Can States Invoke the National Security Exception in the TRIPS Agreement in Response to COVID-19?

By:

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This post addresses one key question: can states invoke the national security exception in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to justify measures implemented to tackle COVID-19? This question will be addressed in light of the recent World Trade Organisation (WTO) panel decision in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* 2020 (Saudi Arabia – Intellectual Property Rights). In this case, for the first time, a WTO panel analysed and applied the provisions of Article 73(b)(iii) of the TRIPS Agreement in the context of a dispute involving intellectual property rights. Crucially, Article 73(b)(iii) 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'. So, is COVID-19 an 'emergency in international relations' that permits a state to suspend the enforcement of patent rights in order to tackle the pandemic?

The decision of the WTO panel in *Saudi Arabia – Intellectual Property Rights* follows the analytical framework developed by a different WTO panel in the context of another dispute involving Article XXI(b)(iii) of GATT which is similar to Article 73(b)(iii) of the TRIPS Agreement i.e. *Russia -Measures Concerning Traffic in Transit* 2019 (Russia – Traffic in Transit). Importantly, the decision in *Russia – Traffic in Transit* was also the first time that a dispute settlement panel interpreted and applied the national security exception in the GATT. Before these two decisions, some states took the view that the national security exceptions in the GATT, GATS, and TRIPS Agreement are self-judging and not subject to WTO adjudication.

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 i.e. beIN from obtaining Saudi legal counsel to enforce its intellectual property rights through civil enforcement procedures before Saudi courts and tribunals (in violation of its obligation under Article 42 of the TRIPS Agreement). Saudi Arabia also invoked this exception to justify its refusal to provide criminal procedures to be applied 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).

In defining the applicable legal standard in this regard, the panel in *Saudi Arabia – Intellectual Property Rights* (following the analytical framework that was developed by the panel in *Russia – Traffic in Transit*) listed the following four factors that need to be considered in this regard. First, 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). Second, whether the relevant actions were "taken in time of" that war or other emergency in international relations. Third, 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. Fourth, 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.

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 is not subject to the subjective discretionary determination of the state invoking the exception. 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). With regard to the term ‘emergency in international relations’, the panel observed that:

> 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.

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. 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’.

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. The panel further held that this ‘chronological occurrence is also an objective fact, amenable to

objective determination.’ In relation to COVID-19, measures taken during the pandemic should arguably fall within the scope of this exception.

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.

The panel further 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. 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. 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.

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. 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.

In *Saudi Arabia – Intellectual Property Rights*, the first three factors were satisfied by Saudi Arabia. However, with regard to the fourth factor, Saudi Arabia was only successful in relation to the measures that prevented beIN from obtaining Saudi legal counsel to enforce its intellectual property rights through civil enforcement procedures. The panel held that Saudi Arabia's non-application of criminal procedures to beoutQ did not meet the minimum requirement of plausibility. 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.

Concerning the COVID-19 pandemic, a state invoking Article 73(b)(iii) in defence of its decision to suspend the 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 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.

Thus, in theory, states may be able to invoke Article 73(b)(iii) in defence of measures that are implemented to tackle COVID-19. However, in this post, I have not sought to analyse whether or not invoking Article 73(b)(iii) is a realistic option for some states (especially those in the global south). In a separate post published here, I have suggested that, while (in theory) states might be able to invoke the security exception in the TRIPS Agreement in response to COVID-19, this is not necessarily a realistic option (especially for states that do not possess local manufacturing capacity).

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