(As delivered)

IN THE WORLD TRADE ORGANIZATION

United Arab Emirates – Measures relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights

WT/DS526

Third Party Oral Statement

by

Norway

at the Third Party Session of the Panel

Geneva
22 August 2019

Mr. Chairperson, Members of the Panel,

1. Norway would like to thank the Panel for the opportunity to make a statement at this meeting in a dispute between Qatar and the United Arab Emirates ("UAE"). This dispute raises issues of systemic importance with regard to the interpretation and applicability of the security exceptions laid down in Article XXI of the GATT 1994, Article XIV*bis* of the GATS and Article 73 of the TRIPS. As a point of departure, Norway notes that the overlapping aspects of the equivalent security exceptions covered by these agreements, should be interpreted and applied in a uniform and consistent manner.

2. Norway did not present a written third party submission to the Panel, and without taking a position on the facts of this dispute, Norway will confine its statement to the following points: *first*, the so-called "justiciability" of the security exceptions; *second*, the order of analysis the Panel should apply; and, *third*, the burden of proof.

I. THE "JUSTICIABILITY" OF THE SECURITY EXCEPTIONS

3. Norway will first offer some brief comments on whether the invocation of the security exceptions in Article XXI of the GATT 1994, Article XIV*bis* of the GATS or Article 73 of the TRIPS Agreement, as a defence by a Member, means that the dispute is "non-justiciable".

Although the UAE does not directly share their position on the issue of the so-called "justiciability", they point out that "some Members have taken the position that the mere invocation of an 'essential security' exception is sufficient to preclude further review by a panel", and that "[i]f this Panel agrees with this view, then the Panel`s work can end there".[1]

4. Norway strongly disagrees with such "justiciability" arguments related to the security exceptions. If mere invocation of the security exceptions would render a claim "non-justiciable", this would allow easy circumvention of WTO obligations. If a respondent could effectively bar a panel, that the UAE acknowledges enjoys jurisdiction, from undertaking objective review by mere invocation of a security exception, this would give "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 the security

[1] The United Arab Emirates' first written submission, para. 161.

exceptions, which had this effect, would render all the obligations in the GATT 1994, the GATS and the TRIPS effectively unenforceable.

5. Moreover, if the intentions of the negotiators were for the panel to have no authority to assess a Member's invocation of a security exception provision, one would also have expected such an important and significant matter be expressly provided for.[2]

6. Hence, in Norway`s view, Article XXI of the GATT 1994, Article XIV*bis* of the GATS and Article 73 of the TRIPS are clearly "justiciable".

II. ORDER OF ANALYSIS

The UAE argues that the Panel should first examine whether the UAE`s measures are justified by the security exceptions provided under the GATT 1994, the GATS and the TRIPS, followed by Qatar's non-violation nullification or impairment (NVNI) claims under the GATT 1994 and the GATS. According to the UAE, the Panel need only address Qatar's violation claims if the Panel finds 1) that the UAE's measures are not justified under the security exceptions; and 2) that the NVNI claims lack merit.[3]

Article XXI of the GATT 1994, Article XIV*bis* of the GATS and Article 73 of the TRIPS operate to justify certain WTO-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…". Hence, the security exceptions are, just like Article XX, affirmative defences to a violation of the covered agreements. Under Article XX, 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. If there is no violation, then the relevant exceptions provision has no operative role; there is nothing to justify in the first place. Logically, therefore, where a respondent invokes a security exception, the panel should first confirm whether there is a violation; and second whether the violation is justified.

[2] 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.
[3] The United Arab Emirates' first written submission, para. 151.

7. 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.[4] Of course, a panel cannot identify the WTO-inconsistent aspects of a measure that would require justification, until it has addressed the claims. Hence, in our view, it is clear that the same reasoning must apply with respect to the other exceptions provisions applicable under the GATT 1994. By contrast, if a panel were obliged to address Article XXI 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.[5]

8. In sum, when assessing the merits under Article XXI of the GATT 1994, Article XIV*bis* of the GATS and Article 73 of the TRIPS, the order of analysis should be such that the Panel *first* assesses the claims of violation under the respective agreement, and *second*, the justification under the security exception in question. Hence, an assessment of whether the measures are justified under the security exceptions before assessing whether the measures violated the covered agreement, is not an appropriate order of analysis.

III. BURDEN OF PROOF

9. I will now turn to sharing Norway`s views on the burden of proof when a security exception is invoked.

The UAE argues that, should the Panel determine that the UAE has shown that it considers its challenged actions necessary to protect its essential security interests, "the burden then shifts to Qatar to present adequate evidence and arguments to prove that the UAE did not 'consider' its actions to be necessary to protect 'its essential security' and, in doing so, it must overcome the presumption that the UAE acted in good faith".[6]

10. As already explained, Article XXI of the GATT 1994 and the security exceptions in the other WTO-agreements, are affirmative defences, just like Article XX. The Appellate Body has found that the burden for establishing limited exceptions in the GATT 1994 lies with the party asserting the defence.[7] Hence, a respondent invoking an affirmative defence must bear the burden of proving that the applicable conditions are met. If the respondent does not take on that

[4] Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.
[5] 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.
[6] The United Arab Emirates' first written submission, para. 231.
[7] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

burden, beyond invoking an exception, a panel should not proceed to consider the merits of the exception.

11. Consequently, if the complainant establishes that a measure imposed by the respondent is inconsistent with the provisions of the GATT 1994, and the respondent does not make a *prima facie* case that those measures are justified under Article XXI, the panel must, as a matter of law, rule in favour of the complainant. 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. The respondent in that dispute argued only that the security exception is not "justiciable", and did not adduce evidence and argument on the merits. In those circumstances, the panel should have found that the respondent did not make its case, and found in favour of the complainant.

In essence; Article XXI of the GATT 1994, Article XIV*bis* of the GATS and Article 73 of the TRIPS are properly understood as affirmative defences: they justify violations of the covered agreements, under certain conditions, and the respondent bears the burden of demonstrating that these conditions are met. If a respondent invoking the security exceptions limits its arguments to the "justiciability" of the provision, and does not adduce arguments, the panel must, by default, find that the measures are not justified.

Thank you.

***