

CHAPTER TWENTY-THREE

EXCEPTIONS

Article 23.01: Definitions

For purposes of this Chapter:

competition authority means:

- (a) for Canada, the Commissioner of Competition or a successor notified to the other party through the Coordinators; and
- (b) for Panama, the Authority of Consumer Protection and Defence of Competition or a successor notified to the other party through the Coordinators;

cultural industry means a person engaged in the following activities:

- (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
- (b) the production, distribution, sale or exhibition of film or video recordings;
- (c) the production, distribution, sale or exhibition of audio or video music recordings;
- (d) the publication, distribution or sale of music in print or machine-readable form; or
- (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;

designated authority means:

- (a) in the case of Canada, the Assistant Deputy Minister for Tax Policy, Department of Finance, or a successor authority notified to the other party through the Coordinators; and
- (b) in the case of Panama, the Vice-Ministry of Finance, Ministry of Economy and Finance, or a successor authority notified to the other party through the Coordinators;

information protected under its competition laws means:

- (a) for Canada, information within the scope of Section 29 of the *Competition Act*, R.S. C. 1985, c.34, or a successor provision; and
- (b) for Panama, information within the scope of Article 103 of the Law 45 of October 31, 2007, or a successor provision;

tax convention means a convention for the avoidance of double taxation or other international taxation agreement or arrangement; and

tax and taxation measure does not include:

- (a) a “customs duty”; or
- (b) a measure listed in exceptions (b), (c), or (d) in the definition of “customs duty” in Article 1.01 (Initial Provisions and General Definitions – Definitions of General Application).

Article 23.02: General Exceptions

1. For the purposes of Chapters Two through Eight and Chapter Fifteen (National Treatment and Market Access for Goods, Rules of Origin, Customs Procedures, Trade Facilitation, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Emergency Action and Electronic Commerce) and Annex IV (International Maritime Section), GATT 1994 Article XX is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT 1994 Article XX (b) include environmental measures necessary to protect human, animal or plant life or health. The Parties further understand that GATT 1994 Article XX (g) applies to measures for the conservation of living and non-living exhaustible natural resources.

2. For the purposes of Chapters Ten, Eleven, Thirteen and Fifteen (Cross-Border Trade in Services, Telecommunications, Temporary Entry for Business Persons, and Electronic Commerce) GATS Article XIV (a), (b) and (c) is incorporated into this Agreement. The Parties understand that the measures referred to in GATS Article XIV (b) include environmental measures necessary to protect human, animal or plant life or health.

3. For the purposes of Chapter Nine (Investment):
 - (a) a Party may adopt or enforce a measure necessary:
 - (i) to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health,
 - (ii) to ensure compliance with a laws or regulation that are not inconsistent with this Agreement, or
 - (iii) for the conservation of living or non-living exhaustible natural resources;

- (b) provided that the measure referred to in sub paragraph (a) is not:
 - (i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or
 - (ii) a disguised restriction on international trade or investment.

Article 23.03: National Security

This Agreement does not:

- (a) require a Party to furnish or allow access to information if that Party determines that the disclosure of this information would be contrary to its essential security interests;
- (b) prevent a Party from taking an action that it considers necessary to protect its essential security interests:
 - (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
 - (ii) taken in time of war or other emergency in international relations, or
 - (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or
- (c) prevent a Party from fulfilling its obligations under the *Charter of the United Nations* for the maintenance of international peace and security.

Article 23.04: Taxation

1. Except as set out in this Article, this Agreement does not apply to a taxation measure.
2. This Agreement does not affect the rights and obligations of a Party under a tax convention. In the event of inconsistency between this Agreement and a tax convention, that convention prevails.
3. Where a provision with respect to a taxation measure under this Agreement is similar to a provision under a tax convention, the competent authorities identified in the tax convention shall use the procedural provisions of that tax convention to resolve an issue that may arise under this Agreement.
4. Notwithstanding paragraphs 2 and 3:
 - (a) Article 2.03 (National Treatment and Market Access for Goods – National Treatment) and the provisions of this Agreement necessary to give effect to that Article apply to a taxation measure to the same extent as Article III of the GATT 1994; and
 - (b) Article 2.10 (National Treatment and Market Access for Goods – Export Taxes) applies to a taxation measure.
5. Subject to paragraphs 2, 3 and 6:
 - (a) Article 10.03 (Cross-Border Trade in Services – National Treatment) and Article 12.03 (Financial Services – National Treatment) apply to a taxation measure on income, capital gains or on the taxable capital of corporations that relate to the purchase or consumption of particular services; and

- (b) Articles 9.04 and 9.05 (Investment – National Treatment and Most-Favoured-Nation Treatment), Articles 10.03 and 10.04 (Cross-Border Trade in Services – National Treatment and Most-Favoured-Nation Treatment) and Articles 12.03 and 12.04 (Financial Services – National Treatment and Most-Favoured-Nation Treatment) apply to a taxation measure, other than one on income, capital gains or on the taxable capital of corporations.

6. Paragraph 5 does not:

- (a) impose a most-favoured-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention;
- (b) impose on a Party an obligation making the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, pension trusts or pension plans conditional on a requirement that the Party maintain continuous jurisdiction over the pension trust or pension plan;
- (c) impose on a Party an obligation making the receipt, or continued receipt, of an advantage relating to the purchase or consumption of a particular service conditional on a requirement that the service be provided in its territory;
- (d) apply to a non-conforming provision of an existing taxation measure;
- (e) apply to the continuation or prompt renewal of a non-conforming provision of an existing taxation measure;
- (f) apply to an amendment to a non-conforming provision of an existing taxation measure provided that the amendment does not decrease its conformity, as it existed immediately before the amendment, with the Articles referred to in paragraph 5; or

- (g) apply to a new taxation measure that is aimed at ensuring the equitable and effective imposition or collection of taxes (including, for greater certainty, a measure that is taken by a Party in order to ensure compliance with the Party's taxation system or to prevent the avoidance or evasion of taxes) and that does not arbitrarily discriminate between persons, goods or services of the Parties.

7. Subject to paragraphs 2 and 3, and without prejudice to the rights and obligations of the Parties under paragraph 4, Article 9.07 (Investment – Performance Requirements) applies to a taxation measure.

8. Notwithstanding paragraphs 2 and 3, Article 9.11 (Investment – Expropriation) applies to a taxation measure, but an investor may not invoke that Article as the basis for a claim under Articles 9.20 (Investment – Claim by an Investor of a Party on Its Own Behalf) or 9.21 (Investment – Claim by an Investor of a Party on Behalf of an Enterprise), where the designated authorities of the Parties have determined under this paragraph that a taxation measure is not an expropriation. The investor shall refer the issue of whether a measure is not an expropriation for a determination to the designated authorities of the Parties at the time that it gives notice under subparagraph 2(c) of Article 9.22 (Investment – Conditions Precedent to Submission of a Claim to Arbitration). If, within a period of six months from the date of this referral, the designated authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation, the investor may submit its claim to arbitration under Article 9.23 (Investment – Submission of a Claim to Arbitration).

9. A claim by:

- (a) an investor of a Party that a tax measure of the other Party breaches an agreement between a central government authority of that Party and the investor concerning an investment, or
- (b) an investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, that a tax measure of the other Party breaches an agreement between a central government authority of the other Party and that enterprise,

may be submitted to arbitration under Section C of Chapter Nine (Settlement of Disputes between an Investor and the Host Party) unless the designated authorities of the Parties, within six months of being notified by the investor of its intention to submit the claim to arbitration, jointly determine that the measure does not contravene such agreement. The investor shall refer the issue of whether a taxation measure does not contravene such agreement for a determination to the designated authorities of the Parties at the same time that it gives notice under Article 9.22 (Investment – Conditions Precedent to Submission of a Claim to Arbitration).

10. In order to give effect to paragraphs 1 to 3:

- (a) If an issue arises as to whether a measure of a Party is a taxation measure in a dispute between the Parties, either Party may refer the issue to the designated authorities of the Parties. The designated authorities shall decide the issue of whether the measure is a taxation measure, and their decision shall bind a panel established under Article 22.07 (Dispute Settlement – Establishment of a Panel) for the dispute. If a Party has referred the issue to the designated authorities and they have not decided the issue within six months of the referral, the panel shall decide the issue;

- (b) If an issue arises as to whether a measure is a taxation measure in connection with a claim by an investor of a Party, the Party that has received notice of intention to submit a claim or against which an investor of a Party has submitted a claim may refer the issue to the designated authorities of the Parties. The designated authorities shall decide whether the measure is a taxation measure, and their decision shall bind a Tribunal with jurisdiction over the claim. A Tribunal seized of a claim in which the same issue arises may not proceed while the designated authorities are considering the issue. If a Party has referred the issue to the designated authorities and they have not decided the issue within six months of the referral, the Tribunal shall decide the issue;
- (c) If an issue arises as to whether a tax convention prevails over this Agreement in a dispute between the Parties, a Party to the dispute may refer the issue to the designated authorities of the Parties. The designated authorities shall consider the issue and decide whether the tax convention prevails. If within six months of the referral of the issue to the designated authorities, they decide with respect to the measure that gives rise to the issue that the tax convention prevails, procedures concerning that measure may not be initiated under Article 22.07 (Dispute Settlement – Establishment of a Panel). Procedures concerning the measure may not be initiated while the designated authorities are considering the issue. If a Party has referred the issue to the designated authorities and they have not decided the issue within six months of the referral, the panel shall decide the issue;

(d) If an issue arises as to whether a tax convention prevails over this Agreement prior to the submission of a claim by an investor of a Party, the Party that has received notice of intention to submit a claim may refer the issue to the designated authorities of the Parties. The designated authorities shall consider the issue and decide whether the tax convention prevails. If within six months of the referral of the issue to the designated authorities, they decide with respect to the measure that gives rise to the issue that the tax convention prevails, a claim concerning that measure may not be submitted under Article 9.23 (Investment – Submission of a Claim to Arbitration). A claim concerning the measure may not be submitted while the designated authorities are considering the issue. An investor of a Party that fails to identify a taxation measure in its notice of intention to submit a claim may not submit a claim concerning that measure under Article 9.23 (Investment – Submission of a Claim to Arbitration). If a Party has referred the issue to the designated authorities and they have not decided the issue within six months of the referral, the panel shall decide the issue.

11. If an investor invokes Article 9.11 (Investment – Expropriation) as the basis for a claim under Article 9.20 (Investment – Claim by an Investor of a Party on Its Own Behalf) or 9.21 (Investment – Claim by an Investor of a Party on Behalf of an Enterprise), the designated authorities shall make a determination under paragraph 8 of whether a measure is an expropriation concurrently with a decision under paragraph 10(b) of whether the measure is a taxation measure.

12. The designated authorities seized of an issue under paragraphs 8, 9 or 10 may modify the time period allowed to decide the issue.

13. This Agreement does not require a Party to furnish or allow access to information whose disclosure would be contrary to that Party's law protecting information concerning the taxation affairs of a taxpayer.

Article 23.05: Disclosure of Information

1. This Agreement does not require a Party to furnish or allow access to information which if disclosed would impede law enforcement, or would be contrary to the Party's law protecting the deliberative and policy-making processes of the executive branch of government at the cabinet level, personal privacy or the financial affairs and accounts of individual customers of financial institutions.
2. In the course of a dispute settlement procedure under this Agreement:
 - (a) a Party is not required to furnish or allow access to information protected under its competition laws;
 - (b) a competition authority of a Party is not required to furnish or allow access to information that is privileged or otherwise protected from disclosure.

Article 23.06: Cultural Industries

This Agreement does not apply to a measure adopted or maintained by a Party with respect to a cultural industry except as specifically provided in Article 2.04 (National Treatment and Market Access for Goods – Tariff Elimination).

Article 23.07: World Trade Organization Waivers

If a right or obligation in this Agreement duplicates one under the WTO Agreement, the Parties agree that a measure adopted by a Party in conformity with a waiver decision adopted by the WTO pursuant to Article IX of the WTO Agreement is deemed to be also in conformity with the present Agreement. Such conforming measure of either Party may not give rise to a claim by an investor of one Party against the other under Section C of Chapter Nine (Settlement of Disputes between an Investor and the Host Party).