

WORKINGPAPER

No. 01, 2023

The Covid-19 Test for Preferential Trade Agreements

National Security Exceptions and Trade and Investment Restrictive Measures in Services

Ana María Palacio Valencia



About the author

Ana María Palacio Valencia PhD (Melbourne), LLM (Melbourne), Grad Cert Comm L, (Deakin), PDipBus L (Externado), LLB (Eafit). Visiting Fellow at the United Nations University Institute on Comparative Regional Integration Studies (UNU-CRIS). This research project is funded through this visiting fellowship.

Acknowledgements

The framing of this paper has significantly benefitted from the valuable comments received at the PEPA-SIEL Conference on an earlier version, especially from Dr Anna Chadwick from the University of Glasgow. Any errors or omissions are exclusively attributed to the author.

About UNU-CRIS

The United Nations University Institute on Comparative Regional Integration Studies (UNU-CRIS) is a research and training institute of the United Nations University, a global network engaged in research and capacity development to support the universal goals of the United Nations and generate new knowledge and ideas. Based in Bruges, UNU-CRIS focuses on the provision of global and regional public goods, and on processes and consequences of intra- and inter-regional integration. The Institute aims to generate policy-relevant knowledge about new patterns of governance and cooperation and build capacity on a global and regional level. UNU-CRIS acts as a resource for the United Nations system, with strong links to other United Nations bodies dealing with the provision and management of international and regional public goods.

The mission of UNU-CRIS is to contribute to generate policy-relevant knowledge about new forms of governance and cooperation on the regional and global level, about patterns of collective action and decision-making.

UNU-CRIS focuses on issues of imminent concern to the United Nations, such as the 2030 Development Agenda and the challenges arising from new and evolving peace, security, economic and environmental developments regionally and globally. On these issues, the Institute will develop solutions based on research on new patterns of collective action and regional and global governance. The Institute endeavours to pair academic excellence with policy-relevant research in these domains.

For more information, please visit www.cris.unu.edu

in alliance with



Abstract

The Covid-19 pandemic has had unprecedented adverse effects on trade in goods and services, and foreign investments. Unilateral government measures on people's physical movement, restrictions on the imports and exports of essential goods, and the assurance of domestic food supplies have subjected the current preferential trade rules for the governance of trade and investments to a stress test.

This paper investigates the extent of this stress test in the context of trade and investment in services. Two questions drive this work. Whether unilateral restrictive measures adopted by states during the pandemic have justification or are permitted within the architecture of regional preferential and investment agreements recently concluded. If so, whether these agreements have balanced the pursuit of legitimate public policy objectives, particularly security, and agreement effectiveness.

Addressing these questions is relevant due to the role plurilateral agreements play in the governance of trade and investment in services. Informed insights on the risks and implications of security exceptions more generally contribute to current debates regarding a pandemic treaty and its content.

This paper records that new and tighter screening rules on foreign investment and the imposition of direct and indirect taxes on digital services and services providers are the most salient restrictive measures during the pandemic. However, debates on these subject matters precede the pandemic. Thus, it is questionable that the Covid-19 emergency is their primary motivation.

Preferential trade and investment agreements provide other architectural choices such as carve-outs and reservations that extensively exempt or limit the application of substantive treaty obligations to the above restrictive measures. Therefore, governments continue to have broad policy space to adopt these types of measures. In those cases where treaty obligations such as national treatment apply to FDI screening regimes and taxation, the risks of misuse and abuse of the security exceptions remain in the current climate, particularly for the former type of restrictive measures. However, the stakes are less than anticipated at the onset and forecasted in the literature.

This paper argues the need for recalibrating security exceptions in these agreements, proposing disciplines on transparency, consultation mechanisms and notification. These disciplines will incorporate procedural 'costs' to use these escape clauses, safeguarding its exceptional character. Interpretative notes could also reduce the ambiguity that promotes self-serving interpretations of these treaty clauses. This paper does not address the constraints for these changes to take place. However, these constraints represent a valuable research agenda for understanding security exceptions and their prospects for recalibration.

Keywords:

Security exceptions, trade in services, preferential trade agreements, investment agreements, restrictive measures

Table of Contents

Abstract	3
Introduction	5
Mapping Governmental Measures in Response to the COVID-19 Crisis: The Landscape for Trade and Investment in Services	6
Trade and Investment Restrictive Measures	6
Trade and Investment Enhancing Measures	8
The Assessment of National Measures Adopted During and ‘in Response to’ the Pandemic	9
Security Exceptions in New Generation PTAs: Have They Gone Too Far?	12
Preliminary Issues: Legal Considerations	12
Unpacking the Provisions	14
The (Re)Assessment of Risk Factors and No Definite Answer	16
Empirical Considerations: Some Additional Firewalls	18
Need for Legal Recalibration to Build Back Better? The Case of Security Exceptions	22
Conclusion	24
References	25

Introduction

This pandemic represents an emergency whose scale took most countries by surprise. With over 5 million human casualties (JHU 2021)¹ and an estimated real GDP contraction of -3.2 per cent (IMF 2021), there is no question that the Covid-19 pandemic has been the worst crisis humans have faced in recent history. Covid-19 has had unparalleled adverse effects on trade in goods and services and foreign investments. Unilateral governmental measures on people's physical movement, restrictions on the imports/exports of essential goods, and the assurance of food supplies have subjected the current preferential trade rules for the governance of trade and investments to a stress test.

This paper explores the extent of this stress test as it relates to trade and investment in services. The fundamental questions of this paper are whether unilateral restrictive measures adopted by states during the pandemic have justification or are permitted within the architecture of regional preferential and investment agreements recently concluded. If so, whether these agreements have struck a balance between the pursuit of legitimate public policy objectives, particularly security, and agreement effectiveness.

Addressing these questions has practical and legal significance considering the growing relevance of regional and plurilateral rules for the governance of trade and investment in services. With uncertainty surrounding the Appellate Body crisis at the WTO (Gao 2021, 535-6), it is also possible that dispute settlement mechanisms of these agreements may play a more active role than seen in the past with other preferential trade agreements. Furthermore, the insights here could inform current discussions on a treaty for future pandemic preparedness and response (Adhanom, 2021), and whether security exceptions should be part of this agreement.

The paper's scope is descriptive, explanatory, and normative and has the following roadmap. First, the paper surveys the unilateral measures affecting trade and investment in services that feature most prominently since the pandemic and their rationale. The survey accounts for trade and investment enhancing measures and restrictive measures to provide insights on patterns of state behaviours pre and during the pandemic. In the descriptive realm, this paper finds that the most significant unilateral restrictive measures for trade and investment in services that governments adopted during the pandemic concern new and tighter screening rules on foreign investment and the imposition of direct and indirect taxes on digital services and services providers. However, debates on these subject matters precede the pandemic. Thus, it is questionable that the Covid-19 emergency and the crisis response are their primary motivations.

In the explanatory realm, this paper argues that the Covid-19 crisis contributes a compelling and visible frame to justify these recent restrictive measures on services along with the protection of national security interests. For example, governments could translate FDI screening in health and R&D sectors into health security concerns such as Covid-19 responses. To a lesser extent, the taxation of digital services and suppliers based on the need to increase government revenues amid the economic crisis could also be translated into Covid-19 responses through expansive interpretations of national security as economic security.

Second, the paper examines how the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP)*, *The Digital Economy Partnership Agreement (DEPA)*; the *EU – China Comprehensive Agreement on Investment: Agreement in Principle (CAI)*; and the *Regional Comprehensive Economic Partnership Agreement (RCEP)* deal with these restrictive measures.

The concern here is that treaty parties could misuse, and abuse security exceptions provided in these agreements amid the Covid-19 pandemic in two ways. First, these escape clauses could be 'abused' to justify new restrictive measures on foreign investment and taxation (or other restrictive measures) underpinned by economic protectionism or nationalism (Sornarajah, 2021, 586) rather than the protection of national security interests. Second, these escape clauses could be misused to avoid scrutiny over restrictive measures whose rationale is other than essential security interests but that may require a higher standard for review than the security exceptions. These concerns underscore the threat that misuses and abuses of security exceptions will ultimately undermine these agreements' effectiveness. The normative assumption here is that (arguably) security

¹ Global deaths by the 8th November 2021 were 5,048,577. Numbers reported to the World Health Organization (WHO) are slightly less than the Johns Hopkins' report.

exceptions should be truly exceptional and their use should be minimal.

This paper finds that the risks of resorting to security exceptions to justify these measures are still present but are less than intuitively anticipated at the onset. Other architectural choices such as carve-outs and reservations that extensively exempt or limit the application of substantive treaty obligations to these types of restrictive measures (taxation and FDI screening regimes) ameliorate these risks. If not exempted from substantive obligations, some exclude the review of these measures through the dispute settlement mechanisms of the agreements. This outcome outlines other challenges for treaty effectiveness but not by way of expansive uses and loopholes of security exceptions.

Third, this paper proposes avenues for recalibrating these agreements in those instances where the risks of misuse and abuse of security exceptions remain. These avenues include incorporating transparency obligations, notification, and consultation mechanisms available when a party attempts to justify a measure on the grounds of essential security interests. Reducing ambiguity in the design of the provisions is also desirable. Security exceptions could incorporate contingent flexibility through objective circumstances for invoking the exceptions. These circumstances could reflect current concerns on the evolution of national security interests beyond military and defence. An early harvest approach could be that treaty parties negotiate an interpretative Annex to guide dispute settlement panels to decide cases. The paper also states potential firewalls at the political and reputation levels that could safeguard the agreements' effectiveness as they currently stand.

Mapping Governmental Measures in Response to the COVID-19 Crisis: The Landscape for Trade and Investment in Services

This part surveys the measures adopted by governments since the start of the pandemic that impacts trade and investment in services. It records trade and investment restrictive and enhancing measures, discussing their basis, as reported by their adopting governments. It also examines the measures in a larger span than the 18 months of the pandemic to pinpoint how they sit within broader regulatory trends.

In addressing the research questions, this exercise sheds light on the types and nature of the restrictive measures adopted during Covid-19 and their relationship to the emergency. The paper finds that two types of unilateral restrictive measures are salient: new and tighter screening rules on foreign investment and the imposition of direct and indirect taxes on digital services, digital transactions, and services providers. This mapping contributes to assessing the risks that are of concern in the subsequent part of the paper.

The survey also highlights several trade and investment enhancing measures adopted during the pandemic, including investment liberalisation in services sectors, (temporary) regulatory flexibilisation of prudential regulations in the financial sector, and waivers and suspensions of taxes and other government levies, amongst others.

Trade and Investment Restrictive Measures

While national measures on the restrictions, bans, and duties for the exports of PPE, ventilators, vaccines and other essential inputs and goods are widely known, most measures affecting trade in services and investment have gone unnoticed. Except for measures restricting the movement of persons across national borders and quarantine/self-isolation periods after international travels, national measures affecting international trade in services and investment have received limited attention. As of July 5, 2021, the [WTO](#) had mapped 137 measures affecting trade by WTO members between trade-restrictive and trade-enhancing/facilitating measures.

In the financial and securities market, the restrictive measures included temporary bans for short-selling securities and similar transactions on the regulated markets in Italy, Belgium, and France. These bans have been lifted in these 3 cases. The Republic of Korea temporarily tightened regulations on the short selling of stocks. Korea also raised the cap of foreign exchange (FX) derivatives positions for local and foreign banks.

Some WTO members imposed stricter scrutiny of foreign investments on specific businesses related to public health or the supply of critical goods and services to their population or government. Regardless of the value of their investments, some WTO members also imposed (temporary) tighter screening of state-owned investors from other WTO members or private investors assessed as being closely tied to or subject to direction from foreign governments ([Government of Canada 2020a](#)).

In the European Union, the sectors for higher screening are outlined broadly as including those operating in health, medical research, biotechnology, and infrastructures deemed essential for security and public order. The framework of the European regulation on screening of foreign direct investments into the Union dates to pre-Covid-19 times. Although the guidelines of the [European Commission](#) (2020a) ahead of the application of the regulation highlight the need to protect strategic Europe's Assets amid the Covid-19 emergency.

The Commission (2020a) states that:

However, today more than ever, the EU's openness to foreign investment needs to be balanced by appropriate screening tools. In the context of the COVID-19 emergency, there could be an increased risk of attempts to acquire **healthcare capacities (for example for the production of medical or protective equipment) or related industries such as research establishments** (for instance developing vaccines) via foreign direct investment. Vigilance is required to ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens. [emphasis in the original].

France added biotechnology to the list of critical technologies likely to have FDI screening and (temporarily) reduced the threshold of voting rights in the acquired company that triggers the screening procedure. These new restrictions apply only to investors from non-members of the EU and non-members of the European Economic Area (EEA). In Germany, the FDI review also extended to the health sector. A notification threshold of 10 per cent will also apply to companies providing services necessary to ensure the functioning of government communication infrastructures. Italy issued (temporary) foreign investment screening measures similarly, subjecting investments in the food security sector; health, banks, and insurance companies; and financial infrastructure to such screenings. Acquisitions within the European Union are also subjected to review if above the 10 percent threshold, even if control of the Italian business does not result from the investment operation. Poland also introduced a stricter screening of foreign investments from non-EU, non-EEA, and non-OECD members. Slovenia also introduced measures of similar scope for specific sectors or companies involving critical infrastructure/critical technologies until 2023.

Also impacting foreign investments, although not exclusively limited to them, the United Kingdom introduced in the *Enterprise Act 2002* (UK) [Order 2020] a new public interest consideration to the already contemplated in the Act for government intervention in mergers and acquisitions. This measure is not circumscribed to the Covid-19 emergency; it allows the government to intervene in mergers involving businesses with a role in combatting or mitigating the impacts of public health emergencies more generally. On April 29, the *National Security and Investment Act 2020* (UK) received Royal Assent. The new Act provides for notification and approval requirements for investments in 17 sectors of the economy.

India introduced measures requiring prior government permission when the investors are entities of a country that shares a land border with India or where the beneficial owner is a citizen or is situated in that neighbouring country.

This mapping of restrictive investment measures is consistent with recent reports from UNCTAD and the Global Trade Alert. In the first case, UNCTAD mapped 96 investment policy measures between May 2020 and December 2020, from which 45 percent were restrictive while 55 percent were trade-enhancing (2021a, 2). This number of restrictive investment measures is the highest since 2003 (UNCTAD 2021a, 2). Global Trade Alert confirms that adoption and implementation of these restrictive investment measures continue throughout 2021 (Evenett 2021, 7), with countries such as the United States, China, and the Russian Federation also introducing new rules or broadening the scope of their review.

The Global Trade Alert mapped close to 20 measures, between January 2020 and April 2021, concerning proposed regulations and measures already in force for taxing digital services. In some cases, the new taxation measures apply to all economic sectors (eg, Canada, Brazil, Argentina, Turkey, Spain, the EU, Thailand, and South Africa), others target platform providers (e.g.,

Mexico, the United Kingdom) and few limit their scope to providers of online advertising (e.g., the United States (Global Trade Alert 2021), and Colombia [Bill 439/2021, art 54])². The measures could concern a digital tax, taxing the revenue of some digital services companies and/or a Value Added Tax (VAT) on certain digital services. For instance, Thailand introduced a VAT for online services by foreigners applicable to all economic activities. Canada is consulting the public on a GST (goods and services tax)/HST (harmonised sales tax) for cross-border digital services ([Government of Canada 2020b](#)). Indonesia introduced taxes for trading activities through electronic systems for companies and individuals. The country established an income tax for foreign suppliers and platforms that satisfy significant economic presence criteria applicable to the internet and other network-enabled services providers. Alternatively, foreign suppliers and platforms could be subjected to an electronic transaction tax instead [Law Number 2 2020 (Indonesia); Partogi and Muhariastuti 2020]. As of 1 July 2020, foreign suppliers of intangibles and services need to register and are responsible for charging a 10 percent VAT, equal to the domestic VAT.

Trade and Investment Enhancing Measures

Governments have also implemented measures to help services sectors cope with the demands on telecommunications, financial services, and other services during the pandemic.

The bulk of the facilitating measures concern the financial sector. These measures include support to financial services institutions for the use of capital buffers to promote ongoing lending to the economy; relaxing of buffer requirements and lowering of countercyclical buffer levels; allowing total capitalisation of the banking system's profit; increase of the banking sector's liquidity by reducing commercial banks' foreign exposure; private moratoriums for banks and financial institutions through the deferral and settlement of repayments issued by national banks/treasuries; temporary liquidity support by national banks in the form of bank loans, and broader liquidity supports to other financial institutions. Some WTO members also reduced the required reserves ratios for commercial banks and other lending institutions, and others allowed banks to operate temporarily below the liquidity coverage ratio. In limited instances, banks received flexibility to participate in the domestic derivatives markets when they were otherwise forbidden from participating.

Some governments took financial measures targeted at physical persons, allowing commercial banks to reschedule mortgages, deferring credit rates, and encouraging lending at lower interest rates from other microfinancing institutions. In some other cases, governments took measures delaying the payment of instalments for loans to citizens and legal persons, while others allowed banks to exempt mortgagors from the amortisation requirements of their loans temporarily.

In health services, facilitation measures included (temporarily) allowing telemedicine for medical services and digital medicine prescription in Brazil, France, Hungary, Romania, and Indonesia. Some countries suspended the requirement for a previously established relationship patient-practitioner in allowing the supply of telemedicine services.

As for the temporary movement of people, facilitating measures included the issuance of visas extending the stay for temporary work visa holders employed in critical sectors for the pandemic. Measures also encompassed automatic and free of charge extensions of residency and work permits for health professionals. In the United Kingdom, automatic and free of charge visa extensions for medical professionals stretched to their family members. The European Union also issued general guidelines to facilitate the safe movement of transport workers, services professionals, essential staff and passengers within the single internal market ([European Commission 2020b](#)).

Governments have also taken measures to ensure the supply of 'necessary services' to assist foreign-invested enterprises in their territories and attract foreign investments in strategic sectors. In the case of China ([Ministry of Commerce People's Republic of China 2020](#)), these services included not only investment promotion but also targeted assistance based on local conditions and help in resuming production and operations. Other facilitating measures included (temporary) reductions of monetary thresholds for foreign investments proposed or made after a set date.

² Debating a tax reform incorporating a 20 percent withholding tax for payments to be made overseas for advertising and marketing services supplied from overseas but directed to the national market or whose benefits take place in the country.

A few WTO members decided to postpone auctions to allocate the 5G spectrum in the telecommunications sector. This measure could be read as trade enhancing because it attempts to secure a higher number of bidders. These measures were also said to be motivated by the need to focus on providing connectivity services during the pandemic. India introduced flexibilities to its guidelines for companies providing 'Applications Services' such as telebanking, telemedicine, tele-education, tele-trading, ecommerce, call centre, network operation centre, and other IT-enabled services. Some members, such as Kenya, fast-tracked operating licences to ensure coverage of internet services in rural areas. Others allocated additional spectrum to licensed network operators to help meet increased customer demand for mobile broadband (e.g., The United States). Oman unblocked the access to voice over the internet protocol (VoIP) applications, including Skype, Google Meet, and Zoom to facilitate the operation of private businesses, education providers and government agencies. The United Arab Emirates also lifted the restriction, permitting VoIP applications services such as Microsoft Teams, Skype for Business, Google Hangouts Meet, Cisco Webex, and Zoom. In some instances, governments granted temporary extensions for the renewal of radiofrequency spectrum licences.

Governments have taken measures to reduce, waive or delay the payment of taxes for specific services businesses having liquidity problems, or more generally. Some are also granting (automatic) extensions for licenses, permits or authorisations required to provide services such as fuel distribution. Measures also include exemptions for the payment of fees for tourism businesses.

In air transport services, some governments suspended minimum operating slot times (eg, the United States and the EU), others introduced flexibilities in the training for professionals in the sector, and others extended the validity of permits, licences, ratings, endorsements, attestation, and certificates of professionals and workers. Governments also took measures to facilitate cargo transport by air. The European Union also introduced temporary flexibilities for the levying of port infrastructure charges for maritime services. Facilitation measures in the transport services included the waiving of self-isolation for aircraft/ships/train crews.

In distribution services, members incorporated flexibilities regarding the remote operation of businesses for the retail trade of medicines and related products.

Several sources mapped various investment enhancing measures, including the liberalisation of investments in Indonesian telecommunications, the Indian digital media, and the defence sectors. UNCTAD (2021a, 5) also mapped the liberalisation of foreign investment in agriculture, pharmaceutical, energy, digital media, financial services, and construction services (e.g., China, Ethiopia).

The Assessment of National Measures Adopted During and 'in Response to' the Pandemic

The mapping of restrictive and facilitating measures affecting trade in services and investment shows that since the start of the pandemic, as for numbers, most WTO members' measures were trade and investment enhancing. As of July 2021, 32 of 137 that the WTO mapped were trade and investment restrictive, while the bulk of measures were trade enhancing (97). In limited cases, the measures were neutral because they encouraged the private sector (e.g., banks and telecommunications providers) to act in specific ways or entail trade enhancing and trade-restrictive effects. In one instance, the scope of the measure was unclear. The public subsidy nature of the measure was evident only in one of them (FCC 2020). Subsidy programs generally have contentious connotations and have not been disciplined in the context of services at the multilateral, let alone plurilateral level. Even though they have not been mapped extensively, there are signs that during the Covid-19 emergency, many governments have introduced subsidies to support economic sectors and boost economic recovery (Global Trade Alert 2020). These subsidies could be in the form of financial grants (eg, [Prime Minister of Australia](#) (Cth) 2020), special funds and aids, and even tax benefits to encourage investment (e.g., Decree 268/020 2020 (Uruguay)).

As expected, WTO members took most of the measures in support of the financial sector to ensure its lending capacity and liquidity, with around 40 percent of the measures (55) in this sector or across the board (15). Some members also adopted restrictive temporary suspensions of short selling in their securities and stock markets to avoid harmful speculation. The second sector where governments adopted most of the measures was telecommunications and other internet or networked-

enabled services, with 22 measures mapped by the WTO. The need to ensure access and quality of telecommunications services, particularly internet connection, justified the measures. Transport services by different means (maritime, air and road) also reported high numbers under the WTO non-comprehensive list of measures.

Most investment restrictive measures that WTO members adopted in connection with the Covid-19 emergency concern new and additional review procedures and notifications for foreign investment in particular investments on sensitive domestic services (e.g., health services), critical infrastructure or core technologies. However, most members have broadly defined the new sectors subject to the governmental screening rules. Governments have justified most of these measures on national interests or security grounds (UNCTAD 2021b, 110). They aim to prevent and avoid 'hostile' (foreign) takeovers during the Covid-19 pandemic (UNCTAD 2021a, 3). However, in most cases, they are not limited to screening foreign investments resulting in company controls. Although many of these measures for a more rigorous review of foreign investments are said to be in response to national interests related to the Covid-19 emergency, only a few cases, such as Slovenia (Sodja and Jandl 2020) and Hungary (WTO 2021), have set specific dates or timeframes to eliminate the measures. In many cases, the measures are open-ended.

Framework regulations for new and additional screening of foreign investment in crucial domestic assets (eg, critical infrastructure) and discussions on this subject matter precede the pandemic (OECD 2016, OECD 2020, 3). Thus, it is questionable that the Covid-19 emergency and the need to respond to it are their primary motivations (Evenett 2021). The Covid-19 crisis contributes a compelling and visible frame to justify these tighter review measures on foreign investment and the addition of new sectors such as health and R&D to the screening regimes.

Overall, WTO members have adopted more trade enhancing/facilitating measures than restrictive measures during the pandemic. Governments also have adopted more investment enhancing measures than restrictive measures (UNCTAD 2021a, 2; UNCTAD 2021b, 109), with developing and transition economies taking the lead in the former front and developed countries in the latter (United Nations 2014)³. Governments have shown significant investment policy activism during the pandemic between investment enhancing and investment restrictive measures, with an increase of 42 percent in the number of measures compared to 2019 (UNCTAD 2021b, 109).

Table 1. on the following page characterises the types of measures adopted in response to the Covid-19 emergency affecting trade and investment in services.

Put into perspective pre- and post-pandemic, global regulatory restrictions for trade and investment in services increased in 2020. However, the tightening of some of the measures in many cases was planned or underway before the pandemic (OECD 2021a). The OECD mapped a tightening trend in services trade regulations in recent years 'notably' accelerated in 2020 compared to 2019 (2021, 3). According to the 2020 Services Trade Restrictiveness Index (STRI), the number of restrictive policy changes more than double in comparison to 2019 in the 48 economies examined. The OECD reported that trade liberalising measures remained parallel with 2019 (2021a, 3). These restrictions are primarily attributed to screening measures of foreign investment and other barriers to commercial establishment. Similarly, UNCTAD (2021b, 109) confirmed that the number of restrictive and regulatory measures on investments, generally, peaked during the pandemic with an increase of close to 58 percent in the number of measures in relation to 2019.

Considering trade and investment restrictive and enhancing measures taken since the pandemic started and a longitudinal approach to assessing policy and regulatory changes offer a more comprehensive picture of how these changes situate in recent global trends than only having a snapshot view of the changes since the start of the pandemic. Through this assessment, it becomes clear that the major trade and investment restrictive measures adopted during the pandemic —new and tighter screening rules on foreign investment and the imposition of direct and indirect taxes on digital services and services providers— are part of regulatory trends that started before the pandemic and accentuated during it.

³ The classification is based on the country classification of the United Nations available at <https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>.

Table 1. Measures Affecting Trade and Investment in Services Adopted during Covid-19

Trade		Investment	
Restrictive	Enhancing	Restrictive	Enhancing
Borders closure	Waivers, automatic extensions: -licenses -certifications -Skills attestations and training -Exams (medical or others) -Fee waivers	Entry and establishment -notification -approval/clearance -review -list of 'prohibited'/unreliable foreign entities -lowering of control thresholds for review -broadening the sectors or scope of circumstances for screening	
Imposition of taxes: -Digital transactions -Revenue on digital services -VAT on digital services	-Taxation payment deferrals -Taxation reductions -Taxation exemptions		Improving business climate
Suspension of short-term selling in financial markets	-Flexibilisation of regulatory and prudential requirements Liquidity Reserves Capital buffers Countercyclical buffers Relief schemes/Public Funds	Ban of foreign investment in specific sectors Foreign ownership caps	Liberalisation/opening up services sectors to foreign investment Removal or reduction of foreign investment thresholds
Quarantine and self-isolation restrictions	Waiver of quarantine and self-isolation periods for specific professionals/workers		Investment promotion and facilitation
Tightening the screening of compliance with conditions of specific types of visas	Loosening of visa conditions for health professionals	Local participation/content requirements	
		Review by the competition authority	
		Registration requirements	
		Local presence requirements	

Source: Author's elaboration based on UNCTAD's Criteria and Global Trade Alert Criteria
 Subsidies are not included in the categories as such

Security Exceptions in New Generation PTAs: Have They Gone Too Far?

This part examines four landmark PTAs and IIAs: the CP-TPP, CAI, DEPA and RCEP. These agreements represent the most up to date developments in preferential rules for trade and investment. This part questions the extent to which unilateral restrictive measures adopted by states during the pandemic have justification or are permitted within the architecture of these agreements. If so, whether these agreements have balanced the pursuit of legitimate public policy objectives, particularly security, and agreement effectiveness.

To answer these questions, the paper examines the two types of restrictive measures on trade in services and investment featuring most prominently since the start of the pandemic, as mapped above. This part reviews the consistency of new and tighter screening measures on foreign investment and the imposition of taxes on digital services with treaty rules and against security exceptions — escape clauses — provided in these agreements.

The primary concern underlying this part is that PTA and IIAs parties might rely on security exceptions to justify restrictive measures that are disguised economic protectionism or nationalism rather than a genuine response to ‘essential’ security interests. The concern also extends over recent restrictive measures that have other policy rationales beyond the crisis response, but that may find a lower threshold for review in the treaty security exceptions than the general exceptions. This paper characterises these two scenarios as instances of abuses and misuses of treaty security exceptions that could compromise treaty effectiveness. This concern is relevant because of the risks that treaty commitments could be undermined when regularly relying on security exceptions. Indiscriminate use of security exceptions to justify tighter controls over foreign investments or their rejections and other restrictive measures would be counterproductive for the economic openness that is one of the bases of PTAs and IIAs agreements.

The economic significance of the partnerships in terms of the volumes of trade and total FDI stock coverage (UNCTAD 2021b, 124), the partners involved and their geopolitical standings, and their subject matter (e.g., DEPA) support the case selection of agreements. Although two of the four PTAs have not entered into force (RCEP, CAI). Escape clauses in these agreements provide a broad array of options with security exception clauses closely resembling the exceptions in WTO agreements (CAI), others adding new limbs in response to current scenarios of national policy concerns (RCEP), and others introducing the highest deference on the parties to ‘escape’ from their treaty commitments (RCEP, CP-TPP, DEPA).

Preliminary Issues: Legal Considerations

Regarding restrictive measures (said to have been) adopted in response to the Covid-19 emergency, a preliminary step for review needs to consider the scope of the chapters on cross-border trade of services, investment, and e-commerce and the relevant carve-outs in each agreement. The carving out of taxation measures from some treaty disciplines is essential for any legal analysis that attempts to review the consistency of a measure with the treaty. To review the consistency of a measure with the respective treaty, the first issue to address would be whether the measure is covered by the treaty obligations fully or partially (Voon 2020, 100).

Only limited disciplines provided in the CP-TPP chapters apply to taxation measures (art 29.4.6 (a), (b) and (c)). Taxation measures are generally excluded from the application of the CP-TPP (art 29.4.2). In the case of DEPA, taxation measures are also excluded from the agreement (15.5.2), while investment measures are not part of the subject matters in the agreement. In CAI, article 11 qualifies the application of treaty disciplines to taxation measures. National treatment (NT) does not apply to existing taxation measures inconsistent with this discipline, provided these measures comply with the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMS) (art 11.5). In RCEP, the exceptional instances where disciplines of the agreement apply to taxation measures are provided in article 17.14. Parties left to future negotiations whether protection against expropriation applies to taxation measures (art 10.18).

These carve-outs mean that the dangers of resorting to security exceptions to justify taxation measures on digital services that might be disguised protectionism, nationalism or have no actual basis on the Covid-19 emergency are ameliorated. In practice, these risks are less than envisioned from the onset because taxation measures are exempted from many of the disciplines and

obligations provided within these agreements. However, the possibility is not entirely ruled out because for some PTAs, for instance (NT), most favoured nation (MFN) and the prohibition of non-discrimination of digital products still apply in relation to all taxation measures or some types of them.

Along with the measures expressly carved-out from the scope of these treaty disciplines, another issue to consider is whether PTA parties have listed measures on taxation or decisions on the admission or approval of FDI or FDI statutes as non-conforming measures or reservations to their commitments under the cross-border trade in services chapters and investment chapters. Treaty parties may reserve policy space this way. In the case of CAI, measures taken by some EU members regarding tightening of screening rules for foreign investments in strategic assets or activities of strategic importance have already been included in the EU's schedules of reservations (Annex II, Schedule of the European Union, Reservation I) for NT and or other substantive obligations and schedules of commitments and limitations for market access (Annex III, Schedule of the European Union). Italy and Lithuania incorporated this type of reservation as a limitation in all sectors. CAI does not generally exclude FDI screening regimes or decisions by FDI authorities from the state-to-state dispute settlement mechanism.

In the CP-TPP, Chile did something close to the above kind of reservation, carving-out from the application of the investment chapter the laws and regulations regarding the approval and conditions of approval of foreign investment applications (CP-TPP Annex 9-F).

Most commonly, parties may subject some of these measures to basic chapter disciplines on services and investment but may exclude them from the general dispute settlement mechanism state-to-state provided in the PTA or from investor-state dispute settlement (ISDS). This is the case of those decisions by competent national authorities (as listed) on the approval or admission of foreign investment.

All parties have taken the above approach in RCEP. FDI Screening regimes in RCEP are excluded from the general dispute settlement mechanism (RCEP 17.11). RCEP does not provide either for an ISDS mechanism as many of the prior IIAs amongst the RCEP parties. This exclusion should also be read in conjunction with the actual scope of the treaty obligations that RCEP parties define in relation to their national FDI screening regimes and their amendments which depends on the schedules of commitments by each RCEP party.

In the CP-TPP, screening measures on FDI of the authorities listed in Annex 9-H are excluded from the general dispute settlement mechanism of the agreement and ISDS. Some of the CP-TPP parties (e.g., Australia, Canada, Mexico, and New Zealand) have reserved wide policy space in their FDI regimes this way.

These approaches in CP-TPP and RCEP soften substantive disciplines and obligations that may apply to these screening measures (Abbott et al. 2000; Abbott and Snidal 2000). Thus, even if obligations on NT, MFN, or fair and equitable treatment (FET) may apply to new or tighter screening rules implemented by RCEP or CP-TPP parties during the pandemic, decisions of national authorities regarding the approval, admission or the conditions and requirements imposed to an investment (or their enforcement) that may violate these substantive treaty obligations are not justiciable under these treaties. Affected parties may need to resort to political, rather than judicialised means to resolve these differences, which outlines a relevant architectural choice in the design of these agreements. This choice may evidence a preference for political rather than legalised solutions to differences arising from screening/entry and approval processes of foreign investments.

As for FDI screening rules and regimes, the potential risks of justifying new and tighter screening rules on foreign investment on the essential security exception provided in these agreements are also reduced through other architectural choices⁴. Parties seem to have reserved broad regulatory space by exempting, carving-out or extensively qualifying how substantive obligations apply to such screening regimes. This architectural choice means that in practice, the universe of measures regarding screening, review, and approval processes of foreign investment under the scope of the agreements that could be subjected to scrutiny is lesser than initially anticipated. However, for this smaller universe of national measures, the security exception could still be a

⁴ But see Caroline Henckels. 2018. Should Investment Treaties Contain Public Policy Exceptions? *Boston College Law Review* 59 (8): 2825-2844. Advocating for an understanding of all these treaty architectural choices as exceptions.

means to justify their inconsistency with the agreements. Thus, abuses and misuses of security exceptions to justify restrictive measures on services investments that are disguised forms of protectionism (Ma 2019, 904, 911) or to defend restrictive measures that should not be justified under these types of escape clauses because they have other policy rationales remain possible.

Unpacking the Provisions

The CP-TPP (art 29.2) incorporates a broadly worded security exception that draws from GATT Article XXI (b) and (c) providing that: ‘Nothing in this Agreement shall be construed to [...] (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 interests* [emphasis added].

A closer review of this provision in the CP-TPP suggests that these security exceptions in the CP-TPP have a broader latitude than the GATT and GATS security exceptions. The scope of the measures for the protection of a party’s essential security interests is not limited to the circumstances/events referred to in article XXI (b) (i)-(iii) of the original GATT and article XIV Bis b (i)-(iii) of GATS.

Following the general rules on interpretation in international law, these differences in the treaty text with WTO agreements should be presumed as intentional. These divergences have implications for treaty interpretation if CP-TPP parties attempt to rely on this security exception to justify a measure *prima facie* inconsistent with the CP-TPP obligations (Mantilla and Pehl 2020, 72).

In interpreting the security exceptions of the CP-TPP, art 28.12.3 of the agreement also needs to be considered because it requires from dispute settlement panels that:

[...] With respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body. The findings, determinations and recommendations of the panel shall not add to or diminish the rights and obligations of the Parties under this Agreement.

Because adoption of GATT/GATS security exceptions is not identical in the CP-TPP, CP-TPP dispute settlement panels need to weigh the differences in drafting when attempting to draw interpretative guidance from WTO case law on the scope and meaning of terms. These differences are particularly relevant considering the recent WTO cases *Russia –Traffic in Transit* discussing the reach of the GATT security exception in article XXI b (iii) and *South Arabia – Protection of IPRs* addressing the security exception under article 73 b (iii) of TRIPS. Some may argue that the security exception provided in article 29.2 of the CP-TPP is not exact incorporation of the GATT security exceptions in XXI b (i)-(iii) and c; thus, a dispute panel is in no obligation to consider relevant WTO reports.

From this wording of the article 29.2 security exceptions, it becomes clear that CP-TPP affords parties even more expansive regulatory space in the use of security exceptions to protect their own essential security interests than the initially conceived in GATT/GATS. The subjective and self-judging aspects of the security exception are (intentionally) reinforced in the CP-TPP drafting. However, the deference to CP-TPP parties does not exempt CP-TPP parties from applying this exception in good faith (*Vienna Convention* art 26; Schill and Briese 2009, 66, 106-7)⁵.

DEPA also provides security exceptions in Module 14, article 15.5. that rely on the template provided in the CP-TPP security exceptions with identical wording. Thus, both agreements raise the same concerns and present similar risks in using these exceptions to protect essential security interests. Following the CP-TPP, DEPA expressly directs dispute settlement panels

⁵ But see Ma (2019, 933-42). The author rejects the good faith approach to the review of self-judging security exceptions in investment disputes and proposes an alternative approach through the payment of compensation for expropriation. He argues his proposed approach promotes political efficiency and eliminates the moral hazard problem of this type of exception.

to consider the interpretations of WTO panels and the WTO Appellate Body regarding provisions of the WTO that have been incorporated in DEPA (art 14C:6, 3).

The RCEP agreement incorporates security exceptions that are semantically close to GATT Article XXI. Unlike the security exceptions in WTO agreements, article 17.13 of RCEP features a (new) critical infrastructure limb stating that:

Nothing in this Agreement shall be construed: [...] (b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests: [...] (iii) taken so as to protect critical public infrastructures, including communications, power, and water infrastructures; [...].

This list of what infrastructure amounts to critical public infrastructure is only illustrative. An explanatory footnote complements the provision stating that it covers infrastructure publicly or privately owned.

Importantly, RCEP expands the scope of the security exceptions' objective circumstances to cover those measures taken in time of war or other emergency in international relations and measures taken in time of national emergency (art 17.13.b (iv)). This drafting dissipates doubts about the possibility of raising a security exception defence in relation to measures that RCEP governments consider necessary to protect their essential security interests during the Covid-19 emergency. Notwithstanding the general security exceptions applicable to RCEP, the investment chapter provides chapter-specific security exceptions. Article 10.15 prescribes that '... nothing in this Chapter shall be construed to: ... (b) preclude a Party from applying measures that it considers necessary for: (i) the protection of its own essential security interests. This deliberate difference expands, even more, the degree of deference given to RCEP parties when adopting or maintaining measures affecting investors or covered investments. Again, this provision emphasises the subjective aspects of the security exception, reducing the scope of the objective review that adjudicatory bodies can undertake in relation to restrictive investment measures.

As with the CP-TPP, RCEP gives weight to the WTO case law providing that dispute settlement panels shall consider relevant interpretations in reports of WTO panels and the WTO Appellate Body, adopted by the WTO Dispute Settlement Body with respect to any provision of the WTO Agreement incorporated in RCEP. An explanatory note gives a more expansive approach to the guidance of WTO case law in interpreting RCEP by stating that panels are not prevented from considering WTO case law with respect to a provision of the WTO Agreement that is not incorporated into RCEP.

The CAI Agreement incorporates security exceptions under Article 10 of Section VI, which are semantically the closest to the GATT/GATS security exceptions. CAI limits the exceptions for protecting essential security interests to the three events prescribed in GATT and GATS with no expansions or additional limbs. These circumstances include actions taken in time of war or other emergency in international relations.

As with the RCEP and CP-TPP, CAI acknowledges the relevance of WTO case law with a footnote that requires panels to consider relevant interpretations in reports of WTO panels and the WTO Appellate Body relating to substantially equivalent obligations (s V, art 11, n 1).

From a legal and practical perspective, differences in treaty drafting also entail that the security exceptions in these agreements are subjected to different standards for review, particularly between CAI and the rest of the agreements studied in this Part. In unpacking these provisions, it is also instructive to investigate the reasons behind drafting more open-ended security exceptions in these recent treaties than in WTO agreements. The drafting of these new generation exceptions may respond to the broadening of the security concerns at the national and international levels, including energy security, environmental security, food security and cybersecurity going beyond traditional understandings of security as largely military and adversarial (Heath 2020, 1034). Mantilla and Pehl state that what they mapped as the third generation of national security exceptions 'is driven by the goal of ensuring that the State enjoys an ample degree of discretion in the protection of its security interests' in a context of uncertainty, scepticism towards trade and investment commitments, and reduced willingness to submit sovereign decisions to international scrutiny (2020, 63-4).

However, the concern is that in dealing with ‘new’ security threats or the discontents over the outcomes of previous international adjudication, these agreements may have gone too far to the point of seriously undermining the commitments that parties have made under these preferential and investment agreements.

The (Re)Assessment of Risk Factors and No Definite Answer

After examining security exceptions in CAI, the CP-TPP, DEPA and RCEP and several devices such as carve-outs, limitations, and exclusions from dispute settlement mechanisms in these agreements’ architecture, it becomes clear that the balance tilts in favour of the regulatory autonomy of states. As in the case of trade in goods (Pauwelyn 2000,729), these agreements give enough deference to governments to take measures that restrict trade in services (and investment) but may be justified in other public policy objectives such as security (Natens 2016, 254; Henckels 2020, 561)⁶.

In safeguarding their policy space through flexibility in treaty drafting (Koremenos, 2016 160), parties have also opened the gate for more expansive, self-serving interpretations of the security exceptions, increasing the risks of undermining the effectiveness of these agreements. Helfer (2013, 176) warns about the dangers of overly capacious flexibility provisions that could prompt ‘opportunistic behaviour whenever economic, political or other pressures make compliance inconvenient’. The risks that security exceptions in CP-TPP, DEPA and RCEP be used to justify trade and investment measures that are disguised economic protectionism, nationalism, or have a substantive basis on other policy objectives rather than essential security interest are greater than in the original GATT/GATS WTO context. Broad understandings of the ‘essential’ security interest in a pandemic setting, as allowed in these treaty provisions, open the space for interpretations of the security exception as also encompassing health security (Sornarajah, 2021, 589, 596). Relationships could also be drawn between the pervasive economic effects of the crisis and economic security as a matter of essential security. There is anecdotal evidence in the LG&E v Argentina investment tribunal that an economic crisis could be regarded as being as severe as a military threat for the purpose of applying the essential security defence. Although allowing for expansive interpretations of the security exceptions may be well-intended to justify bona fide, legitimate measures to pursue public policies in times of crisis, they are also a double-edged sword and a vacuum that risks opportunistic behaviour from the states.

Regarding the two types of measures that have been the source of concern in this paper — tighter and new screening rules on foreign investment and taxation of digital services —this paper finds that treaty parties enjoy a high degree of deference in taking these measures. However, in these two instances, the states’ preference is to preserve their regulatory space primarily through other treaty devices that significantly qualify, exempt, or limit the application of treaty obligations on these types of measures. For these trade and investment restrictive measures, the risks of resorting to security exceptions for justification is less than originally thought because in a substantial number of cases, they are out of the scope of these treaties, or the measures are not justiciable or subject to review under the treaty. In some instances, although distant, the risk remains for some treaty parties and types of measures covered by the treaties.

Relying on security exceptions that are deliberately broader than the ‘master’ article XXI GATT security exceptions and article XIV Bis GATS security exceptions, some CP-TPP parties could still attempt to justify the legality of challenged new and additional restrictions for deeper and further screening of foreign investment. Respondent parties could allege that these measures were necessary to protect essential security interests of the party when the restrictive measures had other policy bases, or protectionist or nationalism grounds rather than a legitimate policy rationale.

However, the successful justification of these restrictive measures (e.g., tighter screening for foreign investment entry) requires a case-by-case analysis to assess their rationale and implementation. This paper takes the view that despite considerable deference and the self-judging nature of many aspects of the security exceptions in the CP-TPP, the use of security exceptions does not confer unfettered discretion; parties are still subject to good faith when relying on these exceptions. Arguably, these security exceptions continue to be justiciable and subject to review by a dispute settlement panel.

⁶ But see Henckels 2018, 2834-2837. For a discussion on how the interpretation of security exceptions in BITs as affirmative defenses may restrict regulatory flexibility.

The distant risk of using security exceptions to justify these types of measures in CAI is alleviated thanks to its semantic closeness with the GATT/GATS security exceptions. There is the expectation that a CAI tribunal will follow or at least consider the standard of review set in *Russia –Traffic in Transit*, rejecting the (entirely) self-judging character of the exception and its non-justiciability. In the case of CAI, any treaty party trying to justify new or tighter FDI screening measures that fall within the scope of the treaty obligations will have the burden to demonstrate that the restrictive measure also falls within the range of one of the objectives (circumstances) provided in Section VI, Article 10 (b), most likely that it is a measure ‘taken in time of [...] emergency in international relations.’ In this respect, the Panel determined that an ‘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 [7.76]. The Panel maintained that these situations give rise to types of interests such as defence or military interests or maintenance of law and public order interests [7.76]. Further, the Panel stated that such emergency is ‘an objective state of affairs’ subject to factual determination [7.77].

That a CAI tribunal would be sympathetic to accept the Covid-19 crisis as an objective emergency in international relations remains uncertain but plausible (Ruse-Khan 2020). The pandemic provides a compelling frame of undisputable emergency at an international and global scale, even if not directly connected with military interests or armed conflict (primarily) amongst sovereign states [7.73]. The sui generis nature of the pandemic, like no other crisis in recent history, leaves room for this interpretation because the notion of ‘emergency in international relations’ as put forward by the *Russia –Traffic in Transit* Panel incorporates the non-excluding expression ‘generally’ which means ‘usually’ or ‘in most cases’⁷.

Oke (2021, 402) suggests that ‘where a pandemic affects the ability of a state to maintain law and public order, then (at least for that state) it could be deemed an “emergency in international relations.”’

Regarding the scope of the qualifying expression ‘taken in time of’ to the objective circumstance ‘emergency in international relations’, A CAI tribunal would need to consider the Panels’ view that this expression means ‘during’ [7.70]. The Panel states that this requirement entails chronological concurrence between the action taken by the state (eg the restrictive measure) and the emergency. This concurrence is also amenable to objective determination [7.77]. This aspect may pose a non-trivial challenge for the defence of restrictive measures on screening of FDI that could have been formally enacted during the pandemic but were subjected to national debates and public consultations before the pandemic.

Following the Panel’s report regarding the interpretation of the Chapeau in Article XXI (b) (or the equivalent in Article 10 (b), Section VI in CAI), a CAI Tribunal will need to consider two requirements for a party to rely on the exception successfully. First, the CAI party would need to ‘articulate’ sufficiently enough the ‘essential security interests’ that the measure (FDI screening) seeks to protect to demonstrate their veracity [7.134]. A sufficient level of articulation would depend on the emergency.

The Panel further states that:

‘[...]T]he less characteristic is the “emergency in international relations” invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise [7.135].’

Thus, this interpretation would suggest an additional burden for a CAI party in the degree of specificity in articulating its essential security interest than in situations involving, for instance, armed conflict.

Second, the measure at issue (FDI screening) must not be implausible as a measure protective of these interests ([7.138]).

As for the meaning of essential security interest, a CAI Panel would need to consider the suggested in *Russia –Traffic in Transit*,

⁷ But see [7.734] where the Panel seems to narrow down the meaning of emergency in international relations by referring to the context in which it is placed in the treaty text, along with other circumstances such as war and situations that could give rise to defence and military interests, as well as the maintenance of law and public order interests. The same textual context applies for the CAI exception.

where a distinction is drawn between a security interest and the narrower concept of essential security interest. The latter was said to ‘generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.’ ([7.130]). Although it would be left to a CAI party to define what it considers to be its essential security interests, this margin of appreciation is subject to the requirement that the party interprets and applies the term in good faith [7.132].

In practice, these differences in treaty drafting will mean that security exceptions relied on to defend similar measures could be subjected to different standards of review — one set in CP-TPP and another in CAI — with the potential for entirely different outcomes from these reviews.

Legal uncertainty surrounds the interpretation of both treaties, albeit for different reasons. In the first case, whether a panel would take it to be a ‘truly’ self-judging exception; in the second case, whether Covid-19 could be taken as an emergency in international relations. These uncertainties might prompt treaty parties to test the waters in both cases.

The risks of misusing or abusing the security exceptions in RCEP and DEPA do not materialise because in the first case, FDI screening regimes are not justiciable under the RCEP dispute settlement mechanism and investment matters are outside the scope of the treaty’s subject matter for DEPA.

The outcome of this (re)assessment in the context of taxation measures of digital services brought to the surface the active preference of the states to deal with taxation matters outside PTAs and IIAs and the lack of a coherent framework to deal with the taxation of businesses operating on a global scale. These agreements are far from being home for discussing general disciplines on taxation, let alone taxation of digital services and service providers. This gap makes initiatives such as the global corporate minimum tax and the framework for international tax reform (OECD 2021b; OECD 2021c) more relevant than ever, considering the recent national taxation measures of digital services during the Covid-19 emergency mapped in this paper. This issue warrants consideration that exceeds the scope of the present paper, although it calls on the need to delve into the structural causes of recent national taxation measures of digital services, such as the aim for a fairer payment of taxes by global digital companies, with the subsequent fragmented treatments. These are causes beyond the Covid-19 response; thus, justifying these taxation measures on the crisis distracts from tackling them with suitable long-term responses.

Empirical Considerations: Some Additional Firewalls

This part addresses the cases and instances in which security exceptions have been invoked to justify restrictive national measures on trade and investment. This mapping is needed to assess whether there is a real or (perceived) trend, as suggested in some literature, for a generalised use of these types of exceptions from the responding states in the WTO dispute setting and investment disputes.

The text and the negotiating history of security exceptions in the 1947 GATT, in the context of the International Trade Organization (ITO), account for the delicate balance that parties intended to achieve between the national security concerns of one of the GATT architects (The United States) and the ‘benefits to developing the international economy by advancing trade multilateralism (Pinchis-Paulsen 2019). From that negotiation history, it was clear that the exception was intended to be used in limited cases. In the context of the WTO, the objective of the security exceptions continues to be preserving freedom of action for WTO members regarding national defence and security while ensuring that WTO members do not impose protectionist measures that undermine their liberalisation commitments for trade and investment in services (mode 3 of supply). Thus, from the onset GATT contracting parties and WTO members acknowledged significant risks that the security exceptions could be abused for protectionist purposes (Commission A 1947, 20-1; Pinchis-Paulsen 2019, 66). For this reason, only in a few instances GATT contracting parties and WTO members have resorted to the security exceptions to justify measures they have adopted.

The Panel in *Russia –Traffic in Transit* mapped 15 instances between working group discussions, committee meetings, consultations and actual disputes where GATT parties (9) and WTO members (6) attempted to justify measures resorting to

GATT Article XXI exceptions predominantly the exception in literal (b) (Appendix [1.4])⁸. From this review, the Panel concluded that no subsequent practice establishing an agreement between WTO members exists regarding the interpretation of Article XXI, according to Article 31 (3) (b) of the Vienna Convention (Appendix 1.90). Vidal (2018, 204) and Glöckle (2020) maintain that for over two decades and 500 disputes, the WTO members avoided raising the exception before WTO panels.

From the record of these discussions, it also became clear that not only GATT and WTO members have restrained from relying on these security exceptions but also that on occasions, these security exceptions have been used to (questionably) justify economic protectionism measures and actions to exert political pressure on other states via economic means. This appraisal is regardless of how successful their justification would have been if complaints or consultations had been carried on to formal dispute settlement.

Two instances are particularly illustrative of these (ab)uses. First, a global import quota system adopted by Sweden on footwear in 1975. The Sweden government justified the measure based on Article XXI b (iii) of GATT. Further, it claimed that the decrease in domestic production became a threat to the planning of Sweden's economic defence in emergency situations as an integral part of its security policy. Sweden maintained that this policy required the maintenance of a minimum domestic production capacity in vital industries⁹. This capacity was said to be indispensable to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations. An argument that the European Commission resembled, to some extent, when justifying its further scrutiny measures on foreign investment for the health and R&D sectors recently adopted (European Commission 2020a).

Second, the 1999 taxation measures that Nicaragua imposed on all the goods and services imported, manufactured, or assembled in or originated in Honduras and Colombia, along with the cancellation of licences for all the fishing vessels under Honduran or Colombian flag. Nicaragua's measures followed the ratification of a bilateral Treaty on Maritime Delimitation in the Caribbean Sea — The Ramirez López Treaty — between Colombia and Honduras. The economic measures presumably attempted to exert political pressure on these two countries. Nicaragua maintained that the measures were fully justified under GATT Article XXI b (iii) and GATS Article XIV bis 1 (b) (iii) in light of the 'serious international tension' acknowledged by the Organization of American States (OAS) (Dispute Settlement Body 2000, 12). This instance provides anecdotal evidence that WTO members have attempted to justify questionable taxation measures based on security exceptions at least on one occasion. However, the overall record of previous instances and cases over the last 70 years shows a truly exceptional practice in using the GATT/WTO security exceptions (Delimatsis and Hryniv 2020, 6; Natens 2016, 253).

The implied (political) agreement, or in other words, the reliance on state-practice for restrained (Pelc 2016, 100), has been allegedly compromised by the ongoing cases concerning tariff measures by the United States against China¹⁰ and other trading partners and the recent cases decided by WTO panels in *Russia – Traffic in Transit* and *South Arabia – Protection of IPRs* (Voon 2019, 45). From the two cases already decided by Panels in the WTO, Russia was successful at pleading the security exception provided in GATT article XXI, while the panel in *South Arabia – Protection of IPRs* concluded that South Arabia met the requirements of the security exception in article 73(b)(iii) of TRIPS in relation to the national measures adopted that were inconsistent with some of its TRIPs obligations (art 41.1 and 42). However, the Panel maintained that South Arabia did not satisfy these requirements for other treaty obligations (art 61). The latter report has been under appeal since July 2020 (WTO n.d). In the context of the Covid-19 pandemic, at least the United States notified measures regarding the imposition of export authorisation requirements on PPE to the WTO on the grounds of 'protection of human life, or health and essential security interests, inter alia (Committee on Market Access 2020, 2). However, the United States did not expressly refer to any article in

⁸ The Panel limits its mapping to instances where invocations of article XXI GATT provoked debate rather than mere unilateral invocations with no reaction from other GATT contracting parties or WTO members. A GATT Secretariat Note from 1987 recalls three more instances in the GATT context: Peru's embargo of imports from Czechoslovakia in 1954, Ghana at the occasion of Portugal's accession in 1961; and Egypt's boycott against Israel in 1970.

⁹ GATT 1947, Sweden Import Restrictions on Certain Footwear, [GATT Doc L/4250 Add 1](#) (17 November 1975) 4.

¹⁰ Request for the Establishment of a Panel by China, India, EU, Canada, Mexico, Norway, Russia, Switzerland and Turkey, United States -- Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS544/8, WT/DS547/8, WT/DS548/14, WT/DS550/11, WT/DS551/11, WT/DS552/10, WT/DS554/17, WT/DS556/15 and WT/DS564/15 (2018).

GATT in its notification. There are fears that this approach might craft a backdrop for other WTO members and PTA parties to follow (Garcia-Santaolalla 2020, 8).

Whether these recent cases amount to a generalised pattern of state behaviour — a trend (Weber and Baisch 2018, 375) — in resorting to the security exceptions provided in WTO agreements is questionable. However, there is an obvious increase in the number of cases where the security exception, specifically the exception regarding measures/actions taken in time of war or other emergency in international relations, has been pleaded. This increase is also connected to the circumstances surrounding specific measures taken by the United States against China and other trading partners. The outcome of the review from the two WTO panel reports examined above means a push back against the views advocated by the United States regarding the scope and effects of this security exception (Reinsh 2019). These decisions may act as a firewall, discouraging other WTO members from following this approach.

An additional firewall may prevent the risk of abuses and misuses of this security exception from materialising to a scale that could compromise (further) the WTO trade regime. A party's views and arguments raised in relation to the application of a particular security exception, its reviewability and general justiciability may affect, at least reputationally, the party's standing for future cases where it ought to act as claimant (Delimatsis and Hryniv 2020, 3). Other treaty parties and trading counterparts could see these views as basic policy stands. Behavioural approaches to international law and the decision-making process may provide informed insights on the likelihood that this firewall works in practice (van Aaken 2014; Broude 2015).

In ISDSs disputes, the security exceptions have been raised by states and addressed by tribunals and annulment committees mostly in the context of disputes arising from the Argentina – US BIT, regarding measures adopted by Argentina in response to the 2001-2002 economic crisis (Henckels 2020, 571; Ma 2019; Mantilla and Pehl 2020, 47-57). These cases include *CMS v Argentina* (2005); *LG&E v Argentina* (2006) where the respondent was successful in pleading the security exception; *Sempra v Argentina* (2007); *Enron v Argentina* (2007); *Continental Casualty v Argentina* (2008); *El Paso v Argentina* (2011); and *Mobil v Argentina* (2013).

In two recent cases against India (*CC Devas v India* 2016; and *Deutsche Telekom v India* 2017), security exceptions in the Mauritius – India (BIPA) and Germany – India BIT were invoked by India.

In the first case, the claims were brought by Mauritian investors in Devas. The Tribunal, under the UNCITRAL Rules, dismissed India's claim that the Mauritius – India Treaty security exception in article 11 (3) was a self-judging provision [219]. It should be noted that, unlike the GATT/GATS exception, this treaty did not incorporate the language 'it considers', and it did not restrict the nature of the security concern ex-ante. The dispute revolved around the annulment/termination of a contract concluded between Devas and Antrix Corporation Ltd. (Antrix), the commercial arm of the Indian space agency. The contract concerned the leasing to Devas of space segment capacity on ISRO/Antrix S-band spacecraft [202]. India argued that the annulment of the contract was to reserve the S-band capacity for the military and security agencies thus was motivated by national security concerns. India further claimed that a detailed review of its capacity requirements for strategic purposes made it clear that India's national security requirements far exceeded India's S-band capacity [305].

By a majority ruling, the Tribunal found that India's decision to annul the contract was partially motivated by other considerations different to essential security interests. The Tribunal concluded that the reservation of spectrum for the need of defence and paramilitary could fall within the scope of the exclusion [exception] of article 11 (3). However, the Tribunal concluded that India's decision to take over the spectrum allocated to Devas for 'railways and other public utility services as well as other societal needs of the countries strategic requirements' could not be regarded as covered within article 11 (3) [354-6]. It further maintained that although India was entitled to re-assign the S-spectrum for non-commercial uses, the part not reserved for military or paramilitary purposes would be subjected to expropriation obligations under the treaty [371].

The Tribunal concluded that a reasonable spectrum allocation directed towards protecting India's essential security interests would not exceed 60 percent of the S-band allocated to the claimants. Thus, India was liable to pay compensation to the claimant, based on expropriation, for their investment to a limit of 40 percent of the value of the investment [373], [501]. The Tribunal also found a violation of the fair and equitable standard of treatment in respect to the portion of the spectrum taken

from Devas that was not required for military uses.

The *Deutsche Telekom v India 2017* case also involved the annulment of the Devas Agreement and the allocation of India's satellite frequency spectrum. It was brought by *Deutsche Telekom*, who became a foreign investor in Devas through its Singaporean subsidiary. In this opportunity, the Tribunal also dismissed the self-judging character of the treaty exception, although India did not argue that character on this occasion [231]. The Tribunal also rejected the application of the security exception as mentioned above under the provisions of the Germany – India BIT, and India was ultimately found in breach of the fair and equitable treatment standard.

The Tribunal reached its conclusion to dismiss the exception by relying on the differences in treaty provisions. The Germany-India BIT referred to the necessity requirement [of the measure] to protect the essential security interests of the party, unlike the Mauritius – India Treaty that only referred to prohibitions and restrictions or actions directed to the protection of essential security interests. According to the Tribunal, India's measure to annul the contract failed to meet the requirements of the necessity test [238] provided in the treaty. For the Tribunal, this test did not refer to the 'standard of necessity' requiring that the measure be the 'only way' to achieve the stated purpose. Instead, the Tribunal's review of the necessity of the measure considered whether the measure was principally targeted to protect the essential security interest at stake and whether the measure was 'objectively required' to achieve that protection. This review considered whether the state had reasonable alternatives, less in conflict with its international obligations [239].

The Tribunal also stressed that although it accepted the degree of deference owed to a state's assessment of its essential security interests, such deference was not unlimited [235-6]. The exception had to be interpreted within the 'natural meaning' of the essential security interests, requiring the presence of interests concerned with security, as opposed to other public or societal interests, and their essential character entailing that they went to the core (the essence) of state security [236].

At the moment of writing, and due to the confidential nature of many of the proceedings in the ISDS, let alone previous consultation or direct negotiation phases, the author does not have information of instances other than ISDS proceedings where the respondent alleged security exceptions. There is no case law under the NAFTA agreement dealing with security exceptions and chapter-specific security exceptions.

Thus, it is also questionable that a generalised trend towards the use of security exceptions by respondent states is present or underway in the context of the investment regime. However, an increase in the number of IIAs incorporating exceptions generally (UNCTAD 2017, tbl III.4, 122; 2020, 26) and security exceptions (UNCTAD; Mantilla and Pehl 2020, 64) may suggest a higher chance of being invoked than in the past when security exceptions were uncommon disciplines in IIAs (UNCTAD 2009a, xviii). Put into perspective, from the 2974 IIAs treaties that the author of this paper mapped through the UNCTAD's Investment Policy Hub (2021c), including terminated agreements and agreements not yet in force, around 15 percent, close to 400 IIAs, incorporate security exceptions. The number of IIAs containing these exceptions has continued to increase since the early 1990s.

Overall, it seems that respondent states have not been particularly successful at invoking security exceptions within the investment regime and the ISDS system. This outcome may act as a firewall against misuses and abuses of the security exception by the states. There is room to argue that adjudication in the investment regime has helped to contain systemic implications of misuses and abuses of the exception until now, notwithstanding other systemic risks regarding the inconsistent interpretation of security exceptions based on the application of different standards of review.

As for the assessment of risks, this paper has considered those regarding misuses and abuses of security exceptions in the context of FDI screening regimes (pre-establishment). This paper has not examined misuses and abuses of the security exception in the post-establishment context, because post-establishment restrictive measures on investments in services did not feature in the mapping exercise above. However, the risks remain regarding the potential use of security exceptions to justify restrictive measures (e.g. expropriation measures) concerning investments and investors already established in a state, as the evidence from the ISDS cases above shows.

Need for Legal Recalibration to Build Back Better? The Case of Security Exceptions

With the above assessment of risks on potential abuses and misuses of the security exceptions in the context of these two types of measures (tighter screening regimes of FDI and taxation of digital services/suppliers), is it still worth questioning the need to recalibrate security exceptions in these agreements?

From a legal and practical view, this paper argues that there is still value in recalibrating disciplines on security exceptions in the recently concluded preferential agreements to incorporate safeguards that better balance the protection of essential security interests and treaty effectiveness than the status quo.

This paper has dealt with two specific types of measures — taxation of digital services and suppliers, and new and tighter screening measures for FDI. However, risks of misuses and abuses of security exceptions may persist to a higher degree in relation to other actions that governments may take, for instance, measures affecting foreign investments and investors in their territory; it is post-establishment measures, such as recent nationalisation measures in the health sector. (O’Gorman, Stothard and Valasek 2020, 17-9).

In the road towards economic recovery, governments in PTA parties may be tempted to adopt trade and investment restrictive measures to protect domestic industries adversely affected by falling demand during the crisis (WB 2020, 3; Baldwin and Evenett 2020, 5, 10; Kowalski 2020, 131, 146-7). Thus, protectionism might be disguised as part of the ‘necessary measures’ to ensure the recovery of economies in crisis when that crisis becomes a matter of national security concern (Sornarajah 2021, 585). The drafting of security exceptions, particularly in the CP-TPP, DEPA, and RCEP investment chapter, does not provide safeguards in this respect.

At the systemic level, abuses of the security exceptions undermine the rules-based system underpinning these preferential agreements, opening the room for power-based relations in the international arena. From this stand, having security exceptions procedurally and substantively designed with a view for restraint could benefit developing and less-developed countries lacking international economic and political power to manoeuvre within power-based systems (García-Santaolalla 2020, 12-3). From a legal standpoint, the recalibration of these disciplines is desirable because, in the effort to reserve policy space to respond to the widening of national security concerns, governments have also delegated broad discretion on the interpretation of these clauses to arbitral tribunals in state-to-state disputes and investor-state disputes. This wide discretion, along with differences in the drafting of the security exceptions between treaties, may result in inconsistent outcomes for the states and the investors regarding the same government measures.

Although this problem does not relate with the abuses and misuses of the security exceptions by governments, higher treaty precision in drafting the circumstances that would trigger the exception and the requirements for governments to rely on it would also aid in reducing the margin for self-serving interpretations of the treaty when cases arise.

Uncertainty about the scope of security-related exceptions goes against the legal predictability that preferential agreements and IIAs attempt to create for businesses and foreign investors. This uncertainty may discourage and undermine businesses and investors’ confidence (UNCTAD 2009a, 138). This point is raised, notwithstanding the inconclusive studies about the impact of IIAs on actual FDI decisions vis à vis economic determinants of the investment (UNCTAD 2009b, 110-11).

Accounting for the broader context of the pandemic and other measures that governments may take to tackle its economic, social and health effects, three of the four agreements examined refer only to essential security interests. These exceptions do not specify circumstances that narrow down the nature of the interests concerned. This drafting opens the gate for broader understandings of essential security interests as encompassing economic security, health security, food security, energy security, climate security ([The White House 2021](#)), cyber security as well as the traditional military and defence understandings in the context of war or armed conflict. Non-traditional understandings of war such as ‘cyber-war’ or ‘currency war’ push even further the conceptual boundaries of security interests (García-Santaolalla 2020, 10-1, 14). The securitisation of these broader policy concerns blurs the distinction between general exceptions and security exceptions. This situation may risk governments circumventing the requirements of the higher standard of review provided in the general exceptions by pleading the security

exception instead.

In better safeguarding the balance, for this and future pandemic responses treaty parties need to explore the following options that incorporate contingent flexibility for parties to ‘escape’ their treaty commitments by ‘conveying the nature of the circumstances underlying the escape’ (Pelc 2016, 10). Procedural ‘costs’ rather than monetary costs (eg compensation/retaliation (Lester and Zhu 2019, 1471-3)) underlie these proposals to (i) introduce transparency disciplines on the use of the security exceptions; (ii) reduce the ambiguity of the security exception provisions regarding the requirements and the circumstances that will trigger the exception through language precision.

Transparency and notification of restrictive measures are crucial to containing and overseeing the implementation of these restrictive measures and ensuring accountability around them. Consistent with the motivations highlighted by governments in implementing some of these measures, adequate oversight should ensure they are genuinely temporary and do not extend indefinitely. In this instance, although global approaches on transparency at the multilateral level, such as the WTO, would deliver more effective outcomes than regional or bilateral transparency measures in PTAs, the latter also improve the status quo.

The early warning system arising from the information/notification requirements of measures adopted under security exceptions in the WTO is not present in the DEPA agreement in relation to measures taken under the security exceptions of the agreement. In the case of DEPA, there is only a self-judging (soft) notification obligation. This general obligation provides that ‘where a Party considers that any proposed or actual measure might materially affect the operation of [DEPA] or otherwise substantially affect another Party’s interests under the Agreement, it shall notify that other Party [...]’ (art 13.5). The CP-TPP provides a similar (soft) obligation to inform other parties of proposed or actual measures that may substantially affect another party’s interests under the CP-TPP or the operation of the agreement (art 26.5). CAI and RCEP do not have specific notification or information requirements regarding restrictive measures undertaken under the security exceptions either.

While DEPA (art 15.6.4), the CP-TPP (arts 29.3.7; 29.3.3 (e)), CAI (s VI, art 9.4) and RCEP (art 17.15.5) have provided expressly notification obligations for other escape clauses such as measures taken in case of serious balance of payments and external financial difficulties, the parties omitted this obligation in relation to measures adopted for the protection of a party’s essential security interests. Notification requirements at an early stage will enhance accountability and the chances for redesigning the measure in ways that would be less trade and investment restrictive when notification is paired with consultation opportunities.

The call is for government negotiators to consider the recent WTO case law and more generally the outcomes of international cases dealing with security exceptions. When attempting to introduce higher precision, negotiators will need to tackle the need for a better definition of the exception’s scope regarding the requirements to invoke the exception, the (objective) circumstances that will trigger it, and the standing of the exception in relation to its judicial oversight. For example, the move towards entirely self-judging security exception clauses through express and precise language in this regard (eg, US-Peru PTPA, art 22.2 nn 2) does not contribute to the consolidation of the rules-based system that these agreements generally advocate for. In contrast, it enhances power-based relationships. Express language about this exception being non-judicial (e.g., India Model BIT, Annex 1 (ii)) or the exclusion of security exceptions from dispute settlement systems are counterproductive for the balance between the pursuit of policy space to deal with essential security concerns and treaty effectiveness.

It is desirable to define the standing of international and national emergency situations in relation to essential security interests. Negotiators will need to address questions such as whether situations of national or international emergency (amenable to objective determination) will be circumstances that will trigger the exception and the degree of severity of the emergency. As for situations of emergency, government negotiators and parties should also consider incorporating sunset clauses that reinforce the temporary nature of some restrictive measures when they are justified in emergency situations.

Another layer of precision in exception drafting needs to tackle the relationship between the measure (actions, restrictions, prohibitions) of the party and the essential security interests that could trigger the exception, knowing that the choice will directly affect the standard of review applicable to the exception. The question here is whether the exception will cover only ‘necessary measures’ to protect these interests or other criteria such as measures ‘directed to’ protect those interests or ‘related to the protection’ of those interests.

An early harvest could be for treaty parties to negotiate an interpretative annex that could guide dispute settlement panels to decide cases when a party relies on security exceptions. This approach will reduce the arbitrators' discretion while avoiding self-serving interpretations of the treaties.

RCEP has outlined a drafting approach involving specific security exceptions in the investment chapter that are broader and provide more deference on the parties than the security exceptions applicable to the rest of the disciplines in the treaty. This approach conveys that parties are more concerned with national security threats and security issues in connection with foreign investment than with other matters regulated in the treaty (eg trade in goods). Although this approach might bring some interpretative challenges when disputes arise, it is an option to explore when negotiating on treaty precision. Treaty parties might be ready to specify security exceptions for some subject matters, which still limits potential abuses and misuses of the security exception in these areas.

Conclusion

Since the start of the pandemic, governments have overall implemented more enhancing measures for the trade and investment in services than restrictive measures. However, the last 18 months have witnessed the progression of a trend towards increased restrictiveness for trade and investment in services that started before the pandemic.

Two types of measures are particularly problematic. First, a growing number of governments have adopted or is consulting on taxation measures for digital services and suppliers. Second, governments have adopted new screening measures or widened the scope of review mechanisms for foreign investment, particularly in developed countries. These restrictions are linked to international discussions that can be traced back to pre-covid-19 times, although some governments have justified these restrictions as responses to the Covid-19 crisis. The need to respond to the health and economic emergency became a new legitimising frame for these restrictive measures at the domestic and international levels.

Unilateral restrictive measures taxing digital services, (partially) justified as a response to the Covid-19 economic emergency, threaten to fragment the international taxation system even more than before. These measures represent differing domestic unilateral approaches on who/what, how, where, and when to tax digital services and suppliers. Because these measures have been taken in the context of the emergency, individual country approaches could lead to incoherence in how digital services are taxed with negative implications for the digital economy as a whole. Although legitimising frames of these measures resort to the 'Covid-19 response' and the need to support economic recovery, these measures have a long-term rather than temporary nature; thus, they require a systematic review of policy options and their implications. Preferential agreements are not well suited to deal with regulatory challenges arising from the taxation of digital services and suppliers, making current discussions on the global corporate minimum tax and the framework for international tax reform from relevant than ever.

This paper also maintains that although the risks that treaty parties misuse security exceptions to justify trade and investment restrictive measures that are economic protectionism or have no real basis on essential security interests are still present, these risks are less than envisioned at the onset, at least in relation to the two types of measures examined here. The risks may persist regarding future measures that governments adopt to respond to domestic groups pressures for protection in a context of economic crisis.

The paper proposed several options for recalibrating security exceptions in new generation PTAs. Most of them would demand renegotiation of treaty aspects. The proposals revolved around two themes: enhancing transparency and accountability in using the security exceptions; and promoting higher precision and less ambiguity by reinforcing or incorporating objective circumstances that will trigger the defence. The proposals include obligations to notify the adopted/proposed measure to other treaty parties at an early stage. It is also desirable to reach a better definition of the standing of national, international, and global emergency situations in relation to the use of the defence. In this regard, incorporating aspects such as the severity of the emergency and sunset clauses will avoid abuses and misuses of the exception in these situations and in 'normal' situations (Pelc 2016, 5).

This analysis was aimed at nudging treaty negotiators towards drafting security exceptions in a manner that allocates procedural costs in the use of these exceptions. This contingent flexibility will contribute to avoiding misuses and uses whose real motivation is disguised economic protectionism or the exertion of political pressure through economic means. Considering these options is relevant for current debates for a pandemic treaty that undoubtedly should incorporate trade and investment related provisions.

With discussions on the rise about the need for a pandemic treaty and stakeholders advocating for it within the frame of building back better, it is timely to question recent drafting practices and changes in the security exceptions language in economic agreements. The concern continues to be that security exceptions that resort to ambiguity and reinforce self-judging aspects that are not subject to objective review may hinder the effectiveness of these treaties.

Although this paper argues from a legal perspective the need for recalibrating security exceptions in these agreements, proposing procedural and substantive disciplines, it has not considered the factors that may prevent these changes from taking place. One is that the current content of these provisions represents an important change from the (previous) status quo— the master GATT security exception. This factor encourages an agenda for future research into the constraints for these changes. Here, prospective theory and behavioural insights such as endowment effects may help to understand such constraints from the states' perspective.

REFERENCES

- Abbott, Kenneth et al. 2000. The Concept of Legalisation. *International Organization* 54 (3): 401-419.
- Abbott, Kenneth and Duncan Snidal. 2000. Hard and Soft Law in International Governance. *International Organization* 53 (3) 421-456.
- Aaken, Anne van. 2014. Behavioural International Law and Economics. *Harvard International Law Journal* 55 (2): 421-81.
- Akande, Dapo and Sope Williams. 2003. International Adjudication on National Security Issues: What Role for the WTO. *Virginia Journal of International Law* 43(2): 365-04.
- Adhanom, Tedros. 2021. WHO Director-General's remarks at the press conference with President of the European Council to discuss the proposal for an international pandemic treaty. World Health Organization [WHO]. [Speech] Available at <<https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-press-conference-with-president-of-the-european-council-to-discuss-the-proposal-for-an-international-pandemic-treaty>>.
- Baldwin, Richard and Simon Evenett (eds). 2020. Introduction in COVID-19 and Trade Policy: Why Turning Inward Won't Work. London: CERP Press. Available at <<https://voxeu.org/content/covid-19-and-trade-policy-why-turning-inward-won-t-work>>.
- Bohmer, Lisa. 2018. Another Indian BIT award surfaces (Deutsche Telekom v. India), revealing divergence between a pair of tribunals with respect to the application of "essential security" clauses (September 17) *Investment Arbitrator Reporter*.
- Brewster, Racher. 2019. Analyzing the Trump Administration's International Trade Strategy. *Fordham International Law Journal* 42 (5) 1419-30 Available at <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2756&context=ilj>>.
- Broude, Tomer. 2015. Behavioral International Law. *University of Pennsylvania Law Review* 163 1099-157
- CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v Republic of India (Jurisdiction and Merits) (PCA Case No. 2013-09, 25 July 2016) [Devas v India].
- Committee on Market Access, Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions, United States, WTO Doc. G/MA/QR/N/USA/4/Add1 (14 May 2020).
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) incorporating certain provisions of the Trans-Pacific Partnership Agreement (signed 4 February 2016, not yet in force) [CP-TPP].
- Commission A, Summary Record of the 33rd Meeting of Commission A, EPCT/A/PV/33 (24 July 1947).
- Decreto 268/020 2020 (Uruguay) [Decree 268/020] (Uruguay) Available at <<https://www.impo.com.uy/bases/decretos/268-2020>>.

Delimatsis, Panagiotis and Olga Hryniv. 2020. Security Exceptions under the GATS – A Legal Commentary on Article XIVbis GATS Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3757455>.

Deutsche Telekom v Republic of India (Interim) (PCA Case No. 2014-10, 13 December 2017) [Deutsche Telekom v India].

Digital Economy Partnership Agreement (signed 12 June 2020, entered into force 7 January 2021) [DEPA].

Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 7 April 2000, WTO Doc WT/DSB/M/78 (12 May 2000).
The Enterprise Act 2002 (UK) c 2, s 58, (2E) [Order 2020].

European Commission. 2020a. Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation). Available at <https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf>.

European Commission. 2020. Guidelines for border management measures to protect health and ensure the availability of goods and essential services. Available at <https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-migration/20200316_covid-19-guidelines-for-border-management.pdf>.

European Union-People's Republic of China Comprehensive Agreement on Investment: Agreement in Principle (not yet signed) [CAI] Available at <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>>.

Evenett, Simon J. 2021. What Caused the Resurgence in FDI Screening? Available at <<https://www.globaltradealert.org/reports>>.

Federal Communication Commission (FCC). 2020. FCC Adopts \$200 Million Covid-19 Telehealth Program. Available at <<https://docs.fcc.gov/public/attachments/DOC-363498A1.pdf>>.

GATT 1947, Sweden Import Restrictions on Certain Footwear, GATT Doc L/4250 Add 1 (17 November 1975).

Gao, Henri. 2021. Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement. *Journal of International Economic Law* 24 (3) 534-50.

Garcia-Santaolalla, Nadia. 2020. A Proposal to Reform "Security Emergency" Exceptions in Trade: A contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and other Trade Agreements. Available at <<https://www.unescap.org/resources/online-repository-contributions-policy-hackathon-model-provisions-trade-times-crisis-and>>.

Global Trade Alert. 2020. State Interventions January-December 2020. Available at <<https://www.globaltradealert.org>>.

Global Trade Alert. 2021. Digital Policy Alert: Policy and Regulatory Activity Affecting Digital Commerce. Available at <https://www.globaltradealert.org/digital_policy>.

Glöckle, Caroline. 2020. The second chapter on a national security exception in WTO law: the panel report in Saudi Arabia – Protection of IPR. Available at <<https://www.ejiltalk.org/the-second-chapter-on-a-national-security-exception-in-wto-law-the-panel-report-in-saudi-arabia-protection-of-ipr/>>

Government of Canada. 2020a. Policy Statement on Foreign Investment Review and COVID-19. Available at <<https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81224.html>>.

Government of Canada. 2020b. Tax Measures: Supplementary Information: Overview. Available at <<https://www.budget.gc.ca/fes-eea/2020/report-rapport/anx4-en.html#overview>>.

Heath, Benton. 2020. The New National Security Challenge to the Economic Order. *The Yale Law Journal* 129: 1020-98.

Helper, Laurence. 2013. Flexibility in International Agreements, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, edited by Jeffrey L. Dunoff and Mark A. Pollack Cambridge: Cambridge University Press, 176-96.

Henckels, Caroline. 2020. Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law. *ICLQ* 69: 557-84.
Henckels, Caroline. 2018. Should Investment Treaties Contain Public Policy Exceptions?. *Boston College Law Review* 59 (8): 2825-44.

International Monetary Fund [IMF]. 2021. World Economic Outlook Update, Available at <<https://www.imf.org/en/Publications/WEO/Issues/2021/07/27/world-economic-outlook-update-july-2021>>.

Johns Hopkins University [JHU]. 2021. Coronavirus Resource Center: Global Map, Available at <<https://coronavirus.jhu.edu/map.html>>.

Knight, Lizzie and Tania Voon. 2020. The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China. *Journal of World Investment and Trade* 21: 104-139

- Koremenos, Barbara. 2016. *The Continent of International Law: Explaining Agreement Design*. Cambridge: Cambridge University Press.
- Kowalskib, Przemyslaw. 2020. Will the post-COVID world be less open to foreign direct investment? in Baldwin, Richard and Simon Evenett (eds). *Introduction in COVID-19 and Trade Policy: Why Turning Inward Won't Work*. London: CERP Press. 131-150.
- LG&E Energy Corporation v Argentina (2007) 46 ILM 36.
- Lester, Simon and Zhu. 2019. A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions. *Fordham Int'l L.J.* 42:5 1451-74.
- Mantilla Blanco and Alexander Pehl. 2020. *National Security Exceptions in International trade and Investment Agreements: Justiciability and Standards of Review*. Cham: Springer.
- Natens, Breg. 2016. *Regulatory Autonomy and International Trade in Services*. Cheltenham: Edward Elgar.
- Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 190 (entered into force 1 January 1995) Annex 1A (General Agreement on Tariffs and Trade 1994) [GATT].
- Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995) Annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights 1994) [TRIPS].
- Ministry of Commerce People's Republic of China. 2020. Circular on Strengthening the Services for Foreign-Invested Enterprises and Investment Attraction Work While Actively Fighting Against COVID-19 Pandemic. Available at <<http://english.mofcom.gov.cn/>>.
- Negotiating Group on GATT Articles, Art XXI, GATT Doc MTN GNG/NG7/W 16 (18 August 1987) (Note by the Secretariat) Available at <<https://docs.wto.org/gattdocs/q/UR/GNGNG07/W16.PDF>>.
- OECD. 2016. *Investment Policies Related to National Security: A Survey of Country Practices* Available at <https://www.oecd-ilibrary.org/finance-and-investment/investment-policies-related-to-national-security_5jlvrrf038nx-en>.
- OECD. 2020. OECD investment policy responses to COVID-19. Available at <<https://www.oecd.org/coronavirus/policy-responses/oecd-investment-policy-responses-to-covid-19-4be0254d/>>.
- OECD. 2021a. OECD Services Trade Restrictions Index: Policy trends up to 2021. Available at <<https://www.oecd.org/trade/topics/services-trade/documents/oecd-stri-policy-trends-2021.pdf>>.
- OECD. 2021b. Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. Available at <<https://www.oecd.org/tax/beeps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf>>.
- OECD. 2021c. 130 countries and jurisdictions join bold new framework for international tax reform. Available at <<https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm>>.
- O'Gorman, Kevin, Paul Stothard and Martin Valasek. 2020. Investor-state claims in the era of the COVID-19 Pandemic. *International arbitration report* 14: 17-19.
- Oke, Emmanuel Kolawole. 2021. COVID-19, Pandemics, and the National Security Exception in the TRIPS Agreement. *JIPITEC* 12: 397-407.
- Panel Report, Russia – Measures Concerning Traffic in Transit, WTO Doc WT/DS512/R (26 April 2019) [Russia –Traffic in Transit].
- Panel Report, South Arabia – Measures concerning the Protection of Intellectual Property Rights, WTO Doc WT/DS567/R (16 June 2019) [South Arabia –Protection of IPRs].
- Pauwelyn, Joost. 2000. Export Restrictions in Times of Pandemic: Options and Limits Under International Trade Agreements. *Journal of World Trade* 54 (5): 727-748.
- Pelc, Krzysztof J. 2016. *Making and Bending of International Rules: The Design of Exceptions and Escape Clauses in Trade Law*. Cambridge: Cambridge University Press.
- Peraturan Pemerintah Pengganti Undang-Undang [Law Number 2 2020 (Indonesia)].
- Pinchis-Paulsen, Mona. 2019. Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception. Available at <<https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02-Mona-Pinchis-Paulsen.pdf>>.
- Partogi, Ponti and Ria Muhariastuti. 2020. INSIGHT: Indonesia—Tax on Cross-Border Digital Services and Intangible Goods. *Bloomberg Tax* (online). Available at <<https://news.bloombergtax.com/daily-tax-report-international/insight-indonesia-tax-on-cross-border-digital-services-and-intangible-goods?context=article-related>>.
- Prime Minister of Australia (Cth). 2020. 250 million JobMaker plan to restart Australia's creative economy [Media release] Available at <<https://www>>.

globaltradealert.org/state-act/45238/australia-new-scheme-to-support-the-creative-economy>.

Proyecto de Ley 439/2021 (Colombia) [Bill 439/2021 (Colombia)]

Regional Comprehensive Economic Partnership Agreement (signed 15 November 2020, not yet in force) [RCEP].

Reinsh, William Adam. 2019. The WTO's First Ruling on National Security: What Does It Mean for the United States? Available at <<https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states>>.

Ruse-Khan, Henning Grosse. 2020. Access to Covid-19 Treatment and International Intellectual Property Protection – Part II: National security exceptions and test data protection. Available at <<https://www.ejiltalk.org/access-to-covid19-treatment-and-international-intellectual-property-protection-part-ii-national-security-exceptions-and-test-data-protection/>>.

Schill, Stephan and Robyn Briese. 2009. "If the State Considers": Self-Judging Clauses in International Dispute Settlement. 2009. Max Planck Y.B. U.N. L. 13: 61-140.

Sodja, Saša and Dunja Jandl. 2020. Slovenia legislates for government screening of foreign investment. CMS Law-Now [online] Available at <<https://www.cms-lawnow.com/ealerts/2020/06/slovenia-legislates-for-government-screening-of-foreign-investment>>.

Vidal, Geraldo. 2019. WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed —Something Blue? Legal Issues of Economic Integration 46 (3):203-224

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 23 January 1980 [Vienna Convention]).

United Nations Conference on Trade and Development [UNCTAD]. 2021a. Investment Policy Monitor: Issue 24. Available at <<https://investmentpolicy.unctad.org/publications/1243/investment-policy-monitor-no-24>>.

UNCTAD. 2021b. World Investment Report 2021: Investing in Sustainable Recovery (UN Doc UNCTAD/WIR/2021). Available at <<https://unctad.org/webflyer/world-investment-report-2021>>.

UNCTAD. 2021c. International Investment Agreements Navigator: Mapping of IIA Content. Available at <<https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping#section-91>>.

UNCTAD 2020. International Investment Agreements: Reform Accelerator (UN Doc UNCTAD/DIAE/PCB/INF/2020/8) Available at <https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf>.

UNCTAD. 2017. World Investment Report 2017: Investment and the Digital Economy (UN Doc UNCTAD/WIR/2017) Available at <https://unctad.org/system/files/official-document/wir2017_en.pdf>.

UNCTAD. 2009a. The Protection of National Security in IIAs (UN Doc UNCTAD/DIAE/IA/2008/5) Available at <https://unctad.org/system/files/official-document/diaeia20085_en.pdf>.

UNCTAD. 2009b. The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries. (UN Doc UNCTAD/DIAE/IA/2009/5). Available at <https://unctad.org/system/files/official-document/diaeia20095_en.pdf>.

Voon, Tania. 2020. Russia — Measures Concerning Traffic in Transit. The American Journal of International Law 114 (1): 96-103.

Voon, Tania. 2019. Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era. AJIL UNBOUND 113: 45-50.

Weber, H Rolf and Rainer Baisch. 2018. Revisiting the Public Moral/Order and the Security Exceptions under the GATS. AJWH 13:375-91.

The White House. 2021. Fact Sheet: Prioritizing Climate in Foreign Policy and National Security (October 21) Available at <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/21/fact-sheet-prioritizing-climate-in-foreign-policy-and-national-security/>>.

World Bank Group [WB]. 2020. Trade and COVID-19 Guidance Note: Do's and Don'ts of Trade Policy in the Response to COVID-19. Available at <<https://documents.worldbank.org>>.

World Trade Organization [WTO]. 2021. COVID-19 Measures affecting trade in services. Available at <https://www.wto.org/english/tratop_e/covid19_e/trade_related_services_measure_e.htm>.

World Trade Organization [WTO]. n.d. Dispute Settlement: Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights/Current Status. Available at <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm>.

WTO. 2020. Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions, United States, WTO Doc. G/MA/QR/N/USA/4/Add.1 (May 14, 2020).

The Covid-19 Test for Preferential Trade Agreements:
National Security Exceptions and Trade and Investment Restrictive
Measures in Services

UNU-CRIS Working Paper #1 2023

Copyright © United Nations University Institute on Comparative Regional
Integration Studies 2023

The views expressed in this publication are those of the authors and do
not necessarily reflect the views of the United Nations University.

Published by: United Nations University Institute on Comparative
Regional Integration Studies

Cover image: Arun Sharm/PTI Photo