Restricting International Trade through Export Control Laws: National Security in Perspective

Export Controls and National Security

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1 Introduction and Background

Currently, international trade is witnessing export controls that are being instituted in the name of national security. The European Union (EU), United States (US), United Kingdom (UK) and others in light of Russia-Ukraine war have banned the export of certain items to Russia that include dual-use goods such as semiconductors, microcircuits, specific computers and software, lasers, sensors, marine and aerospace systems.[[1]](#footnote-1) Russia has also retorted by imposing countersanctions in the form of export ban of around 200 products such as telecom, medical, vehicle, agricultural, and electrical equipment, as well as some forestry products on about 48 countries including the US and EU.[[2]](#footnote-2) The existence of an armed conflict may provide the context to justify above-mentioned export bans through seeking recourse to Article xxi General Agreement on Tariffs and Trade (gatt). It could be argued that on this occasion these export restrictions are firmly embedded in international peace and security. However, it may be noted that in the recent past export restrictions have also been imposed in circumstances that bear no connection with an armed conflict, situation of war, public order, territorial sovereignty but are nevertheless couched in national interest and security terms. For instance, United States (US) comprehensively tightened its export control regime through the Export Control Reform Act of 2018. This legislation has been successfully utilised to limit Chinese technology giant Huawei’s access to semiconductor chips made with US technology on national security grounds.[[3]](#footnote-3) Japan has also restricted exports of fluorinated polyimide, resist polymers and hydrogen fluoride, and their related technologies to Korea through licensing policies and procedures with a view to safeguard national security.[[4]](#footnote-4) These products are primarily used in the production of smartphones, tv displays and semiconductors. Japan’s position is that more stringent export licensing procedures in relation to the above products and their relevant technologies are applied because it “recently found that certain sensitive items have been exported to Korea with inadequate management by companies”.[[5]](#footnote-5) Korea has challenged Japan’s export restrictions in the World Trade Organization (wto) through *Japan – Measures Related to the Exportation of Products and Technology to Korea.*[[6]](#footnote-6)Consultation did not yield any outcomes following which a Panel was constituted on 29 July 2020 and it remains to be seen what will be the outcome of the dispute. People’s Republic of China (China) also instituted an export control law (ecl) which came into force on 1 December 2020. This law applies to dual-use items, military items, nuclear items and other goods, technologies, services and items relating to the maintenance of national security and national interests, and performance of anti- proliferation and other international obligations.[[7]](#footnote-7)

With the above background, the question that arises is whether gatt Article xxi accommodates concerns that go beyond military threats. Such threats may include a wide variety within the ambit of “new national security”[[8]](#footnote-8) such as economic crises, climate change, societal and cultural matters, infectious diseases, cybersecurity. The above question is considered by utilising the framework that has been created by China for control/consolidation of the rare earths sector through People’s Republic of China Export Control Law (ecl) and the proposed Administrative Regulation on rare earth (are).[[9]](#footnote-9) The prognosis is that China may potentially utilise the ecl and the are framework to restrict export of rare earths to the US as tit-for-tat security claims in view of its recent relationship with the US and potentially utilise gatt Article xxi to justify its action. This chapter considers in detail if the phrase “essential security interest” or “emergency in international law” may provide the opportunity to China to accommodate resource security argument advanced through ecl and are within the ambit of gatt Article xxi.

In the past, the gatt Article xxi was seldom utilised by Members which could be considered as a reflection of good will and the singular commitment to the wto/gatt framework. However, the genie was let out of the bottle with Donald Trump’s presidency as he aimed to counter the rise of China’s economic might by utilising the national security argument to justify trade restrictions.[[10]](#footnote-10) It is projected that trade restrictions, especially export restrictions, may be increasingly couched in national security terms where Members would seek to protect their own economic interests by exerting their own understanding of security in the wto. In addition, geopolitics has an important impact on security considerations. The current geo-political dynamic central to the security debate is characterised by the rise of China on the world stage. The liberal Western democracies have expressed concerns about China’s meteoric rise as they note that China rejects liberal norms embraced by democracy in Europe and the US.[[11]](#footnote-11) It is submitted, that this geopolitical dynamic will most certainly play out in the wto and the adjudicatory mechanism of the wto[[12]](#footnote-12) will then be expected to police the abuse of the exception by undertaking the onerous task of balancing the two competing interests, namely security and trade. It is rightly argued that “major geo-politics disputes now play out within trade and investment institutions rather than outside them”.[[13]](#footnote-13) While the restrictions signal underlying economic problems[[14]](#footnote-14) and will cause disruption of supply chains, they are particularly problematic from an organizational perspective because such repeated inconsistent practices signal the unwillingness of the Members to abide by the commitments of the wto thus posing a risk to the organization.

Following the introduction, section 2 presents the legal framework offered by the ecl and the are in a comprehensive manner as it is pertinent for the rare earths sector. More specifically, this section considers the question of how the tandem operation of the ecl and the are offers the legal basis to China to restrict the exportation of rare earth on grounds of resource security. In seeking out this question, this section also engages with the idea that resource security is considered as a matter of national security in China pursuant to the Overall National Security Outlook, which includes within its scope both traditional and non-traditional security issues.[[15]](#footnote-15) Section 3 presents a thorough analysis of gatt Article xxi and critically considers *Russia* – *Measures Concerning Traffic in Transit* (*Russia* – *Traffic in Transit*)and *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* dispute (*Saudi Arabia– Intellectual Property Rights*).[[16]](#footnote-16) This detailed discussion allows the chapter to answer the question whether China will be able to justify export controls measures under the national security exception under gatt Article xxi. Section 4 concludes by offering some broad observation about the challenges associated with the scope of gatt Article xxi and reliance on adjudication as the only way to address measures that concern security.

2 China’s Export Control of Rare Earths

China is a major supplier of rare earths, that are widely deployed in defence, automotive, electronics, renewable energy industries. Japan, US and the Netherlands are the three major importers of rare earths from China.[[17]](#footnote-17) Almost 90% of rare earths production is controlled by China and it has emerged as the technological leader in the processing of the element.[[18]](#footnote-18) China was successful in taking over the leadership position in production from the US in the rare earths market simply because it could access cheap labour and had the advantage of lower environmental protection standards.[[19]](#footnote-19) Two new developments in China are of interest in context of rare earths which include: i) the ecl passed by the Standing Committee of the National’s People Congress that came to force in December 2020, and ii) the proposed are which was circulated for public comment on 15 January 2021 by Ministry of Industrial Policies and Regulations and Ministry of Information Technology.

2.1 Brief Overview of the Export Control Architecture Relevant for Rare Earths

As mentioned above, the ecl has been put in place to enhance and regulate export control to safeguard national security and interests, and performance of anti-proliferation and other international obligations. It applies to controlled items that include dual-use items, military items, nuclear items and other goods, technologies, services, and items relating to the national security and national interests.[[20]](#footnote-20) Through this comprehensive law, China has implemented a unified export control system that is overseen by the State Export Control Administrative Departments (Departments of the State Council and the Central Military Commission) by making control lists, directories, and catalogues (collectively referred to as “Control Lists”), and implementing export licensing.[[21]](#footnote-21)are is specifically formulated to ensure rational development and utilization of rare earths resources, promoting the sustainable and sound development of the rare earths industry. This proposed regulation utilises management approach to the rare earths sector with the intention of protecting environment and ensuring resource security for Chinese domestic industries.[[22]](#footnote-22)

2.2 Export Control Law and National Security

Article 1 of the ecl spells out clearly that the objective of the Law is to safeguard national security and interest. This provision also clarifies that the controlled items include within its ambit technical information and data related to the items. Currently, no control list has yet been published and thus questions remain open whether rare earths will feature on such a list. This delay in the publication of such a list is not unusual as most lists that accompany Laws in China are published after some time has elapsed.[[23]](#footnote-23) Article 9 is particularly important provision as it provides that the State Export Control Administrative Departments may exercise temporary control over any goods, technologies and services outside the export control lists if required for the maintenance of national security and interest. This provision provides usually wide discretion to go beyond the controlled list which has a broad coverage to address national security and interests. Additionally, Article 21 of the National Security Law focuses on resources and considers sustainable, reliable, and effective supply of resources required for economic and social development as a matter of national security.[[24]](#footnote-24)

Both terms, national security, and interests that feature in the above-mentioned key provisions remain undefined. It is not surprising that both the terms national security and interests, which are at the core of this law remain undefined, because that leaves room for diverse and broad interpretations. The interpretation of national security may range from purely traditional threats of security that affect the integrity of the State such as armed or military conflict and appeals to the State’s right of self-defence situation brought about by grave danger that threatens its existence.[[25]](#footnote-25)It may also include a broader array of threats or risks which extend beyond preservation of territorial sovereignty and includes concern for public welfare and order and health, property, environment, and includes matters of economic interest.[[26]](#footnote-26)

The question that arises is what are the various interests that may be relevant under national security within the meaning of the ecl? In the past, defending the Chinese Communist party rule and enhancing social stability, promoting economic development and opening to the worldhas been identified as a part of core national security strategy.[[27]](#footnote-27) In the present context, China’s national security interests encompasses broad issues such as, strengthening the party’s centralized and unified leadership over national security work, protection of Chinese overseas investment, securing maritime integrity, deepening energy and resource security, extending control of space and cyberspace resources, protection for maintaining industries, and shaping a world order conducive to its development.[[28]](#footnote-28) To gain a bit more insight into the China’s national security strategy it is imperative to trace back to President Xi Jinping’s speech, on 15 April 2014, which he gave while presiding over the first meeting of the Central National Security Committee.[[29]](#footnote-29) At this event he unveiled the “Overall National Security Concept” (onsc) where he emphasized the need to “pay attention to both traditional and non-traditional military security, economic security, cultural security, social security, technological security, information security, ecological security, resource security, and nuclear security”.[[30]](#footnote-30)Article 2 of the National Security Law of the People’s Republic of China 2015 (nsl) reflects a broad and all-encompassing definition of “national security” along the lines of onsc. Article 2 states that “[n]ational [s]ecurity means a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally and the capability to maintain a sustained security status”.[[31]](#footnote-31)

The onsc was also reiterated by Xi in 2017 when he called for its implementation and highlighted that national security and development are deeply intertwined with each other.[[32]](#footnote-32) An earlier speech made in 2015 by Xi also captures the position well where he had remarked that “security and development are two sides of the same issue, two wheels in the same driving mechanism. Security guarantees development, and development is the goal of security”.[[33]](#footnote-33) His statements reflect a more assertive posture of reinforcing security to promote development. At the National Cybersecurity and Informatization Work Conference, Xi highlighted that cybersecurity and informatization are focus areas for security.[[34]](#footnote-34) Promoting breakthrough in core technologies and active participation in cyberspace governance processes (with Chinese characteristics) were also mentioned as a part of security policy. The speech has a clear development tone as it is indicative of China’s ambition of establishing itself as a cyber superpower. In 2020, Xi did not stress on “economic slowdown”, which was considered as a matter of security earlier in 2015. Rather, he associated the term ‘security’ with ‘quality of development’ and ‘innovation’. During this time he emphasised on the need for a holistic national security architecture.[[35]](#footnote-35) More recently, during the centenary of Chinese Communist Party in 2021, Xi highlighted the importance of integrating security in every domain.[[36]](#footnote-36) 2021 was marked with the deployment of various laws to tighten security controls such as security-related legislation for counterterrorism, cybersecurity, and national intelligence.[[37]](#footnote-37) In June 2021, National People’s Congress also cleared the Anti-Foreign Sanctions Law that targets “individuals and organisations that take part in the formulation, decision, and implementation of discriminatory restrictive measures” against China.[[38]](#footnote-38)It is clear that Xi’s leadership has expanded and strengthened China’s national security edifice. Currently, the Chinese national security strategy extends beyond the traditional notion of territorial integrity which may be in line with the contemporary interpretation of the term “security”, which is not restricted to military or territorial affairs. Rather, it is being increasingly applied in concerns beyond war, conflict and violence.[[39]](#footnote-39) In fact, there is a strong argument that the “notion of security bound to the level of individual States and military issues” is simply inadequate as it fails to capture the dynamics of contemporary security relations.[[40]](#footnote-40)In fact, it has been argued that the focus should be moved away from State to individuals or social groups for deepening the security agenda.[[41]](#footnote-41) Therefore, the fact that Article 21 of the National Security Law includes within its ambit resources and associated economic development, it is not an unreasonable one and is deeply entrenched in the “new development concepts”.[[42]](#footnote-42)

2.3 Intersection of the ecl and are

The most striking element of the proposed are is the articulation of the legislative purpose with particular focus on sustainability, ecological environment, and resource security. Article 1 of the are refers to resource security, which as indicated above has been considered within the broader ambit of China’s national security strategy. It is important to note that are expressly invokes the application of the ecl. Article 15 provides for the applicability of the ecl to export enterprises. Article 15 stipulates that the rare earth import, and export enterprises shall comply with laws and regulations on foreign trade, export control.[[43]](#footnote-43) This short provision is quite potent as it subjects the rare earths to the export control policies and control measures detailed under the ecl. In this respect, the State Council and the Central Military Commission (collectively referred to as the State Export Control Administrative Departments or secad s) may prohibit the export of rare earths if required for the maintenance of national security and national interests.[[44]](#footnote-44) ecl also prescribes specific licensing procedures and processes to implement export control of items that are on the controlled list or subject to temporary control. Export operators shall apply for the license to the secad s.[[45]](#footnote-45)Overall, the State is responsible for implementing the licensing system for exports.[[46]](#footnote-46) When an export application is made, secad s will review the export operator’s application and consider factors such as national security and national interests, international obligations and commitments, type of export, sensitivity of items, destination of country or region of the export, end users and end use and other factors provided in the regulation.[[47]](#footnote-47) By virtue of Article 10 of the ecl, export of an item may be prohibited to certain countries and regions, organizations and individuals in the interest of national security and national interests. What this entails is that the ecl makes it possible to prohibit export of rare earths to a certain company in the name of national security and national interests. The possibility of exercising restrictions towards a company is not unique to ecl and may also be found in other export control regimes such as that of the US and the EU. In fact, the US has successfully stopped Huawei, a Chinese company, from buying computer chips made with US technology on the grounds of national security and foreign policy interests.[[48]](#footnote-48) China has had a turbulent relationship with the US in the past three years over restrictions over Huawei Technologies Co., the Semiconductor Manufacturing International Corp.

While ecl may be seen as China’s response to export controls adopted by the US against Chinese companies, through are China wants to regulate the rare earths sector more comprehensively to address environmental concerns and plan adequately for rare earths production and domestic utilization. are reflects a change in position where China is not satisfied with being simply being an exporter of rare earths that has pollution consequences for the country without any real benefit for its value-added sector. As Xi has remarked, “innovation-driven growth has become the pressing demand for China’s development”.[[49]](#footnote-49) Once the extraction and processing of rare earths is limited considering sustainability and environmental concerns outlined in are, the resource will inevitably be reserved for domestic industries. Rare earths are an important resource for China as it is an important input for many crucial industries (electronics, steel, vehicles etc). Equipment’s such as wind turbines and hybrid electric vehicles that use nickel-metal hydride batteries requires the crucial input of rare earths, and China has set its ambition to lead the green technology sector through its control over rare earths. In this context, there is an economic and social, ecological dimension that is at play. Based on the enforcement of ecl and are, and China’s current national security strategy, the case for export control in the favour of rare earths for ensuring resource security for its domestic industries can be made. The justification is that it is crucial for the country’s economic and social development and falls within the ambit of the “national security”. Such an expansive approach to security which includes economic and social dimension also finds support in current academic literature.[[50]](#footnote-50) It should be noted that interplay between security and development is not a novel consideration.[[51]](#footnote-51)

It is not the first time that economic development has been argued as a matter of national security. US equates security with self-sufficiency and competitiveness.[[52]](#footnote-52) Perusal of US’s legislative development reveals that economic welfare of the domestic industries has been linked with national security.[[53]](#footnote-53) The Trump administration advocated vehemently for the protection of industries as a matter of national security. The United States Department of Commerce conducted multiple investigations under Section 232 (c) of the Trade Expansion Act of 1962 to determine if certain imports threaten to impair national security.[[54]](#footnote-54) During the investigation for steel and aluminium, both current and future requirements for national defence and 16 specific critical infrastructure sectors were analysed. The investigation concluded that steel and aluminium are pertinent for US national security and that the quantities of imports negatively impacted the domestic production capacity of these products thereby “weakening internal economy” and thus “threatened to impair national security”. The report indicated that steel and aluminium imports led to the weakening of the domestic capacity for providing input for military equipment. Following the investigation, President Trump applied tariffs of 25% and 10% on certain imports of steel and aluminium, respectively.[[55]](#footnote-55) US was under intense scrutiny for designing regulatory techniques that support domestic industries in the name of security,[[56]](#footnote-56) but it seems that China may also adopt a similar approach.

While the rationale of resource security remains central to the are, it is argued that the ecl along with the proposed are is setting the legal ground for Chinese authorities to counter export control regimes such as that of the US which have targeted leading Chinese companies. US has also revoked China Telecom’s licence citing national security concerns.[[57]](#footnote-57) China has had a turbulent relationship with the US in the past three years over restrictions over Huawei Technologies Co., the Semiconductor Manufacturing International Corp., etc. China has not ruled out the possibility of using rare earths as leverage tool in the US trade war initiated under Trump administration on the basis of national security.[[58]](#footnote-58) The current Biden administration does not take a dramatically different sentiment towards China than its predecessor and it is not likely that trade disputes will abate.[[59]](#footnote-59) The proposal that China may use the ecl and are to impose export restrictions can also be reinforced by looking into its past conduct. In September 2010, China temporarily restricted the rare earths exports to Japan over a maritime incident.[[60]](#footnote-60) China export restrictions on rare earths on two instances that were challenged in the wto through, two cases namely *China-Raw Materials* in 2012[[61]](#footnote-61) and *China-Rare Earths* in 2014 by US.[[62]](#footnote-62) China had sought to justify the export restrictions by constructing an argument based on environmental protection seeking recourse to gatt Article xx (b)[[63]](#footnote-63) and Article xx (g)[[64]](#footnote-64) but failed on both occasions.

3 Consideration under wto Law

3.1 Introducing gatt Article xxi

China may restrict exports of the rare earths through several measures such as export duties, a ban, instituting an export quota, minimum export price requirement, discretionary and non-automatic licensing system. China is most likely to invoke the national security exception under gatt Article xxi if a complaint is made by Member(s) of the wto to defend ecl and are. gatt Article xxi allows Members to adopt measures inconsistent with the any of the provisions of the agreement against other Members for the purpose of security. gatt Article xxi provides regulatory autonomy to the wto Members to address a matter of (i) national security information; (ii) nuclear material; (iii) military goods and services; (iv) war or other emergency in international relations; and (v) UN Charter Obligations. The Article allows opportunity for a wto member to maintain any gatt inconsistent measure to address national security provided the measure in question meets the above stipulated requirements. Security exception also appears in Article xiv bis of the General Agreement on Trade in Services (‘gats’) only with modulation to accommodate the scope of the Agreement which is services. Both provisions are structured in the same way with similar substantive stipulation except that Article xiv bis of the gats is concerned with the ‘supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment’. Further, national security has also been carved out as an exception in the trips Agreement through Article 73 which is verbatim to gatt Article xxi.

gatt Article xxi strikes a balance or reconciles between trade liberalisation, market access and non-discrimination rules with the security interests of the Member States. Such a reading is viable because it reflects a line of equilibrium between the right of the Members to adopt measures that pursue security interests versus the right of the Members to trade. The support to such an approach may also be found in the following discussion of the drafters:

I think there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put measures which really have a commercial purpose. We have given considerable thought to it and that this is the best we could preserve that proper balance.[[65]](#footnote-65)

It has also been argued that national security exception under gatt is self-judging which means the exception allows a Member State to evaluate what “it *considers* necessary for the protection of its essential security interests”. What the phrase self-judging means is that the exception is not reviewable by the panel and the ab[[66]](#footnote-66) or that it is not ‘justiciable’. The “self-judging” approach in context of Article xxi (b) is supported by the US, the uae, Bahrain, Saudi Arabia, and Egypt.[[67]](#footnote-67) The problem with the self-judging approach is that it leaves the provision open to misuse without any kind of review. In *Russia – Traffic in Transit* the argument that the Panel lacks jurisdiction to review Russia’s invocation of gatt Article xxi(b)(iii) was expressly rejected.[[68]](#footnote-68) The Panel clarified that it has jurisdiction to determine whether the requirements of the above gatt Article xxi(b)(iii) are satisfied.[[69]](#footnote-69)

3.2 Scope of application of gatt Article xxi and Export Duties and Charges on Rare Earths

A brief discussion on the scope of gatt Article xxi is instructive considering the possibility that China may impose export duties on the rare earths. There is limited interpretative extrapolation on the scope of gatt Article xxi as opposed to Article xx entitled “General Exceptions”, but the interpretive approach adopted under the latter provision is relevant and instructive. Article xx allows under specific conditions from the gatt obligations and other wto Agreements provided it has been explicitly incorporated by reference. In addition, whether gatt Article xx can be utilised to justify inconsistency, for instance with obligations under the Accession Protocol, has been clarified through various cases such as *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China -Publications and Audiovisual Products*),[[70]](#footnote-70) *China – Export Duties on Certain Raw Materials (China-Raw Materials)*[[71]](#footnote-71) and *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (China-Rare Earths).*[[72]](#footnote-72)

gatt Article xx is available only to justify inconsistency of the obligations of the Protocol of Accession provided there is an objective link between an individual provision of the Protocol and an obligation or right under the gatt 1994.[[73]](#footnote-73) Whether there is an objective link between the gatt and the Protocol of Accession requires an evaluation based on rules on customary treaty interpretation and involves the analysis of the relevant provision of the Protocol of Accession, and the Accession working party report.[[74]](#footnote-74) This analysis also requires the consideration of overall architecture of the wto system as a single package of rights and obligations.[[75]](#footnote-75) In the China rare Earths cases, the Appellate Body (ab) has clarified thatgatt Article xx was not available to China to justify measures inconsistent with its commitments under paragraph 11.3 of the Protocol of Accession simply because the language of paragraph 11.3 of the Protocol of Accession does not suggest availability of the Article xx as an exception to justify inconsistency with the obligations arising from the Protocol of Accession.[[76]](#footnote-76) China had argued that paragraph 1.2 of the Protocol of Accession builds a bridge between the Protocol and the gatt. The ab clarified that while paragraph 1.2 builds a bridge between the provisions of Protocol of Accession, and it does not mean obligations or rights may be automatically transposed from one part of this legal framework to another.[[77]](#footnote-77) The same analysis may be applied to the use of Article xxi of the gatt to justify inconsistency of a measure with paragraph 11.3 of Protocol of Accession which is of particular interest in the case of rare earths. Paragraph 11.3 of Protocol of Accession provides:

Taxes and Charges Levied on Imports and Exports

3.China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article viii of the gatt 1994.

This implication of this paragraph is quite clear in light of *China – Rare Earths* and *China – Raw Materials* which is that China cannot subject a rare earth to export duty or charge unless a particular form of rare earth appears on Annex 6 and if it does it may not be subject to more than what has been stipulated in the Annex. There is nothing in the language of paragraph 11. 3 of Protocol of Accession that suggests that gatt Article xxi is available to China by way of an exception. Therefore, if China was to impose export duties on rare earths inconsistent with its obligations under the Protocol of Accession, then gatt Article xxi would not be available as an exception. The important message is that China’s Protocol of Accession has created more onerous obligations for China compared to other wto members, and this restricts their ability in terms of maintaining export restriction in the form of duties aimed at rare earths management.[[78]](#footnote-78)

3.3 Can Economic Development and Resource Security Be Justified under the Phrase “Essential Security Interests” under gatt Article xxi?

As mentioned above gatt Article xxi, provides the possibility for the wto members to maintain trade restrictive measures that they may consider necessary to protect their “essential security interests”. Interestingly, “security” has not been defined under the gatt and thus what constitutes a matter of security remains a matter of interpretation. It may be noted that “national security emergency” or “security emergency” clauses appear as open-textured phrases in other treaties too. The China–Australia Free Trade Agreement incorporates gatt Article xxi and Article xiv bis, *mutatis mutandis*, in [Chapter 16](#CBML_ch16_ch_001).[[79]](#footnote-79) For example, a similar construction of gat’S essential security exception is to be found in Article 32.2 of the Agreement between the United States of America, the United Mexican States, and Canada.[[80]](#footnote-80)In this agreement “essential security” remains undefined but also includes “maintenance or restoration of international peace or security”. A similar undefined “essential security” phrase is also found in Argentina–US bit.[[81]](#footnote-81)

In context of the wto, during discussions in the Geneva session of the Preparatory Committee, drafters of the original Draft Charter had contemplated the challenges associated with the lack of definition of security. The drafters highlighted that a broad interpretation allows that the possibility of restrictive measures to be justified through reasoning that can be connected to security interest. This would mean that anything under the sun could be cited as a matter of security interest. Such a broad approach has the potential of justifying measures that were for the purpose of “protection for maintaining industries under every conceivable circumstance” which has been considered as problematic.[[82]](#footnote-82)At the same time, the drafters also contemplated against a narrow interpretation because it would prevent adoption of measures by Members that would be pertinent for addressing their security interests.[[83]](#footnote-83)

It may be recapitulated that Article 21 of the nsl refers to utilization and protection, management and control of resources. It also seeks to ensure the sustainable, reliable, and effective supply of resources and energies required for economic and social development.[[84]](#footnote-84)The straightforward articulation by China would be based on the fact that rare earths are an important input for critical industries and thus important for economic reasons. Rare earths are an important commodity for value added downstream sectors which is important for reinforcing their industrial base and thus resource security may simply be articulated as a matter of security interest.

In addition to the above, China can reinforce the security argument by seeking recourse to climate change agenda which has been in the recent past argued as a matter of security.[[85]](#footnote-85) China may pursue the argument that rare earths constitute an important input for the manufacturing renewable energy sector products which ultimately will contribute to address environment and broader climate change issues. China has recently announced its ambitious carbon reduction targets and export restrictions on rare earths may be argued as a tool to achieve these goals.[[86]](#footnote-86) are has a clear management focus for the purpose of rational development and utilization of rare-earth resources and protecting ecological environment.

It is to be recognised that are reflects the intention of China of trying to tackle the environmental impact of rare earths mining. Therefore, drawing connection between environment and security is not an unreasonable one. Rather bringing the issue of climate under the security exception is from a contemporary standpoint, need of the hour. There have been several studies undertaken that has extensively explored climate change in exacerbating security problems.[[87]](#footnote-87) Until the end of the Cold war “the notion of environment as a significant source of insecurity was not on the radar screen”[[88]](#footnote-88) but the interplay between the environmental crisis and security has been explored since the mid-2000s.[[89]](#footnote-89) One view is that as climate change intensifies, natural resources become scarce and that can generate conflict to access resources.[[90]](#footnote-90) In fact, a recent global survey of people’s opinions about climate change reveals that two thirds of people around the world view climate change as a global emergency.[[91]](#footnote-91)Governments across the world also recognise climate change as a security risk.[[92]](#footnote-92) It is pertinent to note that climate change was indicated as cause of conflict in Sudan and Drafur by the former UN Secretary General Ban Ki-Moon.[[93]](#footnote-93) Hendrix and Glasser identified that climate suitability for agriculture and freshwater availability was responsible for the onset of conflict in Africa.[[94]](#footnote-94) Framing the climate change as a matter of national security has supporters on both sides. Some argue against utilising the national security frame[[95]](#footnote-95) while other stress the need for disruption of trade and investment rules that are too onerous for climate.[[96]](#footnote-96)

The above line of argumentation also finds basis in the sovereignty argument by virtue of which every nation has an inherent right to exploit its natural resources.[[97]](#footnote-97) *China – Rare Earths* has recognised the sovereignty of all States over its natural resources but with the qualification that ‘they have the sovereign right to choose to structure and apply their export quota systems in a manner that advances their own conservation goals, but they must do so consistently with their gatt/wto obligations’.[[98]](#footnote-98) In this particular case, as highlighted above, it was a matter of technicality that the gatt Article xx was not available to justify obligation under paragraph 11.3 of the Protocol of Accession. However, the sovereignty argument was not outrightly rejected in the instant case.

3.3.1 The Subparagraphs Are Limitative

The relevant paragraph under which China can potentially present its argument is paragraph (b) of gatt Article xxi through the phrase “essential security interests” in the introductory part of paragraph (b). The presence of the phrase “essential security interests” gives the impression of unconstrained discretion to the wto members. The introductory part where the phrase “essential security interests” features may be characterized as the chapeau for following the three subparagraphs that are enumerated under:

(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 relation; or

However, seeking the structure of paragraph (b) reveals the limit of what may be included within the scope of the phrase “essential security interests”. The chapeau of Article xxi (b) is followed by detailed enumeration of types of exceptions that are contemplated in the subparagraphs. These subparagraphs are separated from each other by semicolons qualify the sentence in the chapeau. The subparagraphs in a clear sense qualifies the determinative scope of “essential security interests” to actions that must relate only to subject matters – i.e., the “fissionable materials”, “traffic in arms”, and situations of “war or other emergency in international relations” described in the enumerated subparagraphs. This position has been clarified in *Russia – Traffic in Transit.*[[99]](#footnote-99) The Panel states:

But if one considers the logical structure of the provision, it is apparent that 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.[[100]](#footnote-100)

The Panel further clarifies that the subparagraphs establish alternative (rather than cumulative) requirements that the action in question must meet for it to fall within the ambit of Article xxi(b).[[101]](#footnote-101)The structural construction of the Article xxi with the chapeau and the subparagraphs is a classic example of purposive enumeration that qualifies measures that can be taken by wto Members. The construction of the provision reflects conscious design. One may argue that the subparagraphs set out a list of exceptions and hence the grounds are limited and exhaustive.[[102]](#footnote-102) Further, the close relation between the chapeau and the paragraphs of Article xxi (b) is manifested by opening phrases of the subparagraphs. Subparagraphs (i) and (ii) opens with the phrase “relating to” and subparagraph (iii) “taken in time of”. Specific to subparagraph (i) and (ii) dictionary meaning of relate means to “show or make a connection between two or more things”. The ab in *US- Shrimp* interpreted ‘relating to’ in Article xx(g) as ‘close and genuine relationship of ends and means’ between the measure and the end pursued.[[103]](#footnote-103) Also, in *China-Raw Materials*, the ab defined the term as ‘hav(ing) some connection with, be(ing) connected to’.[[104]](#footnote-104) Applying the understanding from the dictionary meaning and the ab jurisprudence on “relating to” it emerges that any Member may take measure which it considers necessary for the protection of its essential ‘security interest’ provided it relates to fissionable material, traffic in arms, ammunition and implements of war and to such traffic in goods and material for the purpose of supplying a military establishment. Paragraph (iii) opens with the phrase “taken in time of” followed by particular circumstances that only includes time of war or emergency in international relations during which the measure pertaining to security may be taken by a Member.

3.3.2 The Qualification of “Essential”

While the Members are free to define what it considers to be “essential security interests”, not every interest is one that relates to the security of a nation, nor will every security interest qualify as being “essential”.[[105]](#footnote-105)The panel in *Russia – Traffic in Transit* has clarified that “essential security interests” is a narrower concept than “security interests” and concerns “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”.[[106]](#footnote-106) While the Panel clarified that this narrow clarification is not a rigid one and that the specific interests may depend on situations perception and changing circumstances,[[107]](#footnote-107) but only dangers of terrorism and extremism were accepted consistent with the formulation described above.[[108]](#footnote-108) The Panel stipulates that the Members are not free to elevate any concern to that of an “essential security interest”.[[109]](#footnote-109) For instance, a trade interest cannot simply be re-labelled as an “essential security interest” by a Member to release itself from the obligations under the “reciprocal and mutually advantageous arrangements” of the wto.[[110]](#footnote-110)It is a settled position that military security is considered essential but it remains unclear whether the ever changing nature of threats that are non-militaristic in nature can also be considered essential. To some extent the Panel has clearly drawn limits on the scope of what can be considered essential. Ultimately, whether a certain interest qualifies as essential will be assessed by Panel and the Appellate Body taking into account all the circumstances of the case at hand and may ultimately be linked to the enumerated sub-paragraphs of Article xxi (b).

3.3.3 The Requirement of “Necessity”

gatt Article xxi gives discretion to the wto to assess the necessity of the measure for protecting their essential security interest. The provisions do not set forth any defining ingredients to what circumstances may be considered “necessary”. It is argued that the term “necessary” when read together with “it considers” gives Members of the wto sufficiently wide discretion to determine the state of necessity to protect their security interests.[[111]](#footnote-111) This view is supported by Australia, China, Japan, Canada, US and Singapore.[[112]](#footnote-112) However, this discretion of the Members is not unfettered because it is qualified by requirement of necessity. The available jurisprudence on the requirements of necessity in context of gatt Article xxi remains limited. The concept of necessity has been interpreted extensively in international law[[113]](#footnote-113) and in the wto in context of gatt Article xx.[[114]](#footnote-114) In identifying if the measure in question is necessary within the context of gatt Article xx, the ab has adopted weighing and balancing the three factors against each other:

i. the importance of the societal value pursued by the measure;

ii. the extent to which a measure contributes to the realization of the end pursued; and

iii. the extent to which the measure in question produces trade restrictive effects[[115]](#footnote-115)

The above prescription has been referred to as the least restrictive measure test which means that if an alternative measure that is less trade restrictive and is reasonably available with an equivalent contribution[[116]](#footnote-116) to the measures that the measure in question will fall short of the “necessary” requirement. The ab has also clarified that an alternative means is not “reasonably available” if it is “merely theoretical in nature and does not achieve the desired level of protection”.[[117]](#footnote-117)The jurisprudence regarding necessity available under gatt Article xx disputes may be instructive, albeit in a limited manner, in informing interpretive matters that arise in gatt Article xxi. This is for the reason that the word ‘necessary’ in gatt Article xxi is different from the context of the same word in gatt Article xx.[[118]](#footnote-118) It has been argued that the presence of ‘which it considers’ in the provisions extend the Members discretion not only to the determination invoking Member’s essential security interests, but also to the necessity of the measures for the protection of those interests.[[119]](#footnote-119)

The Panel in *Russia – Traffic in Transit* case has clarified the rubric of necessity by way of two important points. First, the Members must sufficiently articulate the “essential security interests” that it considers the measures at issue are necessary to protect. Second, for a measure to be necessary under gatt Article xxi, it must “meet a minimum requirement of plausibility in relation to the proffered essential security interest, i.e., they are not implausible as measures protective of these interests”.[[120]](#footnote-120) Arguably, the approach of “minimum requirement of plausibility”[[121]](#footnote-121) could be effective in tackling interests of the invoking Member that challenge the baseline expectations of the treaty regime in question.[[122]](#footnote-122)

It is interesting to note that the above two-point evaluation was utilised to the full extent by the Panel in the more recent *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* dispute,[[123]](#footnote-123) where inadequate protection of intellectual property rights held by or applied for entities based in Qatar was challenged.[[124]](#footnote-124) With respect to the first point regarding the formulation of the “essential security interests”, the Panel stipulated that the purpose of this part is simply to assess whether the challenged measures are related to the interest indicated. Only a “minimal satisfactory” standard is applied to this effect.[[125]](#footnote-125) The Panel accepted Saudi Arabia’s articulation of the “essential security interests” as they relate to quintessential functions of the State.[[126]](#footnote-126) The standard of plausibility which explores the connection between the measures and essential interests set forth by *Russia – Traffic in Transit* was applied by the Panel in Saudi Arabia true to its spirit. In conclusion, the Panel found that the measures, that directly or indirectly, prevented beIN Media Group llc from obtaining Saudi legal counsel to enforce its ip rights through civil enforcement procedures before Saudi courts and tribunals meets the requirements of trips Article 73(b)(iii).[[127]](#footnote-127) The Panel recognised that Saudi’s umbrella policy of ending or preventing any form of interaction with Qatari nationals and access to civil remedies through Saudi courts (anti-sympathy measures) was plausibly directed to protect Saudi population and citizens government institutions, and its territory from the threats of terrorism and extremism.[[128]](#footnote-128) The Panel clearly remarked that the “anti-sympathy” measures “met 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”.[[129]](#footnote-129) However, the Saudi Arabia’s non-application of criminal procedures and penalties to broadcasting entity beoutQ did not meet the requirement of minimum plausibility as the connection with the measures and essential security interests remained unclear. Therefore, the criminal procedures and penalties do not meet the requirements for invoking trips Article 73(b)(iii). The Panel indicated that it was not clear how 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.[[130]](#footnote-130)

3.3.4 The Scope of “Emergency in International Relations”

Another interesting question is whether the phrase in paragraph (iii) “other emergency in international relations” allows the wto Members expansive room for manoeuvre to include concerns that may include issues that are social and economic in nature. In fact, covid-19 crisis has also forced countries to revisit the traditional understanding of what constitutes a matter of emergency. Pauwelyn argues that the phrase gives a great deal of leeway to enact restrictive economic measures in times of emergency in international law.[[131]](#footnote-131) Broadly, the concept of “emergency” in domestic sphere also does not remain confined to event or situation and goes beyond defence concerns, territorial sovereignty or physical safety of the State and includes social cost:

An ‘emergency’ occurs when there is a general agreement that a nation or some part of it faces a sudden and unexpected rise in social costs, accompanied by a great deal of uncertainty about the length of time the high level of cost will persist …. ‘Emergency powers’ describe the expansion of governmental authority generally and the concomitant alteration in the scope of individual liberty, and the transfer of important ‘first instance’ law-making authority from legislatures to executive officials in emergencies.[[132]](#footnote-132)

One can also capture the abovementioned broad scope by seeking recourse to the definition of the ‘emergency’ in various jurisdictions. For instance, the UK’s Civil Contingency Act 2004 defines emergency as:

(a) an event or situation which threatens serious damage to human welfare in a place in the United Kingdom,

(b) an event or situation which threatens serious damage to the environment of a place in the United Kingdom, or

(c) war, or terrorism, which threatens serious damage to the security of the United Kingdom.[[133]](#footnote-133)

Further, human welfare under Section 1 (a) has been defined generously to include loss of human life, human illness or injury, homelessness, damage to property, disruption of a supply of money, food, water, energy or fuel, disruption of a system of communication, disruption of facilities for transport, or disruption of services relating to health. Environment in Section 1 (b) includes disruption or destruction of plant life or animal life.

Canada’s Emergencies Act defines national emergency as an urgent and critical situation of a temporary nature that:

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada and that cannot be effectively dealt with under any other law of Canada.[[134]](#footnote-134)

Both the above definitions above capture damage to health and safety of human life, environment within the scope of emergency.

The question is – whether “emergency” covers matters of both military, serious security-related conflicts and non-military interests’ such as natural disasters, pandemics, or financial crises as a permissible basis for Members to excuse themselves from their responsibility under gatt. One may argue for “adverse economic situation” as a basis for deviation from gatt obligations under the security-exception clause because the origin of gatt lies in the slumped economic condition post second world war. gatt formulates trade relations between Member States and thus has an economic context which may allow for the above-mentioned phrase to be read to include economic emergency. It should be noted that the option of deviating from treaty obligations in case of adverse economic/industrial situation is not unknown but controversial. In 1975, Sweden notified import restrictions on leather shoes, plastic shoes, and rubber boots on security grounds with the justification that maintenance of a minimum domestic production capacity in vital industries was necessary to meet basic needs in case of war or other emergency in international relations.[[135]](#footnote-135) Eventually, Sweden decided to terminate the quotas on leather and plastic shoes.

*Russia – Traffic in Transit* has clarified that only specific type of interests that are similar to the situation of war are justified pursuant to “emergency in international relations”. This is because phrase “emergency in international relations” is prefixed by the phrase “taken in time of war” joined with the “or” which indicates that war is one example of the larger category of “emergency in international relations”.[[136]](#footnote-136) The Panel has clarified that conflicts that give rise to defence and military interests, are included under this subparagraph.[[137]](#footnote-137) It seems that the Panel has considered the phrase in the context of the entire provision where the subparagraphs set forth only specific type of matters such as fissionable materials, and traffic in arms, ammunition and implements of war, as well as traffic in goods and materials for the purpose of supplying a military establishment. Without contest, matters included in the subparagraphs fall within the scope of traditional threats that compromise the physical integrity of the State that require immediate action. Although, the Panel has considered a sufficiently wide scope of conflict which includes situations of armed conflict but also latent conflict.[[138]](#footnote-138) In coming to this conclusion, the Panel relied on the historical diplomatic practice and referred to Article 11 of the Covenant of the League of Nations: “Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League … [i]n case any such emergency should arise …”.[[139]](#footnote-139) It is interesting to note that Panel recapitulated the exchange between the delegate from Netherlands and US on meaning of the term “or other emergency in international relations”[[140]](#footnote-140) during the ito Charter’s negotiations. The US delegate’s position reflected that “other emergency in international relations” reflects the “situation which existed before the last war, before our own participation in the last war”.[[141]](#footnote-141)

Following the above order, it is interesting to note during clarification of the “emergency in international relations” the Panel in *Russia – Measures Concerning Traffic in Transit* has also included maintenance of law and public order interests within the scope of this phrase. The Panel clarified that “heightened tension or crisis, or of general instability engulfing or surrounding a state”[[142]](#footnote-142) are also included within the ambit of the phrase. By including “maintenance of law” and “public order”, the Panel may have inadvertently suggested the inclusion of law enforcement activities pursuant to police powers to ensure public safety. There is a fine difference between public order and national security which arguably is in the nature of action required for risk management and severity. Public order tends to cover law-enforcement activities during peace time while “security interests” are implicated when the public order itself may be under severe stress due to armed hostilities or acute crises.[[143]](#footnote-143) Public order may include threats such as riots and other civil disturbances. In most cases the threats that are covered within the ambit of security are related to terrorism, weapons of mass destruction, attack by foreign country, regional conflicts, technology enabled crime, organized crime, critical infrastructure, global pandemics. Following this reasoning, one cannot help but question if it is wise to juxtapose public order into the security exception as the Panel has regarded. In fact, in many instruments such as oecd Declaration on International Investment and Multinational Enterprises C (76)99,[[144]](#footnote-144) the General Agreement on Trade in Services,[[145]](#footnote-145) Agreement on Government Procurement,[[146]](#footnote-146) public order and security interests feature as independent requirements in the same provision or in different provisions as a part of the same agreement.

Overall, *Russia – Traffic in Transit* has nudged the position that that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations.[[147]](#footnote-147) The Panel also drew attention to the conduct of Members in the past. The Panel stated that in the past Members have generally exercised restraint in their invocations of gatt Article xxi(b)(iii), and only invoked the exception in situation of armed conflict and acute international crisis of the nature where tensions could lead to armed conflict.[[148]](#footnote-148)In the past, the Members have separated military and serious security-related conflicts from economic and trade disputes.[[149]](#footnote-149)

More recently, in *Saudi Arabia –Intellectual Property Rights,* Saudi Arabia argued that it had severed diplomatic and economic ties with the complaining Member which is an ultimate State expression of the existence of an emergency in international relations. Saudi Arabia alleges that the reason for its action is Qatar’s repudiation of the Riyadh Agreements concluded between the gcc members designed to address regional concerns of security and stabilityof the region[[150]](#footnote-150) and its interference in the international affairs of the countries in the region.[[151]](#footnote-151) Saudi Arabia also alleged that Qatar supported terrorism and extremism which affects the peace and stability of gcc members.[[152]](#footnote-152) To assess whether an “emergency in international relations” exist between the disputing parties Panel utilised the analytical framework of *Russia – Traffic in Transit*. The Panel reiterated 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”.[[153]](#footnote-153) The Panel accepted the argument tendered by Saudi Arabia that severance of all diplomatic, consular and economic ties with Qatar is indicative of exceptional and serious crisis in the relations between the two States and sufficiently establishes the existence of an “emergency in international relations”.[[154]](#footnote-154) The Panel recognised that severance of diplomatic or consular relations is a measure of last resort in a situation of severe crisis between the relations of States and thus can be seen as an “exceptional act”.[[155]](#footnote-155) The nature of Saudi Arabia’s allegations of Qatar’s support of terrorism and extremism in the region is indicative of situation of heightened tension or crisis a concern which is beyond political or economic in nature but relates to security interests.[[156]](#footnote-156)The Panel’s acceptance of the breakdown of diplomatic and economic relations with Qatar as an “emergency in international relations” reflects that the phrase encompasses action taken to uphold the territorial integrity of the State and counter threats to the peace.

3.3.5 China’s Projection of National Security in the wto and Some Overarching Reflections

China’s approach to security through onsc is a comprehensive one and in some manner reflective some of the contemporary understanding of security described in the above sections and is to a large extent is aimed to safeguard China’s interests nationally and internationally. It is inevitable that China will seek to argue for its own view on national security in the wto in line with the visions and strategy of the onsc. As a matter of fact, the US also demonstrates a much broader understanding of security which goes beyond the scope of the gatt Article xxi in its current form and has in the past also pushed its own understanding of national security in the wto. The discussion in the above section has highlighted that a formalistic reading of gatt Article xxi shows that it has a narrow scope and potentially covers the security interest that are considered traditional in nature. This does not come as a matter of surprise since the instrument was drafted several decades ago and does not in any way accommodate the reality that the concept of security has been enlarged in light of political, social, cultural and economic developments. There is nothing in the sub-paragraphs of gatt Article xxi (b) that may accommodate the concern for resource security and associated economic concerns. In fact, it could be argued that gatt Article xx (g) that concerns exhaustible natural resource may be somewhat more relevant and may serve as a valid ground for seeking the exception. While Article xx (g) offers a basis for protection of exhaustible natural resource, it does not fully allow the pursuit of the argument of resource security which is intrinsically linked to economic development and stability.

Further, there has been much excitement and optimism built around phrases such as “which it considers necessary for the protection of its essential security interests” and “emergency in international law” on the basis that these phrases leave open the room for manoeuvre by the Members to argue for their position on national security in the wto. Could this mean that the phrase “essential security interest” or “emergency in international law” may provide the opportunity to China to accommodate resource security argument within the ambit of gatt Article xxi? *Russia- Traffic in Transit* displays a cautious approach in fleshing the meaning of the phrases which has remained confined to war, conflict and violence. The Panels in both the disputes were confronted with situations that pertained to conflict (territorial and diplomatic) and not to situations that reflected the broadened and deepened security concerns that go beyond issues of war and peace. For China’s argument of resource security to be recognised, the Panels would have to engage with the broader meaning of security through the elaboration of somewhat open textured phrases. However, the Panel’s interpretative exercise may not yield the outcome that a Member like China that have a broader security frame desire and this is because of the institutional constraint on the Panels. The wto agreements formalize specific rules and are the written expression of the will and consent of the Member States.[[157]](#footnote-157) The construction and language of the wto Agreements reflects the objectives of the organization and also the expectations of the wto Members. In addition, the Members of the wto have through Article 3.2 of the dsu which provides that the dsb serves to provide security and predictability to the multilateral trading system and their recommendation and rulings of the cannot add or diminish the rights and obligations provided in the covered agreements.[[158]](#footnote-158) Article 3.2 of the dsu aims to avoid uncertainties and any judicial activism that can arise from the process. Therefore, the expression of the will and consent of the Members must be upheld by the Panel as it rightly concerns rules that the wto Members wanted to impose on their relationship. For example, even though the Panel may consider the domestic experience and understanding of “emergency”, they must interpret by reconciling the overall treaty language, structure and prevailing institutional context in which the Agreement operates and also the interest and expectations of the Members.[[159]](#footnote-159)The institutional constraint thus restricts the ability of the Panel to read more into the security provisions keeping in view the contemporary developments. If Panel adopts a broader interpretive approach may go beyond their competence. Moreover, the object and purpose of the wto Agreement and 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. Article 3.2 of the dsu and 19.2 of the dsu indicate that the recommendations and rulings of the dsb cannot add to or diminish the rights and obligations provided in the covered agreements. The Panel carry the burden of ensuring the security and predictability of the regime while doing the difficult task of balancing the competing claims and thus may encounter political risk if they add to what has been set out in gatt Article xxi when addressing questions of national security. One example which demonstrates that the Panel has been aware of the institutional constraints imposed on them was in *Russia – Traffic in Transit* when it clearly articulated that political or economic differences between Members are not sufficient by themselves to constitute an emergency in international relations for purposes of subparagraph (iii). The Panel highlighted that the exception provides flexibility for the Member to pursue their security interest but does not allow for expression of the unilateral will of a Member that would be contrary to the security and predictability of the wto.[[160]](#footnote-160) While this articulation is praiseworthy from the perspective that it has clarified that the exclusion of economic and political concerns within this particular exception but it does not serve as a panacea for the problems between Members exacerbated by closer coupling of politics and security.[[161]](#footnote-161)

4 Conclusion

The chapter explored the possibility of accommodating resource security and economic development arguments under gatt Article xxi. The conclusion is that while security is available as an exception for the wto Members the scope of the provision is very narrow. In fact, the scope is by and large only confined to militaristic matters. If China aims to defend export restrictions under gatt Article xxi, it is most likely to fail. China’s argument is representative of a broader understanding of security and gatt Article xxi is not representative of the contemporary field of security and where it is headed. Several issues (climate, health, resources, development, economic) that reflect shifting economic, social and political priorities in terms of security remains excluded. The current security demands of the wto Members cannot be simply ignored and to hope that Members practice self-restrain that was prevalent before Trump era is not pragmatic. The understanding of the complex interplay between both trade and security has evolved and the US-Ukraine conflict highlights tension surrounding the issue of security. The realignment of wto in mainly two large blocks with US and Allies on one side and China on the other also add to the complexity of consideration of security in the wto. Members may be tempted to establish their notion of security through the dispute settlement process and given the diverse interpretations by Members it may not be reasonable to conceive that the Panels may be able to offer quick, easy solution by resolving the disputes that concern national security.

The so called undefined catch all phrases such as “essential security interest” or “emergency in international law” touted as possibilities for encompassing the contemporary issues is a falsehood. The Panels are limited in their function and interpretive role by the organizational structure and dsu provisions. While this exposes the limits of wto’s design, the more important argument is that the Panels cannot make up for what does not exist in the text of gatt Article xxi. A gallant approach to expansive interpretations by a certain Panel that add to the meaning of the provision would expose them to political risk.[[162]](#footnote-162) Moreover, an undesirable outcome for any of the Members may prompt them to discredit the Panel and the implementation of the recommendations may also be protracted amidst geo-political tensions. While adjudication may assist in helping the Members to understand their priorities[[163]](#footnote-163) it does not seem to offer a full resolution that the matter requires.

What complicates matters is that the ab has collapsed because US has persistently blocked the appointment of new Members over ab’s interpretive approach. This has implications for the Panel reports as they are not binding subject to appeal. While this entails significant weakening of the wto Dispute Settlement System with considerable risk for the wto’s credibility. As Heath rightly remarks that the collapse of the ab has shifted authority dynamics in the trading system.[[164]](#footnote-164) While the EU led Multi Party Interim Appeal Arbitration Arrangement seeks to offer a stop gap measure by providing an appellate function, it does not cover all Members. Most importantly US has not signed up for it and thus leaves its veracity of national security legalism open for discussion.

The chapter fully explores that for China in context of rare earths, resource security is a matter of importance given its economic (innovation, green-tech sector) and environmental concerns and the failure of the gatt framework to accommodate its interest may be detrimental to their willingness towards their larger commitment to the wto. China’s resource security argument simply becomes an example to highlight what lacks in substance under the existing exception. Inadequate rules cannot be a satisfactory explanation for the Members not to address their evolving security interests. The importance of addressing the inadequacy of the provision is critical to ensure Member’s commitment to the integrity of the legal structure of the wto and to tackle risk to free flow of trade in the name of national security. If every Member was to assert their own position on security in the wto it would jeopardise the delicate order of the wto.

The contentious nature of security disputes perhaps requires a different strategy for its resolution. In addition, in absence of a clear strategy to resolve the ab crisis and by the wto Members does make one wonder if judicialization of trade disputes is something in the past. Therefore, it becomes somewhat pressing to find other strategies that can address the issue of security in the wto. Perhaps, a functional approach to the issue may be adopted where Members may consider arbitration under Article 25 of the dsu or the option of conciliation, mediation and good offices under Article 5 of the dsu to resolve such disputes. Another proposal could be to develop best practices through a specialized committee modelled along the lines of Technical Barrier to Trade committee which will keep track of measures taken for national security under review measures, provide opportunity for periodic review of such measures, and provide a formal forum for Members to raise their concerns. The work in the committee may potentially feed into adopting authoritative interpretation by the Members to clarify the provisions or also transforming the provisions entirely.

To conclude, the overall finding, of this work is that revisiting the security exception provision is the need of the hour. Perhaps, in the larger scheme of things, it also highlights the needs for revisiting gatt and other Agreements to keep up with the rapid pace of economic change and political priorities.

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12. The wto dss comprises of a political institution called the Dispute Settlement Body and the quasi-judicial and judicial-type bodies such as the ad-hoc Panels and the permanent Appellate Body respectively. The dss may be argued as one of the most prolific and active of all international State-to State dispute settlement system and it has also navigated through disputes that were subject to controversy and public debate. For comprehensive discussion on the wto dispute settlement system refer to P Van den Bossche and W Zdouc, *The Law and Policy of the WTO: Text, Cases and Materials* (Cambridge, 2019) 80–159. [↑](#footnote-ref-12)
13. ibid. [↑](#footnote-ref-13)
14. RE Hudec, “GATT or GABB? The Future Design of the General Agreement on Tariff and Trade” (1971) 80(7) *The Yale Law Journal* 1299–1386. [↑](#footnote-ref-14)
15. The Overall National Security Outlook discussed in detail in section 2 includes both traditional and non-traditional view of security and includes resource security amongst other issues such as economic security, cultural security, societal security, science and technology security, cybersecurity, environmental security, nuclear security, and the security of overseas interests. Jude Blanchette, Ideological Security as National Security, December 2020 available at <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/201202\_Blanchette\_Ideological\_Security\_National\_Security.pdf> accessed 15 October 2021. [↑](#footnote-ref-15)
16. The case of *Saudi Arabia – Measures Concerning the Protection of Intellectual Property* is also considered because the language of the security provisions in the gatt and trips is similarneither the parties nor the Panel in contested or deviated from the interpretative approach in *Russia – Traffic in Transit* and it builds on the clarification made in the Russia case*.* It is submitted that the paper does suggest transferability of Art. xxi gatt’s interpretation to Art. 73 trips or vice versa because of identical language of both the provisions. However, since there has been limited disputes which have involved national security in the wto interpretation on national security under the trips may be instructive for dispute under the gatt or vice versa. [↑](#footnote-ref-16)
17. Chinese data indicate that its rare earths exports totalled 53,518 metric tons, with a value of $517 million. China’s top three rare earths exports markets by value were Japan (54% of total), the United States (14%), and the Netherlands (8%). China also exported $1.7 billion worth of magnets containing rare earths (including $201 million to the United States), an indicator of the significance of Chinese downstream industries that utilize rare earths. Trade Dispute with China and Rare Earth Elements, June 28, 2019 <https://fas.org/sgp/crs/row/IF11259.pdf> accessed 11 October 2021. [↑](#footnote-ref-17)
18. M Schmid, “Rare Earths in the Trade Dispute Between the US and China: A Déjà vu” (2019) 54 *Intereconomics* 378–384. [↑](#footnote-ref-18)
19. ibid. [↑](#footnote-ref-19)
20. Article 2 prc Export Control Law (n 7). [↑](#footnote-ref-20)
21. Article 4, ibid. [↑](#footnote-ref-21)
22. On January 15, 2021, the Ministry of Industry and Information Technology issued the draft version of the Regulations on Rare Earth Management to gather public opinions until February 15, 2021. Translated version sourced from LexisNexis. [↑](#footnote-ref-22)
23. This aspect was gleaned from conversation with Prof Yongmei Chen. The example she cited to support the assertion was that no national negative list for services has been published yet. [↑](#footnote-ref-23)
24. (n 31). [↑](#footnote-ref-24)
25. For narrow view refer to JB Heath, “National Security and Economic Globalization: Towards Collision or Reconciliation” (2019) 42 *Fordham International Law Journal* 1431. [↑](#footnote-ref-25)
26. For broad view refer to JB Heath, “Trade and Security among the Ruins” (2020) 30 *Duke Journal of Comparative and International Law* 223; JB Heath, “The New Security Challenge to the Economic Order Law” (2020) 129 *Yale Law Journal* 924. [↑](#footnote-ref-26)
27. MS Tanner and PW Mackenzie, *China’s Emerging National Security Interests and Their Impact on the People’s Liberation Army* (Marine Corps University Press, 2015) 1–26. [↑](#footnote-ref-27)
28. X Junyong and Z Zhipeng, “Forty Years of Research on the Rule of Law in China’s National Security: Retrospect and Prospect” (2019) (google translate was utilized to read this article). [↑](#footnote-ref-28)
29. This discussion is important as in the case of China the President’s speech is of significant importance and showcases national strategy. [↑](#footnote-ref-29)
30. “Xi Jinping Chairs First nsc Meeting, Stresses National Security with Chinese Characteristics”, Xinhua News Agency, 15 April 2014, available at <http:/www.xinhuanet.com//politics/2014-04/15/c\_1110253910.htm.> accessed 15 October 2021. [↑](#footnote-ref-30)
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53. The following statement of Alexander Hamilton from 1791 captures the direct connection of commercial interests with security as perceived by the US: Not only wealth; but the independence and security of the country, appear to be materially connected with the prosperity of the manufacturers. Every nation, with a view to those great objects, ought to endeavour to possess within all the essential of national supply. This comprises the means of subsistence, habitation, clothing and defence.

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64. Appellate Body Report, *China – Export Duties on Certain Raw Materials*, wt/ds394/20; Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum,* wt/ds431/17. [↑](#footnote-ref-64)
65. United Nations, Econ. & Soc. Council, Preparatory Comm. of the U.N. Conference on Trade & Emp’t, Thirty-Third Meeting of Commission A, at 19, U.N. Doc. e/pc/t/a/pv/33 (1947) (Dr. Speekenbrink on behalf of the Netherlands), available at https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF accessed on 24 May 2021. [↑](#footnote-ref-65)
66. R Bhala, “National Security and International Trade Law: What the GATT Says, and What the United States Does” (1998) 19 *University of Pennsylvania Journal of International Law* 263; A Emmerson, “Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse” (2010) 11 *Journal of International Economic Law* 135; RP Alford, “The Self-Judging Security Exception” (2011) *Utah Law Review* 697. R S Whitt, “The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and Article xx1 Defence in the Context of the US. Embargo of Nicaragua” 19 (1987) *Law and Policy in International Business* 603. [↑](#footnote-ref-66)
67. For more discussion on the different positions taken by the wto Members on the “self-judging” nature of the security exception refer to T Voon (n54). [↑](#footnote-ref-67)
68. Panel Report, wt/ds512/r, paras 7.102 – 7.104. [↑](#footnote-ref-68)
69. ibid paras 7.53–7.58. [↑](#footnote-ref-69)
70. ab Report, wt/ds363/ab/r, (21 December 2009). [↑](#footnote-ref-70)
71. ab Report,wt/ds394/20. [↑](#footnote-ref-71)
72. ab Report,wt/ds431/17. [↑](#footnote-ref-72)
73. ab Report, China -Raw Materials (2012), para 307. [↑](#footnote-ref-73)
74. ab Report, *China – Rare Earths* (2014) para 5.74. [↑](#footnote-ref-74)
75. ibid. [↑](#footnote-ref-75)
76. ibid. [↑](#footnote-ref-76)
77. ibid. [↑](#footnote-ref-77)
78. U Ghori, “Three Lessons on the Construction of Export Controls under WTO Law” 39 (2020) *University of Queensland Law Journal* 85. [↑](#footnote-ref-78)
79. Article 16.3: Security Exceptions. [↑](#footnote-ref-79)
80. 1. Nothing in this Agreement shall be construed to: (a) require a Party to furnish or allow access to information the disclosure of which it determines to be contrary to its essential security interests; or (b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interest. [↑](#footnote-ref-80)
81. Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment signed 14 November 1991 (entered into force 20 October 1994). This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests. [↑](#footnote-ref-81)
82. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission held on Thursday, 24 July 1947 in the at Palais Des Nations, Geneva, e/pc/t/a/pv/33, pp. 20–21. [↑](#footnote-ref-82)
83. ibid. [↑](#footnote-ref-83)
84. (n 31). [↑](#footnote-ref-84)
85. For a comprehensive overview on literature on climate change and security refer to J Bubsy, “Environmental Security” in A Gheciu and XC Wohlforth (eds), *The Oxford Handbook of International Security* (oup 2018) 471- 479 which refers to literature such as J Barnett, RA Mathew and KL O’Brien, “Global Environment Change and Human Security: An Introduction” in RA Mathew, J Barnett, B Mc Donald and KL O’Brein (eds.), *Global Environmental Change and Human Security* (mit Press 2010) 3–32; I Salehyan, “Climate Change and Conflict: Making Sense of Disparate Findings” (2014) 43 *Political Geography, Special Issue: Climate Change and Conflict* 1–5. EJ Parry, “The Greatest Threat to Global Security: Climate Change Is Not Merely an Environmental Problem <www.un.org/en/chronicle/article/greatest-threat-global-security-climate-change-not-merely-environmental-problem > accessed 15 October 2021. For contradictory view of not using national security frame for climate issues refer to M Jamshidi, “The Climate Crisis is a human security, not a national security issue” (2019) 93 *Southern California Law Review Postscript*. [↑](#footnote-ref-85)
86. ‘China and US pledge climate change commitment’ (bbc 18 April 2021) available at <www.bbc.com/news/world-asia-china-56790077> accessed 15 October 2021. [↑](#footnote-ref-86)
87. (n 85). [↑](#footnote-ref-87)
88. R Dannrether, International Security: The Contemporary Agenda: Cambridge: Polity Press. [↑](#footnote-ref-88)
89. For a quick view of various studies undertaken refer to J Bubsy, “Environmental Security” in A Gheciu and XC Wohlforth (eds), *The Oxford Handbook of International Security* (oup 2018) 471- 479. [↑](#footnote-ref-89)
90. T. Homer Dixon, *Environment Scarcity and Violence* (Princeton University Press 1999); A Mathew, ‘Environment, Conflict and Sustainable Development’ in N Tschirgi, M Lund and F Mancini (eds.), *Security and Development: Searching for Critical Connections* (Lynne Reinner 2010). [↑](#footnote-ref-90)
91. Global poll finds most believe it’s a ‘global emergency’ (bbc 27 January 2021) available at < www.bbc.co.uk/newsround/55822356 > accessed 15 October 2021. [↑](#footnote-ref-91)
92. M McDonald “Climate Change and Security: Towards Ecological Security?” (2018) 10 *International Theory* 153. [↑](#footnote-ref-92)
93. Ban Ki-moon, A Climate Culprit in Darfur, 16 June 2007 available at <www.un.org/sg/en/content/sg/articles/2007-06-16/climate-culprit-darfur> accessed 15 October 2021. [↑](#footnote-ref-93)
94. CS Hendrix and SM Glaser, “Trends and Triggers: Climate Change and Civil Conflict in Sub-Saharan Africa” (2007) 26 *Political Geography* 695–715. [↑](#footnote-ref-94)
95. Jamshidi (n85). [↑](#footnote-ref-95)
96. See (n 85). [↑](#footnote-ref-96)
97. General Assembly resolution 1803 (xvii) of 14 December 1962, “Permanent sovereignty over natural resources”. [↑](#footnote-ref-97)
98. Panel Report para 7.662. [↑](#footnote-ref-98)
99. Panel Report, wt/ds512/r, paras 7.127, 7.64- 68, 7.82. [↑](#footnote-ref-99)
100. ibid para 7.65. [↑](#footnote-ref-100)
101. ibid para 7.68. [↑](#footnote-ref-101)
102. This is similar to Art xx of the gatt also contains a limited and exhaustive enumeration listed in paragraphs (a) to (j) along with the introductory clause which is called the chapeau sets requirements for further appraisal of the measures that are sought to be justified under one of the paragraphs. Art xx sets out in paragraphs (a) to (j) grounds of justification for measures taken to protect societal values such public morality; human, animal or plant life; compliance with gatt consistent laws and regulations; exhaustible natural resource, national treasures of artistic, historic or archaeological value. [↑](#footnote-ref-102)
103. Para 141. [↑](#footnote-ref-103)
104. ab Report, *China – Raw Material* (2012) Para 355. [↑](#footnote-ref-104)
105. P Delimatsis and T Cottier and ‘Art xiv bis: Security Exceptions’ in R Wolfrum, PT Stoll, Cl Feinäugle, (eds.) in *WTO – Trade in Service* (Martinus Nijhoff Publishers 2008) 329–348. [↑](#footnote-ref-105)
106. Panel Report, *Russia – Traffic in Transit* (2019), para. 7.130. [↑](#footnote-ref-106)
107. ibid. [↑](#footnote-ref-107)
108. ibid. [↑](#footnote-ref-108)
109. ibidpara 7.132. [↑](#footnote-ref-109)
110. ibid para 7.133. [↑](#footnote-ref-110)
111. W Weiss, “Adjudicating Security Exception in WTO Law: Methodical and Procedural Preliminaries” (2020) 54(6) *Journal of World Tarde* 829–852. [↑](#footnote-ref-111)
112. Panel Report (n 106) See the section on main arguments of the third parties pg 33–39. Australia’s third-party statement, paras. 9–21; Brazil’s third-party submission, paras. 4–5 and8–9; third-party statement, paras. 21–30; and response to Panel question No. 6; Canada’s third-party statement, paras. 6–8; and response to Panel question No. 6, para. 8; China’s third-party statement, paras. 18–19; and response to Panel question No. 6, para. 6; Japan’s third-party submission, paras 32–38; Singapore’s third-party statement, paras. 14–19; United States’ third-party statement, paras. 1, 11–12, 34–35; and response to Panel question No. 6, para. 31. [↑](#footnote-ref-112)
113. The formulations of necessity in international law have been considered extensively. Grotius credited for bringing the doctrine from realms of municipal law to international law has explained the doctrine of necessity through examples has regarded necessity is “nothing short of extreme exigency”. He proposed that “under the plea of necessity nothing short of extreme exigency can give one power a right over what belongs to another no way involved in the war”. Ago states, that the essential interest must be “absolutely of an exceptional nature”. One may also seek recourse to the 2001 ilc Art 25 on Responsibility of States for Internationally Wrongful Acts to understand what constitutes necessity. One element of necessity under Art 25 is “to safeguard an essential interest against grave and imminent peril”. In addition, the measures in question must be the “only way” available to safeguard its essential interests. This means that no other alternatives are available to protect its essential interests except the measure adopted by the State. It further stated that this rule would also apply even if such lawful alternatives were more costly or less convenient. [↑](#footnote-ref-113)
114. Art xx: General Exceptions of the gatt. [↑](#footnote-ref-114)
115. It is important to consider the ab’s finding in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, wt/ ds135/ab/r (adopted 5 April 2001) (*ec-Asbestos)* (2001) regarding the requirements of necessity. [↑](#footnote-ref-115)
116. The ab in the *ec-Asbestos*, para 172 has clarified the meaning of “reasonableness” by stating that a measure with less restriction on trade could not be considered as “a reasonable alternative” if it does not have the potential to achieve the same level of protection sought. *ec-Asbestos* (2001) paras169–174. [↑](#footnote-ref-116)
117. *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, wt/ds363/ab/r, (21 December 2009) para 318 – 319. [↑](#footnote-ref-117)
118. P Ranjan, “National Security Exceptions in the General Agreement on Tariffs and Trade (GATT) and India-Pakistan Trade” (2020 54 (3) *Journal of World Trade* 643. [↑](#footnote-ref-118)
119. Wolfgang Weiss, Adjudicating Security exceptions in WTO Law: Methodical and Procedural Preliminaries (2020) *Journal of World Trade* 54(6) 829. [↑](#footnote-ref-119)
120. (n 99) para 7 138 – 7 139. [↑](#footnote-ref-120)
121. (n 99) para 7 138. [↑](#footnote-ref-121)
122. (n 118). [↑](#footnote-ref-122)
123. The case of *Saudi Arabia – Measures Concerning the Protection of Intellectual Property* is also considered because the language of the security provisions in the gatt and trips is similar andneither the parties nor the Panel in this case contested or deviated from the interpretative approach in *Russia – Traffic in Transit. Saudi Arabia – Measures Concerning the Protection of Intellectual Property* builds on the clarification made in the Russia – Traffic in Transit case*.*It is submitted that the paper does suggest transferability of Art. xxi gatt’s interpretation to Art. 73 trips or vice versa because of identical language of both the provisions. However, since there has been limited disputes which have involved national security in the wto interpretation on national security under the trips may be instructive for dispute under the gatt or vice versa. [↑](#footnote-ref-123)
124. Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights – Communication from Qatar wt/ds567/8, 5 October 2020. [↑](#footnote-ref-124)
125. ibid para 7.281. [↑](#footnote-ref-125)
126. ibidpara 7.280. [↑](#footnote-ref-126)
127. ibid para 7.281. [↑](#footnote-ref-127)
128. ibid para 7.286–7.288. [↑](#footnote-ref-128)
129. ibid para 7.288. [↑](#footnote-ref-129)
130. ibid para 7.289. [↑](#footnote-ref-130)
131. J Pauwelyn, “Export Restrictions in Times of Pandemic: Options and Limits under International Trade Agreements” (April 30, 2020). [↑](#footnote-ref-131)
132. M Tushnet, “The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation” (2008) 3 *International Journal of Law in Context* 275. [↑](#footnote-ref-132)
133. Part 1 – Meaning of Emergency <www.legislation.gov.uk/ukpga/2004/36/contents >accessed 15 October 2021. [↑](#footnote-ref-133)
134. Emergencies Act r.s.c., 1985, c. 22 (4th Supp.) <https://laws-lois.justice.gc.ca/eng/acts/e-4.5/page-1.html#h-213808 > accessed 15 October 2021. [↑](#footnote-ref-134)
135. Introduction of A Global Import Quota System for Leather Shoes. Plastic Shoes and Rubber Boots, Notification by the Swedish Delegation, <https://docs.wto.org/gattdocs/q/GG/L4399/4250.PDF > accessed 15 October 2021. [↑](#footnote-ref-135)
136. (n 68) para 7.72. [↑](#footnote-ref-136)
137. (n 68) paras 7.75–7.76. [↑](#footnote-ref-137)
138. (n 68) para 7.76. [↑](#footnote-ref-138)
139. (Covenant of the League of Nations, done at Paris, 28 June 1919, League of Nations Treaty Series, Vol. 108, p. 188). [↑](#footnote-ref-139)
140. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held-on Thursday, 24 July 1947, e/pc/t/a/pv/33, p. 19 (as corrected by Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, e/pc/t/a/pv/33.Corr.2). [↑](#footnote-ref-140)
141. ibid. [↑](#footnote-ref-141)
142. (n 68) 7.76. [↑](#footnote-ref-142)
143. WW Burke-White & AV Staden, “Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties” (2008) 48(2) *Virginia Journal of International Law* 308 -409. [↑](#footnote-ref-143)
144. Adopted on: 21/06/1976 Amended on: 25/05/2011 available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144> accessed 15 October 2021. National Treatment ii. 1. That adhering governments should, consistent with their needs to maintain *public order*, to protect their *essential security interests* and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government (hereinafter referred to as (“Foreign-Controlled Enterprises”) treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as “National Treatment”). [↑](#footnote-ref-144)
145. Art xiv: General Exceptions Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain *public order;*(5) … Footnote: 5. The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. Article xiv bis: Security Exceptions 1. Nothing in this Agreement shall be construed: (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its *essential security interests*; or … [↑](#footnote-ref-145)
146. Art xxiii: Exceptions to the Agreement 1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for *national security* or for national defence purposes.

     2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect *public morals, order* or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour. [↑](#footnote-ref-146)
147. (n68) para 7.75. [↑](#footnote-ref-147)
148. (n68) para 7.81. [↑](#footnote-ref-148)
149. ibid. [↑](#footnote-ref-149)
150. 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. [↑](#footnote-ref-150)
151. Saudi Arabia’s opening statement at the first meeting of the Panel, para. 47. [↑](#footnote-ref-151)
152. 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. [↑](#footnote-ref-152)
153. Panel report, wt/ds567/8, Para 7.245. [↑](#footnote-ref-153)
154. Ibid 7.262. [↑](#footnote-ref-154)
155. ibid 7.259. [↑](#footnote-ref-155)
156. ibid 7.263. [↑](#footnote-ref-156)
157. C Fernandez de Casadevante V Romani, Sovereignty and Interpretations of International Norms (Springer, Berlin 2007) 4. [↑](#footnote-ref-157)
158. Art 3.2 provides that The dispute settlement system of the wto is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. [↑](#footnote-ref-158)
159. The aspect of preservation of legitimate expectation arising out of the covered agreements is manifestly important as it protects and promoted the trade interaction between the Member States which lies at the heart of the existence of the wto as an institution. An interesting treatment of legitimate expectation is also, found in Korea-Government Procurement Panel where the Panel recognized that legitimate expectations not only arise from the negotiated concessions but also concern measures which impair the concession under negotiations.

     Panel Report, Korea-Measures Affecting Government Procurement Measures, wt/ds163/r, adopted June 2009, 7.95. [↑](#footnote-ref-159)
160. (n 68) 7.79. [↑](#footnote-ref-160)
161. RR Krebs, ‘The Politics of Security’ in A Gheciu and XC Wohlforth (eds), The Oxford Handbook of International Security (oup 2018) 299. [↑](#footnote-ref-161)
162. D Boklan and A Bahri, “The First WTO’s Ruling on National Security Exception: Balancing Interests or Opening Pandora’s Box” (2020) 19(1) *World Trade Review* 122–136. [↑](#footnote-ref-162)
163. CL Davis Why Adjudicate? Enforcing Trade Rules in the wto (Princeton University Press 2012). [↑](#footnote-ref-163)
164. Heath JB, “Trade and Security among the Ruins” (2020) 30 *Duke Journal of Comparative and International Law* 223. [↑](#footnote-ref-164)