

CHAPTER TWENTY-TWO

EXCEPTIONS

Article 22.1: General Exceptions

1. For the purposes of Chapters Two (National Treatment and Market Access for Goods), Three (Rules of Origin), Four (Origin Procedures and Trade Facilitation), Five (Sanitary and Phytosanitary Measures), Six (Standards-Related Measures), Seven (Trade Remedies), and Thirteen (Electronic Commerce), Article XX of the GATT 1994 and, for greater certainty, its interpretative 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. The Parties further understand 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 the purposes of Chapters Nine (Cross-Border Trade in Services), Eleven (Telecommunications), Twelve (Temporary Entry for Business Persons), and Thirteen (Electronic Commerce), Articles XIV (a), (b) and (c) of GATS are incorporated into and made part of this Agreement, *mutatis mutandis*. 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.

3. For the purposes of Chapter Eight (Investment), subject to the requirement that those measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, this Agreement is not to be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) to protect human, animal or plant life or 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.

Article 22.2: National Security

This Agreement is not to be construed:

- (a) to require either Party to furnish or allow access to information if that Party determines that the disclosure of the information would be contrary to its essential security interests;
- (b) to prevent either Party from taking 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 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 its international agreements for the maintenance of international peace and security.

Article 22.3: Taxation

1. Except as set out in this Article, this Agreement does not apply to a taxation measure.
2. (a) This Agreement does not affect the rights and obligations of either Party under a tax convention. In the event of inconsistency between this Agreement and a tax convention, the tax convention shall prevail to the extent of the inconsistency.

- (b) In the case of a tax convention between the Parties, the competent authorities under that convention shall have the sole responsibility for determining whether an inconsistency exists between this Agreement and that convention.
- 3. Notwithstanding paragraph 2:
 - (a) Article 2.2 (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) Articles 2.8 (Export Duties, Taxes or Other Charges) and 2.9 (Most-Favoured-Nation Treatment for Internal Taxes and Emissions Regulations) apply to a taxation measure.
- 4. Subject to paragraphs 2 and 5:
 - (a) Articles 9.2 (National Treatment), 10.2 (National Treatment), and 10.5 (Cross-Border Trade) apply to a taxation measure on income, on capital gains, or on the taxable capital of corporations that relates to the purchase or consumption of particular services, except that this subparagraph does not 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 8.3 (National Treatment) and 8.4 (Most-Favoured-Nation Treatment), Articles 9.2 (National Treatment) and 9.3 (Most-Favoured-Nation Treatment), and Articles 10.2 (National Treatment) and 10.3 (Most-Favoured-Nation Treatment) apply to all taxation measures, other than those on income, on capital gains, or on the taxable capital of corporations, or taxes on inheritances and gifts.
- 5. Paragraph 4 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 a national treatment obligation with respect to the conditioning of a receipt, or continued receipt, of an advantage relating to the contributions to, or income of, pension trusts or pension plans on a requirement that a Party maintain continuous jurisdiction over the pension trust or pension plan;
- (c) apply to a non-conforming provision of an existing taxation measure;
- (d) apply to the continuation or prompt renewal of a non-conforming provision of an existing taxation measure;
- (e) apply to an amendment to a non-conforming provision of an existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with the Articles referred to in paragraph 4; or
- (f) apply to a 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.

6. Subject to paragraph 2, and without prejudice to the rights and obligations of the Parties under paragraph 3, Article 8.8 (Performance Requirements) applies to taxation measures.

7. Article 8.11 (Expropriation and Compensation) applies to a taxation measure. However, an investor shall not invoke Article 8.11 (Expropriation and Compensation) as the basis for a claim under Article 8.18 (Claim by an Investor of a Party on its Own Behalf) or 8.19 (Claim by an Investor of a Party on Behalf of an Enterprise) if it has been determined pursuant to this paragraph that the measure is not an expropriation. The investor shall refer to the designated authorities, at the time that it gives its Notice of Intent under Article 8.20 (Notice of Intent to Submit a Claim to Arbitration), the issue 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 180 days of such referral, the investor may submit its claim to arbitration under Article 8.23 (Submission of a Claim to Arbitration).

8. This Agreement is not to 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 22.4: Transfers

1. Chapters Eight (Investment), Nine (Cross-Border Trade in Services), and Ten (Financial Services) are not to be construed to prevent Korea from applying measures pursuant to Article 6 of the *Foreign Exchange Transactions Act*, provided that such measures¹:

- (a) are in effect for a period not to exceed one year; however, if extremely exceptional circumstances arise such that Korea seeks to extend such measures, Korea will coordinate in advance with Canada concerning the implementation of a proposed extension;
- (b) are not confiscatory;
- (c) do not constitute a dual or multiple exchange rate practice;
- (d) do not otherwise interfere with investors' ability to earn a market rate of return in the territory of Korea on restricted assets²;
- (e) avoid unnecessary damage to the commercial, economic, or financial interests of Canada;
- (f) are temporary and phased out progressively as the situation calling for imposition of such measures improves;
- (g) are applied in a manner consistent with Articles 8.3, 9.2, and 10.2 (National Treatment) and Articles 8.4, 9.3, and 10.3 (Most-Favoured-Nation Treatment) subject to Korea's Schedules to Annex I, Annex II, and Annex III; and

¹ Korea shall endeavour to provide that such measures will be price-based.

² For greater certainty, the term "restricted assets" in this subparagraph refers only to assets invested in the territory of Korea by an investor of Canada that are restricted from being transferred out of the territory of Korea.

- (h) are promptly published by the Ministry of Strategy and Finance or the Bank of Korea, or their respective successors.
- 2. Paragraph 1 does not apply to measures that restrict:
 - (a) payments or transfers for current transactions, unless:
 - (i) the imposition of such measures complies with the procedures stipulated in the *Articles of Agreement of the International Monetary Fund*³; and
 - (ii) Korea coordinates such measures in advance with Canada; or
 - (b) payments or transfers associated with foreign direct investment.

Article 22.5: Disclosure of Information

- 1. This Agreement is not to 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. This Agreement is not to 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 other information that is privileged or otherwise protected from disclosure.

³ "Current transactions" shall have the meaning set forth in Article XXX(d) of the *Articles of Agreement of the International Monetary Fund* and, for greater certainty, shall include interest pursuant to a loan or bond on any restricted amortisation payments coming due during the period that controls on capital transactions are applied.

Article 22.6: Cultural Industries

This Agreement is not to be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Articles 1.6 (Cultural Cooperation) and 2.3 (Tariff Elimination).

Article 22.7: World Trade Organization Waivers

To the extent that there are overlapping rights and obligations in this Agreement and the WTO Agreement, measures adopted by a Party in conformity with a waiver decision adopted by the WTO pursuant to Article IX of the WTO Agreement are deemed to be also in conformity with this Agreement. The conforming measure of either Party shall not give rise to legal actions by an investor of a Party against the other Party under Section B of Chapter Eight (Investor-State Dispute Settlement).

Article 22.8: Definitions

For the purposes of this Chapter:

competition authority means:

- (a) for Korea, the Korea Fair Trade Commission; and
 - (b) for Canada, the Commissioner of Competition,
- or their respective successors;

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;
- (e) radio communications in which the transmissions are intended for direct reception by the general public;

- (f) radio, television and cable broadcasting undertakings; or
- (g) satellite programming and broadcast network services;

designated authority means:

- (a) for Korea, the Deputy Minister for Tax and Customs, Ministry of Strategy and Finance; and
- (b) for Canada, the Assistant Deputy Minister for Tax Policy, Department of Finance,

or their respective successors;

information protected under its competition laws means:

- (a) for Canada, information within the scope of Section 29 of the *Competition Act*, or any successor provision; and
- (b) for Korea, information within the scope of Articles 22-2, 50 and 62 of the *Monopoly Regulation and Fair Trade Act*;

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 1.8 (Definitions of General Application); or
- (b) the measures listed in exceptions (b) and (c) to that definition.

Annex 22-A

Taxation and Expropriation

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 recognised tax policies, principles, and practices does 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.