

## **CHAPTER 16 EXCEPTIONS**

### **ARTICLE 16.1 DEFINITIONS**

For the purposes of this Chapter:

**tax agreement** means a convention for the avoidance of double taxation or other international taxation agreement or arrangement.

### **ARTICLE 16.2 GENERAL EXCEPTIONS**

1. Article XX of GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement, *mutatis mutandis*, for the purposes of Chapters 3 (Trade in Goods), 5 (Customs Procedures), 6 (Sanitary and Phytosanitary Measures), and 7 (Technical Barriers to Trade), 11 (Electronic Commerce) and 13 (Intellectual Property Cooperation). The Parties understand that the measures referred to in Article XX(b) of GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

2. Subparagraphs (a), (b) and (c) of Article XIV of GATS (including its footnotes) are incorporated into and made part of this Agreement, *mutatis mutandis*, for the purposes of Chapters 8 (Cross-Border Trade in Services), 9 (Investment), 11 (Electronic Commerce) and 13 (Intellectual Property Cooperation). The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health.

### **ARTICLE 16.3 ESSENTIAL SECURITY**

Nothing in this Agreement shall be construed:

- (a) to require a Party to furnish or allow to have access to any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance of international peace or security, or the protection of its own essential security interests<sup>29</sup>.

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<sup>29</sup> For greater certainty, nothing in this Agreement shall prevent a Party from taking any action which it considers necessary for the protection of critical public infrastructure, including but not limited to communications, power, water, and transportation infrastructure, from deliberate attempts intended to disable or degrade such infrastructure.

#### ARTICLE 16.4 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 agreement in force between the competent authorities of the Parties. In the event of any inconsistency between this Agreement and any such agreement, that agreement shall prevail to the extent of the inconsistency. In the case of such tax agreement in force between the competent authorities of the Parties, the competent authorities under that agreement shall have sole responsibility for determining whether any inconsistency exists between this Agreement and that agreement.
3. Notwithstanding paragraph 2, Article 3.3 (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 GATT 1994.
4. For greater certainty, subject to paragraph 2, Article 8.3 (National Treatment) and Article 9.5 (National Treatment) shall not be applied to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes permitted by Article XIV(d) of GATS.
5. Articles 9.12 (Expropriation) and 9.16 (Settlement of Disputes between a Party and an Investor of the Other Party) shall apply to taxation measures to the extent that such taxation measures constitute expropriation as provided for therein<sup>30</sup>. An investor that seeks to invoke Article 9.12 (Expropriation) with respect to a taxation measure must first refer to the relevant authorities specified in Annex 16, at the time that it gives notice under Article 9.16 (Settlement of Disputes between a Party and an Investor of the Other Party), the issue of whether that taxation measure involves an expropriation. If the relevant 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 six (6) months of such referral, the investor may submit its claim to arbitration under Article 9.16 (Settlement of Disputes between a Party and an Investor of the Other Party).

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<sup>30</sup> With reference to Article 9.12 (Expropriation) in assessing whether a taxation measure constitutes expropriation, the following considerations are relevant:

- (i) the imposition of taxes does not generally constitute expropriation. The mere introduction of new taxation measures or the imposition of taxes in more than one jurisdiction in respect of an investment does not in and of itself constitute expropriation;
- (ii) taxation measures which are consistent with internationally recognised tax policies, principles and practices do not constitute expropriation. In particular, taxation measures aimed at preventing the avoidance or evasion of taxes should not, generally, be considered to be expropriatory; and
- (iii) taxation measures which are applied on a non-discriminatory basis, as opposed to being targeted at investors of a particular nationality/citizenship or specific individual taxpayers, are less likely to constitute expropriation. A taxation measure should not constitute expropriation if, when the investment is made, it was already in force, and information about the measure was made public or otherwise made publicly available.

## **ARTICLE 16.5 RESTRICTIONS TO SAFEGUARD THE BALANCE OF PAYMENTS**

1. For the purposes of Chapter 3 (Trade in Goods), the Parties shall endeavour to avoid the imposition of restrictive measures for balance of payments purposes.
2. Any such measure taken for trade in goods must be in accordance with Article XII of GATT 1994 and the *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*, which shall be incorporated into and made a part of this Agreement.
3. For the purposes of Chapters 8 (Cross-Border Trade in Services) and 9 (Investment), in the event of serious balance of payments and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on:
  - (a) payments or transfers related to investments; or
  - (b) trade in services in respect of which it has obligations under Articles 8.3 (National Treatment) and 8.4 (Market Access), including on payments or transfers for transactions relating to such obligations.

It is recognised that particular pressures on the balance of payments of a Party in the process of economic development may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.

4. The restrictions referred to in paragraph 3 shall:
  - (a) be consistent with the *Articles of Agreement of the International Monetary Fund*;
  - (b) avoid unnecessary damage to the commercial, economic and financial interests of the other Party;
  - (c) not exceed those necessary to deal with the circumstances described in paragraph 3;
  - (d) be temporary and be phased out progressively as the situation specified in paragraph 3 improves; and
  - (e) be applied on a non-discriminatory basis such that the other Party is treated no less favourably than any non-Party.
5. Any restrictions adopted or maintained under paragraph 3, or any changes therein, shall be promptly notified to the other Party.
6. The Party adopting any restrictions under paragraph 3 shall commence consultations with the other Party in order to review the restrictions adopted by it.