COVID-19, Pandemics, and the National Security Exception in the TRIPS Agreement

by **Emmanuel Kolawole Oke***

Abstract: As a result of the COVID-19 pandemic, a number of scholars and commentators have suggested that states can invoke the national security exception in Article 73(b)(iii) of the TRIPS Agreement to enable the suspension of patent laws in order to facilitate the production and importation of patented medicines and vaccines. This article therefore critically assesses the extent to which states can realistically invoke the national security exception in response to the COVID-19 pandemic. Drawing on two recent rulings by WTO Panels in both Russia – Traffic in Transit (2019) and Saudi Arabia – Intellectual Property Rights (2020) where the nature and scope of the national security exception wasanalysed, the article acknowledges that states may be able to invoke the national security exception in response to pandemics such as COVID-19. However, the article contends that the invocation of the national security exception in this context may not actually be helpful to states that do not possess local manufacturing capacity. Furthermore, the article argues that the national security exception cannot be used to obviate the strictures contained in Article 31bis of the TRIPS Agreement. It is therefore doubtful whether the national security exception in the TRIPS Agreement is a realistic option for states that do not possess local manufacturing capacity.

Keywords: COVID-19; security exception; TRIPS Agreement; manufacturing capacity; medicines; vaccines, pandemics

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A. Introduction

1 Article 73 of the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[1] provides for security exceptions that states can invoke to defend their non-compliance with the TRIPS Agreement. This is a unique provision in the context of international intellectual property law. Crucially, the major intellectual property treaties that were in existence before the TRIPS Agreement i.e. the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)[2] and the Paris Convention for the Protection of Industrial Property (Paris Convention)[3] do not contain any security exceptions.

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1 Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, April 1994, 1869 U.N.T.S. 3; 33 I.L.M. 1197 (1994).

2 Berne Convention for the Protection of Literary and Artistic Works, 1886, as last revised at Paris in 1971 and as amended in 1979, 828 U.N.T.S. 221.

3 Paris Convention for the Protection of Industrial Property, 1883, as last revised at Stockholm in 1967 and as amended in 1979, 828 U.N.T.S. 305.

Article 73 of the TRIPS Agreement mirrors similar provisions in Article XXI of the WTO's General Agreement on Tariffs and Trade (GATT) and Article XIV *bis* of the General Agreement on Trade in Services (GATS) and it provides that:

> *Nothing in this Agreement shall be construed:*
>
> *(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
>
> *(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;*
>
> *(i) relating to fissionable materials or the materials from which they are derived;*
>
> *(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
>
> *(iii) taken in time of war or other emergency in international relations; or*
>
> *(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

2 The recognition of the need to permit states to be excluded from their obligations under the TRIPS Agreement in order to protect their essential security interests confirms the central role of the principle of territoriality in international trade law generally and in international intellectual property law specifically. This principle is connected to the concept of state sovereignty in international law and it is the foundational principle in international intellectual property law.[4] Article 73 of the TRIPS Agreement therefore reaffirms the ability of states to take steps to secure their sovereign interests even in the context of international intellectual property law.[5]

3 Nevertheless, the precise scope of these security exceptions has been unclear until very recently. Fortunately, Article XXI of the GATT and Article 73 of the TRIPS Agreement have been considered and interpreted by two WTO dispute settlement panels.[6] Prior to these two decisions, a number of states took the view that these exceptions were "self-judging" and could not be subject to adjudication via the

4 See, Susy Frankel, 'WTO Application of the Customary Rules of Interpretation of Public International Law to Intellectual Property' (2006) 46(2) *Virginia Journal of International Law* 365, 371 (noting that, "[d]espite the growth of intellectual property in international trade, intellectual property remains a territorial creature and an owner of an intellectual property right must claim that right on a territory-by-territory basis."). See also, Lydia Lundstedt, *Territoriality in Intellectual Property Law* (Stockholm University, 2016) 91; Hans Ullrich, 'TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy' (1995) 4(1) *Pacific Rim Law & Policy Journal* 153, 159 (noting that, "...intellectual property, whether it is a patentable invention or a copyrightable work, is national by nature. Therefore, it must be acquired, maintained, and defended independently from one country to the other. In fact, the conditions governing the acquisition, existence, maintenance, validity, scope, and termination of intellectual property vary widely from one country to the other. The privilege granted to the owner of the intellectual property to exclusively exploit a right, extends to the entire territory of the state granting protection, but is also limited to this territory."); Peter Yu, 'A Spatial Critique of Intellectual Property Law and Policy' (2017) 74(4) *Washington & Lee Law Review* 2045, 2064 (stating that, "Territoriality is the bedrock principle of the intellectual property system, whether the protection concerns copyrights, patents, trademarks, or other forms of intellectual property rights. This principle not only carefully identifies the prescriptive jurisdiction, but also helps set boundaries for protection within and outside the country. Strongly supported by the principle of national sovereignty, the territoriality principle aims to address concerns about international comity.").

5 See also, UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (CUP, 2005) 801 (noting that, "Although there is a relatively widespread tendency among scholars to perceive international trade law as a concept differing from the classical idea of state sovereignty and to regard national security, borders and territory as state interests difficult to reconcile with liberalization of markets, the provision of Article 73, almost identical to Article XXI of the GATT and Article XIV *bis* of the GATS, proves that these traditional state interests continue to be a major concern of WTO Members.").

6 See, WTO, *Russia – Measures Concerning Traffic in Transit*, Panel Report, WT/DS512/R (5 April 2019) (interpreting Article XXI of the GATT); WTO, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, Panel Report, WT/DS567/R (16 June 2020) (interpreting Article 73 of the TRIPS Agreement). It should be noted that Saudi Arabia has launched an appeal against this decision to the WTO's Appellate Body. This means that the panel report in this case cannot be considered for adoption by the WTO's dispute settlement body until the conclusion of the appeal. As the Appellate Body is currently non-functional due to disagreements among WTO members regarding the appointment of members to the Appellate Body, it is not yet clear as at the time of writing when this appeal will be resolved. See, WTO, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, Notification of an Appeal by the Kingdom of Saudi Arabia, WT/DS567/7 (30 July 2020).

WTO dispute settlement system.[7] In this regard, it is worth noting that the most relevant exception in the context of pandemics is the one contained in Article 73(b)(iii) of the TRIPS Agreement which permits a state to take "any action which it considers necessary for the protection of its essential security interests" during the "time of war or other emergency in international relations". Thus, Article 73(b)(iii) and how it has been interpreted and applied will be the focus of the analysis in this article.

4 In the light of the coronavirus (COVID-19) pandemic of 2019/2020, Article 73(b)(iii) has gained some prominence. This is because some scholars and commentators have suggested that states could invoke this provision in defence of measures aimed at suspending the protection and enforcement of intellectual property rights in order to facilitate the purchase, importation, or production of diagnostics, vaccines, and medicines that they need to address the COVID-19 pandemic.[8] Therefore, this article will also critically consider the extent to which states can invoke Article 73(b)(iii) to facilitate access to diagnostics, vaccines, and medicines during a pandemic such as COVID-19. While the discussion in this regard is focused on COVID-19, the arguments made here are equally applicable to other pandemics that may occur in the future.

5 The rest of this article is structured into three main sections. Section B will focus on the historical approach of states to the security exceptions as "self-judging". In this regard, attention will be paid to how the security exceptions were construed in the pre-WTO era. Section C will focus on the recent jurisprudence emanating from the WTO dispute settlement panels regarding the interpretation of Article XXI of GATT and Article 73 of the TRIPS Agreement. Attention will also be paid to the question of whether states can, in theory, invoke Article 73(b)(iii) of the TRIPS Agreement in response to pandemics such as COVID-19. Section D will thereafter critically assess whether the invocation of Article 73(b)(iii) is a realistic option for states in the fight against pandemics, especially those states that do not possess local manufacturing capacity.

B. The Historical Approach to the National Security Exceptions in International Trade Law

6 Prior to the adoption of the WTO Agreement that created the WTO in 1994, security exceptions were contained in Article XXI of GATT 1947 which was meant to be part of the Havana Charter for an International Trade Organisation that never came into force. However, the provisions of GATT 1947 remained in force provisionally until it was incorporated (with some adjustments) into GATT 1994 which is a component of the current WTO Agreement. Thus, the "provisions of the GATT 1947, incorporated into the GATT 1994, continue to have legal effect as part of the GATT 1994, itself a component of the WTO Agreement."[9] There was, however, no legal interpretation of Article XXI of GATT 1947 prior to its transformation into the current Article XXI of GATT 1994 although a number of states took the view that it was a "self-judging" provision.

7 For instance, during the accession of Portugal to GATT in 1961, Ghana invoked Article XXI(b)(iii) in support of its decision to impose a ban on goods entering Ghana from Portugal and it noted that "under this Article each contracting party was the sole judge of what was necessary in its essential security interests."[10] According to Ghana:

7 See, GATT, *Analytical Index: Guide to GATT Law and Practice* (1995) 599-610. See further, Tania Voon, 'The Security Exception in WTO Law: Entering a New Era' (2019) 113 *AJIL Unbound* 45.

8 See, South Centre, 'COVID-19 Pandemic: Access to Prevention and Treatment is a Matter of National and International Security: Open Letter from Carlos Correa, Executive Director of the South Centre' (4 April 2020) available at <https://www.southcentre.int/wp-content/uploads/2020/04/COVID-19-Open-Letter-REV.pdf> (urging the Director-Generals of the WHO, WIPO, and WTO to "support developing and other countries, as they may need, to make use of Article 73(b) of the TRIPS Agreement to suspend the enforcement of any intellectual property right (including patents, designs and trade secrets) that may pose an obstacle to the procurement or local manufacturing of the products and devices necessary to protect their populations."); Henning Grosse Ruse-Khan, 'Access to Covid-19 Treatment and International Intellectual Property Protection – Part II: National Security Exceptions and Test Data Protection' *EJIL:Talk!* (15 April 2020) available at <https://www.ejiltalk.org/access-to-covid19-treatment-and-international-intellectual-property-protection-part-ii-national-security-exceptions-and-test-data-protection/>; Nirmalya Syam, 'Intellectual Property, Innovation and Access to Health Products for COVID-19: A Review of Measures Taken by Different Countries', South Centre Policy Brief No. 80 (June 2020) 4; Frederick Abbott, 'The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic', South Centre Research Paper 116, (August 2020).

9 See, WTO, 'GATT 1947 and GATT 1994: What's the Difference?' available at <https://www.wto.org/english/docs_e/legal_e/legalexplgatt1947_e.htm>

10 GATT, Contracting Parties Nineteenth Session, 'Summary Record of the Twelfth Session' SR.19/12 (21 December 1961) 196.

> *There could therefore be no objection to Ghana regarding the boycott of goods as justified by its security interests. It might be observed that a country's security interests may be threatened by a potential as well as an actual danger. The Ghanaian Government's view was that the situation in Angola was a constant threat to the peace of the African continent and that any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, was therefore justified in the essential security interests of Ghana. There could be no doubt also that the policy adhered to by the Government of Portugal in the past year had led to an emergency in international relations between Portugal and African States.*[11]

8 Also, during the GATT Council discussions in 1982 of the trade restrictions imposed on Argentina for non-economic reasons by the European Economic Community (EEC), Canada, and Australia, similar sentiments were expressed by these states to justify their restrictions against imports from Argentina into their territories.[12] In this regard, the EEC took the view that it had acted on the basis of its inherent rights "of which Article XXI of the General Agreement was a reflection" and that the "exercise of these rights constituted a general exception, and required neither notification, justification, nor approval" because "every contracting party was - in the last resort - the judge of its exercise of these rights."[13] Canada contended that "the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised."[14] Australia also argued that its "measures were in conformity with the provisions of Article XXI:(c), which did not require notification or justification."[15]

9 In addition, apart from taking the view that the security exceptions in GATT 1947 were self-judging, some states also took the view that the invocation of this exception could neither be reviewed by members of GATT nor by a dispute settlement panel. Thus, after the United States imposed a trade embargo against Nicaragua in 1985, a panel was established to examine the measures of the United States but the terms of reference of the panel precluded it from examining the motivation for or the validity of the invocation of Article XXI(b)(iii) by the United States. Ultimately, the panel could not provide a legal interpretation of Article XXI(b)(iii) and, in a report which was not adopted, the panel held in this regard that:

> *The Panel first considered the question of whether any benefits accruing to Nicaragua under the General Agreement had been nullified or impaired as the result of a failure of the United States to carry out its obligations under the General Agreement (Article XXIII:1(a)). The Panel noted that, while both parties to the dispute agreed that the United States, by imposing the embargo, had acted contrary to certain trade-facilitating provisions of the General Agreement, they disagreed on the question of whether the non-observance of these provisions was justified by Article XXI(b)(iii)...*
>
> *The Panel further noted that, in the view of Nicaragua, this provision should be interpreted in the light of the basic principles of international law and in harmony with the decisions of the United Nations and of the International Court of Justice and should therefore be regarded as merely providing contracting parties subjected to an aggression with a right to self-defence. The Panel also noted that, in the view of the United States, Article XXI applied to any action which the contracting party taking it considered necessary for the protection of its essential security interests and that the Panel, both by the terms of Article XXI and by its mandate, was precluded from examining the validity of the United States' invocation of Article XXI.*
>
> *The Panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article as this examination was precluded by its mandate. It recalled that its terms of reference put strict limits on its activities because they stipulated that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b)(iii) by the United States (cf. paragraph 1.4 above). The Panel concluded that, as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement.*[16]

10 The above sums up the approach of a number of states to the security exceptions in the GATT. Essentially, some states took the view that the invocation of Article XXI of GATT was a matter solely within the scope of the discretion available to states under international trade law. Thus, they contended that the motivations for invoking any of the security exceptions could not be reviewed by a dispute settlement panel. As there was no legal interpretation of Article XXI, the uncertainty

11 Ibid.

12 GATT, Council, 'Minutes of Meeting' C/M/157 (22 June 1982).

13 GATT, Council, 'Minutes of Meeting' C/M/157 (22 June 1982) 10.

14 Ibid.

15 Ibid 11.

16 *United States – Trade Measures Affecting Nicaragua*, Report by the Panel, L/6053, (13 October 1986) paras 5.1-5.3.

surrounding the scope of the security exceptions continued until and after the adoption of the WTO Agreement in 1994.

C. The Recent Clarification of the Scope of Article 73(b)(iii) and its Applicability in the Context of Pandemics

11 The uncertainty surrounding the interpretation and scope of the security exceptions continued even after the adoption of GATT 1994 and the TRIPS Agreement until 2019 when Article XXI(b)(iii) of GATT 1994 was interpreted and applied by the WTO dispute settlement panel in *Russia – Measures Concerning Traffic in Transit* (hereinafter, *Russia – Traffic in Transit*). Moreover, in 2020, Article 73(b)(iii) of the TRIPS Agreement which is identical to Article XXI(b)(iii) of GATT 1994 was also interpreted by a panel in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (hereinafter, *Saudi Arabia – Intellectual Property Rights*). The decisions of both panels will thus be used to analyse the scope of Article 73(b)(iii) of the TRIPS Agreement.

12 In *Saudi Arabia – Intellectual Property Rights,* Saudi Arabia invoked the security exception in Article 73(b)(iii) of the TRIPS Agreement to justify its measures that prevented a company headquartered in Qatar, beIN, from obtaining Saudi legal counsel to enforce its intellectual property rights through civil enforcement procedures before Saudi courts and tribunals. This violated its obligation under Article 42 of the TRIPS Agreement. Saudi Arabia also invoked this exception to justify its refusal to apply criminal procedures to beoutQ, a company subject to its jurisdiction that was engaged in wilful copyright piracy on a commercial scale through its unauthorised distribution and streaming of media content belonging to beIN (in violation of its obligation under Article 61 of the TRIPS Agreement).

13 In defining the applicable legal standard in this regard, the panel in *Saudi Arabia – Intellectual Property Rights* adopted the analytical framework that was developed by the panel in *Russia – Traffic in Transit* in the context of Article XXI(b)(iii) and it listed the following four factors that need to be considered in this regard:

> *(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.*[17]

14 In relation to the first factor, i.e. whether the existence of a "war or other emergency in international relations" has been established, the panel in *Russia – Traffic in Transit* took the view that this should be objectively determined and not decided through the subjective discretionary determination of the state invoking the exception.[18] Thus, the panel rejected the argument that Article XXI(b)(iii) is self-judging and it also rejected Russia's argument that the panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii).[19] According

17 *Saudi Arabia – Intellectual Property Rights*, para 7.242. The panel justified its decision to adopt the analytical framework developed by the panel in *Russia – Traffic in Transit* in footnote 752 where it noted that: "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).)". Considering the differences between the GATT and the TRIPS Agreement, it has been questioned whether the panel in *Saudi Arabia – Intellectual Property Rights* should have adopted the analytical framework developed in the context of Article XXI of the GATT in its interpretation of Article 73 of the TRIPS Agreement. In this regard, see Caroline Glöckle, 'The Second Chapter on a National Security Exception in WTO Law: The Panel Report in Saudi Arabia – Protection of IPR' *EJIL: Talk!* (22 July 2020) available at < https://www.ejiltalk.org/the-second-chapter-on-a-national-security-exception-in-wto-law-the-panel-report-in-saudi-arabia-protection-of-ipr/>. See further, Susy Frankel, 'The Applicability of GATT Jurisprudence to the Interpretation of the TRIPS Agreement' in Carlos Correa (ed.), *Research Handbook on the Interpretation and Enforcement of Intellectual Property under WTO Rules* (Edward Elgar, 2010) 3-23.

18 *Russia – Traffic in Transit*, paras 7.71, 7.100.

19 Ibid paras 7.102-7.103.

to the panel, the clause "which it considers" in the chapeau of Article XXI(b) "does not extend to the determination of the circumstances in each subparagraph" listed in Article XXI(b).[20] This makes it clear that the determination of the existence of a war or other emergency in international relations is not within the discretion available to states in this regard.

15 The panel in *Russia – Traffic in Transit* arrived at this conclusion for a number of reasons. According to the panel, "the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances."[21] The panel also examined the negotiating history of Article XXI of GATT 1947 and it concluded in this regard that the drafters considered that:

> *(a) the matters later reflected in Article XX and Article XXI of the GATT 1947 were considered to have a different character, as evident from their separation into two articles;*
>
> *(b) the "balance" that was struck by the security exceptions was that Members would have "some latitude" to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b); and*
>
> *(c) in the light of this balance, the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter.*[22]

16 The panel thus concluded in this regard that "there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny."[23]

With regard to the term "emergency in international relations", the panel observed that:

> *the reference to "war" in conjunction with "or other emergency in international relations" in subparagraph (iii), and the interests that generally arise during war, and from the matters addressed in subparagraphs (i) and (ii), suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii). Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be "emergencies in international relations" within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.*
>
> *An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.*[24]

17 In *Saudi Arabia – Intellectual Property Rights*, the panel held that there was a situation of heightened tension or crisis which is related to Saudi Arabia's defence or military interests or maintenance of law and public order interests sufficient to establish an emergency in international relations that has persisted since 5 June 2017.[25] The panel arrived at this conclusion for a number of reasons including, inter alia, the fact that Saudi Arabia severed diplomatic and economic ties with Qatar in 5 June 2017.[26] According to the panel, the severance of all diplomatic and economic ties could be considered as "the ultimate State expression of the existence of an emergency in international relations."[27] The panel also supported its conclusion in this regard by referring to Saudi Arabia's accusation against Qatar that the latter is supporting terrorism and extremism. As the panel pointed out, "when a group of States repeatedly accuses anotherof supporting terrorism and extremism … that in and of itself reflects and contributes to a "situation … of heightened tension or crisis" between them that relates to their security interests."[28]

20 Ibid para 7.101. See also, ibid para 7.82 (holding that, "the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.").

21 Ibid para 7.65.

22 Ibid para 7.98.

23 Ibid para 7.100.

24 Ibid paras 7.75-7.76.

25 *Saudi Arabia – Intellectual Property Rights*, para 7.257.

26 Ibid paras 7.258-7.262.

27 Ibid para 7.259.

28 Ibid para 7.263.

18 The analysis of the term "emergency in international relations" in *Russia – Traffic in Transit* clearly excludes political or economic conflicts between states. The panel's approach in this regard seems to situate the term "emergency in international relations" in the context of armed conflict and it is therefore unclear whether it includes a pandemic such as COVID-19.[29] Nevertheless, one could argue that where a pandemic affects the ability of a state to maintain law and public order, then (at least for that state) it could be deemed an "emergency in international relations".[30]

19 Concerning the second factor, i.e. that the relevant actions be "taken in time of" war or other emergency in international relations, the panel in *Russia – Traffic in Transit* took the view that this meant that the relevant actions must be taken during the war or other emergency in international relations.[31] The panel further held that this "chronological occurrence is also an objective fact, amenable to objective determination."[32] In other words, this is also not within the discretion available to states in this regard.

20 In *Saudi Arabia – Intellectual Property Rights*, the panel took the view that the two actions that needed to be examined in this regard (i.e. measures preventing beIN from obtaining Saudi legal counsel to enforce its intellectual property rights through civil enforcement procedures before Saudi courts and tribunals, and the refusal to provide criminal procedures to be applied to beoutQ) were "taken in time of" the emergency in international relations that has persisted since at least 5 June 2017.[33] In relation to COVID-19, measures taken during the pandemic should arguably fall within the scope of this exception.

21 With regard to the third factor, i.e. 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, the panel in *Russia – Traffic in Transit* began its analysis by drawing a distinction between "security interests" and "essential security interests". According to the panel:

> *"Essential security interests", which is evidently a narrower concept than "security interests", may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.*[34]

22 The panel clarified that the articulation of the essential security interests that are directly relevant to the protection of a state from external or internal threats is subjective. According to the panel:

> *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.*[35]

23 In other words, the articulation of essential security interests falls within the discretion available to states in this regard. However, the panel stressed that this does not imply that states have the freedom to elevate any concern to that of an essential security interest and it noted that the freedom available to states in this regard is circumscribed by their obligation to interpret and apply Article XXI(b)(iii) in good faith. As the panel notes in this regard:

29 See, *Russia – Traffic in Transit*, para 7.99 (noting that, "The Panel is also mindful that the negotiations on the ITO Charter and the GATT 1947 occurred very shortly after the end of the Second World War. The discussions of "security" issues throughout the negotiating history should therefore be understood in that context.").

30 See also, Henning Grosse Ruse-Khan, 'Access to Covid-19 Treatment and International Intellectual Property Protection – Part II: National Security Exceptions and Test Data Protection' *EJIL:Talk!* (15 April 2020) (contending that: "... the severity of the Covid19 pandemic and its far-reaching consequences across the globe, plus the clarifications under para.5c) of the Doha Declaration that 'public health crises, including (...) epidemics' can represent a 'national emergency', arguably support an application of Article 73(b)(iii) TRIPS ... a WHO declared pandemic should constitute an international emergency, especially if accompanied with general economic, social and political instabilities").

31 *Russia – Traffic in Transit*, para 7.70.

32 Ibid.

33 *Saudi Arabia – Intellectual Property Rights*, para 7.269 (noting that, "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.").

34 *Russia – Traffic in Transit*, para 7.130.

35 Ibid para 7.131.

> *...this does not mean that a Member is free to elevate any concern to that of an "essential security interest". Rather, the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ("[a] treaty shall be interpreted in good faith ...") and Article 26 ("[e]very treaty ... must be performed [by the parties] in good faith") of the Vienna Convention.*
>
> *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.*[36]

24 In *Saudi Arabia – Intellectual Property Rights*, the panel held that Saudi Arabia had expressly articulated its essential security interests in terms of protecting itself from the dangers of terrorism and extremism.[37] The panel further noted that the interests identified by Saudi Arabia clearly relate to the quintessential functions of the state, i.e. "the protection of its territory and its population from external threats, and the maintenance of law and public order internally".[38] The panel equally observed that the standard that is applied to the articulation of essential security interests is whether this articulation is "minimally satisfactory" in the circumstances and it is not necessary to demand greater precision from the invoking state.[39] According to the panel:

> *Although Qatar argued that Saudi Arabia's formulations of its essential security interests are "vague" or "imprecise", the Panel sees no basis in the text of Article 73(b)(iii), or otherwise, for demanding greater precision than that which has been presented by Saudi Arabia. The Panel recalls that, in Russia – Traffic in Transit, the standard applied to the invoking Member was whether its articulation of its essential security interests was "minimally satisfactory" in the circumstances. The requirement that an invoking Member articulate its "essential security interests" sufficiently to enable an assessment of whether the challenged measures are related to those interests is not a particularly onerous one, and is appropriately subject to limited review by a panel. The reason is that this analytical step serves primarily to provide a benchmark against which to examine the "action" under the chapeau of Article 73(b). That is, this analytical step enables an assessment by the Panel of whether either of the challenged measures found to be inconsistent with the TRIPS Agreement is plausibly connected to the protection of those essential security interests.*[40]

25 Indeed, in a footnote, the panel further stated that, "[a]mong 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."[41] Thus, with regard to the pandemic caused by COVID-19, it will be up to any state that wants to invoke Article 73(b)(iii) to articulate in good faith its essential security interests in this regard which may relate to its need to maintain law and order within its territory during the pandemic.

26 In relation to the fourth and final factor, i.e. 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, the panel in *Russia – Traffic in Transit* adopted a standard based on the minimum requirement of plausibility.[42] This requires that the measures in question must not be so remote from, or unrelated to the emergency that it is implausible that the state implemented the measures for the protection of its essential security interests arising out of the emergency.[43]

36 Ibid paras 7.132-7.134.

37 *Saudi Arabia – Intellectual Property Rights*, para 7.280.

38 Ibid.

39 Ibid para 7.281.

40 Ibid citing *Russia – Traffic in Transit*, para 7.137.

41 *Saudi Arabia – Intellectual Property Rights*, para 7.281, footnote 826.

42 *Russia – Traffic in Transit*, para 7.138 (stating that, "The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.").

43 Ibid para 7.139.

27 In *Saudi Arabia – Intellectual Property Rights*, with regard to the measures preventing beIN from obtaining Saudi legal counsel to enforce its intellectual property rights through civil enforcement procedures, the panel held that these "anti-sympathy" measures meet a minimum requirement of plausibility in relation to the articulated essential security interests.[44] According to the panel in this regard:

> *The measures aimed at denying Qatari nationals access to civil remedies through Saudi courts may be viewed as an aspect of Saudi Arabia's umbrella policy of ending or preventing any form of interaction with Qatari nationals. Given that Saudi Arabia imposed a travel ban on all Qatari nationals from entering the territory of Saudi Arabia and an expulsion order for all Qatari nationals in the territory of Saudi Arabia as part of the comprehensive measures taken on 5 June 2017, it is not implausible that Saudi Arabia might take other measures to prevent Qatari nationals from having access to courts, tribunals and other institutions in Saudi Arabia. Indeed, it is not implausible that, as part of its umbrella policy of ending or preventing any form of interaction with Qatari nationals, as reflected through, inter alia, its 5 June 2017 travel ban intended to "prevent[] Qatari citizens' entry to or transit through the Kingdom of Saudi Arabia", which forms part of Saudi Arabia's "comprehensive measures", Saudi Arabia might take various formal and informal measures to deny Saudi law firms from representing or interacting with Qatari nationals for almost any purpose.*[45]

28 The panel however held that Saudi Arabia's non-application of criminal procedures to beoutQ did not meet the minimum requirement of plausibility. In this regard, the panel observed that:

> *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.*[46]

29 Importantly, the panel noted that the non-application of criminal procedures to beoutQ was affecting not only Qatar or Qatari nationals, "but also a range of third-party right holders" from other countries.[47] The panel therefore concluded in this regard that there is "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."[48]

30 Concerning the COVID-19 pandemic, a state invoking Article 73(b)(iii) in defence of its decision to suspend the protection and enforcement of intellectual property rights would have to demonstrate that the measures it is implementing are not remote from or unrelated to the emergency. Thus, where a state suspends the protection and enforcement of patent rights to facilitate the local production of vaccines or medicines for treating COVID-19, this could arguably be held to be related to the COVID-19 pandemic and therefore related to the emergency. Therefore, in theory, the invocation of the security exception in response to the COVID-19 pandemic can satisfy all the four factors identified by the panels in both *Russia – Traffic in Transit* and *Saudi Arabia – Intellectual Property Rights*.

D. Article 73(b)(iii) of the TRIPS Agreement and Pandemics: A Realistic Assessment

31 While it may be possible, at least in theory, for states to invoke Article 73(b)(iii) of the TRIPS Agreement in response to pandemics such as COVID-19, it is contended here that this is not a realistic option for a number of states. In this regard, there are at least two reasons why Article 73(b)(iii) of the TRIPS Agreement is not a realistic option for some states. These reasons are further explored below.

32 First, regarding the production of patented medicines or vaccines, only states that possess the capacity to manufacture pharmaceutical products domestically can arguably invoke Article 73(b)(iii) to justify the suspension of the protection and enforcement of patent rights to protect their essential security interests during a pandemic such as COVID-19. Invoking Article 73(b)(iii) may thus be unhelpful to countries that cannot produce the needed vaccines or medicines domestically. Besides the fact that only some developed and developing countries can actually produce vaccines, several developing and least-developed countries do not even possess the capacity to produce medicines.[49]

44 *Saudi Arabia – Intellectual Property Rights*, paras 7.286-7.288.

45 Ibid para 7.286.

46 Ibid para 7.289.

47 Ibid para 7.291.

48 Ibid para 7.292.

49 See, Zoheir Ezziane, 'Essential Drugs Production in Brazil, Russia, India, China and South Africa (BRICS): Opportunities and Challenges' (2014) 3(7) *International Journal of Health Policy and Management* 365; UNCTAD, 'COVID-19 Heightens Need for Pharmaceutical Production in Poor Countries' (27 May 2020) available at < https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2375> In relation to COVID-19,

33 Second, in relation to the importation of patented medicines or vaccines, the security exception in Article 73(b)(iii) cannot be used to circumvent the problems associated with the waiver system contained in Article 31*bis* of the TRIPS Agreement.[50] Article 31*bis* waives the obligation contained in Article 31(f) of the TRIPS Agreement[51] where a state grants a compulsory licence for the production of a pharmaceutical product and its export to an eligible importing country. The usefulness of the waiver mechanism in Article 31*bis,* however, remains doubtful as it contains a number of complex and cumbersome requirements and this has meant that it has been used only once to export anti-retroviral drugs from Canada to Rwanda.[52] In this regard, the key point is that, Article 73(b)(iii) is specifically designed to enable the state invoking the exception to take measures to protect *its* own essential security interests during an emergency and therefore, it cannot be used to address the essential security interests of another state and thereby avoid the strict and cumbersome requirements associated with Article 31*bis* of the TRIPS Agreement. This is not to suggest that Article 73 is subject to either Article 31 or Article 31*bis* but rather to emphasise the limited scope of Article 73(b)(iii) of the TRIPS Agreement. This further complicates the situation for countries that do not possess domestic manufacturing capacity to produce medicines and vaccines.

34 Thus, to provide an illustration, State A cannot invoke the security exception in Article 73(b)(iii) to justify a decision to suspend the protection and enforcement of patent rights in its territory to produce and export patented medicines or vaccines into the territory of State B. As interpreted by the panel in *Russia – Traffic in Transit* and in *Saudi Arabia – Intellectual Property Rights*, the measures implemented by State A pursuant to Article 73(b)(iii) must not be remote from or unrelated to the emergency that it is implausible that State A implemented the measures for the protection of *its* own essential security interests arising out of the emergency. In other words, it is doubtful whether State A can invoke Article 73(b)(iii) to justify the suspension of the protection and enforcement of patent rights in its own territory in order to protect the essential

it is worth noting that China, India, and Russia have been able to produce some vaccines. See, BBC, 'COVID: What do we know about China's Coronavirus Vaccines?' (14 January 2021) available at <https://www.bbc.co.uk/news/world-asia-china-55212787>; Kamala Thiagarajan, 'COVID-19: India is at Centre of Global Vaccine Manufacturing, But Opacity Threatens Public Trust' *The BMJ* (28 January 2021) available at <https://www.bmj.com/content/bmj/372/bmj.n196.full.pdf>; Rachel Schraer, 'Russia's Sputnik V Vaccine has 92% Efficacy in Trial' *BBC News* (2 February 2021) available at https://www.bbc.co.uk/news/health-55900622; Ian Jones and Polly Roy, 'Sputnik V COVID-19 Vaccine Candidate Appears Safe and Effective' (2021) 397 *The Lancet* 642-643.

50 *Cf.* Henning Grosse Ruse-Khan, 'Access to Covid-19 Treatment and International Intellectual Property Protection – Part II: National Security Exceptions and Test Data Protection' *EJIL:Talk!* (15 April 2020) (querying whether "a WTO Member that (for whatever reason) cannot use the Article 31bis system [can] alternatively rely on Article 73 [by] arguing that importing Covid19 treatment to address its own insufficient manufacturing capacity is 'necessary' for protecting its 'essential security interests'").

51 Article 31(f) of the TRIPS Agreement provides that compulsory licences and government use must be authorised "predominantly for the supply of the domestic market".

52 See, UN Secretary General's High-Level Panel on Access to Medicines, 'Report of the United Nations Secretary-General's High Level Panel on Access to Medicines: Promoting Innovation and Access to Health Technologies' (September 2016) 23 (noting that, "There are differing opinions as to why the "Paragraph 6 decision" has only been used once in 13 years. Some note that multilateral health financing has removed the need for resource-constrained countries to use it. Others argue that it is too complex to be used. The only time the mechanism was used, it proved to be complex and cumbersome and serious questions remain as to its effectiveness."). See also, Muhammad Zaheer Abbas and Shamreeza Riaz, 'Compulsory Licensing and Access to Medicines: TRIPS Amendment Allows Export to Least-Developed Countries' (2017) 12(6) *Journal of Intellectual Property Law and Practice* 451, 452 (observing that, "the effectiveness of Article 31bis is likely to be hindered by the tedious and unnecessarily cumbersome authorization processes. Procedural details and formalities may discourage the generic drug manufacturers from exploiting this provision ... As of February 2017, the waiver flexibility has been used only once. This demonstrates that it did not provide a workable solution to the problem highlighted in Paragraph 6 of the Doha Declaration. Making this flexibility a permanent solution, without making changes to address the above-mentioned concerns, is unlikely to have any substantial practical significance."); Carlos Correa, 'Will the Amendment to the TRIPS Agreement Enhance Access to Medicines?' Policy Brief No. 57, South Centre (January 2019) 3 (noting that, "The required notifications and the nature of the information required – plus the obligation to adopt measures to avoid the 'diversion' of the products to other countries – would seem more suitable for the export of weapons or dangerous materials than for products to address public health needs."); Nicholas Vincent, 'TRIP-ing Up: The Failure of TRIPS Article 31*bis*' (2020) 24(1) *Gonzaga Journal of International Law* 1. It should be noted that Bolivia recently notified the WTO that it needs to import COVID-19 vaccines via Article 31*bis* of the TRIPS Agreement. If Bolivia is successful, then this would be the second instance where Article 31*bis* has been used by a WTO member. See, WTO, 'Bolivia Outlines Vaccine Import Needs in use of WTO Flexibilities to tackle Pandemic' (12 May 2021) available at <https://www.wto.org/english/news_e/news21_e/dgno_10may21_e.htm>

security interests of State B by exporting patented medicines or vaccines from State A into State B.

35 Therefore, even if one can successfully argue that the COVID-19 pandemic should be classified as "an emergency in international relations", invoking Article 73(b)(iii) may be unhelpful to a number of developing and least-developed countries that do not possess domestic manufacturing capacity to produce pharmaceutical products. Besides, least-developed countries are currently exempted from providing patent protection for pharmaceutical products until 2033.[53] Thus, it is unnecessary for least-developed countries to invoke Article 73(b)(iii) in order to implement measures to suspend the protection and enforcement of patent protection for pharmaceutical products.

E. Conclusion

36 It is now clear that the invocation of the security exceptions in Article 73 of the TRIPS Agreement is not self-judging and non-justiciable. Importantly, the determination of whether there is an emergency in international relations pursuant to Article 73(b)(iii) of the TRIPS Agreement is an objective fact that is amenable to objective determination. Nevertheless, the articulation of the essential security interests for which protection is being sought falls within the discretion available to the invoking state in this regard although this has to be done in good faith.

37 Crucially, the panels in both *Russia – Traffic in Transit* and *Saudi Arabia – Intellectual Property Rights* arguably struck the right balance between respecting the principle of territoriality and the sovereignty of states in terms of protecting their essential security interests on the one hand and ensuring that states do not abuse and misuse the security exception as a means for avoiding their obligations under international trade law and international intellectual property law on the other hand.[54]

38 Moreover, even if a pandemic such as COVID-19 can be regarded as an emergency in international relations, it is doubtful if suspending the protection and enforcement of patent rights would really be helpful to countries with no capacity to domestically produce pharmaceutical products. Thus, Article 73(b)(iii) of the TRIPS Agreement may not be helpful in addressing the needs of the poorest countries even during a pandemic.[55] Crucially, this shows that, in the absence of domestic manufacturing capacity, most of the flexibilities in the TRIPS Agreement (including the most extreme one, i.e. the national security exception) may not be useful to some countries. Importantly, it also demonstrates the point that facilitating access to medicines in some situations may require measures that (include but also) transcend intellectual property rights.[56]

53 See, WTO Council for TRIPS, 'Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products', Decision of the Council for TRIPS of 6 November 2015, IP/C/73 (6 November 2015).

54 The approach of the panels also reflects the intention of the drafters of Article XXI of GATT 1947. See, UN Economic and Social Council, 'Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment' Verbatim Report, Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33, (24 July 1947) 20-21. See also, GATT, *Analytical Index: Guide to GATT Law and Practice* (1995) 600.

55 See also, UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (CUP, 2005) 809 (noting that, "The rare recourse to security exceptions in the context of international economic relations illustrates the limited importance of such exception for developing countries. The problems these countries will face in the intellectual property area are usually of an economic and a social nature, rather than security-related."); Carlos Correa, 'Lessons from COVID-19: Pharmaceutical Production as a Strategic Goal' SouthViews No. 202 (17 July 2020) 1 available at <https://www.southcentre.int/wp-content/uploads/2020/07/SouthViews-Correa.pdf> (observing that: "The strategic importance of a local pharmaceutical industry has been growingly recognized as a result of the COVID-19 crisis. Developing countries should take advantage of this opportunity to strengthen their pharmaceutical industry, including biological medicines. Industrial policies would need to be reformulated under an integrated approach so as to expand value added & create jobs while addressing public health needs. South-South cooperation may also play an important role in increasing the contribution of developing countries to the global production of pharmaceuticals.").

56 As Correa notes, "Taking advantage of these opportunities to strengthen a pharmaceutical/ biotechnology industry may require the reformulation of industrial policies, so as to promote with an integrated approach this sector as a generator of value added, employment and foreign exchange, as well as an instrument for achieving health autonomy to address public health needs. Such an integrated approach implies the deployment of a series of well articulated instruments ... These instruments include, among others, fiscal measures, access to financing, support to research and development (R&D) including of an experimental nature, a regulatory framework that does not create undue obstacles to registration (especially for biosimilars), an intellectual property regime that uses the flexibilities of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) such as compulsory licensing, and a policy of government procurement that provides predictability to local demand." See, Carlos Correa, 'Lessons from COVID-19: Pharmaceutical Production as a Strategic Goal' SouthViews No. 202 (17 July 2020) 3.