation, regionally targeted to the Middle East, and in particular, Saudi Arabia.[549]

7.144. As noted above, FIFA is one of at least four entities[550] that has received reports that beoutQ's pirated content is broadcast on Arabsat satellite frequencies. Specifically, FIFA stated that "[b]eoutQ's unauthorised transmissions of the FIFA Women's World Cup 2019 are made available by way of Arabsat satellite frequencies".[551] The European Union also indicated that, according to complaints received from EU right holders, "the satellite services of BeoutQ are being transmitted by satellite (Badr-4/Arabsat-4b) of the Arab Satellite Communications Organization."[552]

7.145. In its 24 June 2019 letter to FIFA, Arabsat stated that the TGI fully vindicated Arabsat, rejected all claims and awarded Arabsat substantial costs.[553] Saudi Arabia added that the TGI rendered a summary judgment order in favour of Arabsat, stating that "the tests carried out at ARABSAT's request … contradict the results of [Nagra's] tests produced by the claimants and show that … beoutQ's programs at issue cannot be broadcast[] in France over the ARABSAT frequencies referred to in [Nagra's] tests via the Badr-4 satellite".[554] FIFA responded, and Qatar agreed, that

[546] Qatar's opening statement at the second meeting of the Panel, para. 55 (referring to MarkMonitor beoutQ Investigation, April 2019, p. 3, as attached as Exhibit 1 to Supplemental Declaration by Football Right Holders, 19 September 2019, Exhibit QAT-238).

[547] Saudi Arabia's response to Panel question No. 39, para. 17 (referring to Arabsat Letter to FIFA, 24 June 2019, Exhibit SAU-39); Qatar's comments on Saudi Arabia's response to Panel question No. 39, para. 55 (referring FIFA Letter to Arabsat, 26 June 2019, Exhibit SAU-40); and Qatar's opening statement at the second meeting of the Panel, para. 55 (referring to MarkMonitor beoutQ Investigation, April 2019, p. 3, as attached as Exhibit 1 to Supplemental Declaration by Football Right Holders, 19 September 2019, Exhibit QAT-238).

[548] These sports leagues or confederations are the Asian Football Confederation (AFC); DFL Deutsche Fußball Liga e.V. (DFL); Fédération Internationale de Football Association (FIFA); Football Association Premier League Limited (PL); Lega Nazionale Professionisti Serie A (Serie A); Liga Nacional de Fútbol Profesional (LaLiga); and Union of European Football Associations (UEFA). (MarkMonitor beoutQ Investigation, April 2019, p. 3, as attached as Exhibit 1 to Supplemental Declaration by Football Right Holders, 19 September 2019, Exhibit QAT-238.)

[549] MarkMonitor beoutQ Investigation, April 2019, pp. 4-5, as attached as Exhibit 1 to Supplemental Declaration by Football Right Holders, 19 September 2019, Exhibit QAT-238. See also Qatar's opening statement at the second meeting of the Panel, para. 55 (referring to MarkMonitor beoutQ Investigation, April 2019, p. 3, as attached as Exhibit 1 to Supplemental Declaration by Football Right Holders, 19 September 2019, Exhibit QAT-238).

[550] The other three entities are UEFA, LaLiga and the Premier League. (See paragraphs 7.102, 7.107 and 7.108 of this Report.)

[551] Synamedia Report, "'*beoutQ' Service Analysis*", 6 June 2019, Exhibit QAT-226, para. 24 (referring to Washington Post, "*FIFA wants Saudis to stop pirated Women's World Cup TV feeds*", 16 June 2019, Exhibit QAT-191).

[552] Qatar's opening statement at the first meeting of the Panel, para. 22 (referring to European Union's third-party submission, para. 4).

[553] Arabsat Letter to FIFA, 24 June 2019, Exhibit SAU-39, p. 2.

[554] Saudi Arabia's response to Panel question No. 29, paras. 43 and 44 (referring to *S.A.R.L. beIN Media Group LLC et al v. Arab Satellite Communication Organization*, Summary Proceedings Order, Tribunal de Grande Instance de Paris, RG number 18/59094 – Portalis number 352J-W-B7C-CNOK, rendered 13 June 2019 (English translation available at https://www.degaullefleurance.com/wp-content/uploads/2019/06/20190613-Ordonnance-de-r%C3%A9f%C3%A9r%C3%A9-English-version.pdf accessed 21 July 2019), Exhibit SAU-28, at p. 11); and Saudi Arabia's second written submission, para. 63.

the TGI did not find beoutQ was not carried by Arabsat's satellite frequencies, but simply dismissed the case on the basis that beoutQ's transmissions were not widely available in France.[555]

7.146. The Panel notes that the TGI explained in its decision that testing by Nagra in January 2019, in two cities in southern France, demonstrated that beoutQ channels were available in France. For purposes of assessing territorial jurisdiction, the TGI determined that the results of Nagra's tests were sufficient to establish that the TGI had jurisdiction.[556] The TGI also found that, in June 2018, beoutQ channels were available on Arabsat frequencies 11919 MHz H and 12207 MHz V on the Arabsat Badr-4 satellite. Furthermore, the TGI noted that Arabsat's own website states that its Badr-4 satellite covers the MENA region, and that this satellite's coverage also "extends to parts of Europe, including the extreme south of France". For the TGI, this was sufficient to establish that Arabsat has the legal capacity to be a defendant.[557]

7.147. Nevertheless, the TGI also relied on tests conducted by Arabsat's outside experts, which contradicted the results of Nagra's test, showing that: (a) the beoutQ programs at issue cannot be broadcast in France over the Arabsat frequencies via the Badr-4 satellite; and (b) in June 2018, only the Badr-5 and Badr-6 satellites actually covered the French territory. The Badr-4 satellite only resulted in "theoretically slight spillovers in the extreme southern part of France", which would have no practical impact for the public, as only a professional antenna and professional technical resources would be able to capture beoutQ's signal.[558] Accordingly, the TGI did not find that beIN demonstrated "the existence of a 'manifestly unlawful disturbance' or evidence of imminent harm" under French law, and it thus dismissed beIN's suit.[559]

7.148. The Panel thus considers the TGI to have found that beoutQ's pirated broadcasts had very limited coverage in southern France because they were transmitted on the Arabsat Badr-4 satellite. This meant that transmissions of beoutQ channels on Arabsat frequencies were unlikely to reach French viewers, but that such transmissions had nevertheless occurred. Qatar contended that, according to Nagra technical reports, beoutQ moved its pirated content off of the Arabsat frequencies with wider coverage in France prior to scheduled testing conducted by Arabsat's outside experts.[560]

7.149. In the light of the expert technical reports prepared by Nagra, Cartesian, Synamedia and MarkMonitor, and the complaints that Arabsat received from other entities, the Panel does not accept Saudi Arabia's statement that, "[b]ased on information that it has collected, Arabsat has established that it does not distribute beoutQ content on its satellite frequencies".[561] The technical reports demonstrate that beoutQ's pirated broadcasts are transmitted via Arabsat's satellite frequencies, and the tests performed by Arabsat's outside experts do not throw doubt on this finding, particularly given that they examine only certain frequencies at certain times. The selective, isolated testing of one frequency at a pre-determined time, as conducted by Arabsat's outside experts, would not detect the operations of a sophisticated broadcast pirate known to move across multiple satellite frequencies without creating any interruptions in its broadcast services. The Panel also notes Nagra's findings that beoutQ switched off of certain Arabsat frequencies shortly before or after they were tested by Arabsat's outside experts, that Arabsat has not undertaken simultaneous or systematic testing when this appears to have been within its capacity to do so, and that the Arabsat frequencies carry unusual data or are missing particular information. Saudi Arabia did not, nor did Arabsat, provide sufficient evidence or argument to rebut the above-mentioned technical reports.

[555] FIFA Letter to Arabsat, 26 June 2019, Exhibit SAU-40; Qatar's opening statement at the second meeting of the Panel, para. 28; and Qatar's second written submission, paras. 61-63 and 67.

[556] S.A.R.L. beIN Media Group LLC et al v. Arab Satellite Communication Organization, Summary Proceedings Order, Tribunal de Grande Instance de Paris, RG number 18/59094 – Portalis number 352J-W-B7C-CNOK, rendered 13 June 2019, Exhibit SAU-28, p. 8.

[557] Ibid. p. 9.

[558] Ibid. p. 11.

[559] Ibid. The TGI stated that it needed a showing of "the existence of a 'manifestly unlawful disturbance' or evidence of imminent harm" to justify "granting its order against ARABSAT to disclose the material relating to the broadcasting of the beoutQ programs at issue in France or the injunctions to enjoin it from broadcasting in France the beoutQ satellite signal". (S.A.R.L. beIN Media Group LLC et al v. Arab Satellite Communication Organization, Summary Proceedings Order, Tribunal de Grande Instance de Paris, RG number 18/59094 – Portalis number 352J-W-B7C-CNOK, rendered 13 June 2019, Exhibit SAU-28, p. 11.)

[560] See paragraphs 7.134 and 7.140 of this Report.

[561] Saudi Arabia's response to Panel question No. 29, para. 43 (referring to "*Press Release, Arabsat*", dated 15 June 2019, Exhibit SAU-27).

7.2.3.3.6 Evidence regarding the involvement of Selevision

7.150. According to additional evidence that beIN provided in its 13 July 2018 letter to Arabsat and in its 3 September 2018 letter to the Ministry and GCAM, beoutQ appears to be "wholly, or in part, operated by Saudi-based persons", including the Saudi Selevision Company LLC (Selevision), a Saudi-based entity and beIN's former content distributor in Saudi Arabia.[562] beIN referred specifically to several pieces of evidence in support of this allegation.[563]

7.151. Until June 2018, beoutQ used a portion of the bandwidth of the Arabsat frequency 12380 MHz H to broadcast signaling data and software updates for beoutQ STBs. The rest of the bandwidth on that frequency was used to broadcast 11 TV channels from the Seevii/Selevision television service.[564] Nagra considered it likely that Seevii/Selevision was renting the entire Arabsat frequency during this time.[565] Nagra also noted that the software for the beoutQ STBs contains strings of code expressly referencing Selevision.[566] For Nagra, "[i]t is unlikely to be a coincidence that beoutQ and Selevision shared the use of Arabsat Badr-6 frequency 12380 MHz H and that the beoutQ STB software contains references to Selevision".[567] After these findings by Nagra were made public, evidence of Selevision's link to beoutQ vanished. Selevision channels were no longer broadcast on Arabsat frequency 12380 MHz H, and Arabsat ceased transmission on that frequency as of 24 June 2018. The same frequency and all references to Seevii/Selevision were removed from Arabsat's website as of 20 July 2018, and beoutQ firmware updates were encrypted to hinder further software analysis.[568]

7.152. In addition, according to beIN, an individual involved in the beoutQ piracy subscribed to beIN's services using a Selevision corporate email address, gained access to beIN's proprietary media content, and rebroadcast this content on beoutQ's pirate transmissions.[569] Such a practice has been corroborated by a New York Times article describing the manner in which beoutQ pirates beIN's signal. According to the article, a single subscriber to beIN's content is able to re-air this content, and even though each such subscriber has a unique identification number that beIN is normally able to trace and use to identify the subscriber, those subscribers that are rebroadcasting beIN's proprietary content on beoutQ's channels have been able to hide their identification numbers

[562] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, pp. 5-6; Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, pp. 2-3; and Qatar's second written submission, para. 71. See also Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, paras. 43-47. Selevision is a digital entertainment services provider based in Saudi Arabia. (Nextv News, "*Selevision launches in MENA*", 18 March 2014, Exhibit QAT-104; and Videonet, "*Selevision uses Verimatrix to protect its new Seevi service, which combines IPTV and OTT*", 3 March 2016, Exhibit QAT-105.)

[563] beIN also presented evidence from US civil proceedings showing that Mr Raed Khusheim, the CEO of the Khusheim Holdings Company, which, in turn, is the parent company of Selevision, used a credit card to pay US company BelugaCDN LLC for the content delivery network service that would be used for the beoutQ pirate website. (Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, pp. 5-6 (referring to Appendix 11: Declaration of Adam Jacob Muller of BelugaCDN LLC, dated 20 June 2018).) See also Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, pp. 2-3; and Qatar's second written submission, para. 71 (referring to Declaration of Adam Jacob Muller, Beluga CDN LLC, 20 June 2018, Exhibit QAT-107).

[564] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, pp. 5-6 (referring to Appendix 9: Nagra Report, "beoutQ Piracy Overview," dated 24 June 2018); Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, pp. 2-3; and NAGRA, Kudelski Report, "*beoutQ Piracy Overview*", 24 June 2018, Exhibit QAT-90, pp. 12-14.

[565] NAGRA, Kudelski Report, "*beoutQ Piracy Overview*", 24 June 2018, Exhibit QAT-90, pp. 13-14.

[566] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, pp. 5-6 (referring to Appendix 9: Nagra Report, "beoutQ Piracy Overview," dated 24 June 2018); and NAGRA, Kudelski Report, "*beoutQ Piracy Overview*", 24 June 2018, Exhibit QAT-90, p. 14. See also Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, pp. 2-3.

[567] NAGRA, Kudelski Report, "*beoutQ Piracy Overview*", 24 June 2018, Exhibit QAT-90, p. 14.

[568] Ibid. p. 10.

[569] Letter from beIN's counsel to Saudi Ministry of Media and General Commission for Audiovisual Media, 3 September 2018, Exhibit QAT-106, pp. 5-6 (referring to Appendix 12: Declaration of Walid Abdelhalim of beIN, dated 27 June 2018).

from detection. beIN's executive director of technology notes that he "[has] never seen this anywhere else", referring to the level of technical sophistication of beoutQ's operation.[570]

7.153. Since Selevision was likely renting the entire frequency, it would follow that Selevision would have been aware of how the bandwidth on that frequency was being used. Such an awareness by Selevision would have been required for it to ensure that all of its channels were being transmitted successfully to viewers. If Selevision was renting the entire frequency, it is also possible that beoutQ needed to secure Selevision's permission to broadcast its pirated content on the same frequency. In the Panel's view, the evidence above leads to the conclusion that Selevision allowed or assisted beoutQ to broadcast its pirated content on Arabsat frequency 12380 MHz H.

7.154. The Panel notes that the evidence regarding the involvement of Selevision has not been disputed by Saudi Arabia.

7.2.3.3.7 Overall assessment

7.155. The Panel considers that the evidence which was provided to Saudi authorities by beIN and other third-party right holders, and which has now been corroborated and supplemented by further evidence submitted to the Panel, supports Qatar's assertions that: (a) beoutQ's piracy was promoted by prominent Saudi nationals, (b) beoutQ targets the Saudi market, (c) beoutQ's pirate broadcasts are transmitted via Arabsat satellite frequencies, and (d) beoutQ has received assistance from a Saudi content distributor in delivering its pirated broadcasts to Saudi consumers. Taking these conclusions together, and recalling the applicable standard of proof and evidentiary principles in WTO dispute settlement[571], the Panel considers that Qatar has established a *prima facie* case that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia.

7.156. The Panel recalls that Qatar submitted a statement from an individual alleged to have specific knowledge of beoutQ's operations in Saudi Arabia. As discussed in section 1.3.6 above, the parties were unable to agree on additional confidentiality procedures for handling the witness statement, and the Panel declined to adopt any such procedures. Saudi Arabia also objected to the submission of the evidence.[572] In the light of the conclusion stated above on the basis of the evidence canvassed above, the Panel considers it unnecessary to review the witness statement submitted by Qatar.[573]

7.2.3.4 Public screenings of beoutQ's broadcasts

7.157. The Panel now turns to Saudi Arabia's alleged promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of some 2018 World Cup matches. The Panel will structure its analysis by reviewing the evidence provided by Qatar, and then considering Saudi Arabia's arguments in response to such evidence.

7.158. With its first written submission, Qatar provided the following categories of evidence as exhibits:

a. a report published by Bloomberg, and the image of and hyperlink to a tweet by a *Wall Street Journal* reporter, both dated 22 June 2018, stating that a government-sponsored event was broadcasting beoutQ's pirated broadcast of the

[570] The *New York Times*, "*The Brazen Bootlegging of a Multibillion-Dollar Sport Network",* 9 May 2018, Exhibit QAT-175.

[571] See paragraphs 7.39 and 7.40 of this Report.

[572] See section 1.3.6 of this Report.

[573] The Panel notes a similarity with a situation that arose in *EC – Bananas III (US) (Article 22.6 – EC)*. In that case, the European Communities indicated that it could not accept the Business Confidential Information (BCI) procedures adopted by the Arbitrator, and as a consequence "could not receive" the information submitted by the other party pursuant to those procedures. The Arbitrator reasoned that the European Communities' refusal to receive the information did not bar the complainant from submitting it, and would not bar the Arbitrator from considering it. However, the Arbitrator ultimately assessed that it did not find it necessary to rely on the BCI at issue to resolve the particular issue before it. (Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 2.6-2.7.)

Saudi Arabia/Uruguay match on large public screens in Riyadh, including on the city's main commercial boulevard[574];

b. an image of an announcement by the Saudi Ministry of Municipal and Rural Affairs, dated 13 June 2018, stating "294 screens in Municipal gardens and squares to broadcast World Cup Games", with a breakdown of how many screens there would be in each of the 13 regions of Saudi Arabia[575];

c. images of, and hyperlinks to, tweets by eight different Saudi municipalities promoting public screenings of broadcasts of 2018 World Cup matches, several of which included images of beoutQ's pirated broadcasts[576]; and

d. photographs showing screenings of beoutQ's pirated broadcasts of the 2018 World Cup Croatia/England match on 11 July 2018 on large public screens at seven different cafes in Riyadh.[577]

7.159. The Panel considers that, in the absence of effective refutation, the above evidence would suffice to substantiate Qatar's assertion that Saudi Arabia promoted public gatherings with screenings of beoutQ's unauthorized broadcasts of certain 2018 World Cup matches.

7.160. The Panel regards Saudi Arabia's assertion that "[t]he Government of Saudi Arabia does not promote or authorize screenings of beoutQ broadcasts"[578] as insufficient to rebut the evidence provided by Qatar. Saudi Arabia has not contested the authenticity of this evidence or challenged any aspect of Qatar's characterization of it. Insofar as Saudi Arabia's assertion is meant to distinguish the central "Government of Saudi Arabia" from the municipalities, it suffices to refer to the applicable principles of state responsibility that apply in WTO dispute settlement.[579]

7.161. The Panel considers that Saudi Arabia's statement that "unofficial, non-government tweets are not usually recognized by legal adjudicators or attributed to a government without explicit approval"[580] is beside the point, because most of the tweets in question are in fact governmental tweets. Article 11 of the ILC Articles on State Responsibility, entitled "Conduct acknowledged and adopted by a State as its own", provides that "[c]onduct which is not attributable to a State … shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own." By its terms, the principle only applies to conduct that is not otherwise attributable to a state. However, as already noted above, under general international law principles of state responsibility, actions at all levels of government (local, municipal, federal), or by any agency within any level of government, are attributable to the State.[581]

7.162. The Panel recalls Saudi Arabia's assurance that it maintains a "vigilant watch" over the enforcement of broadcast copyright violations at public gatherings[582], and its explanation that on 14 April 2019, the Saudi Ministry of Municipal and Rural Affairs forwarded Royal Court Circular No. 40752 to the Secretariats, the Agencies and the Public Administrations of the Ministry, including to all Saudi municipal administrations.[583] The Panel notes, however, that Qatar's assertion and

[574] See Qatar's first written submission, para. 87 (referring to Tweet from Margherita Stancati, Wall Street Journal reporter, 22 June 2018, Exhibit QAT-84; and Bloomberg, "*Saudis Dismiss Piracy Claim as Soccer Rights' Spat Escalates*", 22 June 2018, Exhibit QAT-77).

[575] See ibid. para. 88 (referring to Saudi Arabia, Ministry of Municipal and Rural Affairs Announcement of 294 screens to broadcast World Cup (Arabic original and English translation), 13 June 2018, Exhibit QAT-85).

[576] See Qatar's first written submission, paras. 89-94 (referring to Social Media Evidence of Saudi Municipalities Organizing Public Screenings of beoutQ's Illegal Pirate Broadcasts of the FIFA 2018 World Cup, June 2018, Exhibit QAT-83).

[577] See Qatar's first written submission, paras. 70 and 86 (referring to Photographic Evidence of Screenings of beoutQ's Illegal Pirate Broadcasts of the FIFA 2018 World Cup at Cafés in Riyadh, Saudi Arabia, 11 July 2018, Exhibit QAT-78).

[578] Saudi Arabia's response to Panel question No. 30(a), para. 61.

[579] See paragraph 7.50 of this Report.

[580] Saudi Arabia's response to Panel question No. 30(a), para. 62.

[581] See paragraph 7.50 of this Report.

[582] Saudi Arabia's second written submission, para. 68.

[583] Ibid.

supporting evidence is directed at the promotion of public screenings of 2018 World Cup matches and not at ongoing conduct.

7.163. Based on the foregoing, the Panel concludes that Saudi Arabia promoted public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches.

7.2.4 Conclusion

7.164. The Panel concludes that although Qatar did not demonstrate the existence of formal legal restrictions being applied to prevent beIN from accessing civil enforcement procedures, Qatar otherwise established that the non-initiation of civil enforcement procedures against beoutQ before Saudi tribunals by beIN, the non-application of criminal procedures or penalties against beoutQ by the Government of Saudi Arabia and the public screening of beoutQ's illegal broadcasts of 2018 World Cup matches in Saudi Arabia are all the result of acts and omissions attributable to Saudi Arabia.

7.3 Claims under Parts I, II and III of the TRIPS Agreement

7.3.1 Introduction

7.165. Having addressed the existence of the challenged measures and made findings on the disputed factual questions in this dispute, the Panel now proceeds to address the applicable provisions in Parts I, II and III of the TRIPS Agreement in connection with the following measures: (a) the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (anti-sympathy measures); (b) the non-application of criminal procedures and penalties to beoutQ; and (c) the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches.

7.166. Qatar raises multiple legal claims in relation to these three measures. First, Qatar claims that the anti-sympathy measures are inconsistent with: (a) the non-discrimination obligations in Article 3.1[584] and Article 4[585] of the TRIPS Agreement, contained in Part I thereof; (b) the obligations to provide authors of works with the exclusive rights mandated in Articles 9[586], 11[587], 11*bis*[588] and 11*ter*[589] of the Berne Convention (1971), as incorporated by reference in Part II of the TRIPS Agreement[590], as well as the obligation to provide broadcasting organizations with the exclusive rights provided for in Article 14.3[591] of the TRIPS Agreement, also contained in Part II thereof; and (c) the obligations in Article 41.1[592] and Article 42[593] of the TRIPS Agreement, which relate to civil enforcement procedures and are included in Part III of the TRIPS Agreement. Second, Qatar claims that the non-application of criminal procedures and penalties to beoutQ is also inconsistent with most of the above-referenced obligations in Parts I and II of the

[584] Qatar's first written submission, paras. 156-157, 187-192 and 205; and second written submission, paras. 141, 143 and 148.
[585] Qatar's first written submission, paras. 206-207, 225-226 and 233; and second written submission, paras. 151, 153 and 158.
[586] Qatar's first written submission, paras. 249 and 252; and second written submission, paras. 164 and 168.
[587] Qatar's first written submission, para. 269; and second written submission, para. 165 and 168.
[588] Qatar's first written submission, paras. 302-305; and second written submission, paras. 166 and 168. In response to a question from the Panel, Qatar clarifies that its claims regarding the anti-sympathy measures extend to subparagraphs (i), (ii) and (iii) of Article 11*bis*(1). (See Qatar's response to Panel question No. 9(b).)
[589] Qatar's first written submission, para. 322; and second written submission, paras. 167-168.
[590] Article 9 of the TRIPS Agreement is entitled "Relation to the Berne Convention", and paragraph 1 thereof states: "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto."
[591] Qatar's first written submission, paras. 341 and 346; and second written submission, paras. 179 and 184.
[592] Qatar's first written submission, paras. 375-376 and 382-383; and second written submission, paras. 189-190 and 194.
[593] Qatar's first written submission, paras. 396-397; and second written submission, paras. 198-199 and 202.

TRIPS Agreement[594], but its claim under Part III concerns Article 61[595], as opposed to Articles 41.1 and 42, of the TRIPS Agreement. Third, Qatar claims that the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches is also a measure that is itself inconsistent with Articles 11 and 11*bis*[596] of the Berne Convention (1971), and also argued that it serves as evidence of the violation of Article 61.[597]

7.167. Saudi Arabia stated that, consistent with its previous position before the Panel, it is not engaging with the substance of any claims raised by the complaining party.[598] Saudi Arabia's submissions did not reference any of the above-cited provisions of the TRIPS Agreement or Berne Convention (1971). However, Saudi Arabia did make arguments, and quoted from third-party arguments, relating to the obligation under Article 61 of the TRIPS Agreement.[599]

7.168. In this dispute, the third parties focused their submissions and oral statements almost exclusively on systemic issues pertaining to the interpretation and application of the security exception in Article 73(b)(iii) of the TRIPS Agreement. The European Union is the only third party that, in its written submission, addressed the interpretation and application of the TRIPS obligations invoked by Qatar.[600] However, in response to questions from the Panel, several third parties provided their views on issues concerning the relationship between the obligations in Parts I, II and III of the TRIPS Agreement and the scope of the obligations in Articles 41.1, 42 and 61.

7.169. The next subsection provides an overview of Qatar's main arguments on the interpretation of the obligations that it invokes, and on how the obligations in Parts I, II and III relate to one another. The next two subsections reflect Saudi Arabia's arguments concerning Article 61 of the TRIPS Agreement, as well as the views expressed by the third parties.

7.3.2 Arguments

7.3.2.1 Qatar

7.170. With respect to its claims under Part I of the TRIPS Agreement, Qatar noted the Appellate Body's statements that the most-favoured-nation treatment and national treatment provisions are "fundamental" and "cornerstone" provisions of the TRIPS Agreement.[601] Qatar explained that while its claims under Articles 3.1 and 4 focus on the discriminatory treatment with respect to civil and criminal enforcement, "because the restrictions on the ability of Qatari nationals to enforce intellectual property rights are so extreme, they also implicate the substantive protections that must be accorded pursuant to Part II of the TRIPS Agreement" and, therefore, Qatar's claims of discrimination also extend to matters covered by Part II of the TRIPS Agreement. Qatar argued that findings of violation under Part III of the TRIPS Agreement would not render any additional findings in respect of the claims under Part I duplicative[602], and stated that "it is important that the Panel consider not only the claims under Parts II and III of the TRIPS Agreement, but also the distinct claims under Part I of the TRIPS Agreement".[603] Qatar noted that this view has largely been shared by third parties, including Canada, the European Union and Japan.[604]

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[594] Qatar's first written submission, paras. 197-201 and 229 (Articles 3.1 and 4 of the TRIPS Agreement), and paras. 251-252, 269, 302-303 and 322 (Articles 9(1), 11, 11bis(1)(ii) and 11ter of the Berne Convention (1971)); and second written submission, paras. 141, 148, 151, 153 and 158 (Articles 3.1 and 4 of the TRIPS Agreement), and paras. 164-168 (Articles 9(1), 11, 11bis and 11ter of the Berne Convention (1971)).

[595] Qatar's first written submission, paras. 411-442; and second written submission, paras. 205-219.

[596] Qatar's first written submission, paras. 271 and 304; response to Panel question No. 9(a); and second written submission, paras. 165 and 168.

[597] Qatar's first written submission, paras. 431 and 437-438; and response to Panel question No. 9(a).

[598] Saudi Arabia's response to Panel question No. 22(a), para. 9; and second written submission, para. 59.

[599] Saudi Arabia's response to Panel question No. 29, para. 46.

[600] European Union's third-party submission, paras. 6-35.

[601] Qatar's first written submission, paras. 160 and 209 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 241 and 297, respectively).

[602] Qatar's response to Panel question No. 22(b), paras. 143-151.

[603] Ibid. para. 151.

[604] Qatar's second written submission, paras. 131-133.

7.171. Regarding the obligations in Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention (1971) and Article 14.3 of the TRIPS Agreement, Qatar argued that a WTO Member must do more than merely provide such rights in name or on paper only, and that for such rights to be meaningful, they must be "enjoyed".[605] Qatar's claims under Part II of the TRIPS Agreement rest on the premise that although Saudi Arabia "provides certain rights on paper (i.e. in the text of their copyright law and regulations), those rights effectively have been stripped"[606] from beIN through the measures at issue. Qatar argued that "[w]here the loss of enforcement is so drastic, the entirety of the rights is eliminated"[607], in the sense that Saudi Arabia's violations of the obligations of Part III of the TRIPS Agreement "are so extreme that they render effectively worthless the substantive rights under Part II of the TRIPS Agreement".[608] Qatar submitted that its interpretation of the obligations in Part II does not render the enforcement obligations in Part III redundant, because "there are many situations where a measure would violate Part III, but not violate any obligations under Part II".[609] Qatar stated that "it is only in the extreme (and, frankly, unusual) situation where right holders are effectively *completely* blocked from accessing civil judicial procedures (*and* where criminal procedures are not applied) that an inability to enforce IP rights would also violate the core substantive obligations under Part II".[610]

7.172. Turning to the relationship among the obligations in Part III that it invokes, Qatar submitted that Article 42 and Article 61 of the TRIPS Agreement are two distinct provisions covering different aspects of the IP enforcement (i.e. civil/administrative enforcement vs. criminal enforcement) that Members are required to provide.[611] Qatar noted that it has challenged a different group of measures under Article 42 and under Article 61, and different compliance obligations may result from this dispute.[612] In Qatar's view, Article 41.1 of the TRIPS Agreement is also distinct from both Article 42 and Article 61. While Article 42 sets out specific requirements for "fair and equitable procedures" that must be available in a Member—e.g. requiring that parties be allowed "independent legal counsel" and be "duly entitled to substantiate their claims and to present all relevant evidence" — Article 41.1 is more focused on the potential results of these procedures (i.e. permitting "effective action" and "expeditious remedies" including those that "constitute a deterrent to further infringements").[613] Similarly, while Article 41.1 focuses on the nature and content of the procedures that must be made "available", Article 61 requires that criminal procedures are "to be applied", at least in situations of egregious commercial-scale piracy such as that occurring with the beoutQ piracy.[614] Given the significant differences between the standards under each of the three provisions, a finding of violation under one would not be duplicative of a finding under either of the other two, Qatar argues.[615]

7.173. With respect to the obligation under Article 61 of the TRIPS Agreement, Qatar submitted that it follows from the phrase "to be applied" that Members "must do more than simply write down criminal procedures and penalties in their criminal laws".[616] In its view, Members "have an obligation to actually *apply* those procedures and penalties, particularly in egregious cases of conduct that qualifies as a crime".[617] As contextual support for its position, Qatar referred to the requirement in the second sentence of Article 61 that "[r]emedies available shall include imprisonment and/or

[605] Ibid. para. 161. Qatar also quotes the European Union's response to Panel question No. 5, which stated that "criminal procedures and penalties should not be provided only on paper, but should be effective in practice, otherwise the obligation would be deprived of its meaning". (Ibid. paras. 209-210 (quoting European Union's response to Panel question No. 5 to third parties, para. 25).)

[606] Qatar's second written submission, para. 161.

[607] Qatar's response to Panel question No. 24(b), para. 161.

[608] Qatar's response to Panel question No. 22(a), para. 64; and response to Panel question No. 24(a), para. 159. See also Qatar's response to Panel question No. 22(a), para. 66.

[609] Qatar's response to Panel question No. 24(c), para. 166.

[610] Ibid. para. 164. (emphasis original)

[611] Qatar's response to Panel question No. 25, para. 168.

[612] Ibid. paras. 169-172.

[613] Ibid. para. 174.

[614] Ibid. para. 175. See ibid. paras. 176-177.

[615] Ibid. para. 177.

[616] See Qatar's first written submission, para. 419. See generally ibid. paras. 413-430; response to Panel question Nos. 26(a) and (b); and second written submission, paras. 205-211.

[617] Qatar's first written submission, para. 419. (emphasis original) In Qatar's view, the phrase "to be applied" in Article 61 can be contrasted with the use of the phrases, *e.g.*, "are available" (in Article 41.1), "shall make available" (in Article 42), and "shall have the authority" (in Articles 44, 45 and 46) in other enforcement-related provisions in Part III of the TRIPS Agreement, in a manner that clarifies the special nature of the obligation under Article 61. (Qatar's second written submission, para. 207.)

monetary fines *sufficient to provide a deterrent* …", and argues that "[t]o provide such [a] deterrent to wilful trademark counterfeiting or copyright piracy on a commercial scale, those acts must be actively prosecuted and punished".[618] It further submitted that the objective of Article 61 would be frustrated without a WTO Member actually applying those criminal procedures and penalties in practice—particularly in situations of egregious, open, widespread piracy—by actively prosecuting and punishing (at least) the two types of infringements identified in Article 61.[619] Qatar added that "such an interpretation of Article 61 does not imply that Members are under an obligation to actively prosecute all cases of wilful trademark counterfeiting or copyright piracy on a commercial scale".[620] Rather, in Qatar's view, "Article 61 mandates that Members prosecute such counterfeiting or piracy at least in some situations, particularly in egregious cases of conduct that qualifies as a crime."[621] In response to Saudi Arabia's indication that it "does not consider that the TRIPS Agreement obliges Members to prosecute every alleged criminal activity" and that a Member may enforce "intellectual property law when justified by the available evidence and circumstances", Qatar stated that "[i]n principle, Qatar *agrees*."[622]

7.3.2.2 Saudi Arabia

7.174. In the light of its invocation of Article 73 of the TRIPS Agreement, Saudi Arabia did not address the claims made by Qatar under Parts I, II and III, with the exception of Qatar's claim under Article 61.

7.175. Saudi Arabia submitted that it "does not consider that the TRIPS Agreement obliges Members to prosecute every alleged criminal activity".[623] Rather, Saudi Arabia stated that it "enforces intellectual property law when justified by the available evidence and circumstances."[624] In its second written submission, Saudi Arabia stated that "even in cases where the TRIPS Agreement provides for criminal procedures and penalties, Members are not required to apply these remedies in all cases." Rather, in Saudi Arabia's view, "Members should provide legal fora and procedures to apply such remedies where warranted and where supported by evidence", and "[i]n particular, Members cannot be expected to act on criminal allegations without evidence and without cooperation of concerned rights holders."[625] Saudi Arabia added that it is prepared to investigate and prosecute violations of IP laws, consistent with the TRIPS Agreement and under Saudi law. However, to take action under Saudi criminal law and procedure, authorities require a reasonable level of evidence to facilitate follow up and prosecution.[626]

7.3.2.3 Third parties

7.176. With respect to the obligations in Part I of the TRIPS Agreement, Canada, the European Union and Japan argued that a finding of violation under Part III of the TRIPS Agreement would not render a finding of violation under Part I duplicative, as the obligations in Parts I and III are distinct. Among other things, Canada observed that "a panel's finding that a Respondent does not permit parties to a domestic civil judicial IP enforcement procedure to be represented by independent legal counsel, as required by TRIPS Article 42 (under Part III), does not also mean that the Respondent has failed to do so on a non-discriminatory basis, as required under TRIPS Article 3.1 (under Part I)". The European Union noted that different measures "can infringe different provisions of the TRIPS Agreement and the same measure can simultaneously violate provisions in Part I and III". Japan suggested that because "Articles 3 and 4 are not subsumed in Parts II or III", in "a situation of discriminatory denial of criminal procedures and penalties, the Panel must therefore also rule concerning the application of Articles 3 and 4 [in addition to ruling under Article 61]".[627] The

[618] Qatar's first written submission, para. 421. (emphasis original)
[619] Ibid. paras. 422-424.
[620] Qatar's second written submission, para. 206 (referring to Qatar's response to Panel question No. 26(b), para. 181).
[621] Ibid.
[622] Ibid. para. 211. (emphasis original)
[623] Saudi Arabia's response to Panel question No. 29, para. 46.
[624] Ibid.
[625] Saudi Arabia's second written submission, para. 59 (referring to the European Union's integrated executive summary, para. 6; and Singapore's integrated executive summary, para. 19).
[626] Saudi Arabia's response to Panel question No. 29, para. 45.
[627] Canada's response to Panel question No. 2(b) to third parties, para. 5; European Union's response to Panel question No. 2 to third parties, para. 5; and Japan's response to Panel question No. 2 to third parties, para. 15.

UAE disagreed with Qatar and these third parties, and submitted that, given the overlap in Qatar's claims under Parts I and III, the UAE did not see how additional findings under Part I would be necessary to resolve the dispute. The UAE maintained that were the Panel to find that Qatari nationals do not have access to civil and criminal remedies and that this constitutes a violation of Part III, the rectification of this violation would necessarily rectify any potential discrimination under Articles 3 and 4.[628]

7.177. Regarding the scope of the obligations in Part II, Canada, the European Union and Japan also suggested that the same aspects of the same measures violate copyright obligations in Part II of the TRIPS Agreement and the enforcement obligations in Part III of the TRIPS Agreement.[629] Canada stated that, "without prejudice to our position as to whether Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention include a requirement that the rights contemplated are able to be 'enjoyed'", a claim regarding the rights under those provisions is different from a claim under Articles 41.1, 42 and 61 of the TRIPS Agreement.[630] The European Union submitted that the 19 June 2017 Circular seems to pertain to the obligations in Parts II and III equally, as it contains some elements that appear to pre-empt the enjoyment of the exclusive right of the right holders, while others appear to make enforcement against infringements practically impossible (and some elements may violate both Parts II and III). The European Union nevertheless considered that the other measures, including the alleged significant difficulties in securing legal representation, may violate the relevant obligations included in Part III rather than Part II, as these measures appear to concern the enforcement of intellectual property rights.[631] The European Union added that accepting Qatar's claims under the Berne Convention" would by no means render the claims related to the enforcement obligations in Part III of the TRIPS Agreement redundant".[632] Japan agreed that "Qatar's interpretation of the Berne Convention would not render Part III of the TRIPS Agreement redundant".[633] In contrast, the UAE submitted that the very fact that the drafters placed the obligations in different Parts with different titles makes clear that the obligations within each Part seek to regulate distinct matters, and thus the very structure of the TRIPS Agreement undermines Qatar's argument that the same aspects of the same measure can violate both sets of obligations simultaneously for the same reasons.[634] For the UAE, Qatar's argument pertains more to the availability of rights as opposed to the enforcement of such rights, as it is submitting that the substantive right is, in fact, not available.[635]

7.178. Regarding the relationship among the obligations in Part III that Qatar invokes, Canada, the European Union, Japan and Ukraine all considered that Articles 41.1, 42 and 61 contain sets of distinct obligations, and therefore, a finding under one of these provisions would not render a finding under another duplicative.[636] The European Union, Japan and Ukraine, in particular, all considered that Article 41.1 sets out general principles or general obligations that are further elaborated in more detail in Articles 42 and 61, and that Article 41.1 is distinct from Articles 42 and 61.[637] Japan noted Articles 42 and 61 develop the general principles in Article 41.1, but do not entirely duplicate them, and as such, the Panel can exercise judicial economy with respect to a finding under Article 41.1 only if there would be no impact on the manner of compliance in the case at issue, in the light of the factual circumstances and claims in that case.[638] The UAE maintained that, as Article 41.1 refers to "enforcement procedures as specified in this Part", there appears to be overlap between Article 41.1 and the other provisions in Part III. To the extent that the Panel considers that its

[628] United Arab Emirates' response to Panel question No. 2(b) to third parties, para. 16.
[629] Canada's response to Panel question No. 3 to third parties, para. 7; European Union's response to Panel question No. 3 to third parties, paras. 6-14; and Japan's response to Panel question No. 3(a) to third parties, paras. 16-18.
[630] Canada's response to Panel question No. 3(c) to third parties, para. 8.
[631] European Union's response to Panel question No. 3 to third parties, paras. 9-10.
[632] Ibid. para. 13.
[633] Japan's response to Panel question No. 3 to third parties, para. 20.
[634] United Arab Emirates' response to Panel question No. 3(a) to third parties, para. 18.
[635] United Arab Emirates' response to Panel question No. 3(b) to third parties, para. 19.
[636] Canada's response to Panel question No. 4 to third parties, paras. 9-10; European Union's response to Panel question No. 4 to third parties, paras. 15-19; Japan's response to Panel question No. 4 to third parties, paras. 24-25; and Ukraine's response to Panel question No. 4 to third parties, paras. 10-15.
[637] European Union's response to Panel question No. 4, paras. 15-19; Japan's response to Panel question No. 4, paras. 24-25; and Ukraine's response to Panel question No. 4, paras. 10-15.
[638] Japan's response to Panel question No. 4, paras. 24-25.

findings under various provisions would be duplicative, and therefore unnecessary, the UAE suggested that the Panel consider exercising judicial economy.[639]

7.179. With respect to the interpretation of Article 61, the third parties presented diverse views. Several third parties, including Brazil, Canada and Ukraine, made arguments consistent with Qatar's interpretation of this provision and submitted that this obligation requires more than merely "writing down" certain criminal procedures and penalties in a Member's domestic law.[640] Several other third parties, including China, Singapore and the UAE, advanced a more restrictive interpretation, arguing that the obligation under Article 61 is fully discharged by the "writing down" of criminal procedures and penalties in a Member's domestic law.[641] The European Union considered that Article 61 merely requires that Members provide for criminal procedures and penalties, and, in principle, the absence of initiation of investigations and the punishment of the alleged perpetrators alone cannot show a violation of Article 61.[642] However, the European Union contemplated that "a constant non-enforcement may amount to facilitating IP rights infringement, against the spirit of Article 61". The European Union added that "[i]ndeed, criminal procedures and penalties should not be provided only on paper, but should be effective in practice, otherwise the obligation under Article 61 would be deprived of its meaning."[643] Japan similarly submitted that the first sentence of Article 61 requires Members to have relevant criminal procedures available for application but does not provide an obligation to prosecute all cases of wilful trademark counterfeiting and copyright piracy on a commercial scale; but similarly added that if a Member "systematically suspends the application" of criminal procedures and penalties, it is reasonable to conclude that it does not provide for such criminal procedures and penalties "to be applied".[644]

7.3.3 Assessment by the Panel

7.3.3.1 Order of analysis

7.180. The parties do not dispute that the text of the Saudi Copyright Law and Implementing Regulations provide for all of the exclusive rights set forth in Part II of the TRIPS Agreement that

[639] United Arab Emirates' response to Panel question No. 4, para. 21.

[640] See Brazil's response to Panel question No. 5(a) to third parties; Canada's response to Panel question No. 5 to third parties, paras. 11-12; and Ukraine's response to Panel question No. 5 to third parties, paras. 16-19. Brazil understood Article 61 of the TRIPS Agreement to require not only the "writing down" of the criminal procedures and penalties, but also their "application", and states that this threshold would be met by a Member "criminalizing these conducts and prosecuting instances of these conducts" according to its legal system. (Brazil's response to Panel question No. 5(a) to third parties.) Canada considered that Article 61 "should be interpreted as requiring Members not only to have criminal procedures and penalties in place, but to apply them in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale". (Canada's response to Panel question No. 5 to third parties, para. 11.) Ukraine stated that it will not comment specifically on the interpretation of Article 61 or the views of Qatar or the European Union, but submits that "the nature of a legal norm that stipulates, in particular, criminal procedures and penalties, entails a possibility of this norm to be applied and/or enforced" and that, "[o]therwise, non-applicability of such norm undermines the relevance of its existence overall." (Ukraine's response to Panel question No. 5 to third parties, para. 19.)

[641] See China's response to Panel question No. 5(a) to third parties, paras. 3-4; Singapore's response to Panel question No. 5 to third parties; and United Arab Emirates' response to Panel question No. 5(a) to third parties, para. 22. According to China, Article 61 "has not imposed any direct obligation for Members to initiate the investigation and eventually, impose penalties against the specific criminal activities. The phrase 'to be applied' in the first sentence of Article 61 "merely sets the scope of those criminal actions, and should not, under any circumstance, be interpreted as to impose [an] additional obligation [on] Members." (China's response to Panel question No. 5(a), para. 3.) Singapore argued that the text of Article 61 "does not support that argument" of Qatar, and observes that in *China – Intellectual Property Rights*, "the panel did not find a duty to prosecute". (Singapore's response to Panel question No. 5 to third parties (quoting Panel Report, *China – Intellectual Property Rights*, paras. 7.596-7.597).) According to the United Arab Emirates, "[c]reating a legal pathway for prosecution is not an obligation to actually prosecute" and "[i]n other words … the text of Article 61 imposes an obligation of procedure, and not an obligation of result." (United Arab Emirates' response to Panel question No. 5(a) to third parties, para. 22.)

[642] The European Union also stated that "[t]he wording 'to be applied' does not add an obligation to investigate and punish all cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. There are certain objective criteria which can justify if a WTO member does not investigate or prosecute in a given case (i.e. lack of evidence). In principle, the absence of initiation of investigations and the punishment of the alleged perpetrators alone cannot show a violation of Article 61." (European Union's response to Panel question No. 5 to third parties, paras. 20-21.)

[643] European Union's response to Panel question No. 5 to third parties, para. 25. (emphasis omitted) See also ibid. paras. 20-24; and third-party submission, paras. 31-35.

[644] Japan's response to Panel question No. 5 to third parties, paras. 26-28.

are relevant to the dispute.[645] The Panel therefore considers Qatar's claims fall more squarely under the enforcement obligations in Part III of the TRIPS Agreement rather than the obligations in Part II.[646] In response to a Panel question, Qatar indicated that, while the "fundamental structure and logic" of certain provisions of the covered agreements would require a panel to follow a particular order of analysis, Parts I, II and III of the TRIPS Agreement do not constitute such provisions.[647] The Panel considers it appropriate to begin with the claims under Part III of the TRIPS Agreement, and then address the claims under Parts I and II in the light of its findings under Part III.

7.181. Regarding the order of analysis of the three distinct claims that Qatar brings under Part III, the Panel proceeds as follows. While the Panel does not question that Articles 41.1, 42 and 61 of the TRIPS Agreement set forth distinct obligations, the Panel addresses the claims under Articles 41.1 and 42 together because both are directed at the same measures said to prevent beIN from accessing civil enforcement procedures. Next, the Panel will then address the claim under Article 61 relating to the non-application of criminal procedures and penalties for wilful copyright piracy on a commercial scale. The Panel notes that, in principle, the general obligation under Article 41.1 applies equally to civil and criminal enforcement procedures provided for in Part III of the TRIPS Agreement. The reason that the Panel does not also rule on the obligation under Article 41.1 in relation to the non-application of criminal procedures and penalties is that the scope of Qatar's claim under Article 41.1 is expressly limited to restrictions imposed on IP right holders from pursuing civil actions before Saudi courts.[648]

7.3.3.2 Claims under Article 42 of the TRIPS Agreement regarding civil and administrative procedures and remedies, and Article 41.1 on general obligations

7.3.3.2.1 Applicable legal standard

7.182. Article 41 constitutes Section 1, entitled "General Obligations", of Part III of the TRIPS Agreement. Article 41.1 reads as follows:

> Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

7.183. As the Appellate Body has noted, "[t]hese enforcement procedures … provide for an internationally-agreed minimum standard which Members are bound to implement in their domestic legislation".[649]

7.184. Article 42, entitled "Fair and Equitable Procedures", is part of Section 2, entitled "Civil and Administrative Procedures and Remedies", of Part III of the TRIPS Agreement. Article 42 reads as follows:

> Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by

[645] Qatar's first written submission, section III.C and paras. 238, 253, 272, 305, 324 and 326.

[646] When panels are confronted with claims under multiple WTO provisions that apply cumulatively to the same measure, they often select the order of analysis on the basis of which provision "deals specifically, and in detail" with the types of measures at issue. (See, e.g. Appellate Body Report, *EC – Bananas III*, paras. 155 and 204.)

[647] Qatar's response to Panel question No. 22(a), paras. 139-142. In response to the same question, Saudi Arabia stated that, consistent with its previous conduct before the Panel, it is not engaging with the substance of any claims raised by the complaining party and has no comment on the Panel's proposed analysis of these claims. (Saudi Arabia's response to Panel question No. 22(a), para. 9.)

[648] Qatar's panel request stated that Saudi Arabia has acted inconsistently with Article 41.1 of the TRIPS Agreement "… by restricting intellectual property right holders (including Qatari rights holders) from pursuing *civil* actions before Saudi courts (or otherwise frustrating their ability to do so) …". (Qatar's panel request, paragraph 15(f). (emphasis added))

[649] Appellate Body Report, *US – Section 211 Appropriations Act*, para. 206.

> independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

7.185. Article 42 is part of Section 2, which deals with civil and administrative procedures and remedies. Article 42 details specific requirements in respect of "civil judicial procedures" concerning the enforcement of any IP rights to ensure that such procedures are "fair and equitable". The Appellate Body has noted that, "[l]ike Section 1 of Part III, Section 2 introduces an international minimum standard which Members are bound to implement in their domestic legislation".[650]

7.186. Footnote 11 to Article 42 clarifies that, for the purpose of Part III, the term "right holder" includes federations and associations having legal standing to assert such rights. The Appellate Body has noted that the term "right holders" within the meaning of Article 42 "includes persons who claim to have legal standing to assert rights".[651]

7.187. The basic obligation in the first sentence of Article 42 is that Members shall "make available" to "right holders" "civil judicial procedures" concerning the enforcement of any IP right covered by the TRIPS Agreement. The Appellate Body has elaborated that "[m]aking something *available* means making it 'obtainable', putting it 'within one's reach' and 'at one's disposal' in a way that has sufficient force or efficacy"[652]; therefore, "the ordinary meaning of the term 'make available' suggests that 'right holders' are entitled under Article 42 to have *access* to civil judicial procedures that are effective in bringing about the enforcement of their rights covered by the Agreement".[653]

7.188. The Appellate Body has further noted that:

> Article 42, first sentence, does not define what the term 'civil judicial procedures' in that sentence encompasses. The *TRIPS Agreement* thus reserves, subject to the procedural minimum standards set out in that Agreement, a degree of discretion to Members on this, taking into account 'differences in national legal systems'.[654] Indeed, no Member's national system of civil judicial procedures will be identical to that of another Member.[655]

7.189. Section 2 of Part III of the TRIPS Agreement also contains Article 49, entitled "Administrative Procedures". Article 49 provides that, to the extent that any civil remedy can be ordered as a result of "administrative procedures" on the merits of a case, such procedures shall conform to the principles equivalent in substance to those set forth in Section 2.

7.3.3.2.2 Application to the facts

7.190. The Panel considers that beIN is undoubtedly a "right holder" for purposes of Articles 41.1 and 42 of the TRIPS Agreement. As elaborated in section 2.2.3 of this Report, beIN has made substantial investments in acquiring licences to broadcast content produced by major international right holders, and has obtained the exclusive rights to broadcast, and to authorize others to broadcast, prime sporting competitions in the MENA region, including in Saudi Arabia. The rights to broadcast this content have been licensed on a territorial basis, and beIN holds exclusive rights to broadcast in the territory of Saudi Arabia.[656]

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[650] Ibid. para. 207.
[651] Ibid. para. 217.
[652] Ibid. para. 215 (referring to *The New Shorter Oxford English Dictionary*, L. Brown (ed.), (Clarendon Press, 1993), Vol. I, p. 154).
[653] Ibid. para. 215 (referring to Panel Report, *US – Section 211 Appropriations Act*, para. 8.95). (emphasis added)
[654] (*footnote original*) Recital 2(c) of the Preamble to the *TRIPS Agreement.*
[655] Appellate Body Report, *US – Section 211 Appropriations Act*, para. 216.
[656] Qatar's first written submission, para. 32 (referring to Declaration by beIN Media Group LLC, 15 April 2019, Exhibit QAT-37, para. 7). See also Various Letters from beIN to Arabsat, dated 16 August 2017 through 13 July 2018, Exhibit QAT-91, p. 5 (stating that beIN "holds exclusive rights to broadcast the 2018 FIFA World Cup in the MENA region, including the World Cup Final game … as well as any rebroadcasts and recaps of that game" and owns "copyrights, trademarks, and other types of intellectual property").

7.191. The Panel considers that it is also clear that sports broadcasts of the type that beIN has been licensed to distribute constitute protected "works" under the provisions of the Berne Convention (1971) as incorporated into the TRIPS Agreement, and are covered by the definition of "Audio-Visual Work" under Article 1 of Saudi Arabia's Copyright Law, or otherwise protected under the Copyright Law. The Panel notes that there is no disagreement between the parties on this issue.[657]

7.192. In addition, beIN generally owns the copyright in any match/event commentary produced by beIN, as well as studio programming such as interviews, beIN logos and musical works. beIN also owns the related rights conferred on broadcasting organizations, including the right to prohibit unauthorized fixations, reproductions of fixations and rebroadcasting by wireless means of broadcasts, as well as communications to the public of television broadcasts of the same.[658] In some instances, beIN had the right to take action under the Saudi Copyright Law in respect of an infringed copyright work or related right where beIN is not the owner of that right.[659]

7.193. The Panel notes Saudi Arabia's observation, made in the context of commenting on paragraph 2.31 of the draft descriptive part of the Report, that "mere assertions" by Qatar that it has broadcast rights for certain content cannot "establish the fact of such rights".[660] The Panel recalls that it put several questions to Qatar aimed at further clarifying and confirming, on the basis of evidence, the nature and extent of beIN's copyright and related rights in connection with beoutQ's broadcasts. The relevant evidence that accompanied Qatar's first written submission has been supplemented with additional evidence, including, among other things: (a) examples of protected works or subject matter of related rights of which beIN is the right owner[661]; (b) examples of licence agreements that enable beIN to take action under the Saudi Copyright Law in respect of the allegedly infringed work or related rights licensed to it[662]; (c) an explanation of the categories of protected works or subject matter of related rights that were infringed in relation to specific broadcasts, such as the beoutQ's screenings of the 2018 World Cup matches[663]; and (d) side-by-side screen captures of a small sampling of sports events or episodes of television shows that were initially broadcast by beIN and then immediately pirated and rebroadcast by beoutQ within a time delay of mere seconds.[664]

7.194. The Panel has found 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.[665] Given that beIN is a right holder for purposes of Article 42 of the TRIPS Agreement, it follows that Saudi Arabia has acted inconsistently with the specific requirement, in the third sentence of Article 42, that parties "shall be allowed to be represented by independent legal counsel".

7.195. The Panel notes that Qatar has also argued that, because of the travel restrictions at issue, Qatari nationals are generally not permitted to enter the territory of Saudi Arabia, including to initiate, conduct, or testify in proceedings for the enforcement of IP rights. According to Qatar, the inability to personally attend legal proceedings in Saudi Arabia, particularly when considered together with the inability to hire legal counsel, "precludes Qatari nationals from presenting evidence in civil judicial proceedings concerning the enforcement of intellectual property rights".[666] According to Qatar, this violates the specific requirement, in the fourth sentence of Article 42, that litigants "shall be duly entitled to substantiate their claims and to present all relevant evidence".[667] As elaborated earlier, the Panel considers that whether or not the travel restrictions would operate to prevent beIN from accessing civil enforcement procedures, if beIN were able to secure legal

[657] See paragraph 2.6 of this Report.
[658] Qatar's response to Panel question No. 6(b)(i), paras. 34-35 (referring to Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217, paras. 7, 10 and 16).
[659] Ibid. para. 37 (referring to Supplemental Declaration by beIN Media Group LLC, 24 July 2019, Exhibit QAT-217, para. 14).
[660] Saudi Arabia's comments on the draft descriptive part of the Report, p. 3.
[661] See Qatar's response to Panel question No. 6(b)(i).
[662] See Qatar's response to Panel question No. 6(b)(ii).
[663] See Qatar's response to Panel question No. 6(d).
[664] Qatar's response to Panel question No. 45, para. 113 (referring to Declaration by beIN Media Group LLC Programming Director, dated 27 October 2019, Exhibit QAT-257).
[665] See section 7.2.3.2.1 ("Anti-sympathy measures") of this Report.
[666] Qatar's first written submission, para. 398.
[667] Ibid.

representation to initiate civil proceedings, is a matter of speculation.[668] In the Panel's view, it is unnecessary to rule on Qatar's argument concerning the fourth sentence of Article 42 in the light of its earlier finding regarding the travel restrictions.

7.196. The Panel has also considered Qatar's argument, made in the context of challenging the Ministerial approval requirement as applied to beIN, that the effect of such a "political" element is that Copyright Committee proceedings are not "civil judicial procedures" within the meaning of Article 42, first sentence, of the TRIPS Agreement.[669] The Panel considers it unnecessary to express any view on the interpretation of the term "civil judicial procedures" in the context of the first sentence of Article 42, in the light of its earlier finding regarding the Ministerial approval requirement. As elaborated earlier, Qatar did not make any "as such" claim in respect of this aspect of Saudi law, and the Panel has concluded that the question of whether—and, if so, how—the Ministerial approval requirement (or replacement measures establishing a different layer of approval[670]) would be applied to beIN, if beIN was able to retain legal counsel in Saudi Arabia and bring a case before the Copyright Committee, would be an exercise in speculation.

7.197. For these reasons, the Panel concludes that Saudi Arabia has acted in a manner inconsistent with Article 42 of the TRIPS Agreement by taking 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.

7.198. The Panel recalls that Qatar has made an additional claim under Article 41.1 of the TRIPS Agreement. The Panel considers that the violation of the obligation under Article 42 of the TRIPS Agreement to allow parties to be "represented by independent legal counsel" gives rise to a consequential violation of the obligation under Article 41.1 to "ensure that enforcement procedures as specified in this Part are available under their law". As the Panel has found that enforcement procedures as specified in Part III are to that extent not "available", the question of whether they permit "effective action against any act of infringement" of IP rights covered by the TRIPS Agreement within the meaning of Article 41.1 does not arise.

7.3.3.2.3 Conclusion

7.199. The Panel concludes that Saudi Arabia has acted in a manner inconsistent with Article 42 and Article 41.1 of the TRIPS Agreement by taking 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.

7.3.3.3 Claim under Article 61 of the TRIPS Agreement regarding criminal procedures

7.3.3.3.1 Applicable legal standard

7.200. Article 61, which constitutes Section 5, entitled "Criminal Procedures", of Part III of the TRIPS Agreement, reads as follows:

> Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

7.201. Qatar's claim is directed at the obligation in the first sentence of Article 61 that Members "shall provide for criminal procedures and penalties to be applied at least in cases of wilful …

[668] See paragraphs 7.87 to 7.89 of this Report.
[669] Qatar's first written submission, paras. 391-395 and 401-409.
[670] See paragraphs 2.11 to 2.14 of this Report.

copyright piracy on a commercial scale." This obligation was invoked as the basis for a claim in one prior case, *China – Intellectual Property Rights*, and that panel's findings provide guidance on the interpretation and application of this provision.[671]

7.202. The scope of the obligation to "provide for criminal procedures and penalties to be applied" is limited by the phrase "at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale".[672] As the panel in *China – Intellectual Property Rights* noted:

> Part III of the TRIPS Agreement distinguishes between the treatment of wilful trademark counterfeiting and copyright piracy on a commercial scale, on the one hand, and all other infringements of intellectual property rights, on the other hand, in that only the former are subject to an obligation regarding criminal procedures and penalties. This indicates the shared view of the negotiators that the former are the most blatant and egregious acts of infringement. This view must inform the interpretation of Article 61.[673]

7.203. As regards the term "wilful", the panel in *China – Intellectual Property Rights* explained that it "functions as a qualifier indicating that trademark counterfeiting or copyright piracy is not subject to the obligation in the first sentence of Article 61 unless it is 'wilful'." This word, in the panel's view, "[which] focus[es] on the infringer's intent, reflects the criminal nature of the enforcement procedures at issue."[674]

7.204. As regards the terms "trademark counterfeiting" and "copyright piracy", the panel in *China – Intellectual Property Rights* considered that the definitions of the similar terms "counterfeit trademark goods" and "pirated copyright goods" provided in footnote 14 to Article 51 of the TRIPS Agreement are relevant to understanding the meaning of these terms in the context of Article 61.[675] Footnote 14(b) provides that, for purposes of the TRIPS Agreement, the term "pirated copyright goods" shall mean:

> [A]ny goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

7.205. The panel in *China – Intellectual Property Rights*, furthermore, clarified the meaning of the term "on a commercial scale" as follows:

> [A] "commercial scale" is the magnitude or extent of typical or usual commercial activity. Therefore, counterfeiting or piracy "on a commercial scale" refers to counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market. The magnitude or extent of typical or usual commercial activity with respect to a given product in a given market forms a benchmark by which to assess the obligation in the first sentence of Article 61. It follows that what constitutes a commercial scale for counterfeiting or piracy of a particular product in a particular market will depend on the magnitude or extent that is typical or usual with respect to such a product in such a market, which may be small or large. The magnitude or extent of typical or usual commercial activity relates, in the longer term, to profitability.[676]

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[671] Panel Report, *China – Intellectual Property Rights*, paras. 7.494-7.669. That panel was also confronted with a related claim under the second sentence of Article 61, which turned on the outcome of the claim made under the first sentence. This panel report was not appealed.

[672] Article 61 sets out a minimum standard. The last sentence of Article 61 provides that Members may provide for criminal procedures and penalties to be applied in other cases of infringement of IP rights, in particular where they are committed wilfully and on a commercial scale.

[673] Panel Report, *China – Intellectual Property Rights,* paras. 7.514 and 7.528.

[674] Ibid. paras. 7.518-7.524.

[675] Ibid. paras. 7.520-7.521 and 7.572.

[676] (*footnote original*) This finding is without prejudice to the qualitative aspect of "commercial scale" considered with respect to the second limb of this claim.

> The Panel observes that what is typical or usual in commerce is a flexible concept. The immediate context in the second sentence of Article 61, which is closely related to the first, refers to the similarly flexible concepts of "deterrent" and "corresponding gravity". Neither these terms nor "commercial scale" are precise but all depend on circumstances, which vary according to the differing forms of commerce and of counterfeiting and piracy to which these obligations apply.[677]

7.206. The first sentence of Article 61 states that Members "shall provide for criminal procedures and penalties to be applied". The meaning of the phrase "to be applied" in this provision has arisen as a general interpretative issue in this case, one not addressed in prior WTO jurisprudence.

7.207. In the Panel's view, the obligation in the first sentence of Article 61 of the TRIPS Agreement is not automatically discharged through the creation of a formal written law that provides for the criminalization of wilful commercial-scale piracy without regard to whether and, if so, how the written law is applied in practice. In cases where a Member has not taken actions that could lead to the application of criminal procedures and penalties against wilful commercial-scale piracy, an assessment of compliance with Article 61 must consider the evidence available to the authorities and other relevant circumstances. Naturally, the onus would rest on the complaining Member to establish that, notwithstanding that another Member's written law provides for criminal penalties and procedures to be applied to cases of wilful copyright piracy, that Member has acted inconsistently with Article 61 in relation to the manner in which its authorities have applied the law.

7.208. The Panel considers this interpretation to be consistent with the ordinary meaning of the relevant terms of Article 61 of the TRIPS Agreement. In particular, the verb to "apply" is defined as "[t]o bring (a rule, a test, a principle, etc.) into contact with facts; to bring to bear practically; to put into practical operation".[678] This would suggest that Members have an obligation to put criminal procedures and penalties into practical operation.

7.209. It is important to consider Article 61 in the context of the whole of the TRIPS Agreement and the distinctions that it draws. The Panel agrees with Qatar that the phrase "to be applied" in Article 61 can be contrasted with the use of the phrase "shall make available" in Article 42.[679] The phrase can also be contrasted with the phrase "shall have the authority" in Articles 44, 45 and 46 of the TRIPS Agreement, and with the more general phrase, in Article 41.1, that requires Members to ensure that enforcement procedures as specified in Part III "are available". This difference in terminology, including in particular the difference in terminology between Article 61 ("shall provide for … to be applied") and Article 42 ("shall make available") reflects and is explained by an important structural difference between civil and criminal procedures. While IP rights are "private rights"[680] that generally require right holders themselves to assert their rights, only States are entitled to enforce criminal law procedures and penalties.[681]

7.210. Certain other elements of the context of Article 61 are difficult to reconcile with the view that the obligation in the first sentence of Article 61 requires nothing more of Members than that they formally "write down criminal procedures and penalties in their criminal laws" without regard to whether and, if so, how they are applied. Article 1.1, first sentence, speaks in broader and more general terms of each Member being required to "give effect" to TRIPS provisions; and, in its third sentence, refers more widely to the implementation of obligations in a Member's "legal system and practice". Likewise, the general obligation under Article 41.1 is that Members shall ensure that enforcement procedures as specified in Part III are available under their law "so as to permit effective action" against any act of infringement of IP rights covered by the TRIPS Agreement.

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[677] Panel Report, *China – Intellectual Property Rights,* paras. 7.577-7.578. The Panel emphasized that its findings regarding the first sentence of Article 61 were confined to the issue of what acts of infringement must be criminalized and not those which must be prosecuted. (See ibid. para. 7.596.)

[678] Oxford English Dictionary online, definition of "apply", available at: < https://www.oed.com/view/Entry/9724?rskey=pQF380&result=2#eid>, accessed 21 January 2020.

[679] Furthermore, in the context of discussing Article 42, the Appellate Body has explained that "the ordinary meaning of the term 'make available' suggests that 'right holders' are entitled under Article 42 to have *access* to civil judicial procedures that are effective in bringing about the enforcement of their rights covered by the Agreement". (Appellate Body Report, *US – Section 211 Appropriations Act*, para. 215 (referring to Panel Report, *US – Section 211 Appropriations Act*, para. 8.95). (emphasis added))

[680] See Preamble to the TRIPS Agreement, fourth recital.

[681] European Union's response to Panel question No. 5 to third parties, para. 25.

7.211. The Panel considers that a restrictive interpretation of the terms "shall provide for criminal procedures and penalties to be applied" would also be at odds with the object and purpose of Article 61. The object and purpose of Article 61 includes singling out what negotiators of the TRIPS Agreement understood to be the two "most blatant and egregious acts of infringement" and "[t]his view must inform the interpretation of Article 61."[682] A restrictive interpretation of the obligation in the first sentence of Article 61 would also be difficult to reconcile with the TRIPS Agreement's overall object and purpose of "provid[ing] effective and appropriate means for the enforcement" of trade-related IP rights, as reflected in subparagraph (c) of the second recital of the preamble.

7.212. The parties and a number of third parties provided views on the scope of the obligation in Article 61 to provide for criminal procedures and penalties "to be applied".[683] The Panel notes that both parties, and third parties that expressed a view, agree with the view that Article 61 does not contain an obligation on Members to investigate and prosecute *all* suspected cases of wilful "trademark counterfeiting" and "copyright piracy" on a commercial scale. The Panel accepts that view. However, the parties and third parties held diverging views about the implications of accepting that premise. Some third parties reasoned that, if there is no obligation to investigate and prosecute all suspected cases of "trademark counterfeiting" and "copyright piracy" on a commercial scale, then it follows that the absence of any express guidance or criteria in the text of Article 61 as to which kinds of circumstances would compel a Member's authorities to investigate and prosecute a particular set of allegations is an indication that no such obligation exists.[684] Certain other third parties presented arguments that eschew an all-or-nothing approach, referring for instance to situations of "constant" or "systematic" non-enforcement potentially giving rise to a violation of the obligation in the first sentence of Article 61.[685]

7.213. The Panel does not consider it necessary to determine further, in the abstract, the scope of the obligation to "provide for criminal procedures and penalties to be applied". Having found that Qatar has established a *prima facie* case that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia[686], the Panel turns to the textual elements of Article 61 of the TRIPS Agreement to assess whether: (a) the conduct identified of beoutQ amounts to "wilful … copyright piracy on a commercial scale", and (b) Saudi Arabia has implemented its obligation to "provide for criminal procedures and penalties to be applied" in the circumstances of this case.

7.3.3.3.2 Application to the facts

7.214. In the Panel's view, the conduct of beoutQ amounts to "wilful … copyright piracy on a commercial scale".

7.215. As elaborated in Section 2.2.4 of this Report, beoutQ has engaged in "copyright piracy on a commercial scale". It initially streamed pirated content online, and then expanded to the retail sale of beoutQ-branded STBs throughout Saudi Arabia and other countries. These STBs receive satellite broadcasts of pirated content and, as discussed further below, they also provide access to IPTV applications offering thousands of pirated movies, TV shows and TV channels around the globe. There are reports that beoutQ STBs and subscriptions have been widely available in Saudi retail outlets since the autumn of 2017. In addition to generating revenue through sales of STBs and subscriptions, beoutQ allegedly sells advertising slots on its 10 pirated channels, and publishes its advertising rates in Saudi riyals on its website (e.g., Premier League "gold packages" for advertising priced at SAR 2,500,000 or approximately USD 666,638). beoutQ has promoted its pirated streams on a variety of social media platforms, including Facebook, Instagram and Twitter. While the focus of beoutQ's broadcasting activities was initially on sports content, it has expanded to cover the most popular movies and television programming in the world.

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[682] Panel Report, *China – Intellectual Property Rights,* para. 7.528.
[683] See paragraphs 7.173, 7.175 and 7.179 of this Report.
[684] The UAE observed that:
Members use different factors in determining priorities, such as the extent of prosecutorial resources, the availability of evidence, cooperation of witnesses and the accused, the impact of prosecution on other ongoing cases or matters, and the presence or absence of remedial efforts. It would be just as impractical to expect all Members to uniformly apply such factors to their decision-making processes. (United Arab Emirates' response to Panel question No. 5(b), para. 23.)
[685] See paragraph 7.179 of this Report.
[686] See section 7.2.3.3 ("Non-application of criminal procedures and penalties") of this Report.

7.216. A figure reflecting the commercial scale of this piracy was provided in a Declaration produced by beIN and submitted by Qatar to the Panel. This Declaration states that, since 12 March 2018, beoutQ has pirated and rebroadcast 33,488 sporting events and 3,447 episodes of television shows that were initially broadcast by beIN.[687] The Declaration also provides side-by-side screen captures of 15 sporting events or episodes of television shows that were initially broadcast by beIN and then immediately pirated and rebroadcast by beoutQ within a time delay of mere seconds. In each of the 15 examples, the screen capture on the left-hand side shows the beoutQ-pirated broadcast, and the screen capture on the right-hand side shows the feed from beIN prior to its broadcast. The screen captures and video clips of beoutQ's pirated content feature a beoutQ logo that is superimposed over the beIN logo. The beIN watermark remains in the background in some of the video clips.[688]

7.217. The Panel considers that beoutQ's conduct is properly characterized as "wilful", taking into account "the infringer's intent".[689] An entity such as beoutQ, whose sole operation consists of providing illegally pirated content and does so on a commercial scale, is not infringing on third-party copyright in a manner that could be characterized as unintentional, accidental, or inadvertent.

7.218. Turning next to the question of whether Saudi Arabia has "provide[d] for criminal procedures and penalties to be applied" to beoutQ's commercial-scale piracy, Saudi Arabia has not identified any such action. Rather, Saudi Arabia argued that its authorities have taken no such action because they have received "no credible evidence".

7.219. The Panel has found that Qatar has established a *prima facie* case that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia.[690] The Panel has also found that beIN and other foreign right holders repeatedly sent detailed information to the Saudi authorities to inform them of beoutQ's alleged piracy, and the extensive evidentiary basis for concluding that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia.[691] Additionally, the Panel has found that, while taking no action to apply criminal procedures and penalties to beoutQ, Saudi authorities engaged in the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches.

7.220. The Panel notes Saudi Arabia's assertions, as reflected in certain media reports, that its authorities have taken actions to seize beoutQ's STBs, thus acknowledging that beoutQ is engaging in illegal activities.[692] Leaving aside Qatar's submissions about the lack of any evidence to sustain Saudi Arabia's assertions in this regard[693], Saudi Arabia did not suggest that any such seizures are "criminal procedures and penalties" in the sense of Article 61, or that they relate to beoutQ's copyright piracy. Rather, Saudi Arabia stated that the basis for its authorities' seizures of beoutQ's STBs is the same basis upon which its authorities have seized beIN's STBs – namely, that they are not licensed.[694] Accordingly, such seizures could not, in the Panel's view, have discharged Saudi

[687] Qatar's response to Panel question No. 45, paras. 110, 111 and 113 (referring to Declaration by beIN Media Group LLC Programming Director, dated 27 October 2019, Exhibit QAT-257).

[688] Ibid.

[689] Panel Report, *China – Intellectual Property Rights,* paras. 7.518-7.524.

[690] See section 7.2.3.3 ("Non-application of criminal procedures and penalties") of this Report.

[691] Ibid.

[692] The media report submitted as Exhibit QAT-77 states:

> Saudi Arabia has strongly denied accusations it was behind a television service pirating multi-billion-dollar content, with a senior official saying that authorities have confiscated thousands of pieces of equipment being used to illegally watch premium soccer events like the World Cup … Al-Qahtani, in rare public remarks to international news organizations, said Saudi authorities have confiscated 12,000 devices used for illegal streaming. 'I believe that the actual number of confiscated devices will prove much higher,' he said. Authorities will continue 'to conduct inspection campaigns in coordination with all relevant bodies to prevent any attempt to broadcast any illegal content,' he said. (Bloomberg, "*Saudis Dismiss Piracy Claim as Soccer Rights' Spat Escalates*", 22 June 2018, Exhibit QAT-77.)

[693] Qatar's response to Panel question No. 21(b), para. 138; and second written submission, para. 52-56. Video footage posted on Twitter suggests that, in late May 2018, the Government of Saudi Arabia has seized beIN STBs from coffee shops and stores, and based on an eyewitness account, at least one coffee shop subsequently purchased a beoutQ STB to replace the beIN STB. (Tweets about beIN and beoutQ STBs (Arabic original and English translation), 25 and 26 May 2018, Exhibit QAT-121.)

[694] In response to Panel question No. 49, Saudi Arabia stated that it "would like to confirm that it seizes STBs of the relevant company of the Complaining Party and beoutQ on the basis that they are not licensed to distribute content by the appropriate Saudi authorities". (Saudi Arabia's response to Panel question No. 49, para. 37.)

Arabia's obligation under Article 61 to provide for criminal procedures and penalties to be applied against beoutQ for its copyright piracy on a commercial scale.

7.3.3.3.3 Conclusion

7.221. Having considered all of the evidence before it, the Panel concludes that Qatar has discharged its burden of establishing that, notwithstanding that Saudi Arabia's written law may provide for criminal penalties and procedures to be applied to cases of wilful copyright piracy on a commercial scale, its authorities have acted inconsistently with the obligation in the first sentence of Article 61 to "provide for criminal procedures and penalties to be applied" to the operations of beoutQ. The Panel therefore concludes that Saudi Arabia has acted inconsistently with Article 61 of the TRIPS Agreement.

7.3.3.4 Claims under Part I and Part II of the TRIPS Agreement

7.222. In its first written submission, Qatar set forth its interpretation of the language "treatment no less favourable"[695], "nationals of other Members"[696], and "with regard to the protection of intellectual property"[697] in the context of Article 3.1, as well as the corresponding textual elements of the legal standard in Article 4.[698] Qatar also presented a detailed discussion and analysis of each of the obligations in Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention (1971) and Article 14.3 of the TRIPS Agreement.[699]

7.223. However, the Panel recalls that the WTO dispute settlement system is not meant "to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute", and that a panel "need only address those claims which must be addressed to resolve the matter in issue in the dispute".[700] For the reasons that follow, the Panel considers it appropriate to exercise judicial economy in respect of Qatar's remaining claims concerning the anti-sympathy measures, the non-application of criminal procedures and penalties and the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches.

7.224. In the light of its finding that the anti-sympathy measures (in particular 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) violate Articles 41.1 and 42 of the TRIPS Agreement and its finding that the non-application of criminal procedures or penalties to beoutQ violates Article 61 of the TRIPS Agreement, the Panel considers it unnecessary to make findings on Qatar's additional claims that these same measures violate Articles 3.1 and 4 of the TRIPS Agreement. In the Panel's view, these additional claims under Part I are premised on the alleged inability of Qatari nationals to access civil and criminal remedies to enforce their IP rights. Specifically, Qatar argued that the treatment/advantages allegedly accorded to Saudi nationals (or non-Qatari foreign nationals) is the treatment reflected in the provisions of Chapter Six of the Saudi Copyright Law.[701] These provisions provide for civil and criminal remedies against the infringement of copyrights that seem to correspond to those required by Part III of the TRIPS Agreement.[702] While the Panel agrees with Qatar, Canada, the European Union and Japan

[695] See Qatar's first written submission, paras. 164-169.
[696] See ibid. paras. 170-173.
[697] See Qatar's first written submission, paras. 174-183.
[698] Ibid. paras. 212-218.
[699] Ibid. paras. 242-247 (Article 9), 255-264 (Article 11), 274-293 (Article 11bis(1)(i), (ii) and (iii)), 308-317 (Article 11ter), and 329-340 (Article 14.3).
[700] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 18-19, DSR 1997:I, 323, at 339-340.
[701] Having said this, Qatar also submitted that third-country nationals have also been frustrated in their attempts to initiate civil proceedings in relation to the beoutQ matter, and that it has no knowledge of any such proceedings being initiated by third-country nationals. (Qatar's response to Panel question No. 20(a), (b) and (c), paras. 128-131.) The Panel recalls that with its second written submission, Qatar provides the Panel with a copy of a public joint statement made on 31 July 2019 by seven major football right holders (including FIFA, UEFA, AFC, the Premier League, Bundesliga, LaLiga and Lega Serie A). According to the joint statement, these right holders have also been unable to engage Saudi counsel or access Saudi courts and administrative tribunals in connection with the beoutQ piracy. (See paragraph 7.65 of this Report.)
[702] Qatar's first written submission, paras. 184-187 and 219. While Qatar stated that its claims under Article 3.1 and 4 also extend to discrimination in respect of matters covered by Part II of the TRIPS Agreement, Qatar at the same time clarified that its claims under Part II are also premised on the same

that the obligations in Articles 3.1 and 4 are distinct from the obligations contained in Part III[703], Qatar and these third parties did not explain how, in the facts of this case, any potential discrimination under Articles 3 and 4 would persist if Saudi Arabia brought its anti-sympathy measures and non-application of criminal procedures and penalties into conformity with its obligations under Part III of the TRIPS Agreement.

7.225. In the light of its findings under Articles 41.1, 42 and 61 of the TRIPS Agreement, the Panel also considers it unnecessary to make findings on Qatar's additional claims relating to the anti-sympathy measures and non-application of criminal procedures and penalties under Part II of the TRIPS Agreement. In the Panel's view, these additional claims under Part II are also premised, insofar as the anti-sympathy measures and the non-application of criminal procedures and penalties are concerned, on the alleged inability of beIN to access civil and criminal remedies to enforce their rights. Qatar made this clear when it characterized Saudi Arabia's violations of the obligations in Part III of the TRIPS Agreement as being "so extreme that they render effectively worthless the substantive rights under Part II of the TRIPS Agreement".[704] Thus, if Qatar is correct in arguing that Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention (1971) and Article 14.3 of the TRIPS Agreement require that WTO Members do more than merely provide such rights in name or on paper only, and that for such rights to be meaningful they must be "enjoyed"[705], in this case, beIN's inability to "enjoy" those rights stems from the submission that its IP rights cannot be "enforced" under Articles 41.1, 42 and 61 of the TRIPS Agreement. Even if it were correct that the same aspects of the same measures may violate copyright obligations in Part II of the TRIPS Agreement and the enforcement obligations in Part III thereof[706], no explanation has been given as to how, on the facts of this case, any violations of Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention (1971) and Article 14.3 of the TRIPS Agreement would persist if Saudi Arabia were to bring its anti-sympathy measures and the non-application of criminal procedures and penalties into conformity with its obligations under Part III of the TRIPS Agreement.

7.226. The Panel notes that certain aspects of Saudi law would persist despite the withdrawal of 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 despite the application of criminal procedures and penalties to beoutQ. Specifically, based on Saudi Arabia's description of its legal regime, it would still be the case that, as reflected in the 19 June 2017 Circular, "unlicensed distributors of illegally distributed content do not have a right to protect copyright in such illegally distributed content".[707] Thus, any violations of Articles 9, 11, 11*bis* and 11*ter* of the Berne Convention (1971) and Article 14.3 of the TRIPS Agreement arising from this measure would persist regardless of the Panel's findings on the anti-sympathy measures and the non-application of criminal procedures and penalties. However, the Panel is not declining to rule on these alleged violations of Part II because it involves speculation. As already explained[708], it is the limited scope of the claims Qatar raised, including its refraining from making any "as such" claim in relation to this measure, that prevents the Panel from ruling on it.

7.227. In the light of its findings under Articles 41.1 and 42 of the TRIPS Agreement regarding the anti-sympathy measures and the non-application of criminal procedures and penalties, the Panel also considers it unnecessary to make findings on Qatar's additional claims that the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches is itself inconsistent with Articles 11 and 11*bis*[709] of the Berne Convention (1971). First, the Panel has already fully taken this measure into account as a relevant factual circumstance in the course of finding that Saudi Arabia does not "provide for" criminal procedures and penalties to "be applied" in the sense of Article 61 of the TRIPS Agreement. Second, the promotion of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches occurred nearly two years ago in the context of the World Cup, and in the absence of any claim or evidence of a

aspects of the same measures that give rise to the violations of Articles 41.1, 42 and 61. (Qatar's response to Panel question No. 8, paras. 57-59; and second written submission, para. 136.)

[703] See paragraphs 7.170 and 7.176 of this Report.

[704] Qatar's response to Panel question No. 22(a), paras. 64 and 66; and response to Panel question No. 24(a), para. 159.

[705] Qatar's first written submission, para. 238. (emphasis omitted)

[706] See paragraphs 7.171 and 7.177 of this Report.

[707] Saudi Arabia's opening statement at the second meeting of the Panel, para. 13.

[708] See paragraphs 7.33 to 7.36 of this Report.

[709] See Qatar's first written submission, paras. 271 and 304; response to Panel question No. 9(a), paras. 69-72; and second written submission, paras. 165 and 168.

continuing act by Saudi Arabia, it is not clear how an additional ruling under Articles 11 and 11*bis* of the Berne Convention (1971) would have any implications for implementation.

7.228. The Panel concludes that, in the light of these findings upholding Qatar's claims under Part III of the TRIPS Agreement, it is unnecessary to make findings on Qatar's additional claims under Parts I and II of the TRIPS Agreement.

7.4 Saudi Arabia's invocation of Article 73(b)(iii) of the TRIPS Agreement

7.4.1 Introduction

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".

7.230. Article XXI(b)(iii) of the GATT 1994, which is identical to Article 73(b)(iii) of the TRIPS Agreement, was recently addressed by the panel in *Russia – Traffic in Transit.*[710] It held that a panel must determine for itself whether the invoking Member's actions were "taken in time of war or other emergency in international relations" in subparagraph (iii) of Article XXI(b) of the GATT 1994. It further found that a panel's review of whether the invoking Member's actions are ones "which it considers necessary for the protection of its essential security interests" under the chapeau of Article XXI(b) of the GATT 1994 requires an assessment of whether the invoking Member has articulated the "essential security interests" that it considers the measures at issue are necessary to protect, along with a further assessment of whether the measures 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. According to the panel in *Russia – Traffic in Transit*, the obligation of a Member to interpret and apply Article XXI(b)(iii) of the GATT 1994 in "good faith" requires "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".[711]

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*.[712] 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".[713] Saudi Arabia also submitted that "[t]he existence of an emergency in international relations has been recognized by other countries which have applied

[710] See generally Panel Report, *Russia – Traffic in Transit*, paras. 7.27-7.149.
[711] Ibid. para. 7.138.
[712] See section 7.4.3.1 ("Applicable legal standard") of this Report.
[713] Saudi Arabia's first written submission, para. 6(a).

similar measures against the complaining Party".[714] It referenced Qatar's alleged repudiation of the Riyadh Agreements concluded between the GCC members[715] and alleged interference in other countries in the region.[716] Saudi Arabia asserted that its action was taken "in time of" the emergency because it severed all diplomatic and consular relations with Qatar on 5 June 2017, following Qatar's repudiation of the Riyadh Agreements and Qatar's continued actions that those agreements identified as threats to the security and stability of GCC members.[717] According to Saudi Arabia, the emergency in international relations "has persisted since June 2017".[718]

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".[719] Thus, it stated that "one of its principal essential security interests" is "the elimination of the extremism and terrorism that have led to instability and conflict in [their] region"[720] and that the "essential security interest" in question is "the protection of Saudi citizens, territory, and government from terrorism and extremism".[721] 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".[722]

7.234. In the context of its invocation of Article 73(b)(iii) Saudi Arabia focused on its "comprehensive measures" taken on 5 June 2017, and on its consequent refusal to engage directly or indirectly with Qatar in this dispute.[723]

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[724]; 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.[725] In Qatar's view no "emergency" in international relations prevails today, and the two countries cooperate in various fora.[726]

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".[727] In its view, Saudi Arabia's apparent interests "are communicated in the most abstract of terms".[728] 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

[714] Saudi Arabia's opening statement at the first meeting of the Panel, para. 46. (fn omitted)
[715] Ibid. paras. 21-22 and 44-45; Saudi Arabia's closing statement at the first meeting of the Panel, paras. 18-20; and second written submission, paras. 14-18 and 41.
[716] Saudi Arabia's opening statement at the first meeting of the Panel, para. 47.
[717] Ibid. para. 48 (referring to Supplementary Riyadh Agreement, Exhibit SAU-4).
[718] Saudi Arabia's second written submission, para. 41; opening statement at the second meeting of the Panel, para. 21.
[719] Saudi Arabia's first written submission, paras. 1, 6(c) and 14.
[720] Saudi Arabia's opening statement at the first meeting of the Panel, para. 21.
[721] Saudi Arabia's response to Panel question No. 30(b), para. 63.
[722] Saudi Arabia's second written submission, para. 42. (fn omitted)
[723] See, e.g. Saudi Arabia's first written submission, para. 7; opening statement at the first meeting of the Panel, paras. 6 and 43; closing statement at the first meeting of the Panel, paras. 5, 8 and 10; response to Panel question No. 28, para. 23; second written submission, paras. 6, 10, 11, 19 and 43-45; opening statement at the second meeting of the Panel, paras. 2 and 4; and closing statement at the second meeting of the Panel, paras. 3-8.
[724] Qatar's opening statement at the first meeting of the Panel, paras. 65-66 and 96; and second written submission, paras. 271, 294-295 and 299-300.
[725] Qatar's opening statement at the first meeting of the Panel, para. 95; and second written submission, para. 265.
[726] Qatar's opening statement at the first meeting of the Panel, paras. 101-103; and opening statement at the second meeting of the Panel, para. 88.
[727] Ibid. paras. 107-115.
[728] Ibid. para. 108.

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".[729] 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.[730] 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.[731]

7.237. Qatar further submitted that the measures at issue are not plausibly connected to Saudi Arabia's essential security interests.[732] In response to Saudi Arabia's submissions about what constitutes the "action" that it considers "necessary to protect its essential security interests" in the sense of the chapeau of Article 73(b) of the TRIPS Agreement, Qatar set out its understanding that Saudi Arabia has not actually invoked Article 73(b) with respect to the measures at issue.[733] In the light of Saudi Arabia's statements that it is *not* invoking Article 73 in respect of any of the six measures challenged by Qatar other than the travel restrictions, Qatar submitted that the Panel "cannot uphold the defense in respect of the measures that the respondent affirmatively asserts were not considered necessary for protecting its essential security interests" and that "[d]oing so would amount to impermissibly making the case for the respondent and legal error."[734] Qatar submitted that the argument presented by the UAE (and adopted by Saudi Arabia) about the impermissibility of "parsing out individual measures" taken as part of an "overall action" is irrelevant to the present dispute, because it is irrelevant "whether or not Saudi Arabia can justify measures other than the measures at issue—either individually or by grouping them into a 'comprehensive measure' or 'overall scheme'".[735]

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.[736] 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.[737] 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).[738] 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.[739] 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

[729] Ibid.
[730] Ibid. para. 110.
[731] Ibid. para. 112. See ibid. paras. 111-115.
[732] Ibid. paras. 116-121; and Qatar's opening statement at the second meeting of the Panel, paras. 81-83.
[733] Qatar's opening statement at the first meeting of the Panel, paras. 81-85; and second written submission, paras. 272-281.
[734] Qatar's second written submission, para. 259. (emphasis original)
[735] Ibid. para. 281. (emphasis original)
[736] Brazil's third-party submission, paras. 12-13; Canada's third-party submission, paras. 21-22; Canada's third-party statement, paras. 6-7; European Union's third-party submission, paras. 81 and 86-87; Japan's third-party statement, paras. 13 and 19; and Russia's third-party statement, paras. 18-19. Both Canada and the European Union considered that, under Article 73(b)(iii), a panel must determine whether there is a "sufficient nexus" between the respondent's measure and the circumstances set out in subparagraph (iii). (Canada's third-party submission, para. 23; Canada's third-party statement, paras. 8-9; and European Union's third-party submission, para. 90.)
[737] United Arab Emirates' third-party submission, para. 9. For this reason, the UAE considered that a panel should not apply a rigid, unbending standard in examining whether an "emergency in international relations" exists. Rather, a panel must take into account the perspective and position of one Member in light of its relationship with another, and must conduct its examination from the vantage point of the Member claiming the existence of an emergency and the essential security interests. (Ibid.)
[738] Bahrain's third-party submission, paras. 5-6; Bahrain's third-party statement, paras. 7-13; United States' third-party submission, para. 5; and United States' third-party statement, paras. 5 and 7.
[739] Japan's third-party submission, para. 12; and third-party statement, para. 16.

underlying or leading to such a severance could qualify as an "emergency in international relations".[740] 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.[741]

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.[742] 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".[743] 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".[744]

7.240. The UAE submitted that a panel "cannot parse out the individual measures taken as part of the overall action of severing diplomatic and economic relations, and seek to apply the plausibility test to each element separately and out of context".[745] The UAE added that, if the Panel applies the test to individual "measures" (e.g. limiting access to a port), as opposed to the overall "action" (e.g. termination of relations), this can only be to consider a plausible connection between the overall "action" and "measures"—i.e. if limiting access to a port is plausibly connected to the termination of relations (which itself must be plausibly connected to the emergency).[746] Brazil responded that the text of Article 73(b) of the TRIPS Agreement refers to "action", not "overall action", and "[n]othing in the text of Article 73(b) limits the scope of this provision to only one action."[747] Canada stated that if "individual measures are included as part of an 'overall action' or comprehensive response to a security threat, the relationship between the comprehensive response and the security interest is relevant to determining whether the individual measures are sufficiently linked to the circumstances set out in subparagraph", but added that a panel should still consider whether each of the individual measures has a sufficient nexus to the circumstances set out in subparagraph (iii).[748] The European Union submitted that it "does not see any basis for the proposition that the required connection should be linked to a nebulous overall 'action', while the concrete measures would escape scrutiny".[749] According to Japan, if an "overall action consisting of individual measures has its own unique effect through synergy between its component measures, the connection with these emergency and security interests should be examined in relation to the overall action, rather than each component measure".[750] Singapore did not agree that the "overall action" to be assessed is the action of "severing diplomatic and economic relations", and stated that what is required in the present case "is an articulation of how the various measures alleged to be substantive violations of the TRIPS Agreement, seen in totality, bear a connection with the 'emergency in international relations'".[751]

[740] European Union's third-party statement, para. 3; and Singapore's third-party statement, para. 6.
[741] United Arab Emirates' third-party submission, para. 25.
[742] European Union's third-party submission, para. 67.
[743] Brazil's third-party submission, para. 37. The Panel notes that Saudi Arabia, when invited to address this point, stated that it "has not taken copyright works of any right-holders in connection with the protection of Saudi Arabia's essential security interests". (Saudi Arabia's response to Panel question No. 35, para. 76.)
[744] European Union's third-party submission, para. 67.
[745] United Arab Emirates' oral statement, para. 23.
[746] United Arab Emirates' response to Panel question No. 7 to third parties, paras. 36-37.
[747] Brazil's response to Panel question No. 7 to third parties.
[748] Canada's response to Panel question No. 7 to third parties, paras. 17-18.
[749] European Union's response to Panel question No. 7 to third parties, para. 29.
[750] Japan's response to Panel question No. 7 to third parties, para. 34. On the other hand, Japan considered that "to the extent the relevant individual measures are independent and distinct, each of these measures may need to be justified by finding a connection with the emergency and security interests at issue". (Ibid. para. 33.)
[751] Singapore's response to Panel question No. 7 to third parties.

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*.[752] 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.[753]

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".[754] In other words, the panel concluded that the adjectival clause "which it considers"

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[752] Where two sets of exceptions from obligations use similar language and requirements and set out their provisions in the same manner, the Appellate Body has considered prior panel and Appellate Body reports concerning the first set of exceptions to be relevant for its analysis under a second set of exceptions. (See Appellate Body Reports, *US – Gambling*, para. 291 (finding previous decisions under Article XX of the GATT 1994 relevant for its analysis under Article XIV of the General Agreement on Trade in Services (GATS)); and *Argentina – Financial Services*, para. 6.202 (referring to the Appellate Body's interpretation of Article XX(d) of the GATT 1994 in *Korea – Various Measures on Beef* to set out its analytical framework for Article XIV(c) of the GATS).)

[753] See Qatar's opening statement at the second meeting of the Panel, paras. 72-73; Qatar's opening statement at the first meeting of the Panel, paras. 43-49 and 65-67; Qatar's second written submission, paras. 265-271; Saudi Arabia's opening statement at the first meeting of the Panel, paras. 43-49; Saudi Arabia's second written submission, para. 33; Saudi Arabia's opening statement at the second meeting of the Panel, paras. 19-48; Saudi Arabia's closing statement at the second meeting of the Panel, para. 7; Australia's third-party statement, paras. 10-14; Brazil's third-party submission, paras. 11-17; Canada's third-party submission, paras. 21-22; Canada's third-party statement, paras. 6-7; European Union's third-party submission, paras. 81-97; Japan's third-party submission, para. 9; Japan's third-party statement, paras. 13 and 19; Russia's third-party statement, paras. 17-21; Singapore's third-party statement, paras. 3-5; Ukraine's third-party submission, paras. 25-26; and Ukraine's third-party statement, paras. 9-13.

[754] Panel Report, *Russia – Traffic in Transit*, para. 7.71. See also ibid. paras. 7.66, 7.72-7.74, 7.77, 7.79 and 7.82. In its interpretation of this phrase in Article XXI(b)(iii) of the GATT 1994, the panel in *Russia – Traffic in Transit* took into account several elements, including: (a) the operation of subparagraphs (i) to (iii) as clauses that "qualify and limit the exercise of the discretion accorded to Members under the *chapeau*" (Panel Report, *Russia – Traffic in Transit*, para. 7.65); (b) the "substantially different" nature of the subject

in the chapeau of Article XXI(b)(iii) of the GATT 1994 "does not qualify the determination of the circumstance[]" in subparagraph (iii).[755] 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".[756]

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".[757]

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.[758] 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."[759] 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.[760]

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".[761]

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".[762] Notably, Saudi Arabia also referred to the "temporal relation" that should exist between qualifying emergencies and related "actions".[763]

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matter in subparagraphs (i) to (iii), each of which establishes an "alternative" requirement (ibid. paras. 7.67-7.68); (c) the ordinary meaning of the term "war" and the use of the term "or" to indicate that war is but one example of a larger category of "emergency in international relations" (ibid. para. 7.72 (emphasis omitted)); and (d) the negotiating history of Article XXI of the GATT 1947, which revealed, *inter alia*, that the potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those circumstances specified in subparagraphs (i) to (iii) (ibid. para. 7.98(b)).

[755] Panel Report, *Russia – Traffic in Transit*, para. 7.82. See also ibid. para. 7.101.

[756] Ibid. para. 7.100.

[757] Ibid. paras. 7.75-7.76. (fn omitted)

[758] Saudi Arabia's second written submission, para. 33 (quoting Panel Report, *Russia – Traffic in Transit*, paras. 7.76 and 7.111); and Qatar's opening statement at the first meeting of the Panel, paras. 61-62, 65-67 and 74-75 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.65, 7.75, 7.76, 7.82, 7.100).

[759] Saudi Arabia's second written submission, para. 33 (quoting Panel Report, *Russia – Traffic in Transit*, paras. 7.76 and 7.111).

[760] See paragraph 7.238 of this Report.

[761] Panel Report, *Russia – Traffic in Transit*, para. 7.70. (emphasis original) See also ibid. para. 7.77.

[762] Saudi Arabia argued that the "measures at issue were 'taken in time of' an emergency in international relations in June 2017 … and continued to be applied within the meaning of TRIPS Article 73(b)(iii)". Saudi Arabia also referred to the "temporal relation" that should exist between qualifying emergencies and related "actions". (Saudi Arabia's first written submission, para. 6(b); and second written submission, para. 33.) For its part, Qatar noted that this phrase connects the defended action to the emergency and requires that the action "be adopted *during* the existence of an emergency, which came into being before their adoption and continues to exist thereafter". (Qatar's opening statement at the first meeting of the Panel, para. 64 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.70). (emphasis original) See also Qatar's second written submission, para. 269 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.70).)

[763] Saudi Arabia's second written submission, para. 33.

None of the third parties expressed any disagreement with this aspect of the panel's interpretation.[764]

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".[765] 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".[766]

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".[767] For the panel, this "obligation of good faith" requires that Members not use the security exception as a means to circumvent their WTO obligations.[768] 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."[769]

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".[770] 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".[771] Most if not all of the third

[764] Canada and the European Union submitted that subparagraph (iii) requires at least that the action be taken during a period of time in which the "war" or "other emergency" exists. (Canada's third-party submission, paras. 23-24; and European Union's third-party submission, paras. 90-92.) Both Canada and the European Union considered that, under Article 73(b)(iii), a panel must also determine whether there is a "sufficient nexus" between the respondent's measure and one of the circumstances set out in subparagraph (iii). (Canada's third-party submission, para. 23; Canada's third-party statement, paras. 8-9; and European Union's third-party submission, para. 90.) Russia and the UAE agreed that the terms "taken in time of" require that the action be taken during the war or other emergency in international relations. Russia referred to the connection between these two elements as "a chronological concurrence that is also an objective fact, amenable to objective determination". (Russia's third-party statement, para. 19 (quoting Panel Report, *Russia – Traffic in Transit*, para. 7.70.)) In the UAE's view, this temporal requirement "must be distinguished from the narrower 'relationship of ends and means' required by the terms 'relating to' used in subparagraphs (ii) and (iii) of Article 73(b)". (United Arab Emirates' third-party submission, para. 10.)

[765] Panel Report, *Russia – Traffic in Transit*, para. 7.130.

[766] Ibid. para. 7.131.

[767] Ibid. para. 7.132.

[768] In what it deemed a "glaring example" of a respondent's circumvention of its WTO obligations, the panel in *Russia – Traffic in Transit* stated that a respondent could seek, hypothetically, to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system. The respondent would do so "simply by re-labelling trade interests that it had agreed to protect and promote within the system, as 'essential security interests', falling outside the reach of that system". (Ibid. para. 7.133.)

[769] Ibid. para. 7.134.

[770] Saudi Arabia's first written submission, paras. 6(c) and 14; opening statement at the first meeting of the Panel, paras. 18-22; second written submission, para. 34 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.130); Qatar's opening statement at the first meeting of the Panel, paras. 74-75, second written submission, paras. 257-258 and 262-264; and opening statement at the second meeting of the Panel, para. 69 (quoting Panel Report, *Russia – Traffic in Transit*, paras. 7.71 and 7.133-7.135).

[771] Saudi Arabia's first written submission, para. 6(c). See also ibid. para. 14; and opening statement at the first meeting of the Panel, paras. 18-22.

parties that addressed this element of the security exception expressed their agreement with one or more elements of the panel's interpretation reviewed above.[772]

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".[773] 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".[774]

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.[775] 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".[776]

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.[777] 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".[778] 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".[779]

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).[780] 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.[781] Nevertheless, the UAE considered that, to give the clause "which it

[772] See Australia's third-party statement, para. 10 (referring to Panel Report, *Russia – Traffic in Transit*, paras. 7.130-7.131); European Union's third-party submission, paras. 62, 94 and 96 (referring to Panel Report, *Russia – Traffic in Transit*, paras. 7.130, 7.132-7.133 and 7.138); Singapore's third-party statement, para. 5; Ukraine's third-party submission, paras. 20-24; and United Arab Emirates' third-party submission, para. 6 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.131).

[773] Panel Report, *Russia – Traffic in Transit*, para. 7.138.

[774] Ibid. para. 7.139. See also ibid. para. 7.145.

[775] Saudi Arabia's second written submission, para. 37 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.133).

[776] Saudi Arabia's second written submission, para. 46.

[777] Qatar's opening statement at the first meeting of the Panel, para. 70. (emphasis omitted)

[778] Ibid. para. 71 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.132).

[779] Ibid. para. 78. (emphasis omitted)

[780] Australia's third-party statement, para. 10 (referring to Panel Report, *Russia – Traffic in Transit*, paras. 7.146-7.147), paras. 11-12 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.138) and paras. 15-16; Brazil's third-party submission, paras. 18 and 27-29; European Union's third-party submission, paras. 44, 96-97, 100 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.138) and para. 101; Russia's third-party statement, para. 21; Ukraine's third-party submission, paras. 20-26 and 28 (referring to Panel Report, *Russia – Traffic in Transit*, paras. 7.132, 7.135 and 7.138); and Ukraine's third-party statement, paras. 11-13.

[781] European Union's third-party submission, para. 100 (referring to Appellate Body Report, *India – Solar Cells*, para. 5.58).

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".[782] The UAE also considered that the "minimum requirement of plausibility"[783] 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.[784] Regardless, in its view, the "plausibility formulation" sets "a very low bar".[785]

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"[786] 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"[787] 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]".[788] 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.[789]

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".[790] The UAE observed that Saudi Arabia's severance of relations with Qatar, "in and of itself, indicates the gravity of the situation"[791], and "there are few circumstances in international relations short of war that constitute a more serious state of affairs".[792]

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.[793] The severance of such relations typically brings about "the termination of all direct official communication between" the two

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[782] United Arab Emirates' third-party submission, para. 5 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.146). See also third-party statement, para. 11.

[783] United Arab Emirates' third-party statement, para. 19 (quoting Panel Report, *Russia – Traffic in Transit*, para. 7.138).

[784] Ibid. para. 20.

[785] Ibid. para. 21.

[786] The Panel notes that neither party has claimed that there was, at any point, a state of "war" in the sense of paragraph 73(b)(iii).

[787] Panel Report, *Russia – Traffic in Transit*, para. 7.76. (fn omitted)

[788] Saudi Arabia's first written submission, para. 1.

[789] Ibid. (quoting "Kingdom of Saudi Arabia severs diplomatic and consular relations with Qatar", Saudi Press Agency, https://www.spa.gov.sa/viewstory.php?lang=en&newsid=1637298).

[790] Saudi Arabia's first written submission, para. 6(a).

[791] United Arab Emirates' third-party statement, para. 16.

[792] Ibid.

[793] Commentary on the 1969 Vienna Convention on the Law of Treaties, Article 63: Severance of diplomatic or consular relations, (Brill, Nijhoff 2009), pp. 786-787, paras. 4-5.

states.[794] The severance of diplomatic relations is an "exceptional" act[795], 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."[796] 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".[797]

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".[798]

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[799] that Qatar had, *inter alia*, repudiated the Riyadh Agreements designed to address regional concerns of security and stability[800], supported terrorism and extremism[801], and interfered in the internal affairs of other countries.[802] 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[803], that in and of itself reflects and contributes to a "situation … of heightened tension or crisis"[804] between them that relates to their security interests.[805] 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.[806]

7.264. Third, the Panel notes the argument of Qatar and Japan that it might involve circular reasoning, and/or render one of the two main elements of Article 73(b)(iii) redundant, if Saudi Arabia's severance of all diplomatic and economic relations with Qatar on 5 June 2017 were deemed to constitute both the "emergency in international relations" under subparagraph (iii), and

[794] Ibid.

[795] John P. Grant and J. Craig Barker, *Parry & Grant, Encyclopaedic Dictionary of International Law, 3rd Edition* (Oxford University Press, 2009), p. 554.

[796] Holger P Hestermeyer, Vienna Convention on Diplomatic Relations (1961), *Max Planck Encyclopedia of International Law*, Oxford University Press, 2015, para. 40.

[797] Working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur, Volume II(2), UN Document A/CN.4/L.166 (July 1971) p. 103, para. 12.

[798] Charter of the United Nations, done at San Francisco, 26 June 1945, 1 UN Treaty Series XVI, Article 41, available at: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf.

[799] See paragraphs 2.22 to 2.28 of this Report.

[800] Saudi Arabia's opening statement at the first meeting of the Panel, paras. 21-22 and 44-45; closing statement at the first meeting of the Panel, paras. 18-20; and second written submission, paras. 14-18 and 41.

[801] Saudi Arabia's opening statement at the first meeting of the Panel, paras. 26-37; closing statement at the first meeting of the Panel, paras. 17-20; and second written submission, paras. 14-15.

[802] Saudi Arabia's opening statement at the first meeting of the Panel, para. 47.

[803] See section 2.2.2 ("The June 2017 severance of relations and events leading up to it") of this Report.

[804] Panel Report, *Russia – Traffic in Transit*, para. 7.76. (fn omitted)

[805] The Panel elaborates further on the nature of these interests in the context of its examination of the measures under the chapeau of Article 73, which entails consideration of the "essential security interests" articulated by Saudi Arabia. (See section 7.4.3.3.3 ("Saudi Arabia's articulation of its 'essential security interests'") of this Report.)

[806] Qatar's opening statement at the first meeting of the Panel, paras. 65-66 and 96; and second written submission, paras. 294-295 and 299-300.

also the "action which [Saudi Arabia] considers necessary for the protection of its essential security interests" under the chapeau of Article 73(b). It is not necessary for the Panel to determine whether, and if so, to what extent one and the same action or factual circumstance may constitute both an "emergency in international relations" and the "action" the Member concerned considers "necessary for the protection of its essential security interests" and "taken in time of" that emergency. In this case the "action" that the Panel must examine under the chapeau of Article 73(b) is not the severance of diplomatic and economic relations that took place on 5 June 2017.

7.265. The Panel recalls that the "action[s]" that it must examine under the chapeau are the specific acts and omissions attributable to Saudi Arabia that it has found to be inconsistent with the TRIPS Agreement. In this case, these are: (a) the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals; and (b) Saudi Arabia's non-application of criminal procedures and penalties to be applied to beoutQ. Qatar itself stressed that the severance of relations is distinct from the measures it is challenging.[807]

7.266. Finally, the Panel does not consider that various forms of cooperation between the disputing parties in the fora highlighted by Qatar[808] 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.

7.267. Both parties, and most third parties in their submissions, agreed that the determination of whether there exists "a war or other emergency in international relations" is to be made "objectively" by a panel.[809] The parties and several third parties advanced divergent views as to whether a panel must grant any margin of "deference" to a respondent's characterization of a situation as an emergency.[810]

7.268. The Panel recalls that the WTO dispute settlement system is not meant "to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute".[811] In the light of its findings above, the Panel does not consider it necessary to rule on certain issues discussed by the parties or third parties about how a panel should proceed in a case where it is not persuaded that an "emergency in international relations" exists, or is presented with an insufficient basis upon which to make any determination of that issue. 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.

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[807] See paragraph 7.29 of this Report.

[808] Qatar's opening statement at the first meeting of the Panel, paras. 101-103.

[809] Saudi Arabia's second written submission, para. 33 (referring to Panel Report, *Russia – Traffic in Transit*, paras. 7.76 and 7.111); and Qatar's opening statement at the second meeting of the Panel, para. 73 (referring to Qatar's opening statement at the first meeting of the Panel, paras. 65-67; and Qatar's second written submission, paras. 265-271). Bahrain and the United States considered that Article 73(b) is entirely "self-judging" and that the words "which it considers necessary" in the chapeau apply to subparagraphs (i) to (iii). (Bahrain's third-party submission, paras. 5-6; Bahrain's third-party statement, paras. 7-13; United States' third-party submission, para. 5; and United States' third-party statement, paras. 5 and 7.)

[810] Saudi Arabia's second written submission, para. 33; Qatar's opening statement at the second meeting of the Panel, paras. 72 and 75; European Union's third-party submission, para. 89; European Union's third-party statement, para. 3; and United Arab Emirates' third-party submission, para. 9.

[811] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 18-19, DSR 1997:I, 323, at 339-340.

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.

7.272. Before turning to those issues, the Panel will first address a fundamental issue regarding the scope of Saudi Arabia's invocation of Article 73(b)(iii).

7.4.3.3.2 The "actions" covered by Saudi Arabia's invocation of Article 73(b)(iii)

7.273. As explained earlier, Saudi Arabia's arguments under Article 73(b)(iii) of the TRIPS Agreement focus on its "comprehensive measures" taken on 5 June 2017. This led Qatar to repeatedly state that these "actions" are not the measures that it is challenging, and to argue that Saudi Arabia has therefore not actually invoked any defence under Article 73(b) with respect to the specific measures at issue in this dispute.[812]

7.274. In its first written submission, Saudi Arabia stated that it has "properly invoked the Security Exception in Article 73(b)(iii) of the TRIPS Agreement"[813] and the consequence of that, according to Saudi Arabia, is that the Panel "should decline to proceed further in this dispute because a WTO dispute settlement panel is not capable of resolving the national security matter at issue".[814] In its second written submission, Saudi Arabia stated that it "has established that its invocation of the *Security Exceptions* under Article 73 of the TRIPS Agreement is justified and that no additional findings be made in this dispute".[815] In short, according to Saudi Arabia, the effect of its invocation of Article 73 was that no further findings can be made in this dispute and thus Article 73 operated to end the case. On that basis, the invocation of Article 73 was an invocation of the security exception in respect of, and which applied to, the entire matter before the Panel.

7.275. To clarify the relationship of the "measures at issue" identified by Qatar and the "comprehensive measures" taken by Saudi Arabia on 5 June 2017, the Panel asked Saudi Arabia "whether Saudi Arabia is asserting that any of the acts or omissions raised by Qatar as the measures at issue are 'action which it considers necessary for the protection of its essential security interests' for purposes of Article 73 of the TRIPS Agreement". Saudi Arabia responded that, with the potential exception of the travel restrictions, it was not asserting that any of the alleged acts or omissions is an "action which it considers necessary for the protection of its essential security interests" for purposes of Article 73 of the TRIPS Agreement.[816] This statement was relied upon by Qatar as a concession by Saudi Arabia that Article 73 was not being invoked in respect of the measures at issue in this case.[817] Thus, Qatar contended, the invocation of Article 73 must fail.

7.276. However, a closer analysis of Saudi Arabia's position shows that Saudi Arabia was not resiling from what it had set forth in its written pleadings. Rather, Saudi Arabia invoked Article 73 in respect

[812] Qatar's opening statement at the first meeting of the Panel, paras. 81-85; second written submission, paras. 272-281.
[813] Saudi Arabia's first written submission, para. 3.
[814] Ibid. para. 4.
[815] Saudi Arabia's second written submission, para. 73.
[816] Saudi Arabia's responses to Panel question Nos. 30 and 31.
[817] See, e.g. Qatar's second written submission, para. 283.

of, and as applied to, the entire matter before the Panel, and was not directing its invocation at the specific measures identified by Qatar. The Panel notes that, given that Saudi Arabia denied that some of the measures identified by Qatar existed in fact, it would have been contradictory for Saudi Arabia to say that it had invoked Article 73 specifically in respect of measures whose existence it denied.

7.277. Saudi Arabia affirmed that its invocation of Article 73 covered the measures at issue identified by Qatar. Saudi Arabia argued that Qatar's panel request asserts the existence of a "direct relationship" between the comprehensive measures and the related measures referenced by Qatar.[818] Saudi Arabia also adopted the view that "a panel cannot parse out the individual measures taken as part of the overall action of severing diplomatic and economic relations, and seek to apply the plausibility test to each element separately and out of context".[819] In response to a question by the Panel, Saudi Arabia stated that it considers that the "comprehensive measures … extend to and encompass the measures referenced by the complaining party in this dispute".[820] Saudi Arabia's position was that the comprehensive measures were taken precisely for the purpose of protecting the essential security interests for which it invokes the security exception in Article 73.

7.278. For these reasons, the Panel concludes that the "actions" covered by Saudi Arabia's invocation of Article 73(b)(iii) of the TRIPS Agreement include the anti-sympathy measures and the non-application of criminal procedures and penalties to beoutQ.

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

7.279. Having addressed the scope of the "actions" covered by Saudi Arabia's invocation of Article 73(b)(iii), 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".[821] 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.[822] 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".[823]

7.281. Although Qatar argued that Saudi Arabia's formulations of its essential security interests are "vague" or "imprecise"[824], 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.[825] 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.[826] 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.

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[818] Saudi Arabia's response to Panel question No. 32(a), para. 68; second written submission, para. 24.
[819] Saudi Arabia's response to Panel question No. 33(a), para. 74.
[820] Saudi Arabia's response to Panel question No. 32(a), para. 65 (emphasis omitted); response to Panel question No. 33(a), para. 74.
[821] Saudi Arabia's first written submission, paras. 1, 6(c) and 14. See paragraph 7.233 of this Report.
[822] Panel Report, *Russia – Traffic in Transit*, para. 7.136.
[823] Qatar's opening statement at the first meeting of the Panel, paras. 74-75 (quoting Panel Report, *Russia – Traffic in Transit*, para. 7.71); Qatar's second written submission, paras. 262-264 (quoting Panel Report, *Russia – Traffic in Transit*, para. 7.71); and Saudi Arabia's second written submission, para. 34 (quoting Panel Report, *Russia – Traffic in Transit*, para. 7.130).
[824] See paragraph 7.236 of this Report.
[825] Panel Report, *Russia – Traffic in Transit*, para. 7.137.
[826] Among other things, it may be noted that an assessment of whether or not certain security interests are "essential" or not is not one that a WTO dispute settlement panel is well positioned to make.

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)[827], and that "the Panel may assess compliance with Saudi Arabia's obligation of good faith".[828] 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".[829] For its part, Qatar stressed that Saudi Arabia's purported non-engagement with parts of the matter before the Panel does not prevent the Panel from fulfilling its function under the DSU and its terms of reference, and that there is "no reason whatsoever for Saudi Arabia's purported 'refusal to engage' with Qatar to frustrate the ability of the Panel to make findings and recommendations based on its terms of reference and the material on the record".[830]

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".[831] 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".[832]

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"[833], 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.

[827] Saudi Arabia's response to Panel question No. 28, paras. 20-23.
[828] Saudi Arabia's second written submission, para. 46.
[829] Saudi Arabia's communication to the Panel, dated 20 December 2019, para. 7.
[830] Qatar's comments on Saudi Arabia's response to Panel question No. 37, para. 19.
[831] Panel Report, *Russia – Traffic in Transit*, para. 7.138.
[832] Ibid. para. 7.139.
[833] Qatar's first written submission, para. 15 (referring to Announcement on the Saudi Embassy to the United States website, "*Kingdom of Saudi Arabia Cuts Off Diplomatic and Consular Relations with the State of Qatar*", 5 June 2017, Exhibit QAT-3).

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[834], 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".[835] 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)".[836]

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".[837]

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[838];

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[839], which Arabsat's legal representative stated in letters to third-party right holders that Arabsat would take into account in its ongoing investigation[840];

c. FIFA's letter to Arabsat concerning the scope of its satellite coverage and its transmission of beoutQ's pirated content[841];

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[842];

[834] See paragraph 7.53 of this Report.
[835] Qatar's response to Panel question No. 13, para. 98. See the Panel's findings at section 7.2.3.2.1 ("Anti-sympathy measures") of this Report.
[836] Qatar's first written submission, paras. 8. 156, 157, 187, 205, 206, 207, 225, 233, 269, 322, 327, 328, 345, 346, 352, 374 and 396; and Qatar's responses to Panel question No. 4, para. 24, Panel question No. 8, paras. 58, 61, and 65, and Panel question No. 17, para. 112.
[837] Panel Report, *Russia – Traffic in Transit*, para. 7.138.
[838] See paragraph 7.102 of this Report.
[839] See paragraph 7.107 of this Report.
[840] See paragraph 7.108 of this Report.
[841] See paragraphs 7.110 to 7.111 of this Report.
[842] See paragraph 7.128 of this Report.

e. a public joint statement made by seven major football right holders condemning beoutQ and requesting enforcement action by Saudi Arabia against beoutQ[843]; 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.[844]

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. Brazil stated that it "fails to see how the respondent's proffered essential security interests, or any country's essential security interests for that matter, could be protected by allowing the operation of a copyright pirate whose broadcasts have spread beyond the respondent's borders and encompass not only the copyrights held by the claimant's nationals but by other countries' nationals as well, including Brazil's".[845] Similarly, the European Union stated that, without taking a position on the facts of this case, it would "welcome a detailed explanation clarifying why, in order to protect its essential security interests, Saudi Arabia considers it necessary to breach the rights of third party right-holders".[846] In its third-party oral statement, the European Union reiterated that it "would appreciate it if Saudi Arabia could provide a plausible explanation of the reasons why 'it considers necessary' to allow the systematic infringement of the intellectual property rights of EU right holders in order to protect its essential security interests".[847]

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".[848] 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".[849]

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[850] arising from the measures that, directly or indirectly, have had the result of preventing beIN from

[843] See paragraph 7.130 of this Report.
[844] See paragraph 7.142 of this Report.
[845] Brazil's third-party submission, para. 37.
[846] European Union's third-party submission, para. 67.
[847] European Union's third-party oral statement, para. 7. (emphasis omitted)
[848] See paragraph 7.285 of this Report.
[849] Panel Report, *Russia – Traffic in Transit*, para. 7.138.
[850] The Panel notes that its analysis under Article 73(b)(iii) of the TRIPS Agreement would apply equally to any violations of Parts I and II of the TRIPS Agreement arising from the anti-sympathy measures, and therefore sees no reason to disturb its decision to exercise judicial economy over those claims.

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:

a. The Panel has no discretion to decline to make any findings or recommendation in the case that has been brought before it;

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;

iii. in the light of these findings, it is unnecessary to make findings on Qatar's additional claims under Parts I and II 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.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with the TRIPS Agreement, they have nullified or impaired benefits accruing to Qatar under that Agreement.

8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends that Saudi Arabia bring its measures into conformity with its obligations under the TRIPS Agreement.

WORLD TRADE ORGANIZATION

WT/DS567/R/Add.1

16 June 2020

(20-4197)

Page: 1/93

Original: English

SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

REPORT OF THE PANEL

Addendum

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

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 27 March 2019

General

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

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

Confidentiality

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

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

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

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

Submissions

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

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

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

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

Preliminary rulings

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

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

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

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

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

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

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

Evidence

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

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

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

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

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

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

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

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

Editorial Guide

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

Questions

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

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

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

Substantive meetings

10. The Panel shall meet in closed session.

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

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

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

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

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

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

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

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

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

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

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

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

f. Following the meeting:

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

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

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

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

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

Third party session

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

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

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

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

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

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

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

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

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

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

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

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

f. Following the third-party session:

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

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

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

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

Descriptive part and executive summaries

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

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

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

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

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

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

Interim review

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

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

Interim and Final Report

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

Service of documents

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

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

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

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

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

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

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

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

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

Correction of clerical errors in submissions

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

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF QATAR

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

II. FACTUAL ASPECTS

A. 19 June 2017 Circular

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Availability of beoutQ boxes

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

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

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

3. Use of Arabsat satellites

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

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

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

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

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

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

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

4. Facilitation of beoutQ piracy by Saudi enterprises and individuals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Gatekeeping function

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

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

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

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

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

III. SAUDI ARABIA VIOLATES MULTIPLE OBLIGATIONS UNDER THE TRIPS AGREEMENT

A. Saudi Arabia violates Article 3.1 of the TRIPS Agreement

1. Legal standard under Article 3.1 of the TRIPS Agreement

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

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

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

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

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

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

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

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

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

B. Saudi Arabia violates Article 4 of the TRIPS Agreement

1. Legal standard under Article 4 of the TRIPS Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Saudi Arabia violates Article 14.3 of the TRIPS Agreement

1. Legal standard under Article 14.3

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

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

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

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

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

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

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

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

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

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

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

E. Saudi Arabia violates Article 41.1 of the TRIPS Agreement

1. Legal standard under Article 41.1 of the TRIPS Agreement

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

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

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

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

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

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

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

F. Saudi Arabia violates Article 42 of the TRIPS Agreement

1. Legal standard under Article 42 of the TRIPS Agreement

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

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

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

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

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

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

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

G. Saudi Arabia violates Article 61 of the TRIPS Agreement

1. Legal standard under Article 61 of the TRIPS Agreement

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

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

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

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

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

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

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

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

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

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

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

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

IV. SAUDI ARABIA'S AFFIRMATIVE DEFENSE

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

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

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

1. Affirmative defense

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION AND REQUEST FOR RELIEF

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

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

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

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

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

ANNEX B-2

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

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

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

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

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

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

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

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

[2] Ibid.

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

[4] *Ibid*, para. 35.

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

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

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

2. Jurisdictional Issues

2.1. The Matter Before the Panel

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

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

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

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

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

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

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

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

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

[8] Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2. Limited Jurisdiction to Assess Essential Security Interests

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

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

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

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

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

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

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

2.3. Impossibility of Satisfactory Settlement

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

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

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

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

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

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

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

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

3.1. The Emergency in International Relations

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

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

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

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

[17] *See Russia – Transit*, para. 7.76 ("Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests." (Footnote omitted.)); European Union's Third Party Integrated Executive Summary, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 18 (While the party invoking *Security Exceptions* "should also provide sufficient explanations and evidence of the causes that motivated the severance of diplomatic relations. This does not imply a high evidentiary threshold.") and para. 29 ("Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests."); Third Party Submission of the United Arab Emirates, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2. Saudi Arabia's Essential Security Interests

38. An "essential security interest" should be understood to mean an interest "relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[30] If a panel were to construe a provision of the TRIPS Agreement to require a Member to take action that it considered to subvert its essential security interests, this would violate the text of Article 73, and would not be acceptable.[31]

[26] *Ibid,* para. 34.
[27] *Ibid,* para. 35.
[28] *Ibid,* para. 1.
[29] *Ibid*, para 44.
[30] *Russia – Transit*, para. 7.130.
[31] *Russia – Transit*, para. 7.131 ("The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.") and para. 132 ("However, this does not mean that a Member is free to elevate any concern to that of an 'essential security interest'. Rather, the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith."); Third Party Executive Summary of Australia, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 8 ("Australia agrees with the panel's finding in Russia – Traffic in Transit that it is for every Member to define for itself what it considers its essential security interests."); Executive Summary of Brazil, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 14 ("It stands out that the language of Article 73 – 'which it considers' – confers a great deal of discretion regarding the necessity of the measure."); European Union's Third Party Integrated Executive Summary, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567) ("EU Executive Summary"), paras. 31 ("The terms "its essential security interests" should be interpreted in such a way as to allow Members to identify their own security interests and the desired level of protection without having the Panel second-guess the value judgment as to the legitimacy of the interest."); Third Party Executive Summary of the United States of America, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), para. 12 ("Accordingly Article 73(b)(iii) reflects a Member's

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

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

40. An "essential security interest" should be understood to mean an interest "relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[33] If a panel were to construe a provision of the TRIPS Agreement to require a Member to take action that it considered to subvert its essential security interests, this would also be inconsistent with the broad agreement in interpretation that a panel may not review the "necessity" of measures taken by Members to protect their self-defined, *bona fide* essential security interests during an emergency in international relations.[34]

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

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

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

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

right to take action it considers necessary for the protection of its essential security interests when that action is taken in time of war or other emergency in international relations.").

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

[33] *Russia – Transit*, para. 7.130.

[34] See note 30 supra.

[35] *See Russia – Transit*, para. 7.132, stating that "discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith."

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

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

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

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

3.4. Respect for the Obligation of Good Faith

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

> [t]he obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the system, as "essential security interests", falling outside the reach of that system.[40]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[54] Opening Statement of the Kingdom of Saudi Arabia at the Second Substantive Meeting of the Panel, 3 October 2019, paras. 11, 13.
[55] *See* Exhibit SAU-41.
[56] Ibid.

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

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

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

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

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

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

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

(3) the travel restrictions allegedly imposed by Saudi Arabia

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

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

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

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

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

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

[62] *Ibid*, para. 35.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

81. In response, FIFA stated as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Conclusion

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

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

- recognizing that *Security Exceptions* have been invoked;

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

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

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

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

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

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

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

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

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

93. Based on all of the statements above, and the supporting evidence provided on the record before the Panel, the Kingdom of Saudi Arabia respectfully requests that the Panel find that Saudi Arabia has established that its invocation of the *Security Exceptions* under Article 73 of the TRIPS Agreement is justified and that no additional findings be made in this dispute.

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

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

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

II. JURISDICTION OF THE PANEL TO REVIEW

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

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

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

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

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

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

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

III. SCOPE OF REVIEW

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE KINGDOM OF BAHRAIN

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

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

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

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

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

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

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

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

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

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

II. RISK OF ABUSE

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

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

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

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

III. CONCLUSION

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

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

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

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

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

II. ARGUMENTS

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

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

a) justiciability of security exceptions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. In addition, Brazil recalls that, in *Russia – Traffic in Transit*, the Panel asserted that although it is left, in general, to every Member to define what it considers to be its essential security interests, this does not mean that a Member is free to elevate any concern to that of an "essential security interest". Accordingly, the Panel determined that "it is [therefore] incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity".[3]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. APPLICABILITY OF THE WTO AGREEMENT AND COVERED AGREEMENTS

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

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

II. CORRECT ORDER OF ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. TRIPS AGREEMENT PROVISIONS AT ISSUE

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

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

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

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

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA*

I. INTRODUCTORY COMMENTS

Distinguished Chair, members of the Panel, colleagues,

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

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

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

3. In its first written submission, Saudi Arabia alleged that the only relevant facts in this dispute is "the severance of relations" between itself and the complainant, and "the publicly-stated reasons" for the measures imposed by Saudi Arabia since that severance[2]. By recognizing such relevant facts, Saudi Arabia opined that 'the Panel should decline to proceed further in this dispute because a WTO dispute settlement panel is not capable of resolving the national security matter at issue', pursuant to Articles 3.4, 3.7, and 11 of the DSU[3].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

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

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

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

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

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

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

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

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

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

Jurisdiction of the Panel

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

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

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

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

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

Burden of proof

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

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

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

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

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

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

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

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

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

21. *Fifth*, the European Union considers that when assessing the necessity of the measure, and particularly the existence of reasonably available alternatives, the Panel should ascertain **whether the interests of third parties which may be affected were properly taken into consideration**. Thus, the European Union would appreciate if Saudi Arabia could provide a plausible explanation of the reasons why "it considers necessary" to allow the systematic infringement of the intellectual property rights of EU right holders in order to protect its essential security interests.

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

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

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

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

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

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

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

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

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

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

29. As the panel noted in *Russia - Traffic in Transit*, an emergency in international relations would appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.

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

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

32. "Essential security interests" is evidently a narrower concept than "security interests" and may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

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

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

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

III. CONTEXT OF THE INTERPRETATION OF TRIPS ARTICLE 73

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

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

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

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

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

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

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

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

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

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

IV. "OTHER EMERGENCY IN INTERNATIONAL RELATIONS"

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

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

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

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

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

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

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

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

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

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

[4] KSA FWS, para. 6.

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

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

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

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

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. ORDER OF ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. BURDEN OF PROOF

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

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

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

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

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

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

ANNEX C-9

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION*

I. INTRODUCTORY

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

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

II. WHETHER THE PANEL SHOULD DECLINE TO PROCEED FURTHER

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

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

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

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

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

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

III. SECURITY EXCEPTIONS

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUDING REMARKS

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

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

ANNEX C-10

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE

I. INTRODUCTION

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

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

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

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

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

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

> The obligation of good faith requires that Members not use the exceptions in Article XXI [in pari materia *with Article 73 of the TRIPS Agreement*] as a means to circumvent their obligations under the GATT 1994 [*which, in the present dispute, would equate to the TRIPS Agreement*]. … It is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity[1].

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

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

[2] "An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e.

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

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

A. Response to Question 1 (order of analysis)

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Response to Question 8 (jurisdiction)

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

ANNEX C-11

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-12

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED ARAB EMIRATES

I. INTRODUCTION

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

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

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

II. ORDER OF ANALYSIS

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

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

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

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

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

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

III. INTERPRETATION OF ARTICLE 73 OF THE TRIPS AGREEMENT

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

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

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

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

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

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

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

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

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

IV. THE PRINCIPLE OF GOOD FAITH AND PLAUSIBILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] Exhibit ARE-1.

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

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

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

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

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

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

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

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

[16] Exhibit ARE-3.

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-13

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

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

1. Article 73(b) of TRIPS mirrors Article XXI(b) of the GATT 1994, and the text of both provisions, in its context, establishes that these exceptions are self-judging. As both provisions state, "nothing" in the agreement shall be construed to prevent a WTO Member from taking "any action" which "it considers necessary" for the protection of its essential security interests. This text establishes that (1) "nothing" in the agreement prevents a Member from taking any action needed to protect an essential security interest, and (2) the action necessary for the protection of its essential security interests is that which the Member "considers necessary" for such protection.

2. The French and Spanish texts of Article 73(b) likewise confirm the self-judging nature of this provision. Specifically, use of the subjunctive in Spanish ("estime") and the future with an implied subjunctive mood in French ("estimera") support the view that the action taken reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate.

3. The context of TRIPS Article 73(b) also supports this understanding. First, the phrase "which it considers necessary" is present in TRIPS Article 73(a) and 73(b), but not in 73(c). The selective use of this phrase highlights that, under Article 73(a) and 73(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase "which it considers" in Article 73(b), and not reduce these words to inutility.

4. Second, the context provided by GATT 1994 Article XX supports the understanding that TRIPS Article 73(b)—like GATT Article XXI(b)—is self-judging. GATT 1994 Article XX sets out "general exceptions," and a number of subparagraphs of Article XX relate to whether an action is "necessary" for some listed objective. Unlike TRIPS Article 73(b) and GATT Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "necessary." Furthermore, Article XX includes a chapeau which subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member's action, is absent from TRIPS Article 73 and GATT 1994 Article XXI.

5. Third, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member "considers" appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. For example, under Article 18.7 of the Agreement on Agriculture, "[a]ny Member" may bring to the attention of the Committee on Agriculture "any measure which it considers ought to have been notified by another Member." Similarly, GATS Article III(5) permits "[a]ny Member" to notify the Council for Trade in Services of any measure taken by another Member which "it considers affects" the operation of GATS. Numerous other provisions of WTO agreements include similar language and thereby vest particular considerations with a WTO Member, a panel, the Appellate Body, or another entity. As in TRIPS Article 73(b), the text of such provisions makes clear that the judgment of whether a situation arises is left to the discretion of the named actor.

6. By way of contrast, and further context, in at least two WTO provisions the judgment of the named actor is expressly subject to review through dispute settlement. DSU Article 26.1 permits the institution of non-violation complaints, subject to requirements including that the panel or Appellate Body agree with the judgment of the complaining party. Thus, in this provision, Members explicitly agreed that it is not sufficient that "[a] party considers" a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that "a panel or the Appellate Body determines that" a non-violation situation is present. A similar limitation—that a "party considers and a panel determines that"—was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c). This context is highly instructive. No such review of a Member's judgment is set out in TRIPS Article 73(b). Accordingly, Members did not agree to subject a Member's essential security judgment to review by a WTO panel.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENT

I. Proper Interpretation Of TRIPS Article 73(b)

7. Under DSU Article 3.2, a panel is to apply customary rules of interpretation of public international law to the text of the covered agreements; these rules establish that TRIPS Article 73(b) is self-judging. That is, each WTO Member has the right to determine, for itself, what it considers necessary for the protection of its own essential security interests.

8. TRIPS Article 73(b) mirrors GATT 1994 Article XXI(b). The text and context of TRIPS Article 73(b) supports an understanding that the provision is self-judging. First, in the chapeau, the ordinary meaning of the terms "it considers" establishes the self-judging nature of this provision. The word "consider[]" means "[r]egard in a certain light or aspect; look upon as." Under Article 73(b), the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for the protection of the acting Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("consider[]") the action as having the aspect of being necessary for the protection of that Member's essential security interests.

9. Second, it is "*its* essential security interests" – the Member's in question – that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves "its interests," that is, potential detriments or advantages from the perspective of that Member. Each WTO Member likewise must determine whether a situation implicates its "security" interests (not being exposed to danger), and whether the interests at stake are "essential," that is, significant or important, in the absolute or highest sense. By their very nature, these questions are political and can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those circumstances.

10. Third, the text of subparagraphs (i) to (iii) of Article 73(b) also supports the self-judging nature of this provision. As an initial matter, these subparagraphs lack any conjunction – such as the cumulating conjunction "and," or the coordinating conjunction "or" – to specify their relationship to each other. The absence of any conjunction here suggests that each of the subparagraphs (i) to (iii) must be considered for its relation to the chapeau of Article 73(b).

11. Subparagraphs (i) and (ii) – which discuss fissionable materials and traffic in arms, respectively – both begin with the phrase "relating to" and directly follow the phrase "essential security interests." Subparagraphs (i) and (ii) thus illustrate the types of "essential security interests" that Members considered could lead to action under Article 73(b).

12. Subparagraph (iii) of Article 73(b), by contrast, begins with temporal language "taken in time of." This language echoes the reference to "taking any action" in the chapeau of Article 73(b), as it is *actions* that are "taken," and not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word "action," rather than the phrase "essential security interests." Accordingly Article 73(b)(iii) reflects a Member's right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations.

13. Subparagraphs (i) to (iii) of Article 73(b) thus reflect that Members wished to set out certain types of "essential security interests" and a temporal circumstance that Members considered could lead to action under Article 73(b). A Member taking action pursuant to Article 73(b) would consider its action to be necessary for the protection of the interests identified in subparagraphs (i) and (ii), or to be taken in time of war or other emergency in international relations as set forth in subparagraph (iii). In this way, the subparagraphs (i) to (iii) guide a Member's exercise of its rights under Article 73(b) while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

14. This interpretation of Article 73(b) is also established by the subsequent agreement of the parties in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia.

15. In brief, in that dispute Czechoslovakia requested the CONTRACTING PARTIES to find that certain U.S. actions were inconsistent with the GATT 1947. In discussing the decision to be made in the following GATT Council meeting, the Chairman opined that the question of whether U.S. measures conformed to GATT Article I "was not appropriately put" because the United States had defended its actions under the essential security exception, which "embodied exceptions" to Article I. As the Chairman stated, the question before the contracting parties was whether the United States "had failed to carry out its obligations" under the GATT 1947. With only Czechoslovakia dissenting, the CONTRACTING PARTIES found that the United States had not failed to carry out its obligations under the GATT.

16. Thus, this subsequent agreement taken into account with the ordinary meaning of the terms of Article 73(b) confirms that, under customary rules of interpretation, TRIPS Article 73(b) leaves to each WTO Member to determine, for itself, what it considers necessary for the protection of its own essential security interests, and to take action accordingly.

II. Negotiating History Of TRIPS Article 73(b)

17. The negotiating history of the essential security exception confirms that (1) essential security matters are within the judgment of the acting government, and (2) a non-violation, nullification or impairment claim – as opposed to a claimed breach of underlying obligations – is the appropriate redress for a Member affected by an essential security action. The United States also described these points in its written submission.

18. TRIPS Article 73 mirrors GATT 1994 Article XXI, and the drafting history of these provisions dates back to negotiations to establish the International Trade Organization of the United Nations ("ITO"), which proceeded alongside the GATT 1947 negotiations. In 1946, the United States proposed a draft charter for the ITO, which included exceptions provisions that related to, among other things, measures taken "in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member."

19. As the United States asserted at that time – in 1946 – these exceptions "afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests in time of war or a national emergency." In 1947, the text that became TRIPS Article 73 was revised to separate the essential security exception from the "commercial" exceptions that became GATT 1994 Article XX, and to place the essential security exception at the end of the ITO Charter, so that it was broadly applicable. In addition, the essential security exception was revised to insert the pivotal "it considers" language, which explicitly indicates the self-judging nature of this provision. As the negotiators stated in November 1947, the essential security exception would permit members to do "whatever they think necessary" to protect their essential security interests relating to the circumstances presented in that provision.

20. Negotiators also explicitly discussed that essential security actions would not be reviewable for consistency with the underlying agreement, and that the appropriate redress for a country affected by such actions would be a non-violation, nullification or impairment claim. For example, at a July 1947 meeting, the representative of Australia withdrew an objection to the essential security provision after receiving assurance that a member affected by essential security actions would have redress pursuant to a non-violation, nullification or impairment claim.

21. And in early 1948, a Working Party of representatives from Australia, India, Mexico, and the United States decided to retain the draft charter's non-violation, nullification or impairment provision because this provision "would apply to the situation of action taken by a Member" to protect its essential security interests. As this Working Party concluded, essential security actions "would be entirely consistent with the Charter, but might nevertheless result in the nullification or impairment of benefits accruing to other Members." The Working Party concluded that "[s]uch other Members should, under those circumstances, have the right to bring the matter before the Organization, not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member."

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

22. The panel in *Russia – Traffic in Transit* found that it had authority to review multiple aspects of a responding party's invocation of the essential security provision at Article XXI of the GATT 1994. That panel's analysis is flawed for numerous reasons.

23. First, the panel failed to apply customary rules of interpretation. The panel acknowledged that the phrase "which it considers" in the chapeau "can be read to qualify . . . the determination of the matters described in the three subparagraphs of Article XXI(b)." The panel gave no interpretive weight to this plain meaning, however. Instead, that panel based its conclusion on what it termed the "logical structure" of the provision. The panel provided no explanation of what it considered to be the "logical structure" of the provision, nor did the panel explain how, consistent with customary rules of interpretation, the "logical structure" of a provision could operate to alter the ordinary meaning of its terms.

24. Second, after reaching an initial conclusion based on the "logical structure" of the essential security exception – in only a few short paragraphs – the panel proceeded to examine "a similar logical query," that is "whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination." Without explanation, the panel stated that it would "focus on" subparagraph (iii) and determine whether "given their nature, the evaluation of these circumstances *can be left* wholly to the discretion of the Member invoking the provision, or is designed to be conducted objectively, by a dispute settlement panel."

25. Again, that panel did not indicate the basis on which this "logical query" could lead to a correct interpretation of Article XXI. The panel also left unexplained why, despite the ordinary meaning of the text of Article XXI – including the key phrase "it considers necessary" – the result of this inquiry could reveal that the evaluation of this provision is "designed to be conducted objectively." In fact, the text of Article XXI(a) undermines both the premise and the conclusion of the panel's query. As that provision states "[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests." Thus, under Article XXI(a), a Member need not provide any information – to a WTO panel or other Members – regarding essential security actions or the Member's underlying security interests.

26. Third, the panel erred in its interpretation of the negotiating history of the essential security exception. Among other problems in this analysis, the panel misconstrued certain statements made during the Article XXI negotiations, including Australia's July 1947 comments regarding the withdrawal of its objection to the essential security exception. Specifically, the panel failed to identify the article to which Australia referred in those comments, not as a general dispute settlement provision of the GATT 1947, but as the article providing for non-violation nullification or impairment claims.

27. In addition, the panel failed to address other pertinent negotiating history, particularly the numerous explicit statements that confirm that the essential security exception is self-judging and that appropriate redress was considered by the negotiators to be a non-violation, nullification or impairment claim, not a claim that a Member has breached its trade obligations.

28. Essential security provisions, such as Article XXI of the GATT 1994 and TRIPS Article 73, concern matters of the utmost importance to sovereign nations. With respect to such matters, the drafters – the representatives of those sovereign nations – must be respected. As even the *Russia – Traffic in Transit* panel understood, the meaning and grammatical construction of the provision "can be read" to vest in each Member the sole determination of what "*it considers necessary* for the protection of *its essential security interests*." Had that panel conducted its analysis consistent with customary rules of interpretation, this is the meaning of the essential security exception that the panel would have discerned. It would risk grave damage to the WTO and its dispute settlement system were panels to attempt to needlessly second guess the decision by any WTO Member to take action it considers necessary for the protection of its essential security interests.

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

29. Response to Question 1: The Panel should begin its analysis by addressing Saudi Arabia's invocation of TRIPS Article 73(b). This order of analysis is consistent with the Panel's terms of reference and the function of panels as set forth in the DSU.

30. Under DSU Article 7.1, the standard terms of reference – which were used in this dispute – call on the Panel "[t]o examine . . . the matter referred to the DSB" by the claimant, and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." As this text establishes, the Panel has two functions: (1) to "examine" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests"; and (2) to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreement.

31. DSU Article 11 confirms this dual function of panels, and similarly provides that the function of panels is to "make an objective assessment of the matter" before it, and "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." As DSU Article 19.1 provides, these "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement."

32. The text of TRIPS Article 73(b), however, establishes that it is for a responding Member to determine whether the actions it has taken are necessary for the protection of its own essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member's determination. Accordingly, when a respondent has invoked its essential security interests under Article 73(b) as to a measure challenged before the DSB, a panel may make no findings that will assist the DSB in making recommendations or giving rulings as to a complaining Member's claims, within the meaning of DSU Articles 7.1 and 11.

33. This result is consistent with DSU Article 19.1 and 19.2 because an essential security measure cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement, and because it would diminish the "right" of a Member to take action it considers necessary for the protection of its essential security interests for a panel or the Appellate Body to purport to find such action inconsistent with a covered agreement.

34. If the Panel finds that Saudi Arabia has invoked Article 73(b) as to the measures challenged, the Panel should limit the findings in its report to a recognition that Saudi Arabia has invoked its essential security interests.