

CHAPTER TWENTY-TWO

EXCEPTIONS

Article 2201: General Exceptions

1. For the purposes of Chapters Two to Seven and Fifteen (National Treatment and Market Access for Goods, Rules of Origin, Customs Procedures and Trade Facilitation, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Emergency Action and Trade Remedies and Electronic Commerce), except to the extent that a provision of these chapters applies to services or investment, GATT 1994 Article XX or any equivalent provision of a successor agreement to which all Parties are party, is incorporated into and made part of this Agreement, *mutatis mutandis*. 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 relating to the conservation of living and non-living exhaustible natural resources.
2. For the purposes of Chapters Nine, Twelve and Fifteen (Cross-Border Trade in Services, Telecommunications, Temporary Entry of Business Persons and Electronic Commerce), and of Chapters Two to Seven (National Treatment and Market Access for Goods, Rules of Origin, Customs Procedures and Trade Facilitation, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, and Emergency Action and Trade Remedies) to the extent that a provision of these chapters applies to services, GATS XIV (a), (b) and (c) or any equivalent provision of a successor agreement to which all Parties are party, is incorporated into and made part of this Agreement, *mutatis mutandis*. 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 Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) 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 and health;
- (b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
- (c) for the conservation of living or non-living exhaustible natural resources.

4. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures relating to nationals of the other Party aimed at preserving public order¹, subject to the requirement that such measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination. Without prejudice to the foregoing, the Parties understand that the rights and obligations under this Agreement, in particular the rights of investors under Chapter Eight (Investment), remain applicable to such measures.

Article 2202: National Security

Nothing in this Agreement shall be construed:

- (a) to require either Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

¹ As in Article XIV (a) of the GATS, this exception may be invoked only where genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

- b) to prevent either Party from taking any actions that it considers necessary for the protection of 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) to prevent either Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article 2203: Balance of Payments

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures that restrict transfers where the Party experiences serious balance of payments difficulties, or the threat thereof, and such restrictions are consistent with paragraphs 2 through 4 and are:

- (a) consistent with paragraph 5 to the extent that they are imposed on transfers other than cross-border trade in financial services; or
- (b) consistent with paragraphs 6 and 7 to the extent they are imposed on cross-border trade in financial services.

General Rules

2. As soon as practicable after a Party imposes a measure under this Article, the Party shall:

- (a) submit any current account exchange restrictions to the IMF for review under Article VIII of the Articles of Agreement of the IMF;
- (b) enter into good faith consultations with the IMF on economic adjustment measures to address the fundamental underlying economic problems causing the difficulties; and
- (c) adopt or maintain economic policies consistent with such consultations.

3. A measure adopted or maintained under this Article shall:

- (a) avoid unnecessary damage to the commercial, economic or financial interests of the other Party;
- (b) not be more burdensome than necessary to deal with the balance of payments difficulties or threat thereof;
- (c) be temporary and be phased out progressively as the balance of payments situation improves;
- (d) be consistent with subparagraph 2(c) and with the Articles of Agreement of the IMF; and
- (e) be applied on a national treatment or most-favoured-nation treatment basis, whichever is better.

4. A Party may adopt or maintain a measure under this Article that gives priority to services that are essential to its economic program, provided that a Party may not impose a measure for the purpose of protecting a specific industry or sector unless the measure is consistent with subparagraph 2(c) and with Article VIII(3) of the Articles of Agreement of the IMF.

Restrictions on Transfers Other than Cross-Border Trade in Financial Services

5. Restrictions imposed on transfers², other than on cross-border trade in financial services:
- (a) where imposed on payments for current international transactions, shall be consistent with Article VIII(3) of the Articles of Agreement of the IMF;
 - (b) where imposed on international capital transactions, shall be consistent with Article VI of the Articles of Agreement of the IMF and be imposed only in conjunction with measures imposed on current international transactions under subparagraph 2(a);
 - (c) where imposed on transfers covered by Article 810 (Investment – Transfers) and transfers related to trade in goods, may not substantially impede transfers from being made in a freely usable currency at a market rate of exchange; and
 - (d) may not take the form of tariff surcharges, quotas, licenses or similar measures.

Restrictions on Cross-Border Trade in Financial Services

6. A Party imposing a restriction on cross-border trade in financial services:
- (a) may not impose more than one measure for each different type of transfer related to cross border trade in financial services, unless consistent with subparagraph 2(c) and with Article VIII(3) of the Articles of Agreement of the IMF, and

². These transfers include payments related to trade in goods and services and investments.

- (b) shall promptly notify and consult with the other Party to assess the balance of payments situation of the Party and the measures it has adopted, taking into account among other elements:
 - (i) the nature and extent of the balance of payments difficulties of the Party,
 - (ii) the external economic and trading environment of the Party, and
 - (iii) alternative corrective measures that may be available.

7. The Parties entering into consultations pursuant to paragraph 6(b) shall:

- (a) consider if measures adopted under this Article comply with paragraph 3, in particular paragraph 3(c); and
- (b) accept all findings of statistical and other facts presented by the IMF relating to foreign exchange, monetary reserves and balance of payments, and shall base their conclusions on the assessment by the IMF of the balance of payments situation of the Party adopting the measures.

Article 2204: Taxation

1. Except as set out in this Article and paragraph 2 of Annex 1101.5, nothing in this Agreement shall apply to taxation measures.

2. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention³. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.

3. Where similar provisions with respect to a taxation measure exist under this Agreement and under a tax convention, the procedural provisions of the tax convention alone shall be used, by the competent authorities identified in the tax convention, to resolve any issue related to such provisions arising under this Agreement.

³ For purposes of this article, tax convention shall be understood as a convention or other international arrangement on taxation to avoid double taxation.

4. Notwithstanding paragraphs 2 and 3:
 - a) Article 202 (National Treatment and Market Access for Goods - National Treatment) 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 1994; and
 - b) Article 210 (National Treatment and Market Access for Goods - Export Taxes) shall apply to taxation measures.

5. Subject to paragraphs 2 and 3:
 - a) Article 902 (Cross-Border Trade in Services - National Treatment) and Article 1102 (Financial Services - National Treatment) shall apply to taxation measures on income, capital gains, or on the taxable capital of corporations that relate to the purchase or consumption of particular services, except that nothing in this subparagraph shall prevent a Party from conditioning the receipt or continued receipt of an advantage relating to the purchase or consumption of particular services on requirements to provide the service in its territory; and
 - b) Articles 803 and 804 (Investment - National Treatment and Most-Favoured Nation Treatment), Articles 902 and 903 (Cross-Border Trade in Services - National Treatment and Most-Favoured Nation Treatment), and Articles 1102 and 1103 (Financial Services - National Treatment and Most-Favoured Nation Treatment) shall apply to all taxation measures, other than those on income, capital gains, or on the taxable capital of corporations, taxes on estates, inheritances and gifts.
 - c) Subparagraphs (a) and (b) shall not:
 - i) impose any most-favoured nation obligation with respect to an advantage accorded by a Party pursuant to any tax convention,
 - ii) apply to a non-conforming provision of any existing taxation measure,

- iii) apply to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure,
- iv) apply to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with any of those Articles,
- v) apply to any new taxation measure that is aimed at ensuring the equitable and effective imposition or collection of taxes (including, for greater certainty, any 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, and
- vi) impose on a Party any obligation with respect to a provision that conditions the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, pension trusts or pension plans on a requirement that the Party maintain continuous jurisdiction over the pension trust or pension plan.

6. Subject to paragraphs 2 and 3, and without prejudice to the rights and obligations of the Parties under paragraph 4, Article 807 (Investment - Performance Requirements) shall apply to taxation measures.

7. Articles 811 and 822 (Investment - Expropriation and Submission of a Claim to Arbitration) shall apply to a taxation measure alleged to be an expropriation. However,

- a) no investor may invoke Article 811 (Investment - Expropriation) as the basis for a claim where it has been determined pursuant to this paragraph that the measure is not an expropriation;

- b) an investor that seeks to invoke Article 811 (Investment - Expropriation) with respect to a taxation measure must first refer to the designated authorities of the Parties at the time that it gives its notice of intent under subparagraph 1(c) of Article 822 (Investment - Submission of a Claim to Arbitration) the issue of whether that taxation measure is not an expropriation; and
- c) the designated authorities of the Parties shall agree to consider the issue. If the designated authorities fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 822 (Submission of a Claim to Arbitration).

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

- (a) Where in a dispute between Parties, an issue arises as to whether a measure of a Party is a taxation measure, 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 any panel established under Article 2106 (Dispute Settlement - Establishment of a Panel) for the dispute. Where the designated authorities have been referred the issue and have not decided the issue within six months of the referral, the panel shall decide the issue;

- (b) Where in connection with a claim by an investor of a Party, an issue arises as to whether a measure is a taxation measure, 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 the issue of whether the measure is a taxation measure, and their decision shall bind any Tribunal formed pursuant to Section B of Chapter Eight (Investment - Settlement of Disputes Between an Investor and the Host Party) with jurisdiction over the claim. A Tribunal seized of a claim in which the issue arises may not proceed pending receipt of the decision of the designated authorities. Where the designated authorities have been referred the issue and have not decided the issue within six months of the referral, the Tribunal shall decide the issue;
- (c) Where in a dispute between Parties, an issue arises as to whether a tax convention prevails over this Agreement, 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, no procedures concerning that measure may be initiated under Article 2106 (Dispute Settlement - Establishment of a Panel). No procedures concerning the measure may be initiated during the period that the issue is under consideration by the designated authorities. Where the designated authorities have been referred the issue and have not decided the issue within six months of the referral, the panel shall decide the issue; and

(d) Where prior to the submission of a claim by an investor of a Party, an issue arises as to whether a tax convention prevails over this Agreement, 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, no claim concerning that measure may be submitted under Article 822 (Investment - Submission of a Claim to Arbitration). No claim concerning the measure may be submitted during the period that the issue is under consideration by the designated authorities. 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 822 (Investment - Submission of a Claim to Arbitration). Where the designated authorities have been referred the issue and have not decided the issue within six months of the referral, the Tribunal shall decide the issue.

9. Where an investor invokes Article 811 (Investment - Expropriation) as the basis for a claim under Article 819 (Investment - Claim by an Investor of a Party on its Own Behalf) or 820 (Investment - Claim by an Investor of a Party on Behalf of an Enterprise), any determination under paragraph 7 of whether a measure is an expropriation shall be made concurrently with any decision by the designated authorities under subparagraph 8(b) of the issue whether the measure is a taxation measure.

10. The designated authorities seized of an issue under paragraphs 7 or 8 may agree to modify the time period allowed for their consideration of the issue.

11. Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would be contrary to the Party's law protecting information concerning the taxation affairs of a taxpayer.

Article 2205: Disclosure of Information

1. 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 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. Nothing in this Agreement shall be construed to require, during the course of any dispute settlement procedure under this Agreement, a Party to furnish or allow access to information protected under its competition laws, or a competition authority of a Party to furnish or allow access to any other information that is privileged or otherwise protected from disclosure.

Article 2206: Cultural Industries

Nothing in this Agreement shall be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Article 203 (National Treatment and Market Access for Goods - Tariff Elimination).

Article 2207: World Trade Organization Waivers

To the extent that there are overlapping rights and obligations in this Agreement and the WTO Agreement, the Parties agree that any measures adopted by a Party in conformity with a waiver decision adopted by the WTO pursuant to Article IX:3 of the WTO Agreement shall be deemed to be also in conformity with the present Agreement, except as otherwise agreed by the Parties. Such conforming measures of either Party may not give rise to legal actions by an investor of one Party against the other under Section B of Chapter Eight (Investment - Settlement of Disputes Between an Investor and the Host Party).

Article 2208: Definitions

For purposes of this Chapter:

competition authority means:

- (a) for Canada, the Commissioner of Competition or any successor, and,
- (b) for Colombia, the Superintendencia de Industria y Comercio, the Superintendencia Financiera, the Superintendencia de Servicios Públicos Domiciliarios, the Comisión Nacional de Televisión, the Aeronáutica Civil, or any successor agencies, when they address matters relating to the administration or enforcement of their competition laws.

cultural industries means persons engaged in any of 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;
- (f) production and presentation of performing arts;
- (g) production and exhibition of visual arts; or
- (h) design, production, distribution and sale of handicrafts.

designated authority means:

- (a) in the case of Canada, the Assistant Deputy Minister for Tax Policy, Department of Finance, or any successor authority;
- (b) in the case of Colombia, the Viceministerio Técnico del Ministerio de Hacienda y Crédito Público or any successor authority.

information protected under its competition laws means

- (a) for Canada, information within the scope of section 29 of the Competition Act, R.S. 1985, c.34, or any successor provision; and
- (b) for Colombia, information protected in accordance with numeral 3 of Article 4 and Article 13 of Ley 155 de 1959, or any successor provisions.

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

taxes and **taxation measures** do not include:

- (a) a “customs duty” as defined in Article 222 (National Treatment and Market Access for Goods - Definitions);
- (b) the measures listed in exceptions (b) and (c) to that definition.