

CHAPTER TWENTY-ONE EXCEPTIONS

ARTICLE 21.1: GENERAL EXCEPTIONS

1. For purposes of Chapters 2 (National Treatment and Market Access for Goods), 3 (Rules of Origin and Origin Procedures), 4 (Customs Administration and Trade Facilitation), 6 (Technical Barriers to Trade), 7 (Trade Remedies), and 12 (Electronic Commerce), Article XX of the GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement, *mutatis mutandis*. The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

2. For purposes of Chapters 8 (Investment), 9 (Cross-border Trade in Services), 10 (Temporary Entry for Business Persons), 11 (Telecommunications), and 12 (Electronic Commerce),¹ Article XIV of the GATS (including its footnotes) is incorporated into and made part of this Agreement, *mutatis mutandis*. The Parties understand that the measures referred to in Article XIV(b) of the GATS include environmental measures necessary to protect human, animal, or plant life or health. The Parties understand that the measures referred to in Article XIV(a) of the GATS include measures aimed at preserving internal public order.

ARTICLE 21.2: ESSENTIAL SECURITY

Nothing in this Agreement shall be construed:

- (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.²

ARTICLE 21.3: TAXATION

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

2. Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such

¹ Article 21.1 is without prejudice to whether digital products should be classified as goods or services.

² For greater certainty, if a Party invokes Article 21.2 in an arbitral proceeding initiated under Chapter 8 (Investment) or Chapter 20 (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.

convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Agreement and that convention.

3. Notwithstanding paragraph 2:

- (a) Article 2.2 (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 2.11 (Export Taxes) shall apply to taxation measures.

4. Subject to paragraph 2:

- (a) Article 9.2 (National Treatment) shall apply to taxation measures on income, on 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) Article 8.3 (National Treatment) and Article 8.4 (Most-Favored Nation Treatment), and Article 9.2 (National Treatment) and Article 9.3 (Most-Favored Nation Treatment) shall apply to all taxation measures, other than those on income, on capital gains, or on the taxable capital of corporations, or taxes on estates, inheritances and gifts, and generation-skipping transfers;

except that nothing in the Articles referred to in subparagraphs (a) and (b) shall apply:

- (c) any most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention;
- (d) to a non-conforming provision of any existing taxation measure;
- (e) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure;
- (f) 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;
- (g) to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes (as permitted by Article XIV(d) of the GATS); or
- (h) to a provision that conditions the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, a pension trust or pension plan

on a requirement that the Party maintain continuous jurisdiction over the pension trust or pension plan.

5. Subject to paragraph 2 and without prejudice to the rights and obligations of the Parties under paragraph 3, Article 8.9 (Performance Requirements) shall apply to taxation measures.

6. (a) Article 8.7 (Expropriation and Compensation) and Article 8.17 (Settlement of Dispute between a Party and an Investor of the Other Party) shall apply to a taxation measure alleged to be an expropriation or a breach of an investment agreement or investment authorization. However, no investor may invoke Article 8.7 (Expropriation and Compensation) as the basis for a claim where it has been determined pursuant to this subparagraph that the measure is not an expropriation.³ An investor that seeks to invoke Article 8.7 (Expropriation and Compensation) with respect to a taxation measure must first refer to the competent authorities, at the time that it gives its notice of intent under Article 8.17 (Settlement of Dispute between a Party and an Investor of the Other Party), the issue of whether that taxation measure involves an expropriation. If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of 180 days of such referral, the investor may submit its claim to arbitration under Article 8.17 (Settlement of Dispute between a Party and an Investor of the Other Party); and

(b) For purposes of this paragraph, **competent authorities** means:

- (i) for Korea, the Deputy Minister for Tax and Customs, *Ministry of Strategy and Finance*; and
- (ii) for Colombia, the Legal Advisory Office of the *Ministry of Finance and Public Credit (Oficina Asesora Jurídica del Ministerio de Hacienda Crédito Público)*.

7. For purposes of this Article,

(a) “taxes” and “taxation measures” do not include:

³ The determination of whether a taxation measure, in a specific fact situation, constitutes an expropriation requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including the factors listed in Annex 8-B (Expropriation) and the following considerations:

- (a) the imposition of taxes does not generally constitute an expropriation. The mere introduction of a new taxation measure or the imposition of a taxation measure in more than one jurisdiction in respect of an investment generally does not in and of itself constitute an expropriation;
- (b) a taxation measure that is consistent with internationally recognized tax policies, principles, and practices should not constitute an expropriation. In particular, a taxation measure aimed at preventing the avoidance or evasion of taxation measures generally does not constitute an expropriation;
- (c) a taxation measure that is applied on a non-discriminatory basis, as opposed to a taxation measure that is targeted at investors of a particular nationality or at specific taxpayers, is less likely to constitute an expropriation; and
- (d) a taxation measure generally does not constitute an expropriation if it was already in force when the investment was made and information about the measure was publicly available.

- (i) a customs duty as defined in Article 1.3 (Definitions); or
 - (ii) the measures listed in exceptions (b), (c), (d), and (e) of that definition;
and
- (b) **tax convention** means a convention for the avoidance of double taxation or other international taxation agreement or arrangement.

ARTICLE 21.4: DISCLOSURE OF INFORMATION

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.