

IN THE WORLD TRADE ORGANIZATION

**Saudi Arabia – Measures concerning the Protection of Intellectual Property
Rights**

WT/DS567

Third Party Submission

by

Norway

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Table of Contents

I. INTRODUCTION.....	1
II. ORDER OF ANALYSIS.....	1
III. JUSTICIABILITY OF ARTICLE 73 OF THE TRIPS AGREEMENT	2
IV. CONCLUSION.....	4

Table of cases cited in this submission

Short Title	Full Case Title and Citation
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014.
<i>Russia – Traffic in Transit</i>	Panel Report, <i>Russia - Measures concerning Traffic in Transit</i> , WT/DS512/R, adopted 26 April 2019.
<i>Thailand – Cigarettes</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011.
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996.

I. INTRODUCTION

1. Norway welcomes the opportunity to present its views as a third party in this case concerning a disagreement between Qatar and the Kingdom of Saudi Arabia (“Saudi Arabia”), regarding the conformity with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“the TRIPS Agreement”) of certain measures imposed by Saudi Arabia. Qatar claims that Saudi Arabia has violated several obligations under the TRIPS Agreement. In response, Saudi Arabia has invoked the security exception laid down in Article 73(b)(iii) of the TRIPS Agreement.¹

2. Without taking a position on the facts of this dispute, Norway will in this third party submission confine itself to address and comment on certain aspects with regard to two legal issues of systemic importance: 1) the order of analysis the panel should apply; 2) the justiciability of Article 73 of the TRIPS Agreement.

3. As a point of departure, we note that equivalent security exceptions as we find in the TRIPS Agreement Article 73 are set out in Article XXI of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) and Article XIV*bis* of the General Agreement on Trade in Services (“GATS”). The overlapping aspects of the security exceptions covered by these agreements of the WTO should thus be interpreted and applied in a uniform and consistent manner.

II. ORDER OF ANALYSIS

4. 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

¹ Subparagraph (iii) identifies measures “taken in time of war or other emergency in international relations”.

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.

5. 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.² 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.³

III. JUSTICIABILITY OF ARTICLE 73 OF THE TRIPS AGREEMENT

6. The question to be discussed under this section, is whether the invocation of security exceptions as a defence by a Member implies that the panel has no jurisdiction over the dispute.

7. 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.

8. 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.

² Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.

³ 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.

9. 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 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.

10. 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.⁴

11. 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”.

12. 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.

13. 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),

⁴ 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.

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.

14. 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.

IV. CONCLUSION

15. 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.

16. In Norway’s view, 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). Hence, 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.

17. Norway respectfully requests the Panel to take account of the above considerations in interpreting the security exception in Article 73 of the TRIPS Agreement.
