

## CHAPTER 28

### EXCEPTIONS AND GENERAL PROVISIONS

#### Section A: Exceptions

##### Article 28.1: General Exceptions

1. For the purposes of Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Rules of Origin and Origin Procedures), Chapter 4 (Customs Administration and Trade Facilitation), Chapter 6 (Sanitary and Phytosanitary Measures), Chapter 7 (Technical Barriers to Trade) and Chapter 16 (State-Owned Enterprises and Designated Monopolies), Article XX of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*.<sup>1</sup>

2. 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.

3. For the purposes of Chapter 9 (Cross-Border Trade in Services), Chapter 11 (Temporary Entry for Business Persons), Chapter 12 (Telecommunications), Chapter 13 (Electronic Commerce)<sup>2</sup> and Chapter 16 (State-Owned Enterprises and Designated Monopolies), paragraphs (a), (b) and (c) of Article XIV of GATS are incorporated into and made part of this Agreement, *mutatis mutandis*.<sup>3</sup> 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.

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<sup>1</sup> For the purposes of Chapter 16 (State-Owned Enterprises and Designated Monopolies), Article XX of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*, only with respect to measures of a Party (including the implementation of measures through the activities of a state-owned enterprise or designated monopoly) affecting the purchase, production or sale of goods, or affecting activities the end result of which is the production of goods.

<sup>2</sup> This paragraph is without prejudice to whether a digital product should be classified as a good or service.

<sup>3</sup> For the purposes of Chapter 16 (State-Owned Enterprises and Designated Monopolies), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, *mutatis mutandis*, only with respect to measures of a Party (including the implementation of measures through the activities of a state-owned enterprise or designated monopoly) affecting the purchase or supply of services, or affecting activities the end result of which is the supply of services.

4. Nothing in this Agreement shall be construed to prevent a Party from taking action, including maintaining or increasing a customs duty, that is authorised by the Dispute Settlement Body of the WTO or is taken as a result of a decision by a dispute settlement panel under a free trade agreement to which both Parties are party.

### **Article 28.2: Security Exceptions**

Nothing in this Agreement shall be construed to:

- (a) 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) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

### **Article 28.3: Temporary Safeguard Measures**

1. A Party may adopt or maintain restrictive measures with regard to cross-border capital transactions as well as payments or transfers for current account and capital movement transactions:

- (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
- (b) in exceptional cases where movements of capital cause or threaten to cause serious difficulties for macroeconomic management.

2. Restrictive measures referred to in paragraph 1 shall:

- (a) not be inconsistent with Article 8.4 (National Treatment), Article 8.5 (Most-Favoured-Nation Treatment), Article 9.3 (National Treatment), Article 9.4 (Most-Favoured-Nation Treatment), Article 10.3 (National Treatment) and Article 10.4 (Most-Favoured-Nation Treatment);<sup>4</sup>

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<sup>4</sup> Without prejudice to the general interpretation of Article 8.4 (National Treatment), Article 8.5 (Most-Favoured-Nation Treatment), Article 9.3 (National Treatment), Article 9.4 (Most-Favoured-Nation Treatment), Article 10.3 (National Treatment) and Article 10.4 (Most-Favoured-Nation Treatment), the fact that a measure adopted or maintained pursuant to paragraph 1 or 2 differentiates between investors on the basis of residency does not necessarily mean that the measure is inconsistent with Article 8.4 (National Treatment), Article 8.5 (Most-Favoured-Nation Treatment), Article 9.3 (National Treatment), Article 9.4 (Most-Favoured-Nation Treatment), Article 10.3 (National Treatment) and Article 10.4 (Most-Favoured-Nation Treatment).

- (b) be consistent with the *Articles of Agreement of the International Monetary Fund*;
- (c) not exceed those necessary to deal with the circumstances set out in paragraph 1;
- (d) be temporary and be phased out progressively as the situation specified in paragraph 1 improves;
- (e) be promptly notified to the other Party; and
- (f) avoid unnecessary damages to the commercial, economic and financial interests of the other Party.

3. The Party which has adopted any measures under paragraph 1 shall, on request, commence consultations with the other Party in order to review the restrictions adopted by it.

#### **Article 28.4: Taxation Measures**

1. For the purposes of this Article:

**designated authorities** means:

- (a) for Australia, the Secretary to the Treasury, or its successor, or an authorised representative of the Secretary; and
- (b) for Peru, the General Director of International Economy, Competition and Productivity Affairs (*Director General de Asuntos de Economía Internacional, Competencia y Productividad del Ministerio de Economía y Finanzas*), or its successor;

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

**taxes** and **taxation measures** include excise duties, but do not include any import or customs duties.

2. Except as provided in this Article, nothing in this Agreement shall apply to taxation measures.

3. This Agreement shall only grant rights or impose obligations with respect to taxation measures where:

- (a) corresponding rights and obligations are also granted or imposed under the WTO Agreement; or
- (b) they are granted or imposed under:
  - (i) Chapter 2 (National Treatment and Market Access for Goods); or
  - (ii) Article 8.10 (Performance Requirements).

4. Notwithstanding paragraph 3, nothing in the Articles referred to in that paragraph shall apply to:

- (a) any non-conforming provision of any existing taxation measure;
- (b) the continuation or prompt renewal of any non-conforming provision of any existing taxation measure;
- (c) an amendment to any non-conforming provision of any existing taxation measure, provided that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with any of those Articles;
- (d) the adoption or enforcement of any new taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes including any taxation measure that differentiates between persons based on their place of residence, provided that the taxation measure does not arbitrarily discriminate between persons, goods or services of the Parties<sup>5</sup>; or
- (e) a provision that conditions the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, a pension trust, pension fund, superannuation fund, or other arrangement to provide pension, superannuation, or similar benefits on a requirement that the Party maintain continuous jurisdiction, regulation, or supervision over such trust, fund, or other arrangement.

5. Article 8.8 (Expropriation and Compensation) shall apply to taxation measures. However, no investor may invoke Article 8.8 (Expropriation and Compensation) as the basis for a claim if it has been determined pursuant to this paragraph that the measure is not an expropriation. An investor that seeks to invoke Article 8.8 (Expropriation and Compensation) with respect to a taxation measure must first refer to the designated authorities of the Party of the investor and the respondent Party, at the time that it gives its notice of intent under Article 8.20 (Submission of a Claim to Arbitration), the issue

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<sup>5</sup> The Parties understand that this paragraph must be interpreted by reference to the footnote to Article XIV(d) of GATS as if the Article was not restricted to services or direct taxes.

of whether that taxation measure is not an expropriation. If 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 within a period of six months of the referral, the investor may submit its claim to arbitration under Article 8.20 (Submission of a Claim to Arbitration). A panel established to consider a dispute related to the measure shall accept as binding a determination of the designated authorities of the Parties made under this paragraph.

6. Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency relating to a taxation measure between this Agreement and any such tax convention, that convention shall prevail to the extent of the inconsistency.

7. If an issue arises as to whether any inconsistency exists between this Agreement and a tax convention between the Parties, the issue shall be referred to the designated authorities of the Parties. The designated authorities of the Parties shall have six months from the date of referral of the issue to make a determination as to the existence and extent of the inconsistency. If the designated authorities agree, such a period may be extended up to twelve months from the date of referral of the issue. No procedure concerning the measure giving rise to the issue may be initiated under Chapter 27 (Dispute Settlement) or Chapter 8 (Investment) until the expiry of the six month period, or such other period as may have been agreed by the designated authorities pursuant to the previous sentence. A panel established to consider a dispute related to a taxation measure shall accept as binding a determination of the designated authorities of the Parties made under this paragraph.

8. Nothing in this Agreement shall oblige a Party to extend to the other Party the benefit of any treatment, preference or privilege arising from any tax convention by which the Party is bound.

## **Section B: General Provisions**

### **Article 28.5: Disclosure of Information**

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 its law or 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.