

## CHAPTER 32

### EXCEPTIONS AND GENERAL PROVISIONS

#### Section A: Exceptions

##### Article 32.1: General Exceptions

1. For the purposes of Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Agriculture), Chapter 4 (Rules of Origin), Chapter 5 (Origin Procedures), Chapter 6 (Textile and Apparel Goods), Chapter 7 (Customs Administration and Trade Facilitation), Chapter 9 (Sanitary and Phytosanitary Measures), Chapter 11 (Technical Barriers to Trade), Chapter 12 (Sectoral Annexes), and Chapter 22 (State-Owned Enterprises and Designated Monopolies), Article XX of the GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*.<sup>1</sup>

2. For the purposes of Chapter 15 (Cross-Border Trade in Services), Chapter 16 (Temporary Entry for Business Persons), Chapter 18 (Telecommunications), Chapter 19 (Digital Trade),<sup>2</sup> and Chapter 22 (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>

3. The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 and GATS Article XIV(b) 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.

4. Nothing in this Agreement shall be construed to prevent a Party from taking action, including maintaining or increasing a customs duty, that is authorized 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

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<sup>1</sup> For the purposes of Chapter 22 (State-Owned Enterprises and Designated Monopolies), Article XX of the 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 a 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 Party considers a digital product to be a good or service.

<sup>3</sup> For the purposes of Chapter 22 (State-Owned Enterprises and Designated Monopolies), Article XIV of the 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 a designated monopoly) affecting the purchase or supply of services, or affecting activities the end result of which is the supply of services.

trade agreement to which the Party taking action and the Party against which the action is taken are party.

### **Article 32.2: Essential Security**

1. Nothing in this Agreement shall be construed to:
  - (a) require a Party to furnish or allow access to 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 32.3: Taxation Measures**

1. For the purposes of this Article:

**designated authorities** means:

- (a) for Canada, the Assistant Deputy Minister for Tax Policy, Department of Finance;
- (b) for Mexico, the Deputy Minister of Revenue of the Ministry of Finance and Public Credit (*Subsecretario de Ingresos*); and
- (c) for the United States, the Assistant Secretary of the Treasury (Tax Policy),

or any successor of these designated authorities as notified in writing to the other Parties;

**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:

- (a) a “customs duty” as defined in Article 1.4 (General Definitions); or
  - (b) the measures listed in subparagraphs (b), (c), and (d) of that definition.
2. Except as provided in this Article, this Agreement does not apply to a taxation measure.

3. This Agreement does not affect the rights and obligations of a Party under a tax convention. In the event of any inconsistency between this Agreement and a tax convention, that convention prevails to the extent of the inconsistency.

4. In the case of a tax convention between two or more Parties, if an issue arises as to whether an inconsistency exists between this Agreement and the tax convention, the issue shall be referred to the designated authorities of the Parties in question. The designated authorities of those Parties shall have six months from the date of referral of the issue to make a determination as to the existence and extent of any inconsistency. If those designated authorities agree, the period may be extended up to 12 months from the date of referral of the issue. No procedures concerning the measure giving rise to the issue may be initiated under Chapter 31 (Dispute Settlement) or, as between the United States and Mexico, Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts) until the expiry of the six month period, or any other period as may have been agreed by the designated authorities. A panel or tribunal established to consider a dispute related to a taxation measure shall accept as binding a determination of the designated authorities of the Parties in question made under this paragraph.

5. Notwithstanding paragraph 3:

- (a) Article 2.3 (National Treatment) and other provisions of this Agreement that are necessary to give effect to that Article apply to taxation measures to the same extent as does Article III of the GATT 1994, including its interpretative notes; and
- (b) Article 2.15 (Export Duties, Taxes, or other Charges) applies to taxation measures.

6. Subject to paragraph 3:

- (a) Article 15.3 (National Treatment) and Article 17.3 (National Treatment) apply to a taxation measure on income, on capital gains, or on the taxable capital of corporations that relate 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 that relates to the purchase or consumption of particular services on requirements to provide the service in its territory;
- (b) Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 15.3 (National Treatment), Article 15.4 (Most-Favored-Nation Treatment), Article 17.3 (National Treatment), Article 17.4 (Most-Favored-Nation Treatment), and Article 19.4 (Non-Discriminatory Treatment of Digital Products) apply to a taxation measure, other than a taxation measure on income, on capital gains, on the taxable capital of corporations, or taxes on estates, inheritances, gifts, and generation-skipping transfers; and

- (c) Article 19.4 (Non-Discriminatory Treatment of Digital Products) apply to a taxation measure on income, on capital gains, or on the taxable capital of corporations that relate to the purchase or consumption of particular digital products, 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 digital products on requirements to provide the digital product in its territory,

but nothing in the Articles referred to in subparagraphs (a), (b), and (c) apply to:

- (d) a most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention;
- (e) a non-conforming provision of a taxation measure in existence as of the date of entry into force of NAFTA 1994;
- (f) the continuation or prompt renewal of a non-conforming provision of a taxation measure in existence as of the date of entry into force of NAFTA 1994;
- (g) an amendment to a non-conforming provision of a taxation measure in existence as of the date of entry into force of NAFTA 1994 to the extent that the amendment does not decrease its conformity, at the time of the amendment, with any of those Articles;
- (h) the adoption or enforcement of a new taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes, including a taxation measure that differentiates between persons based on their place of residence for tax purposes, provided that the taxation measure does not arbitrarily discriminate between persons, goods, or services of the Parties;<sup>4</sup>
- (i) a provision that conditions the receipt or continued receipt of an advantage relating to the contributions to, or income of, a pension trust, pension plan, or other arrangement to provide pension, or similar benefits, on a requirement that the Party maintain continuous jurisdiction, regulation, or supervision over that trust, plan, fund, or other arrangement; or
- (j) an excise duty on insurance premiums to the extent that the excise duty would, if levied by another Party, be covered by subparagraphs (e), (f), or (g).

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<sup>4</sup> The Parties understand that this subparagraph 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.

7. Subject to paragraph 3, and without prejudice to the rights and obligations of the Parties under paragraph 5, Article 14.10.2 (Performance Requirements), Article 14.10.3, and Article 14.10.4 apply to a taxation measure.

8. Article 14.8 (Expropriation and Compensation) applies to a taxation measure. However, as between the United States and Mexico, no investor may invoke Article 14.8 (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 of the United States or Mexico that seeks to invoke Article 14.8 (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 14.D.3 (Submission of 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 six months of the referral, the investor of the United States or Mexico may submit its claim to arbitration under, as applicable, Annex 14.D.3 (Submission of a Claim to Arbitration) or paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

#### **Article 32.4: Temporary Safeguards Measures**

1. For the purposes of this Article:

**foreign direct investment** means a type of investment by an investor of a Party in the territory of another Party, through which the investor exercises ownership or control over, or a significant degree of influence on the management of, an enterprise or other direct investment, and tends to be undertaken in order to establish a lasting relationship; for example, ownership of at least 10 percent of the voting power of an enterprise over a period of at least 12 months generally would be considered a foreign direct investment.

2. This Agreement does not prevent a Party from adopting or maintaining a restrictive measure with regard to payments or transfers for current account transactions in the event of serious balance of payments and external financial difficulties or threats thereof.

3. This Agreement does not prevent a Party from adopting or maintaining a restrictive measure with regard to payments or transfers relating to the movements of capital:

- (a) in the event of serious balance of payments and external financial difficulties or threats thereof; or
- (b) if, in exceptional circumstances, payments or transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management.

4. A measure adopted or maintained under paragraph 2 or 3 must:
- (a) not be inconsistent with Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 15.3 (National Treatment), Article 15.4 (Most-Favored-Nation Treatment), Article 17.3 (National Treatment), and Article 17.4 (Most-Favored-Nation Treatment);<sup>5</sup>
  - (b) be consistent with the Articles of Agreement of the IMF;
  - (c) avoid unnecessary damage to the commercial, economic, and financial interests of another Party;
  - (d) not exceed those necessary to deal with the circumstances described in paragraph 2 or 3;
  - (e) be temporary and be phased out progressively as the situations specified in paragraph 2 or 3 improve, and shall not exceed 12 months in duration; however, in exceptional circumstances, a Party may extend that measure for one additional period of one year, by notifying the other Parties in writing within 30 days of the extension;
  - (f) not be inconsistent with Article 14.8 (Expropriation and Compensation);<sup>6</sup>
  - (g) in the case of restrictions on capital outflows, not interfere with investors' ability to earn a market rate of return in the territory of the restricting Party on assets invested in the territory of the restricting Party by an investor of a Party that are restricted from being transferred out of the territory of the restricting Party; and
  - (h) not be used to avoid necessary macroeconomic adjustment.
5. As soon as practicable after a Party imposes a measure under paragraph 2, the Party shall:
- (a) submit any current account exchange restrictions to the IMF for review and approval under Article VIII of the Articles of Agreement of the IMF;
  - (b) consistent with its obligations under the Articles of Agreement of the IMF, enter into good faith consultations with the IMF on economic adjustment measures

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<sup>5</sup> Without prejudice to the general interpretation of the Articles listed in this sub-paragraph, the fact that a measure a Party adopts or maintains pursuant to paragraph 2 or 3 differentiates between investors on the basis of residency does not necessarily mean that the measure is inconsistent with those Articles.

<sup>6</sup> For greater certainty, a measure referred to in paragraph 2 or 3 may be non-discriminatory regulatory actions by a Party that is designed and applied to protect legitimate public welfare objectives as referred to in Annex 14-B.3(b) (Expropriation).

necessary to remove the restrictions in 3(a); and

(c) adopt or maintain economic policies consistent with those consultations.

6. Measures referred to in paragraphs 2 and 3 shall not apply to payments or transfers relating to foreign direct investment.

7. A Party shall endeavor to provide that a measure it adopts or maintains under paragraph 2 or 3 be price-based, and if that measure is not price-based, the Party shall explain the rationale for using quantitative restrictions when it notifies the other Parties of the measure.

8. In the case of trade in goods, Article XII of GATT 1994 and the *Understanding on the Balance-of-Payments Provisions of the GATT 1994*, set out in Annex 1A to the WTO Agreement, are incorporated into and made part of this Agreement, *mutatis mutandis*. Any measure it adopts or maintains under this paragraph shall not impair the relative benefits accorded to another Party under this Agreement as compared to the treatment of a non-Party.

9. A Party adopting or maintaining a measure under paragraph 2, 3, or 8 shall:

(a) notify, in writing, the other Parties of the measure, including any changes in it, along with the rationale for their imposition, within 30 days of its adoption;

(b) present, as soon as possible, either a time schedule or the conditions necessary for their removal;

(c) promptly publish the measure; and

(d) promptly commence consultations with the other Parties in order to review the measure.

(i) In the case of capital movements, promptly respond to any other Party that requests consultations in relation to the measure, provided that such consultations are not otherwise taking place outside of this Agreement.

(ii) In the case of current account restrictions, if consultations in relation to the measure are not taking place under the framework of the WTO Agreement, a Party, if requested, shall promptly commence consultations with any interested Party.

### **Article 32.5: Indigenous Peoples Rights**

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods,

services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.<sup>7</sup>

### **Article 32.6: Cultural Industries**

1. For the purposes of this Article, “cultural industry” means a person engaged in 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.

2. This Agreement does not apply to a measure adopted or maintained by Canada with respect to a cultural industry, except as specifically provided in Article 2.4 (Treatment of Customs Duties) or Annex 15-D (Programming Services).

3. With respect to Canadian goods, services, and content, the United States and Mexico may adopt or maintain a measure that, were it adopted or maintained by Canada, would have been inconsistent with this Agreement but for paragraph 2.

4. Notwithstanding any other provision of this Agreement, a Party may take a measure of equivalent commercial effect in response to an action by another Party that would have been inconsistent with this Agreement but for paragraph 2 or 3.

5. Notwithstanding Article 31.3 (Choice of Forum):

- (a) dispute regarding a measure taken under paragraph 4 shall be settled exclusively under this Agreement unless a Party seeking to establish a panel under Article

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<sup>7</sup> For greater certainty, for Canada the legal obligations include those recognized and affirmed by section 35 of the *Constitution Act 1982* or those set out in self-government agreements between a central or regional level of government and indigenous peoples.

31.6 (Establishment of a Panel) has been unable to do so within 90 days of the date of delivery of the request for consultations under Article 31.4 (Consultations); and

- (b) a panel established under Article 31.6 (Establishment of a Panel) with respect to that challenge shall have jurisdiction and may make findings only with respect to:
  - (i) whether an action to which another Party responds is a measure adopted or maintained with respect to a cultural industry for purposes of this Article, and
  - (ii) whether the responsive action of a Party is of “equivalent commercial effect” to the relevant action of the other Party.

## **Section B: General Provisions**

### **Article 32.7: Disclosure of Information**

This Agreement does not 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.

### **Article 32.8: Personal Information Protection**<sup>8</sup>

1. For the purposes of this Article:

**personal information** means information, including data, about an identified or identifiable natural person.

2. Each Party shall adopt or maintain a legal framework that provides for the protection of personal information.<sup>9</sup> In the development of this legal framework, each Party should take into account principles and guidelines of relevant international bodies, such as the *APEC Privacy Framework* and the *OECD Recommendation of the Council concerning Guidelines governing*

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<sup>8</sup> This Article does not apply to information held or processed by or on behalf of a Party, or measures related to that information, including measures related to its collection.

<sup>9</sup> For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information, or personal data protection law, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

*the Protection of Privacy and Transborder Flows of Personal Data (2013).*

3. The Parties recognize that, pursuant to paragraph 2 key principles include: limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability.

4. Each Party shall endeavor to adopt non-discriminatory practices in protecting natural persons from personal information protection violations occurring within its jurisdiction.

5. Each Party shall publish information on the personal information protections it provides, including how:

- (a) individuals can pursue a remedy; and
- (b) an enterprise can comply with legal requirements.

6. Recognizing that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. The Parties shall endeavor to exchange information on the mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them. The Parties recognize that the *APEC Cross-Border Privacy Rules* system is a valid mechanism to facilitate cross-border information transfers while protecting personal information.

7. The Parties shall endeavor to foster cooperation between appropriate government agencies regarding investigations on matters involving personal information protection and encourage the development of mechanisms to assist users to submit cross-border complaints regarding protection of personal information.

### **Article 32.9: Access to Information**

Each Party shall maintain a legal framework that allows a natural person in its territory to obtain access to records held by the central level of government, subject to reasonable terms and limitations specified in the Party's law, provided that the terms and limitations applying to natural persons of another Party in the Party's territory are no less favorable than those applying to natural persons of the Party, or of another country, in the Party's territory.<sup>10</sup>

### **Article 32.10: Non-Market Country FTA**

1. For the purposes of this Article:

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<sup>10</sup> For the United States, this provision applies to "agencies," as defined at 5 U.S.C. 551(1).

**non-market country** is a country:

- (a) that on the date of signature of this Agreement, a Party has determined to be a non-market economy for purposes of its trade remedy laws; and
  - (b) with which no Party has signed a free trade agreement.
2. At least 3 months prior to commencing negotiations, a Party shall inform the other Parties of its intention to commence free trade agreement negotiations with a non-market country.
3. Upon request of another Party, a Party intending to commence free trade negotiations with a non-market country shall provide as much information as possible regarding the objectives for those negotiations.
4. As early as possible, and no later than 30 days before the date of signature, a Party intending to sign a free trade agreement with a non-market country shall provide the other Parties with an opportunity to review the full text of the agreement, including any annexes and side instruments, in order for the Parties to be able to review the agreement and assess its potential impact on this Agreement. If the Party involved requests that the text be treated as confidential, the other Parties shall maintain the confidentiality of the text.
5. Entry by a Party into a free trade agreement with a non-market country will allow the other Parties to terminate this Agreement on six months' notice and replace this Agreement with an agreement as between them (bilateral agreement).
6. The bilateral agreement shall be comprised of all the provisions of this Agreement, except those provisions that the relevant Parties agree are not applicable as between them.
7. The relevant Parties shall utilize the six months' notice period to review this Agreement and determine whether any amendments should be made in order to ensure the proper operation of the bilateral agreement.
8. The bilateral agreement enters into force 60 days after the date on which the last party to the bilateral agreement has notified the other party that it has completed its applicable legal procedures.

**Article 32.11: Specific Provision on Cross-Border Trade in Services, Investment, and State-Owned Enterprises and Designated Monopolies for Mexico**

With respect to the obligations in Chapter 14 (Investment), Chapter 15 (Cross-Border Trade in Services), and Chapter 22 (State-Owned Enterprises and Designated Monopolies), Mexico reserves the right to adopt or maintain a measure with respect to a sector or sub-sector

for which Mexico has not taken a specific reservation in its Schedules to Annexes I, II, and IV of this Agreement, only to the extent consistent with the least restrictive measures that Mexico may adopt or maintain under the terms of applicable reservations and exceptions to parallel obligations in other trade and investment agreements that Mexico has ratified prior to entry into force of this Agreement, including the WTO Agreement, without regard to whether those other agreements have entered into force.

**Article 32.12: Exclusion from Dispute Settlement**

A decision by Canada following a review under the *Investment Canada Act*, R.S.C. 1985, c.28 (1st Supp.), with respect to whether or not to permit an investment that is subject to review, shall not be subject to the dispute settlement provisions of Chapter 31 (Dispute Settlement).