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Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

Chapter Twenty-One

Exceptions

Article 21.1: General Exceptions

1. For purposes of Chapters Three through Seven (National Treatment and Market Access for Goods,¹ Rules of Origin and Origin Procedures, Customs Administration, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade), Article XX of 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 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. For purposes of Chapters Eleven, Thirteen, and Fourteen (Cross-Border Trade in Services, Telecommunications, and Electronic Commerce²), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement. 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 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.

Article 21.3: Taxation

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

¹ Negotiators Note: The Parties understand that the National Treatment and Market Access for Goods Chapter includes Sections on Agriculture and Textiles and Apparel.

² This article is without prejudice to whether digital products should be classified as goods or services.

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2. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between any of 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 XX (National Treatment and Market Access for Goods - 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 XX (National Treatment and Market Access for Goods - Export Taxes) shall apply to taxation measures.

4. Subject to paragraph 2:

- (a) Article XX (Cross-Border Trade in Services - National Treatment) and Article XX (Financial Services - National Treatment) shall apply to taxation measures on income, 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) Articles XX (Investment - National Treatment) and XX (Investment - Most-Favored Nation Treatment), Articles XX (Cross-Border Trade in Services - National Treatment) and XX (Cross-Border Trade in Services - Most-Favored Nation Treatment) and Articles XX (Financial Services - National Treatment) and XX (Financial Services - Most-Favored Nation Treatment) shall apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations, taxes on estates, inheritances, gifts, and generation-skipping transfers,

except that nothing in those Articles shall apply:

- (c) any most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to any 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;

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- (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 GATS); or
- (h) to a provision that conditions the receipt, or continued receipt of an advantage relating to the contributions to, or income of, pension trusts or pension plans 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 XX (Investment - Performance Requirements and Performance Incentives) shall apply to taxation measures.

6. Article XX (Investment - Expropriation and Compensation) and Article XX (Investment - Submission of a Claim to Arbitration) 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 XX (Investment - Expropriation and Compensation) as the basis of a claim where it has been determined pursuant to this paragraph that the measure is not an expropriation. An investor that seeks to invoke Article XX (Investment - Expropriation and Compensation) with respect to a taxation measure must first refer to the competent authorities of the Parties of the claimant and the respondent set out in Annex 21.3 at the time that it gives its notice of intent under Article XX (Investment - Submission of a Claim to Arbitration), 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 six months of such referral, the investor may submit its claim to arbitration under Article XX (Investment - Submission of a Claim to Arbitration).

Article 21.4: Balance of Payments Measures on Trade in Goods

Should a Party decide to impose measures for balance of payments purposes, it shall do so only in accordance with that Party's rights and obligations under GATT 1994, including the *Declaration on Trade Measures Taken for Balance of Payments Purposes* (1979 Declaration) and the *Understanding on the Balance of Payments Provisions of the GATT 1994* (BOP Understanding). In adopting such measures, the Party shall immediately consult with the other Parties and shall not impair the relative benefits accorded to the other Parties under this Agreement.³

³ For greater certainty, this Article applies to balance of payments measures imposed on trade in goods.

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Article 21.5: 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.

Article 21.6: Definitions

For purposes of this Chapter:

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 XX (National Treatment and Market Access for Goods - Definitions); or
- (b) the measures listed in exceptions (b) and (c) of the definition of customs duty.

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Annex 21.3

Competent Authorities

For purposes of this Chapter:

competent authorities means

- (a) in the case of Costa Rica, the Vice Minister of Treasury;
- (b) in the case of El Salvador, the Vice Minister of Treasury;
- (c) in the case of Guatemala, the Vice Minister of Public Finances;
- (d) in the case of Honduras, the Subsecretary of Finances;
- (e) in the case of Nicaragua, the Vice Minister of Treasury and Public Credit;
and
- (f) in the case of the United States, the Assistant Secretary of the Treasury
(Tax Policy), Department of the Treasury.