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Exceptions and Regulatory Autonomy

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Exceptions and Regulatory Autonomy

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Abstract

This chapter provides a comparative overview of exceptions commonly included in Preferential Trade Agreements (PTAs). After some brief reflections on the role of exceptions in trade agreements (section 1), the chapter analyses agreement-wide exceptions found in most PTAs, considering general exceptions provisions (section 2), security exceptions (section 3) and taxation exceptions (section 4). Common exceptions for confidential information and for balance of payments difficulties are also briefly addressed (section 5). The chapter then analyses more novel agreement-wide exceptions that are only found in certain PTAs, considering exceptions for cultural issues (section 6.1) and exceptions for measures concerning a party's indigenous peoples (section 6.2). Overall, the chapter demonstrates that there has been an evolution in the approach to exceptions in PTAs, with contemporary agreements often including significant variations on (or clarifications to) the exceptions found in World Trade Organization-covered agreements and exceptions with no direct equivalent at the multilateral level.

Keywords: Preferential Trade Agreements; general exceptions; security exceptions; taxation exceptions; cultural exceptions; indigenous exceptions; confidential information exception; policy space

1 Introduction

All trade agreements include various types of exceptions, and preferential trade agreements (PTAs) are no different.[1] Exceptions are included in trade agreements because the economic liberalization or integration objectives pursued by such agreements are not absolute and must be balanced against other public policy interests that States wish to retain the ability to pursue.[2] Relatedly, certain categories of government measures are of overriding importance when compared to the aims of trade liberalization or economic integration – for example, measures to protect national security or public order. Also, as de Mestral and Vanhonnaeker note, it is often too politically difficult to subject certain government measures to the disciplines contained in PTAs, hence the need for some form of exception.[3] In short, as prior literature has suggested, exceptions make the disciplines contained in PTAs acceptable to governments in the face of uncertainty regarding what the future may hold.[4] Thus others have demonstrated that there is a strong relationship between the depth of commitments in PTAs and the use of flexibilities, whereby deeper agreements include more flexibilities.[5] This literature also rightly emphasizes that flexibilities in trade agreements often have 'strings' or conditions attached, which are aimed at preventing their abuse in a manner that would undermine the wider agreement.[6]

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[1] Armand de Mestral and Lukas Vanhonnaeker, 'Exception Clauses in Mega-Regionals (International Investment Protection and Trade Agreements)' in Thilo Rensmann (ed), *Mega-Regional Trade Agreements* (Springer International Publishing 2017) 75–76, 79–80.

[2] See eg Caroline Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69 ICLQ 557, 557–58. Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) 169–71.

[3] de Mestral and Vanhonnaeker (n 1) 79–80.

[4] Krzysztof J Pelc, *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law* (Cambridge University Press 2016) 2, 22, 25. For this point in relation to investment treaties see Anne van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 Journal of International Economic Law 507, 509, 516–19.

[5] See generally Leonardo Baccini, Andreas Dür and Manfred Elsig, 'The Politics of Trade Agreement Design: Revisiting the Depth-Flexibility Nexus' (2015) 59 International Studies Quarterly 765. For similar observations regarding investment treaties see Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford University Press 2022) 55, 98.

[6] Baccini, Dür and Elsig (n 5) 767, 774; Pelc (n 4) 38–42.

This chapter provides a comparative overview of exceptions commonly included in PTAs. It pays particular attention to so-called mega-regional agreements that have become more common in the last decade and may be an important influence on future trade and investment agreements.[7] The chapter begins by addressing agreement-wide exceptions that are found in most PTAs, namely general exceptions provisions (section 2), security exceptions (section 3) and exceptions for taxation measures (section 4). Two other common agreement-wide exceptions are treated more briefly in section 5 – exceptions concerning confidential information and exceptions for temporary safeguard measures in cases of balance of payments difficulties or other external financial difficulties. The chapter then analyses more novel agreement-wide exceptions that only feature in certain PTAs, considering exceptions for cultural issues (section 6.1) and exceptions for measures concerning the indigenous peoples of a party (section 6.2).

Overall, this chapter demonstrates that there has been an evolution in the approach to exceptions in PTAs. While some early PTAs simply incorporated by reference exceptions found at the multilateral level (e.g. Articles XX and XXI of the General Agreement on Tariffs and Trade (GATT)),[8] over time PTAs have been a site of experimentation and innovation in relation to exceptions. Contemporary PTAs routinely feature significant variations on (or clarifications to) the exceptions found in WTO-covered agreements, as well as exceptions with no direct equivalent at the multilateral level.

[7] de Mestral and Vanhonnaeker (n 1) 79–80.
[8] Eg US–Israel FTA art 7. General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 190 (GATT). General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194.

2 General Exceptions Provisions

PTAs typically include exceptions that are equivalent to GATT Article XX and Article XIV of the General Agreement on Trade in Services (GATS),[9] however there are significant variations in how these exceptions are included. The following three subsections unpack these differences.

2.1 PTA Exceptions based on GATT Article XX

While some PTAs contain provisions that are essentially identical to GATT Article XX,[10] it is common for PTAs to incorporate GATT Article XX by reference.[11] In some PTAs, GATT Article XX is applied to the entire agreement.[12] By contrast, in many PTAs, Article XX of the GATT is only applied to certain chapters of the agreement. Typically, these are the chapters that address trade in goods, although in many agreements GATT Article XX is also applied to other chapters including, with considerable variation, chapters addressing investment, digital trade and electronic commerce, and state-owned enterprises.[13]

2.1.1 Clarifications to GATT Article XX

An important innovation in PTAs is the addition of clarifications regarding certain aspects of GATT Article XX and GATS Article XIV. For example, the North American Free Trade Agreement (NAFTA), concluded in 1992, introduced the following clarification regarding GATT Article XX(b) and (g):

[9] General Agreement on Trade in Services, (adopted 15 April 1994, entered into force 1 January 1995), Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, art XIV (GATS).
[10] Eg EFTA–Mexico FTA art 17; EFTA–Chile FTA art 21; EU–Colombia, Peru FTA art 106(1).
[11] Eg Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) art 29.1(1); Regional Comprehensive Economic Partnership (RCEP) art 17.12(1); United States–Mexico–Canada Agreement (USMCA) art 32.1(1); Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA) art 28.3(1); EU–UK TCA art 412(1); EU– Japan EPA arts 2.22(2), 8.3(1); US–Korea FTA art 23.1(1).
[12] Eg New Zealand–China FTA art 200(1); US–Israel FTA art 7; EFTA–Indonesia CEPA art 2.19.
[13] Eg CPTPP art 29.1(1); RCEP art 17.12(1); USMCA art 32.1(1); CETA art 28.3(1); EU–UK TCA art 412(1). Australia–UK FTA art 31.1(1).

> The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.[14]

These clarifications to GATT Article XX(b) and (g) have often been included in subsequent PTAs.[15] Bartels has argued that these clarifications are unlikely to have a significant effect, since in relation to GATT Article XX(b) '[t]he express reference to "environmental measures" does not increase its scope', and the clarification regarding Article XX(g) simply confirms the WTO Appellate Body's holding in *US–Shrimp* that the term 'exhaustible natural resources' includes both living and non-living natural resources.[16] Two recent United Kingdom (UK) PTAs take this practice somewhat further, adding a clarification that '"non-living exhaustible natural resources" includes clean air and a global atmosphere with safe levels of greenhouse gases'.[17] Again, arguably this does not add much beyond existing WTO jurisprudence concerning GATT Article XX(g), given that the panel in *US–Gasoline* accepted that clean air was an 'exhaustible natural resource' within the meaning of the provision and rejected Venezuela's argument that Article XX(g) could not cover conservation of renewable resources.[18] The above-mentioned two recent UK PTAs also add to the NAFTA clarification regarding GATT Article XX(b) by providing that as well as environmental measures necessary to protect human, animal or plant life or health, the provision also covers 'measures necessary to mitigate climate change'.[19] European Union (EU) PTAs also routinely include additional

[14] North American Free Trade Agreement (NAFTA) art 2101(1).
[15] Eg CPTPP art 29.1(2); RCEP art 17.12(1) fn 5; USMCA art 32.1(3). CETA art 28.3(1) and (2)(b) fn 2; EU–UK TCA art 412(3)(a)(b); US–Korea FTA art 23.1(1).
[16] Lorand Bartels, 'Social Issues: Labour, Environment and Human Rights' in Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and Regional Trade Agreements* (2nd edn, Cambridge University Press 2015) 369; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, [131].
[17] UK–Iceland, Lichtenstein and Norway FTA, art 14.1(3)(c) fn 90; UK–New Zealand FTA art 32.1(3) fn 1.
[18] Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, [6.36]–[6.37]. The Appellate Body did not address this issue: Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, [11]–[12].
[19] The clarification also covers GATS art XIV(b): UK–New Zealand FTA art 32.1(3); UK–Iceland, Lichtenstein and Norway FTA art 14.1(3)(a)–(b).

requirements regarding the process that parties must follow when invoking GATT Article XX(i) (concerning export restrictions to ensure essential quantities of materials for a domestic processing industry) and (j) (concerning measures for products in general or local short supply).[20] Other clarifications to GATT Article XX are less common but noteworthy. For example, the CARIFORUM–EC EPA clarifies in the general exceptions provision that 'measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health'.[21]

2.2 PTA Exceptions based on GATS Article XIV

As many PTAs govern trade in services, it is unsurprising that PTAs frequently include provisions based on GATS Article XIV. Compared to exceptions provisions based on GATT Article XX, there is somewhat more variation in provisions based on GATS Article XIV. One approach, taken in a significant number of agreements, is to incorporate GATS Article XIV by reference and to apply it to those chapters that address trade in services (e.g. chapters on trade in services and temporary entry rights for business persons).[22] GATS Article XIV is also often applied to other services-related chapters, such as chapters on investment, electronic commerce/digital trade, and state-owned enterprises.[23] Another approach is that the general exceptions provision of a PTA will only incorporate by reference paragraphs (a), (b), and (c) of GATS Article XIV.[24] In these agreements, the issue dealt with by GATS Article XIV(d) – which addresses measures 'aimed at aimed at ensuring the equitable or effective imposition or

[20] Eg EU–Korea FTA art 2.15(2); EU– Japan EPA art 2.22(2)–(4); EU–UK TCA art 412(4); EU–Singapore FTA art 2.14(2); EU–Vietnam FTA art 2.22(2).
[21] CARIFORUM–EC EPA art 224 fn 31; CARIFORUM–UK EPA art 224 fn 1.
[22] Eg RCEP art 17.12(2); US–Singapore FTA art 21.1(2); US–Korea FTA art 23.1(2); ASEAN–Australia–New Zealand FTA ch 15, art 1(2).
[23] Eg RCEP art 17.12(2); ASEAN–Australia–New Zealand FTA ch 15, art 1(2); EU–Japan EPA arts 12.9, 13.8; China–Korea FTA art 21.1(2).
[24] Eg CPTPP art 29.1(3); USMCA art 32.1(2); UK–New Zealand FTA art 32.1(2).

collection of direct taxes in respect of services or service suppliers of other Members' – is left to be covered by a provision of the PTA's taxation exception, which, unlike GATS Article XIV(d), is not limited to direct taxes or services.[25] Yet another drafting strategy that achieves a similar outcome is to include a provision that reproduces almost the exact wording of GATS Article XIV.[26] Again, while sometimes GATS Article XIV(d) is omitted from such general exceptions provisions,[27] a provision of the PTA's taxation exception typically provides a more wide-ranging exception covering the same issue.[28] A final difference in drafting approach – although again, less in substance – is that in EU PTAs where general exceptions are approached on a chapter-by-chapter basis rather than an agreement-wide basis, the chapter on trade in services, investment liberalization and e-commerce will often include a general exceptions provision that features subparagraphs from both GATS Article XIV and GATT Article XX.[29]

2.3 PTA General Exceptions Provisions that Differ Markedly from GATT Article XX and GATS Article XIV

The previous subsections considered exceptions that are identical or relatively similar to GATT Article XX and GATS Article XIV, containing minor but noteworthy variations or clarifications to those provisions. In contrast, there is a subset of PTAs that contain general exceptions provisions that depart in more fundamental ways from the model of GATT Article XX and GATS Article XIV. For example, Bartels highlights the example of PTAs concluded among countries of the Commonwealth of Independent States (CIS), where the general

[25] CPTPP art 29.4(6)(h); USMCA art 32.3(6)(h).
[26] Eg EU–Japan EPA art 8.3(2).
[27] Eg CETA art 28.3(2); EU–UK TCA art 412(2); EU–New Zealand FTA art 25.1(2).
[28] Eg CETA art 28.7(4)(d); EU–UK TCA art 413(3)(a); EU–New Zealand FTA art 25.3(4)(a).
[29] Eg EU–Korea FTA art 7.50; EU–Singapore FTA art 8.62; EU–Vietnam FTA art 8.53; EU–Colombia Peru FTA art 167.

exceptions provisions often differ markedly from GATT Article XX.[30] An example is the Kyrgyz Republic–Armenia FTA that provides:

> Nothing herein must prevent a Contracting Party from taking measures which it considers necessary to protect its vital interests or which are undoubtedly necessary for the implementation of the international agreements of which it intends to become a signatory, if these measures concern:
>
> • information affecting interests of the national defense;
>
> • trade in weapons, ammunition and military equipment;
>
> • investigations or production connected with needs of defense;
>
> • deliveries of materials and equipment used in nuclear industry;
>
> • defense of public moral and public order;
>
> • protection of industrial or intellectual property;
>
> • gold, silver or other precious metals and stones;
>
> • health protection of people, animals and plants.[31]

The chapeau conditions in this provision are obviously different from GATT Article XX and GATS Article XIV, requiring that the relevant measure is either one that a Party 'considers necessary to protect its vital interests' or 'which are undoubtedly necessary for the implementation of the international agreements of which it intends to become a signatory'. Some PTAs of CIS States use 'and' rather than 'or', which would make these two conditions cumulative,[32] or only include one of these two conditions.[33] Some intra-CIS PTAs also include a further requirement that the relevant measures are 'adopted in international practice'[34] or 'generally accepted in the international practice'.[35] The list of subparagraphs in the Kyrgyz Republic–Armenia FTA also combines elements that are similar (although not always

[30] Bartels (n 16) 372–73.
[31] Kyrgyz Republic–Armenia FTA art 10.
[32] Eg Georgia–Turkmenistan FTA art 9; Georgia–Kazakhstan FTA art 11.
[33] Eg Kyrgyz Republic–Kazakhstan FTA art 11.
[34] Eg Georgia–Turkmenistan FTA art 9; Georgia– Kazakhstan FTA art 11.
[35] Eg Armenia–Moldova FTA art 11; Kyrgyz Republic–Kazakhstan FTA art 11.

identical) to those found in GATT Articles XX and XXI. This would make the equivalents to GATT Article XXI (e.g. measures concerning 'information affecting interests of the national defense' or 'trade in weapons, ammunition and military equipment'), subject to the chapeau conditions contained in this provision. Among PTAs concluded between CIS States, this approach, of including within a single exceptions provision subparagraphs that are identical or similar to those found in GATT Articles XX and XXI is a common one.[36] While these departures from GATT Article XX and XXI are interesting, the more recent PTA practice of the CIS states appears much more conventional regarding exceptions. For example, the 2011 Treaty on a Free Trade Area between members of the CIS, which replaced a former 1994 plurilateral FTA among the CIS States, contains a general exceptions provision that permits a member to adopt measures permitted by GATT Article XX and a security exception that incorporates GATT Article XXI by reference.[37]

3 Security Exceptions

PTAs routinely contain wide-ranging exceptions for security issues, which often exhibit significant variations or outright departures from the security exceptions found in the WTO-covered agreements. By way of background, the security exception in GATT Article XXI, which is similar in other WTO Agreements, provides:

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> > (i) relating to fissionable materials or the materials from which they are derived;

[36] Eg Kyrgyz Republic–Uzbekistan FTA art 5; Kyrgyz Republic–Armenia FTA art 10; Georgia–Turkmenistan FTA art 9.
[37] CIS States Treaty on a Free Trade Area arts 15–16.

> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[38]

Some PTAs incorporate Article XXI of GATT and GATS Article XIV *bis* by reference and apply them to the entire agreement.[39] Somewhat differently, some PTAs incorporate these exceptions by reference into specific chapters of the agreement, for example the parts of the agreement dealing with trade in goods and services respectively. This appears to be a common approach in PTAs of the European Free Trade Association (EFTA) States.[40] Rather than incorporation by reference, some PTAs also include a security exception that is identical to Article XXI of GATT.[41]

Among PTA security exceptions that are more innovative, there is a distinction between those provisions that remain obviously based on GATT Article XXI, although containing noteworthy variations on it, and those that depart more significantly from the basic structure of GATT Article XXI. Taking the latter category first, the majority of United States (US) PTAs, beginning with the US–Singapore FTA signed in 2003, contain a security exception that has a notably different structure from GATT Article XXI.[42] It provides:

> Nothing in this Agreement shall be construed:

[38] GATT (n 8) Art XXI; GATS (n 9) art XIV *bis*.
[39] Eg US–Israel FTA art 7; China–Australia FTA art 16.3; China–Korea FTA art 21.2.
[40] Eg EFTA–Hong Kong FTA arts 2.16, 3.16, 4.9; EFTA–Ecuador CEPA arts 2.20, 3.17, 4.11; EFTA–Georgia FTA arts 2.18, 5.17, 6.11; EFTA–Central American States FTA arts 2.19, 4.17, 5.10.
[41] Eg Canada–EFTA FTA art 24.
[42] On the evolution of the US approach to security exceptions see James Mendenhall, 'The Evolution of the Essential Security Exception in U.S. Trade and Investment Agreements' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (Oxford University Press 2012) 324–42.

> (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
>
> (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[43]

This provision is also found in the CPTPP and USMCA.[44] This style of security exception has several noteworthy differences from GATT Article XXI. The subparagraphs of GATT Article XXI(b), which further define measures a Party 'considers necessary for the protection of its essential security interests' are omitted.[45] This is significant because those subparagraphs limit the kind of 'essential security interests' that fall within the exception and WTO panels have held that whether the circumstances of the relevant subparagraph of GATT Article XXI(b) is fulfilled is subject to objective determination.[46] Additionally, the US-style security exception combines into one provision GATT Article XXI(b) and (c), so that the exception for measures 'necessary for the fulfilment of its [a Party's] obligations with respect to the maintenance or restoration of international peace or security' is now subject to the self-judging language ('that it considers necessary'). Furthermore, unlike GATT Article XXI(c), which refers to 'action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security', the above US-style security exception does not refer to a Party's obligations under the UN Charter, but, potentially more broadly, to '*its obligations* with respect to the maintenance *or restoration* of international peace or security'.[47] Another

[43] US–Singapore FTA art 21.2; Identical or extremely similar: DR–CAFTA art 21.2; US–Australia FTA art 22.2; US– Bahrain FTA art 20.2; US–Oman FTA art 21.2; US–Peru FTA art 22.2; US–Korea FTA art 23.2; US–Colombia TPA art 22.2; US–Panama FTA art 21.2. Minor variation: US–Chile FTA 23.2.

[44] CPTPP art 29.2. USMCA art 32.2. This wording has sometimes been used by certain US FTA partners, eg Korea–Peru FTA art 24.2; Singapore–Australia FTA (as amended) ch 17 art 2.

[45] But see US–Morocco FTA art 21.2 (Providing non-exhaustive guidance on the kinds of measures that may fall within those 'a Party considers necessary for the protection of its own essential security interests' that draws on GATT art XXI(b)(ii)).

[46] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019, [7.65]–[7,77], [7.82], [7.100]–[7.1002]; Panel Report, *United States — Origin Marking Requirement*, WT/DS597/R, circulated 21 December 2022, appealed 30 January 2023, [7.89], [7.160]; Panel Report, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS544/R, circulated 9 December 2022, appealed 30 January 2023, [7.113], [7.128].

[47] US–Singapore FTA art 21.2 (emphasis added).

important innovation in a handful of the more recent US PTAs is that they add a footnote that clarifies that if a Party invokes the security exception in either investor–State or State–State dispute settlement under the agreement, the tribunal 'shall find that the exception applies'.[48] Beyond these US agreements, only a small number of PTAs appear to contain a security exception that explicitly clarifies that a tribunal may not review the invocation of the exception.[49]

Among PTAs that include a security exception that follows the basic structure of GATT Article XXI, there are some noteworthy variations on Article XXI. For example, the Association of Southeast Asian Nations (ASEAN), and often its member states in their bilateral PTAs, have used a security exception that contains an important variation on GATT Article XXI(b)(iii) (extracted above) and adds an entirely new sub-paragraph to GATT Article XXI(b). For example, the ASEAN–Japan EPA provides 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 infrastructure, including communications, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure;
> > (iv) taken in time of domestic emergency, or war or other emergency in international relations.[50]

Slight variations on these provisions found in other ASEAN PTAs are, in relation to subparagraph (iii), omitting the reference to 'from deliberate attempts intended to disable or degrade such infrastructure' (thus broadening this aspect of the exception),[51] and clarifying in

[48] US–Peru FTA art 22.2 fn 2; US–Korea FTA art 23.2 fn 2; US–Colombia TPA art 22.2; US–Panama FTA art 21.2 fn 2. On the context for this change in the US approach to security exceptions see Mendenhall (n 41) 338–41.
[49] Colombia–Korea FTA art 21.2 fn 2.
[50] ASEAN–Japan EPA art 8(b). For similar approaches in bilateral FTAs of ASEAN member states see eg Gulf Cooperation Council–Singapore FTA art 1.10(iv) and (v); Korea–Vietnam FTA art 16.2(1)(b)(iii)–(iv); Indonesia–Australia CEPA art 17.3(b)(iii)–(iv).
[51] E.g. RCEP art 17.13(b)(iii); Indonesia–Australia CEPA art 17.3(b)(iii).

a footnote that the provision covers 'critical public infrastructures whether publicly or privately owned'.[52] Notably, sub-paragraph (b)(iv) of the ASEAN-Japan EPA security exception covers 'any action which it [a Party] considers necessary for the protection of its essential security interests taken in time of *domestic emergency* or war or other emergency in international relations'.[53] RCEP and the ASEAN–Australia–New Zealand FTA are similar but replace 'domestic emergency' with 'national emergency'.[54] This ASEAN-led practice is an important variation on GATT Article XXI(b)(iii), which only covers measures 'taken in time of war or other emergency in international relations', and broadens this aspect of the security exception to cover domestic emergencies. In contrast, recent WTO case law concerning GATT Article XXI(b)(iii) suggests that 'emergency in international relations' would not cover domestic emergencies. For example, the panel in *United States—Origin Marking Requirement* held that 'not any emergency would qualify under Article XXI(b)(iii), but only those occurring in international relations. Thus, the emergency must directly concern those relations'.[55] It further held that an 'emergency in international relations' would require 'a breakdown or near-breakdown in the relations between states or other participants in international relations'.[56] Similarly, the panel in *Russia–Traffic in Transit* held that the term '"emergency in international relations" must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of [GATT] Article XXI(b)', including the reference to 'war' in the same subparagraph.[57] The panel further held that '[a]n emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general

[52] Eg RCEP art 17.13(b)(iii) fn 7; ASEAN–Australia–New Zealand FTA ch 15 art 2(b)(iii) fn 3.
[53] ASEAN–Japan EPA art 8(b)(iv) (emphasis added).
[54] RCEP art 17.13(b)(iv); ASEAN–Australia–New Zealand FTA art ch 15 art 2(b)(iv).
[55] *United States — Origin Marking Requirement* (n 46) [7.281]. See also [7.297].
[56] Ibid [7.306], see generally [7.289]–[7.290], [7.297], [7.304], [7.311]–[7.312].
[57] *Russia – Traffic in Transit* (n 46) [7.74], see generally [7.71]–[7.75].

instability engulfing or surrounding a state'.[58] The *United States—Certain Measures on Steel and Aluminium Products* panel also observed that '[t]he terms of Article XXI(b)(iii) appear to distinguish the relevant emergency under that subparagraph from an emergency in purely domestic or national affairs and indicate the "international" character of the emergency in time of which Members are not prevented from taking action'.[59]

EU PTAs typically contain a security exception that resembles GATT Article XXI and GATS Article XIV *bis* more closely. Focusing on those aspects that differ significantly from the multilateral security exceptions, compared to GATT Article XX(b)(ii) (extracted above), the equivalent provision in EU PTAs typically has a somewhat different wording, reflecting that modern PTAs have a much broader scope than just trade in goods. For example, the relevant part of the security exception in CETA provides:

> Nothing in this Agreement shall be construed: …
>
> (b) to prevent a Party from taking an action that it considers necessary to protect its essential security interests:
>
> > (i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment;[60]

Compared to GATT Article XXI(b)(ii) which covers measures 'relating to the traffic in arms, ammunition and implements of war', this exception uses the nexus 'connected to' and covers measures connected to the production of such goods and materials, as well as 'traffic', ie. trade in such materials.[61] Importantly, the part of this exception applying to measures carried out directly or indirectly for the purpose of supplying a military establishment also covers other

[58] Ibid [7.76].
[59] *United States — Certain Measures on Steel and Aluminium Products* (n 46) [7.137].
[60] CETA art 28.6(b)(i).
[61] A footnote clarifies that 'The expression "traffic in arms, ammunition and implements of war" in this Article is equivalent to the expression "trade in arms, munitions and war material"': CETA art 28.6(b)(i) fn 1.

forms of 'security establishment' and covers not just 'traffic and transactions in other goods and materials' (similar to GATT Article XXI(b)(ii)), but also 'services and technology undertaken, and to economic activities' carried out with the specified purpose.[62] In other EU PTAs, this aspect of the security exception is broken into two subparagraphs, with one dealing with trade in goods or materials carried out directly or indirectly for the purposes of supplying a military establishment (equivalent to GATT Article XXI(b)(ii)), and another subparagraph covering measures 'relating to the supply of services carried out directly or indirectly for the purpose of provisioning a military establishment' (language from GATS Art XIV *bis*).[63] Typically one of the subparagraphs also refers to 'economic activities' carried out with the specified purpose, thus broadening the scope of the exception.[64] Some EU PTAs also include a further subparagraph within the agreement-wide security exception for measures 'relating to government procurement indispensable for national security or for national defence purposes', language taken from the WTO Agreement on Government Procurement.[65]

Another element of EU PTAs that sometimes differs from security exceptions in WTO agreements is the paragraph equivalent to GATT Article XXI(c), which covers measures taken by a Party 'in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'.[66] Essentially, while some EU PTAs use this exact wording or very similar wording,[67] the EU has also frequently used security exceptions where this part of the exception is not limited to a Party's obligations under the UN Charter. For example, the relevant paragraph in the CETA provides that the Agreement does not 'prevent a Party from

[62] Similar: EU–UK TCA art 415(b)(i).
[63] GATS (n 9) art XIV *bis* (1)(b)(i); EU–Japan EPA art 1.5(b)(ii)–(iii); EU–Singapore FTA art 16.11(b)(i)–(ii); EU–Vietnam FTA art 17.13(b)(i)–(ii).
[64] Eg EU–Vietnam FTA art 17.13(b)(ii); EU–Singapore FTA art 16.11(b)(i); EU–Korea FTA art 15.9(b)(i).
[65] Eg EC–Chile Association Agreement, art 194(1)(b)(iii); CARIFORUM–EC EPA art 225(1)(b)(iv); EU–Colombia, Peru FTA art 295(1)(b)(i). Agreement on Government Procurement, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, (signed 15 April 1994, entered into force 1 January 1996), 1915 UNTS 103, art XIII(1).
[66] GATT (n 8) art XXI(c).
[67] Eg EU–UK TCA art 415(c); EU–Vietnam FTA art 17.13(c); EU–Japan EPA art 1.5(c).

taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security'.[68] The equivalent paragraph in the EU–Singapore FTA is broader again, as it is not limited to a Party's international obligations concerning international peace and security, but rather simply states that '[n]othing in this Agreement shall be construed to prevent either Party from taking any action for the purpose of maintaining international peace and security'.[69]

4 Taxation Exceptions

PTAs commonly include wide-ranging exceptions for taxation measures that remove such measures from the scope of most obligations contained in the agreement. This may reflect that '[t]axation is a sensitive issue in most countries as they desire to keep their fiscal sovereignty intact'[70] and additionally PTA negotiators may view taxation issues as better addressed by tax treaties. The evolution of taxation exceptions in PTAs can be illustrated by examples from North American treaty practice. The 1988 Canada–US FTA included a very short taxation exception, which provided that nothing in the FTA affected the rights of the Parties under the Canada–US tax treaty or any successor convention and that 'matters involving the *Income Tax Act* of Canada or the *Internal Revenue Code* of the United States' would be governed exclusively by the tax treaty.[71]

In contrast, NAFTA contained a far more detailed tax exception, which has provided a template for the tax exceptions found in many contemporary PTAs and accordingly will be unpacked in some detail. NAFTA Article 2103 begins by providing that '[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures'.[72] The provision further provides

[68] CETA art 28.6(c). Almost identical: EU–Korea FTA art 15.9(c). Compare EU–Colombia, Peru FTA, art 295(c).
[69] EU–Singapore FTA art 16.11(c).
[70] de Mestral and Vanhonnaeker (n 1) 86.
[71] Canada–US FTA art 2001.
[72] NAFTA art 2103(1).

that nothing in NAFTA shall affect the rights and obligations of a Party under any tax convention, and in the event of any inconsistency between NAFTA and a tax convention, the latter shall prevail to the extent of the inconsistency.[73] Paragraphs 3 to 6 of the exception then apply certain obligations of NAFTA to some or all taxation measures. For trade in goods, the exception provides that NAFTA's national treatment obligation for trade in goods 'and such other provisions of this Agreement as are necessary to give effect to that Article shall apply to taxation measures to the same extent as does Article III of the GATT'.[74] It also establishes that tax measures are covered by NAFTA provisions prohibiting export taxes in relation to trade in goods and energy.[75] For trade in services and financial services, the national treatment obligation is applied to taxes on income or capital 'that relate to the purchase or consumption of particular services'.[76] According to one NAFTA negotiator, the purpose of this provision is 'to discourage … governments from favoring selected domestic services industries through the imposition of discriminatory income or capital tax measures on consumers designed to induce them to buy from national services providers'.[77] For tax measures other than taxes on income, capital, estates and inheritances, such measures are subject to the national treatment and MFN obligations in the chapters on investment, services and financial services.[78]

Furthermore, NAFTA's tax exception establishes that a prohibition on performance requirements in the investment chapter applies to tax measures.[79] Essentially, this provision prohibits a Party from conditioning the receipt of a (tax) advantage in connection with an investment in its territory on certain requirements, such as achieving a given level of domestic

[73] Ibid, art 2013(2).
[74] Ibid, art 2013(3)(a).
[75] Ibid, art 2013(3)(b).
[76] Ibid, art 2103(4)(a).
[77] Kenneth P Freiberg, 'Exceptions' in Judith H Bello, Alan F Holmer and Joseph J Norton (eds), *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas* (Section of International Law and Practice, the American Bar Association and the International Lawyer 1994) 346.
[78] NAFTA art 2103(4)(b). See also art 2103(4)(c)–(h).
[79] Ibid, art 2103(5).

content or purchasing domestically-produced goods.[80] However, there is an important clarification whereby NAFTA Parties are permitted to condition (tax) advantages conferred on an investment on a requirement to locate production, provide a service, train or employ workers, construct particular facilities, or carry out research and development in the Party's territory.[81] Finally, NAFTA's tax exception provides that the investment chapter's provision on expropriation applies to taxation measures.[82] It also establishes a 'filter mechanism' whereby if an investor alleges a tax measure constitutes an expropriation it must refer this question to the treaty parties' tax authorities, who have a period of six months to consider the issue. A joint determination by the tax authorities that the tax measure is not an expropriation prevents an investor submitting such a claim to investor–State arbitration.[83]

Strikingly, the tax exceptions in the CPTPP and the USMCA only contain minor variations on NAFTA's tax exception, despite the passage of close to 30 years. One notable difference is that while any tax convention is still to prevail in the event of any inconsistency with the CPTPP or the USMCA, in these agreements a mandatory procedure is created whereby if an issue arises concerning a potential inconsistency between a tax convention and the PTA, the issue must be referred to the tax authorities of the relevant treaty parties who have six months to determine the existence of any inconsistency. Any determination by the designated tax authorities is binding on either a State–State panel or investor–State tribunal.[84] Another difference is that these more modern exceptions apply a provision from the electronic commerce or digital trade chapters requiring non-discriminatory treatment of digital products to many types of tax measures.[85] Other recent mega-regional agreements contain a less detailed tax exception than

[80] Ibid, art 1106(3); Freiberg (n 74) 346.
[81] Ibid, art 1106(4).
[82] Ibid, art 2103(6).
[83] Ibid.
[84] CPTPP art 29.4(4); USMCA art 32.3(4).
[85] CPTPP art 29.4(6)(b)–(c).

the examples just considered. For example, RCEP's tax exception begins with the usual provisions that except as established by the exception, nothing in the agreement applies to tax measures, and that the agreement does not affect the rights and obligations of any treaty party under a tax convention, with tax conventions prevailing in the event of inconsistency.[86] Furthermore, RCEP's tax exception provides that the agreement shall only 'grant rights or impose obligations with respect to taxation measures … to the extent that the WTO Agreement grants rights or imposes obligations with respect to such taxation measures', or to the extent that the investment chapter's provision on free transfers imposes obligations concerning tax measures.[87] Ultimately, this provision does not seem to achieve the same level of clarity as the NAFTA/CPTPP/USMCA tax exceptions, which positively establish the extent to which specific provisions in the PTA apply to tax measures. Somewhat similarly, the EU–Japan EPA provides that the agreement applies to tax measures 'only in so far as such application is necessary to give effect to the provisions of' the PTA, an approach is common in many (but not all) of the EU's PTAs.[88]

CETA's tax exception presents another interesting variation on the examples just considered. In the CETA, while there is the standard provision that the PTA does not affect the rights of a party under a tax convention, and tax conventions prevail to the extent of any inconsistency, there is no carve-out which establishes that as a general matter that the PTA does not apply to tax measures.[89] Instead, only certain permissible tax measures are excluded from the scope of CETA. These include, among others, tax measures that provide 'an advantage relating to the purchase or consumption of a particular service, conditional on a requirement that the service

[86] RCEP art 17.14(2), (4).
[87] RCEP arts 17.14(3), 10.9.
[88] EU–Japan EPA art 1.4(2). Similar: EU–Singapore FTA art 16.6(1); EU–Korea FTA art 15.7(1); EU–Colombia, Peru FTA art 296(1).
[89] CETA art 28.7(3). For EU PTAs with a similar approach see eg EU–Vietnam FTA art 17.7; EU–New Zealand FTA art 25.3; CARIFORUM–EC EPA art 226. EU–UK TCA art 413.

be provided in the territory of that Party', and tax measures 'aimed at ensuring the equitable and effective imposition or collection of taxes'.[90] CETA's tax exception also features a wide-ranging attempt to coordinate its investment chapter with tax measures. CETA creates a referral mechanism, whereby if an investor requests consultations claiming that a tax measure breaches a substantive obligation in the investment chapter, the respondent can refer for joint determination by the treaty parties certain issues, including whether the measure is a tax measure and whether it breaches an obligation in CETA's investment chapter.[91] The treaty parties have 180 days in which to consult and if they reach a joint determination, this is binding on CETA's investor–State tribunal.[92] This is more wide-ranging than the 'filter mechanism' contained in NAFTA, USMCA and CPTPP considered above, reflecting that in those agreements only certain specified investment provisions (e.g. the expropriation provision) apply to tax measures, whereas under CETA, many tax measures are subject to the entire investment chapter. Finally, CETA's tax exception also clarifies that nothing in the agreement 'shall be construed to prevent a Party from adopting or maintaining any taxation measure aimed at preventing the avoidance or evasion of taxes pursuant to its tax laws or tax conventions'.[93]

5 Other Common Agreement-Wide Exceptions in PTAs

5.1 Exceptions concerning Confidential Information

PTAs frequently include an exception to prevent the agreement being construed in a manner that requires a party to provide access to certain forms of confidential information that are protected for legitimate reasons, such as law enforcement, legitimate commercial interests (e.g.

[90] CETA art 28.7(4).
[91] CETA art 28.7(7)(a).
[92] CETA art 28.7(7)(b)–(c).
[93] CETA art 28.7(2). See also art 28.7(1).

business confidentiality), or other public policy reasons. As with many PTA exceptions, it appears the origins of this provision lie in NAFTA, which provided:

> Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.[94]

While some early US and Canadian PTAs reproduce this provision,[95] in the early 2000s the exception was broadened considerably in US FTAs. In these more recent PTAs, while the first part of the exception concerning disclosure of information that would impede law enforcement is identical, the subsequent parts of the exception cover much broader categories of information. For example, the US–Singapore FTA, signed in 2003, provides:

> Nothing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information, the disclosure of which would impede law enforcement, *or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.*[96]

Compared to the equivalent provision in NAFTA, it is notable that rather than referring to disclosure of information that would be contrary to a Party's laws protecting personal privacy, the exception now covers information the disclosure of which would 'be contrary to the public interest' – a much broader term. Similarly, the third limb of the exception is not limited to the financial affairs of individual customers of financial institutions, but now covers information the disclosure of which 'would prejudice the legitimate commercial interests of particular enterprises, public or private'. In the mega-regional agreements of the last decade this exception often appears in a form that is only slightly modified from that of the US–Singapore FTA.[97] For example, the CPTPP, USMCA and RCEP add an additional prong to the exception

[94] NAFTA art 2105.
[95] E.g. Canada–Chile FTA art O-05; US–Chile FTA 23.5.
[96] US–Singapore FTA art 21.4 (emphasis added).
[97] See eg EU–Japan EPA art 1.6(1).

to prevent the PTA requiring a Party to disclose information 'which would be contrary to its law'.[98]

5.2 Exceptions for Temporary Safeguard Measures in cases of Balance of Payments and External Financial Difficulties

PTAs often include an exception which enables the treaty parties to restrict payments and transfers in cases of serous balance of payments difficulties and external financial difficulties.[99] This exception is only touched on here as it is addressed by other chapters in this book.[100] There appears to have been considerable evolution in this exception, whereby it has become more detailed in more recent agreements and goes beyond the multilateral rules from the trade and monetary context that are relevant to these issues. For example, the Canada–US FTA included a relatively simple balance of payments exception, which permitted a Party to 'apply trade restrictions in accordance with Article XII' of the GATT and the GATT Declaration on Trade Measures for Balance-of-Payments Purposes, as well as restrictions on current account transactions in accordance with Article VIII of the Articles of Agreement of the International Monetary Fund (IMF),[101] and restrictions on international capital movements in accordance with Article 7 paras (c)–(e) of the 1961 OECD Code of Liberalisation of Capital Movements.[102] All such restrictions had to comply with chapeau-like conditions.[103] Freiberg highlights that NAFTA's balance of payments exception was 'a major departure from' the Canada–US FTA and the GATT and more restrictive of states' ability to adopt balance of payments restrictions, *inter alia* requiring that such measures comply with the Articles of Agreement of the IMF and

[98] CPTPP art 29.7; USMCA art 32.7; RCEP art 17.7. Compare CETA art 28.8(1).
[99] See generally Bryan Mercurio, *Capital Controls and International Economic Law* (Cambridge University Press 2023) 132–134. Mercurio notes that 'while a BoP exception is now commonplace in FTAs, the inclusion of such a clause is not universal and is not included in many FTAs': 134.
[100] See this volume, chapters 32 'Multilateral Rules on Payments and Exchange-Rates' and 81 'Finance'.
[101] Articles of Agreement of the International Monetary Fund (adopted 22 July 1944, entered into force 27 December 1945) 2 UNTS 39, art VIII.
[102] OECD Code of Liberalisation of Capital Movements (1961), art 7(c)-(e).
[103] Canada–US FTA art 2002.

prohibiting such measures taking the form of import quotas or surcharges.[104] NAFTA's balance of payments exception imposed several other conditions on any measure adopted pursuant to the exception that have been developed incrementally in subsequent agreements. These include that a measure adopted under the exception must: 'avoid unnecessary damage to the commercial, economic or financial interests of another Party', 'not be more burdensome than necessary to deal with the balance of payments difficulties', 'be temporary and be phased out progressively as the … situation improves', and be applied on a non-discriminatory basis.[105] While this exception in NAFTA only referred to 'serious balance of payments difficulties or threat thereof', in contemporary PTAs the exception also covers 'external financial difficulties or threats thereof' and circumstances where 'payments or transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management'.[106] EU PTAs include an additional exception that permits the EU to adopt temporary safeguard measures regarding capital movements, payments or transfers '[i]n exceptional circumstances of serious difficulties for the operation of the European Union's economic and monetary union, or threat thereof'. Such measures are restricted to those 'strictly necessary' and must not constitute a means of arbitrary or unjustifiable discrimination between the treaty partner and third countries in like situations.[107]

6 More Novel PTA Exceptions

This section considers relatively novel exceptions that are only found in a small number of PTAs. Specifically, it analyses PTA exceptions for cultural issues and exceptions for measures

[104] NAFTA art 2104(3)(d), 5(d); Freiberg (n 77) 347–48.
[105] NAFTA art 2104(3)(a)–(c), (e). Compare, for example, CPTPP art 29.3(3); USMCA art 32.4(4); RCEP art 17.15(3); EU–Japan EPA art 9.4(3); CETA art 28.5(2).
[106] CPTPP art 29.3(1)–(2); USMCA art 32.4 (2)–(3); RCEP art 17.15(1)–(2); CETA art 28.5(1). EU–Japan EPA art 9.4(2).
[107] EU–Japan EPA art 9.4(1). CETA art 28.4; EU–New Zealand FTA art 25.5; In some EU PTAs this exception is also available to the treaty partner: eg EU–Singapore FTA art 16.10; EU–Vietnam FTA art 17.11.

to fulfil a Party's obligations to its indigenous peoples. Often such exceptions have been used repeatedly by a single state or a handful of states.[108]

6.1 Exceptions for Cultural Issues

GATT Article XX, which is typically incorporated into PTAs, already includes an exception (Article XX(f)) for measures 'imposed for the protection of national treasures of artistic, historic or archaeological value'.[109] However, as this exception 'does not protect domestic content not rising to the level of a "national treasure"', some States have included exceptions in their PTAs to safeguard a broader range of measures for protecting national culture.[110] The most well-known of these is Canada's consistent use of a wide-ranging exception regarding 'cultural industries'. Canada's first PTA, the 1988 Canada–US FTA, included Article 2005(1) that provided '[c]ultural industries are exempt from the provisions of this Agreement', except for a few specifically identified provisions. This exception further provided that '[n]otwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1'.[111] NAFTA, which replaced the Canada–US FTA, included a cultural industries exception that provided that as between Canada and the United States and Mexico, except for specific commitments on tariffs, any measure with respect to cultural industries would be governed by the provisions of the Canada–US FTA.[112] The USMCA, which in turn replaced NAFTA, also contains a broad exception establishing that '[t]his Agreement does not apply to a measure adopted or maintained by Canada with respect to a

[108] One rarely used category of exceptions not discussed further in this chapter are exceptions for religious practices. See eg US–Israel FTA art 8 ('This Agreement shall not preclude the adoption or enforcement by either Party of measures relating to prohibitions on religious or ritual grounds provided that they are applied in accordance with the principle of national treatment'.) Egypt–Jordan FTA art 8(a).
[109] GATT art XX(f).
[110] Bartels (n 16) 371.
[111] Canada–US FTA art 2005.
[112] NAFTA art 2106.

cultural industry', except for a few specifically identified provisions.[113] This exception further provides that '[w]ith respect to Canadian goods, services, and content, the United States and Mexico may adopt or maintain a measure that, were it adopted or maintained by Canada, would have been inconsistent with this Agreement but for' the exception concerning cultural industries.[114] Where Canada, Mexico or the United States rely on these exceptions, a Party is permitted to 'take a measure of equivalent commercial effect in response to an action by another Party that would have been inconsistent with this Agreement' but for the exception for cultural industries.[115] The vast majority of Canada's PTAs concluded since NAFTA include an agreement-wide exception for measures concerning cultural industries, although there is some difference in the wording of these exceptions.[116] Importantly, Canadian PTAs outside of the North American regional setting do not include the provision permitting retaliation of 'equivalent commercial effect' where a Party relies on the exception.[117] The approach in the CETA and the CPTPP is different. In these PTAs there is no agreement-wide exception for cultural industries; rather in CETA cultural industries are excluded from several chapters, or parts thereof, on a chapter-by-chapter basis, and in CPTPP the exceptions mainly relate to specific sectors and measures and are established in annexes of reservations and non-conforming measures.[118]

Most but not all of New Zealand's PTAs include an exception that applies to the entire agreement and is broader than GATT Article XX(f), covering 'measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts

[113] USMCA art 32.6(2).
[114] USMCA art 32.6(3).
[115] USMCA art 32.6(4).
[116] See eg Canada–Costa Rica FTA art XIV.6; Canada–Chile FTA, Annex O-06; Canada–Panama FTA art 23.06; Canada–Korea FTA art 22.6. On the evolution of Canada's approach to the cultural exception see Gilbert Gagné, 'The Evolution of Canada's Cultural Exemption in Preferential Trade Agreements' (2020) 26 Canadian Foreign Policy Journal 298.
[117] ibid; Gagné (n 116) 302.
[118] Eg CETA arts 7.7; 8.2(3), 9.2(2)(c); 12.2(b)(i); Annex 19-7(1)(i) and (2)(b). Gagné (n 116) 303–6.

of national value'.[119] The exception includes a footnote that further defines what is meant by 'creative arts',[120] and it has been suggested that it is broad enough to cover 'the whole of cultural products, with the exclusion of radio and television broadcasting'.[121] In order for measures to be covered by New Zealand's cultural exception, they must comply with conditions whose wording is borrowed from the chapeau to GATT Article XX and GATS Article XIV.[122] As Gagné and Jean-Desnoyers note, with its reference to measures 'necessary' for the specified purpose, and the fact that the exception is subject to compliance with the chapeau conditions, New Zealand's cultural exception 'has less of a self-judging character' than Canada's exclusion of cultural industries from the scope of many of the latter's PTAs.[123]

6.2 Exceptions for Measures to fulfil a Party's Obligations to its Indigenous Peoples

New Zealand has pioneered a novel agreement-wide exception that is consistently found in its PTAs and aims to protect New Zealand's policy space to fulfil its obligations under the Treaty of Waitangi[124] to protect the interests of Māori, its indigenous people.[125] The exception was developed in the late 1990s and first used in the New Zealand–Singapore CEPA, signed in 2000.[126] The text of the exception has remained consistent, even in New Zealand's most recent

[119] New Zealand–Singapore CEP art 16.4(5); New Zealand–China FTA art 200(3); New Zealand–Thailand FTA art 15.1(f); New Zealand–Malaysia FTA art 17.1(2); New Zealand–Hong Kong FTA ch 19 art 1(3); Australia–New Zealand–ASEAN FTA ch 15 art 1(4); New Zealand–UK FTA art 32.1(4) (the exception does not apply to the intellectual property chapter). For slight wording changes see New Zealand–Korea FTA art 20.1(3); New Zealand–Taiwan ECA ch 24, art 1(3); P4 Agreement art 19.1(3). New Zealand's cultural exception is not found in the following agreements: EU–New Zealand FTA art 25.1; RCEP art 17.12; CPTPP arts 29.1, 29.8; Australia–New Zealand FTA art 18.
[120] See eg Australia–New Zealand–ASEAN FTA ch 15, art 1(4) fn 2; New Zealand–UK FTA art 32.1(4) fn 2.
[121] Gilbert Gagné and Camille Jean-Desnoyers, 'Cultural Services in Australia and New Zealand's Preferential Trade Agreements' (2023) 57 Journal of World Trade 31, 41.
[122] See agreements cited above n 119.
[123] Gagné and Jean-Desnoyers (n 121) 41.
[124] Treaty of Waitangi (1840).
[125] Amokura Kawharu, 'The Treaty of Waitangi Exception in New Zealand's Free Trade Agreements' in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade* (Cambridge University Press 2020) 274, 294.
[126] Ibid 278–279.

PTAs, despite considerable criticism of the drafting of the exception in recent years.[127] The exception takes the following form:

> 1 Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.
>
> 2 The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.[128]

Starting with the first paragraph, obviously the scope of the exception is narrowed by requiring that measures must comply with chapeau-like conditions. The exception is strictly not limited to measures necessary for New Zealand to fulfil its obligations under the Treaty of Waitangi (given the use of 'including'). Beyond this, Kawharu highlights several potential ambiguities and shortcomings of this exception. First, the exception only covers measures that accord 'more favourable treatment' to Māori, however not all 'government actions that may be needed to protect Māori interests' may involve such preferential treatment.[129] Second, the reference to 'more favourable treatment' to Māori raises questions about the appropriate comparator, such as whether it is limited to a person of the other treaty party that is in like circumstances.[130] It would be more straightforward to remove the reference to 'more favourable treatment' so that the exception would cover 'measures New Zealand deems necessary to fulfil its obligations to

[127] See generally ibid 278–94.
[128] CPTPP art 29.6. There are minor and insignificant wording changes in New Zealand's other PTAs. See eg RCEP art 17.16; New Zealand–UK FTA art 32.5; EU–New Zealand FTA art 25.6; ASEAN–Australia–New Zealand FTA art ch 15 art 5; New Zealand–Korea FTA art 20.6. New Zealand–China FTA art 205.
[129] Kawharu (n 125) 280–81.
[130] Ibid 285–287.

Māori under the Treaty of Waitangi'.[131] Third, in relation to paragraph 2 of the exception, although many New Zealand PTAs include investor–State dispute settlement (ISDS), it is unclear whether ISDS tribunals are bound by the exclusion of certain issues – concerning the interpretation of the Treaty of Waitangi – from dispute settlement in the first sentence, as it simply refers to 'dispute settlement provisions' and the second and third sentences only mention the relevant provisions on State–State dispute settlement. It is alternatively possible to interpret the second and third sentences (which confirm certain issues remain within State–State dispute settlement) as precluding an ISDS tribunal from considering the application of the entire exception.[132]

The USMCA also includes a novel agreement-wide exception that aims to protect policy space for the Parties to fulfil their legal obligations towards their indigenous peoples, which was developed after Canada, during the renegotiation of NAFTA, proposed an entirely new chapter on trade and indigenous peoples.[133] The exception provides:

> [p]rovided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.[134]

As Schwartz has noted, 'although the drafting of this article is similar to the Treaty of Waitangi exception … it removes the limiting language of "to accord more favourable treatment"'.[135] VanDuzer and Mallet offer several helpful observations on this provision. Firstly, it is important to appreciate that this agreement-wide exception in USMCA is intended to

[131] Ibid 285, 292.
[132] Ibid 288–289.
[133] See generally Risa Schwartz, 'Developing a Trade and Indigenous Peoples Chapter for International Trade Agreements' in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade* (CUP 2020) 261–70.
[134] USMCA art 32.5. Essentially the same exception is found in the Agreement between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States regarding Trade between the United States of America and Taiwan (signed 1 June 2023, not yet in force), art 7.5.
[135] Schwartz (n 133) 266–67.

complement rather than replace an approach used by Canada in its prior PTAs (and still present in USMCA) of including reservations in relation to non-discrimination obligations in services and investment chapters, which preserve Canada's right 'to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples'.[136] Second, there are certain respects in which the novel agreement-wide exception in USMCA may be harder to satisfy than Canada's traditional reservation in services and investment chapters. The agreement-wide exception only covers measures taken by a party 'to fulfil its legal obligations to indigenous peoples', whereas the traditional reservation covers 'rights or preferences provided to' indigenous peoples that may not follow from a legal obligation.[137] Additionally, USMCA's agreement-wide exception would be more difficult for a regulating State to satisfy as it is subject to the chapeau-like conditions (unlike Canada's standard services and investment reservation) and it only covers measures that a party 'deems necessary' to fulfil its legal obligations to indigenous peoples, which would permit some degree of good faith review of the invocation of the exception.[138]

7 Conclusion

This chapter has provided a comparative overview of exceptions commonly found in PTAs. The analysis suggests that there has been an evolution in the exceptions provisions found in PTAs, whereby more recent agreements add clarifications or significant further detail to exceptions that are found in some form at the multilateral level, as well as exceptions that have

[136] NAFTA Annex II, Schedule of Canada. Canada's schedules under Annex II of CPTPP, CETA and USMCA contain the same reservation. J Anthony VanDuzer and Melanie Mallet, 'Indigenous Rights and Trade Obligations: How Does CUSMA's Indigenous General Exception Apply to Canada?' (2021) 58 Canadian Yearbook of international Law 1, 6–7. USMCA (like CETA and CPTPP) includes other carve-outs for indigenous-related issues that complement the agreement-wide exception, for example regarding government procurement and domestic regulation: see Van Duzer and Mallet, 9–10, Schwartz (n 133) 259–60, 268.
[137] VanDuzer and Mallet (n 136) 9.
[138] See ibid 9, 11–26.

no direct equivalent at the multilateral level. For example, this chapter has considered, among other developments, notable clarifications or additions to GATT Article XX, security exceptions that differ markedly from those found at the multilateral level, detailed PTA exceptions for taxation measures or balance of payments difficulties, PTA exceptions for cultural issues that are significantly more protective of policy space than GATT Article XX(f), and exceptions for a party's obligations towards its indigenous peoples.

Overall, this chapter's findings are consistent with recent literature on the design and evolution of PTAs. For example, NAFTA is often suggested to represent an influential, American-led model of a PTA, which has shaped many subsequent PTAs.[139] Consistently with this suggestion, several of the exceptions studied in this chapter, found in most contemporary PTAs (including mega-regionals) clearly had their origins in NAFTA – for example, detailed exceptions for taxation measures, balance of payments difficulties, and confidential information. Yet the analysis also demonstrates that it is not the case that the NAFTA exceptions have been entirely copy-pasted in more recent agreements – for most of the exceptions considered, there were, at a minimum, minor significant evolutions in the more recent agreements. A related finding is that for many of the exceptions considered there was a clear 'US approach' and 'EU approach' and sometimes certain other notable approaches (eg the ASEAN approach to security exceptions). This is consistent with recent literature which suggests that motivations for copy-pasting across PTAs include that powerful actors want to disseminate their preferred language on particular provisions in a consistent manner, and that individual members of plurilateral PTAs (e.g. NAFTA, CPTPP) often adopt the approach of the plurilateral agreement in their future bilateral PTAs.[140] The above analysis also suggests

[139] Leonardo Baccini, Andreas Dür and Yoram Z Haftel, 'Imitation and Innovation in International Governance: The Diffusion of Trade Agreement Design' in Andreas Dür and Manfred Elsig (eds), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (CUP 2015) esp. 171, 190.
[140] Todd Allee and Manfred Elsig, 'Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements' (2019) 63 International Studies Quarterly 603, esp. 609-10.

that there is a strong core of commonality in the exceptions included in PTAs, meaning, contrary to fears of fragmentation, PTAs may be contributing to 'a relatively coherent body of law'.[141]

Finally, the practice concerning PTA exceptions analysed here suggests that concerns about the impact of PTAs on regulatory autonomy remain alive and well. Such concerns essentially arise because of the vast scope of contemporary PTAs, which often go far beyond States' commitments at the multilateral level and affect virtually all areas of public policy. As suggested in the introduction to this chapter, as the scope and depth of PTAs grows, it appears more sophisticated exceptions are required to secure States' buy-in.

[141] Ibid, 611.