

# Annotated CAFTA Labor Chapter

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## Chapter Sixteen

### Labor

#### Article 16.1: Statement of Shared Commitment

1. The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration).<sup>1</sup> Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law.

No commitment to meet ILO standards.  
Rolls back U.S. - Jordan standard.  
Here, commitment is only to "strive". Thus, obligation is met if a country demonstrates it is taking steps, making any effort i.e. striving regardless of outcomes or what standard is in affect.

2. The Parties affirm their full respect for their Constitutions. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 16.8 and shall strive to improve those standards in that light.

#### Article 16.2: Enforcement of Labor Laws

See pg 16-5 about enforcement tribunals

1. (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

This guts this

(b) Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

Art. 16.2(1)(b)  
"GRAMM"  
CLAUSE  
EVISCERATES  
WEAK  
ENFORCEMENT  
STANDARD IN  
Art. 16.2(1)(a)

2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.8 as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

JUST ROLL  
BACK  
NAFTA

Art. 1114(2) in NAFTA "striving to ensure" is only requirement

<sup>1</sup> The Parties recall that paragraph 5 of the ILO Declaration states that labor standards should not be used for protectionist trade purposes.

WATERS DOWN EVEN NAFTA LANGUAGE which required: "A Party should not waive or otherwise derogate from..." Here, commitment is only "to strive to ensure" not to waive!

3. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party.

**Article 16.3: Procedural Guarantees and Public Awareness**

1. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to tribunals for the enforcement of the Party's labor laws. Such tribunals may include administrative, quasi-judicial, judicial, or labor tribunals, as provided in the Party's domestic law.

*ie. if law does not recognize unions, no problem...*

2. Each Party shall ensure that proceedings before such tribunals for the enforcement of its labor laws are fair, equitable, and transparent and, to this end, each Party shall ensure that:

- (a) such proceedings comply with due process of law;
- (b) any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;
- (c) the parties to such proceedings are entitled to support or defend their respective positions, including by presenting information or evidence; and
- (d) such proceedings do not entail unreasonable charges or time limits or unwarranted delays.

3. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

- (a) in writing and state the reasons on which the decisions are based;
- (b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and
- (c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.

4. Each Party shall provide, as appropriate, that parties to such proceedings have the right to seek review and, where warranted, correction of final decisions issued in such proceedings.

5. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

6. Each Party shall provide that the parties to such proceedings may seek remedies to ensure the enforcement of their rights under its labor laws. Such remedies may include measures such as orders, fines, penalties, or temporary workplace closures, as provided in the Party's laws.

7. Each Party shall promote public awareness of its labor laws, including by:

(a) ensuring the availability of public information related to its labor laws and enforcement and compliance procedures; and

(b) encouraging education of the public regarding its labor laws.

8. For greater certainty, decisions or pending decisions by each Party's administrative, quasi-judicial, judicial, or labor tribunals, as well as related proceedings, shall not be subject to revision or be reopened under the provisions of this Chapter.

**Article 16.4: Institutional Arrangements** *Blah, Blah, Blah ... Meetings.*

1. The Parties hereby establish a Labor Affairs Council, comprising cabinet-level or equivalent representatives of the Parties, or their designees.

2. The Council shall meet within the first year after the date of entry into force of this Agreement and thereafter as often as it considers necessary to oversee the implementation of and review progress under this Chapter, including the activities of the Labor Cooperation and Capacity Building Mechanism established under Article 16.5, and to pursue the labor objectives of this Agreement. Unless the Parties otherwise agree, each meeting of the Council shall include a session at which members of the Council have an opportunity to meet with the public to discuss matters relating to the implementation of this Chapter.

3. Each Party shall designate an office within its labor ministry that shall serve as a contact point with the other Parties, and with the public, for purposes of carrying out the work of the Council, including coordination of the Labor Cooperation and Capacity Building Mechanism. Each Party's contact point shall provide for the submission, receipt, and consideration of communications from persons of a Party on matters related to the provisions of this Chapter, and shall make such communications available to the other Parties and, as appropriate, to the public. Each Party shall review such communications, as appropriate, in accordance with domestic procedures. The Council shall develop general guidelines for considering such communications.

4. Each Party may convene a new, or consult an existing, national labor advisory or consultative committee, comprising members of its public, including representatives of its labor and business organizations, to provide views on any issues related to this Chapter.

5. All decisions of the Council shall be taken by consensus. All decisions of the Council shall be made public, unless otherwise provided in this Agreement, or unless the Council otherwise decides.

6. The Council may prepare reports on matters related to the implementation of this Chapter, and shall make such reports public.

**Article 16.5: Labor Cooperation and Capacity Building Mechanism** *Blah, Blah, Blah...*

1. Recognizing that cooperation on labor issues can play an important role in advancing development in the territory of the Parties and in providing opportunities to improve labor standards, and to further advance common commitments regarding labor matters, including the principles embodied in the ILO Declaration and *ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)* (ILO Convention 182), the Parties hereby establish a Labor Cooperation and Capacity Building Mechanism, as set out in Annex 16.5. The Mechanism shall operate in a manner that respects each Party's law and sovereignty.

2. While endeavoring to strengthen each Party's institutional capacity to fulfill the common goals of the Agreement, the Parties shall strive to ensure that the objectives of the Labor Cooperation and Capacity Building Mechanism, and the activities undertaken through that Mechanism:

- (a) are consistent with each Party's national programs, development strategies, and priorities;
- (b) provide opportunities for public participation in the development and implementation of such objectives and activities; and
- (c) take into account each Party's economy, culture, and legal system.

**Article 16.6: Cooperative Labor Consultations** *More unenforceable Blah, Blah*

1. A Party may request consultations with another Party regarding any matter arising under this Chapter by delivering a written request to the contact point that the other Party has designated under Article 16.4.3.

2. The consultations shall begin promptly after delivery of the request. The request shall contain information that is specific and sufficient to enable the Party receiving the request to respond.

3. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter, taking into account opportunities for cooperation relating to the matter,

and may seek advice or assistance from any person or body they deem appropriate in order to fully examine the matter at issue.

4. If the consulting Parties fail to resolve the matter pursuant to paragraph 3, a consulting Party may request that the Council be convened to consider the matter by delivering a written request to the contact point of each of the other Parties.<sup>2</sup>

5. The Council shall promptly convene and shall endeavor to resolve the matter, including, where appropriate, by consulting outside experts and having recourse to such procedures as good offices, conciliation, or mediation.

6. If the matter concerns whether a Party is conforming to its obligations under Article 16.2.1(a), and the consulting Parties have failed to resolve the matter within 60 days of a request under paragraph 1, the complaining Party may request consultations under Article 20.4 (Consultations) or a meeting of the Commission under Article 20.5 (Commission – Good Offices, Conciliation, and Mediation) and, as provided in Chapter Twenty (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter. The Council may, as appropriate, provide information to the Commission on consultations held on the matter.

7. No Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 16.2.1(a).

8. No Party may have recourse to dispute settlement under this Agreement for a matter arising under Article 16.2.1(a) without first pursuing resolution of the matter in accordance with this Article.

9. In cases where the consulting Parties agree that a matter arising under this Chapter would be more appropriately addressed under another agreement to which the consulting Parties are party, they shall refer the matter for appropriate action in accordance with that agreement.

Article 16.7: Labor Roster **SYSTEM FOR ENFORCING LABOR PROVISIONS**

1. The Parties shall establish within six months after the date of entry into force of this Agreement and maintain a roster of up to 28 individuals who are willing and able to serve as panelists in disputes arising under Article 16.2.1(a). Unless the Parties otherwise agree, up to three members of the roster shall be nationals of each Party, and up to seven members of the roster shall be selected from among individuals who are not nationals of any Party. Labor roster members shall be appointed by consensus, and may be reappointed. Once established, a roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new roster. The Parties may appoint a replacement where a roster member is no longer available to serve.

See This Provision AND Article 20.17 on page 20-10 attached.

<sup>2</sup> For purposes of paragraphs 4, 5, and 6, the Council shall consist of the cabinet-level representatives of the consulting Parties or their high-level designees.

16-5

**UNLIKE ENFORCEMENT OF ALL NAFTA COMMERCIAL PROVISIONS, LABOR AND ENVIRONMENTAL VIOLATIONS ARE NOT SUBJECT TO TRADE SANCTIONS - ONLY FINES CAPPED AT \$15 MILLION PER YEAR**

2. Labor roster members shall:

- (a) have expertise or experience in labor law or its enforcement, international trade, or the resolution of disputes arising under international agreements;
- (b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;
- (c) be independent of, and not affiliated with or take instructions from, any Party; and
- (d) comply with a code of conduct to be established by the Commission.

3. Where a Party claims that a dispute arises under Article 16.2.1(a), Article 20.9 (Panel Selection) shall apply, except that the panel shall be composed entirely of panelists meeting the qualifications in paragraph 2.

**Article 16.8: Definitions**

For purposes of this Chapter:

**labor laws** means a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

For greater certainty, the setting of standards and levels in respect of minimum wages by each Party shall not be subject to obligations under this Chapter. Each Party's obligations under this Chapter pertain to enforcing the level of the general minimum wage established by that Party.

**statutes or regulations** means:

- (a) for Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, laws of its legislative body or regulations promulgated pursuant to an

act of its legislative body that are enforceable by action of the executive body;  
and

- (b) for the United States, acts of Congress or regulations promulgated pursuant to an act of Congress that are enforceable by action of the federal government.

## Annex 16.5

### Labor Cooperation and Capacity Building Mechanism

#### *Organization and Principal Functions*

1. The Labor Affairs Council working through each Party's contact point shall coordinate the activities of the Labor Cooperation and Capacity Building Mechanism. The contact points shall meet within six months after the date of entry into force of this Agreement and thereafter as often as they consider necessary.

2. The contact points, together with representatives of other appropriate agencies and ministries, shall cooperate to:

- (a) establish priorities, with particular emphasis on those subjects identified in paragraph 3 of this Annex, for cooperation and capacity building activities on labor issues;
- (b) develop specific cooperative and capacity building activities in accordance with such priorities;
- (c) exchange information regarding each Party's labor laws and practices, including best practices, as well as ways to strengthen them; and
- (d) seek support, as appropriate, from international organizations such as the International Labor Organization, the Inter-American Development Bank, the World Bank, and the Organization of American States, to advance common commitments regarding labor matters.

#### *Cooperation and Capacity Building Priorities*

3. The Mechanism may initiate bilateral or regional cooperative activities on labor issues, which may include, but need not be limited to:

- (a) *fundamental rights and their effective application*: legislation and practice related to the core elements of the ILO Declaration (freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labor, the effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation);
- (b) *worst forms of child labor*: legislation and practice related to compliance with ILO Convention 182;



- (c) *labor administration*: institutional capacity of labor administrations and tribunals, especially training and professionalization of human resources, including career civil service;
- (d) *labor inspectorates and inspection systems*: methods and training to improve the level and efficiency of labor law enforcement, strengthen labor inspection systems, and help ensure compliance with labor laws;
- (e) *alternative dispute resolution*: initiatives aimed at establishing alternative dispute resolution mechanisms for labor disputes;
- (f) *labor relations*: forms of cooperation and dispute resolution to ensure productive labor relations among workers, employers, and governments;
- (g) *working conditions*: mechanisms for supervising compliance with statutes and regulations pertaining to hours of work, minimum wages and overtime, occupational safety and health, and employment conditions;
- (h) *migrant workers*: dissemination of information regarding labor rights of migrant workers in each Party's territory;
- (i) *social assistance programs*: human resource development and employee training, among other programs;
- (j) *labor statistics*: development of methods for the Parties to generate comparable labor market statistics in a timely manner;
- (k) *employment opportunities*: promotion of new employment opportunities and workforce modernization;
- (l) *gender*: gender issues, including the elimination of discrimination in respect of employment and occupation; and
- (m) *technical issues*: programs, methodologies, and experiences regarding productivity improvement, encouragement of best labor practices, and the effective use of technologies, including those that are Internet-based.

#### *Implementation of Cooperative Activities*

4. Pursuant to the Mechanism, the Parties may cooperate on labor issues using any means they deem appropriate, including, but not limited to:

- (a) technical assistance programs, including by providing human, technical, and material resources, as appropriate;
- (b) exchange of official delegations, professionals, and specialists, including through study visits and other technical exchanges;
- (c) exchange of information on standards, regulations, and procedures, and best practices, including pertinent publications and monographs;
- (d) joint conferences, seminars, workshops, meetings, training sessions, and outreach and education programs;
- (e) collaborative projects or demonstrations; and
- (f) joint research projects, studies, and reports, including by engaging independent specialists with recognized expertise.

*Public Participation*

5. In identifying areas for labor cooperation and capacity building, and in carrying out cooperative activities, each Party shall consider the views of its worker and employer representatives, as well as those of other members of the public.

## Chapter Twenty

### Dispute Settlement

#### Section A: Dispute Settlement

##### Article 20.1: Cooperation

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

##### Article 20.2: Scope of Application

Except as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply:

- (a) with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement;
- (b) wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or that another Party has otherwise failed to carry out its obligations under this Agreement; and
- (c) wherever a Party considers that an actual or proposed measure of another Party causes or would cause nullification or impairment in the sense of Annex 20.2.

##### Article 20.3: Choice of Forum

1. Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which the disputing Parties are party or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.
2. Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.

##### Article 20.4: Consultations

1. Any Party may request in writing consultations with any other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.
2. The requesting Party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the actual or proposed measure or other matter at issue and an indication of the legal basis for the complaint.
3. A Party that considers it has a substantial trade interest in the matter may participate in the consultations on delivery of written notice to the other Parties within seven days of the date

of delivery of the request for consultations. The Party shall include in its notice an explanation of its substantial trade interest in the matter.

4. Consultations on matters regarding perishable goods<sup>1</sup> shall commence within 15 days of the date of delivery of the request.

5. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the consulting Parties shall:

- (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation and application of this Agreement; and
- (b) treat any confidential information exchanged in the course of consultations on the same basis as the Party providing the information.

6. In consultations under this Article, a consulting Party may request another consulting Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.<sup>2</sup>

#### **Article 20.5: Commission – Good Offices, Conciliation, and Mediation**

1. If the consulting Parties fail to resolve a matter pursuant to Article 20.4 within:

- (a) 60 days of delivery of a request for consultations;
- (b) 15 days of delivery of a request for consultations in matters regarding perishable goods; or
- (c) such other period as they may agree,

any such Party may request in writing a meeting of the Commission.<sup>3</sup>

2. A consulting Party may also request in writing a meeting of the Commission where consultations have been held pursuant to Article 16.6 (Cooperative Labor Consultations), Article 17.10 (Collaborative Environmental Consultations), or Article 7.8 (Committee on Technical Barriers to Trade).

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<sup>1</sup> For greater certainty, the term “perishable goods” means perishable agricultural and fish goods classified in chapters 1 through 24 of the Harmonized System.

<sup>2</sup> A consulting Party receiving such a request shall strive to accommodate it.

<sup>3</sup> For purposes of this paragraph and paragraphs 2 and 4, the Commission shall consist of the cabinet-level representatives of the consulting Parties, as set out in Annex 19.1 (The Free Trade Commission), or their designees.

3. The requesting Party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the actual or proposed measure or other matter at issue and an indication of the legal basis for the complaint.

4. Unless it decides otherwise, the Commission shall convene within ten days of delivery of the request and shall endeavor to resolve the dispute promptly. The Commission may:

- (a) call on such technical advisers or create such working groups or expert groups as it deems necessary;
- (b) have recourse to good offices, conciliation, mediation, or such other dispute resolution procedures; or
- (c) make recommendations,

as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute.

5. Unless it decides otherwise, the Commission shall consolidate two or more proceedings before it pursuant to this Article regarding the same measure or matter. The Commission may consolidate two or more proceedings regarding other matters before it pursuant to this Article that it determines are appropriate to be considered jointly.<sup>4</sup>

#### Article 20.6: Request for an Arbitral Panel

1. If the consulting Parties fail to resolve a matter within:

- (a) 30 days after the Commission has convened pursuant to Article 20.5;
- (b) 30 days after the Commission has convened in respect of the matter most recently referred to it, where proceedings have been consolidated pursuant to Article 20.5.5;
- (c) 30 days after a Party has delivered a request for consultations under Article 20.4 in a matter regarding perishable goods, if the Commission has not convened pursuant to Article 20.5.4;
- (d) 75 days after a Party has delivered a request for consultations under Article 20.4, if the Commission has not convened pursuant to Article 20.5.4; or
- (e) such other period as the consulting Parties may agree,

any consulting Party that requested a meeting of the Commission with regard to the measure or other matter in accordance with Article 20.5 may request in writing the establishment of an arbitral panel to consider the matter. The requesting Party shall deliver the request to the other

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<sup>4</sup> For purposes of this paragraph, the Commission shall consist of the cabinet-level representatives of the consulting Parties in the relevant proceedings, as set out in Annex 19.1 (The Free Trade Commission), or their designees.

Parties, and shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint.

2. An arbitral panel shall be established upon delivery of a request.

3. A Party that is eligible under paragraph 1 to request the establishment of a panel and considers it has a substantial interest in the matter may join the arbitral panel proceedings as a complaining Party on delivery of written notice to the other Parties. The notice shall be delivered at the earliest possible time, and in any event no later than seven days after the date of delivery of the request by the Party for the establishment of a panel.

4. If a Party does not join as a complaining Party in accordance with paragraph 3, it normally shall refrain thereafter from initiating or continuing:

- (a) a dispute settlement procedure under this Agreement; or
- (b) a dispute settlement proceeding under the WTO Agreement or under another free trade agreement to which it and the Party complained against are party, on grounds that are substantially equivalent to those available to it under this Agreement,

regarding the same matter in the absence of a significant change in economic or commercial circumstances.

5. Unless otherwise agreed by the disputing Parties, the panel shall be established and perform its functions in a manner consistent with the provisions of this Chapter.

6. An arbitral panel may not be established to review a proposed measure.

#### **Article 20.7: Roster**

1. The Parties shall establish within six months of the date of entry into force of this Agreement and maintain a roster of up to 60 individuals who are willing and able to serve as panelists. Unless the Parties otherwise agree, up to eight members of the roster shall be nationals of each Party, and up to 12 members of the roster shall be selected from among individuals who are not nationals of any Party. The roster members shall be appointed by consensus, and may be reappointed. Once established, a roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new roster. The Parties may appoint a replacement where a roster member is no longer available to serve.

2. Roster members shall:

- (a) have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements;
- (b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;

- (c) be independent of, and not be affiliated with or take instructions from, any Party;  
and
- (d) comply with a code of conduct to be established by the Commission.

#### **Article 20.8: Qualifications of Panelists**

All panelists shall meet the qualifications set out in Article 20.7.2. Individuals may not serve as panelists for a dispute in which they have participated pursuant to Article 20.5.4.

#### **Article 20.9: Panel Selection**

1. The Parties shall apply the following procedures in selecting a panel:
  - (a) the panel shall comprise three members;
  - (b) the disputing Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the disputing Parties are unable to agree on the chair within this period, the chair shall be selected by lot within three days from among the roster members who are not nationals of a disputing Party;
  - (c) within 15 days of selection of the chair, the complaining Party or Parties shall select one panelist and the Party complained against shall select one panelist;
  - (d) if the complaining Party or Parties or the Party complained against fail to select a panelist within this period, the panelist shall be selected by lot within three days from among the roster members who are nationals of such Party or Parties, as the case may be; and
  - (e) each disputing Party shall endeavor to select panelists who have expertise or experience relevant to the subject matter of the dispute, as appropriate.
2. Panelists shall normally be selected from the roster. Any disputing Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by a disputing Party within 15 days after the individual has been proposed.
3. If a disputing Party believes that a panelist is in violation of the code of conduct, the disputing Parties shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with this Article.

#### **Article 20.10: Rules of Procedure**

1. The Commission shall establish by the date of entry into force of this Agreement Model Rules of Procedure, which shall ensure:
  - (a) a right to at least one hearing before the panel, which, subject to subparagraph (e), shall be open to the public;

- (b) an opportunity for each disputing Party to provide initial and rebuttal written submissions;
  - (c) that each participating Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel shall be public, subject to subparagraph (e);
  - (d) that the panel will consider requests from non-governmental entities in the disputing Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties; and
  - (e) the protection of confidential information.
2. Unless the disputing Parties otherwise agree, the panel shall conduct its proceedings in accordance with the Model Rules of Procedure.
  3. The Commission may modify the Model Rules of Procedure.
  4. Unless the disputing Parties otherwise agree within 20 days from the date of the delivery of the request for the establishment of the panel, the terms of reference shall be:
 

"To examine, in the light of the relevant provisions of this Agreement, the matter referenced in the panel request and to make findings, determinations, and recommendations as provided in Articles 20.10.6 and 20.13.3 and to deliver the written reports referred to in Articles 20.13 and 20.14."
  5. If a complaining Party in its panel request has identified that a measure has nullified or impaired benefits, in the sense of Annex 20.2, the terms of reference shall so indicate.
  6. If a disputing Party wishes the panel to make findings as to the degree of adverse trade effects on any Party of a Party's failure to conform with the obligations of this Agreement or of a Party's measure found to have caused nullification or impairment in the sense of Annex 20.2, the terms of reference shall so indicate.

**Article 20.11: Third Party Participation**

A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties, shall be entitled to attend all hearings, to make written and oral submissions to the panel, and to receive written submissions of the disputing Parties in accordance with the Model Rules of Procedure. Those submissions shall be reflected in the final report of the panel.

**Article 20.12: Role of Experts**

On request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree.



#### Article 20.13: Initial Report

1. Unless the disputing Parties otherwise agree, the panel shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the disputing Parties, and on any information before it pursuant to Article 20.12.
2. If the disputing Parties request, the panel may make recommendations for resolution of the dispute.
3. Unless the disputing Parties otherwise agree, the panel shall, within 120 days after the last panelist is selected or such other period as the Model Rules of Procedure established pursuant to Article 20.10 may provide, present to the disputing Parties an initial report containing:
  - (a) findings of fact, including any findings pursuant to a request under Article 20.10.6;
  - (b) its determination as to whether a disputing Party has not conformed with its obligations under this Agreement or that a Party's measure is causing nullification or impairment in the sense of Annex 20.2, or any other determination requested in the terms of reference; and
  - (c) its recommendations, if the disputing Parties have requested them, for resolution of the dispute.
4. When the panel considers that it cannot provide its report within 120 days, it shall inform the disputing Parties in writing of the reasons for the delay together with an estimate of the period within which it will provide its report. In no case should the period to provide the report exceed 180 days. The panel shall inform the disputing Parties of any determination under this paragraph no later than seven days after the initial written submission of the complaining Party or Parties and shall adjust the remainder of the schedule accordingly.
5. Panelists may furnish separate opinions on matters not unanimously agreed.
6. A disputing Party may submit written comments to the panel on its initial report within 14 days of presentation of the report or within such other period as the disputing Parties may agree.
7. After considering any written comments on the initial report, the panel may reconsider its report and make any further examination it considers appropriate.

#### Article 20.14: Final Report

1. The panel shall present a final report to the disputing Parties, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the disputing Parties otherwise agree. The disputing Parties shall release the final report to the public within 15 days thereafter, subject to the protection of confidential information.

2. No panel may, either in its initial report or its final report, disclose which panelists are associated with majority or minority opinions.

#### **Article 20.15: Implementation of Final Report**

1. On receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel.
2. If, in its final report, the panel determines that a disputing Party has not conformed with its obligations under this Agreement or that a disputing Party's measure is causing nullification or impairment in the sense of Annex 20.2, the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment.<sup>5</sup>
3. Where appropriate, the disputing Parties may agree on a mutually satisfactory action plan to resolve the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel. If the disputing Parties agree on such an action plan, a complaining Party may have recourse to Article 20.16.2 or Article 20.17.1, as the case may be, only if it considers that the Party complained against has failed to carry out the action plan.<sup>6</sup>

#### **Article 20.16: Non-Implementation – Suspension of Benefits**

1. If a panel has made a determination of the type described in Article 20.15.2, and the disputing Parties are unable to reach agreement on a resolution pursuant to Article 20.15 within 45 days of receiving the final report, or such other period as the disputing Parties agree, the Party complained against shall enter into negotiations with the complaining Party or Parties with a view to developing mutually acceptable compensation.
2. If the disputing Parties:
  - (a) are unable to agree on compensation within 30 days after the period for developing such compensation has begun; or
  - (b) have agreed on compensation or on a resolution pursuant to Article 20.15 and a complaining Party considers that the Party complained against has failed to observe the terms of the agreement,

any such complaining Party may at any time thereafter provide written notice to the Party complained against that it intends to suspend the application to the Party complained against of benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend. Subject to paragraph 6, the complaining Party may begin suspending

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<sup>5</sup> Compensation, the payment of monetary assessments, and the suspension of benefits are intended as temporary measures pending the elimination of any non-conformity or nullification or impairment that the panel has found.

<sup>6</sup> For greater certainty, as part of an action plan the disputing Parties may undertake, modify, or enhance cooperation activities.

benefits 30 days after the later of the date on which it provides notice under this paragraph or the panel issues its determination under paragraph 3, as the case may be.

3. If the Party complained against considers that:

- (a) the level of benefits proposed to be suspended is manifestly excessive; or
- (b) it has eliminated the non-conformity or the nullification or impairment that the panel has found,

it may, within 30 days after the complaining Party provides notice under paragraph 2, request that the panel be reconvened to consider the matter. The Party complained against shall deliver its request in writing to the complaining Party. The panel shall reconvene as soon as possible after delivery of the request and shall present its determination to the disputing Parties within 90 days after it reconvenes to review a request under subparagraph (a) or (b), or within 120 days for a request under subparagraphs (a) and (b). If the panel determines that the level of benefits proposed to be suspended is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.

4. The complaining Party may suspend benefits up to the level the panel has determined under paragraph 3 or, if the panel has not determined the level, the level the complaining Party has proposed to suspend under paragraph 2, unless the panel has determined that the Party complained against has eliminated the non-conformity or the nullification or impairment.

5. In considering what benefits to suspend pursuant to paragraph 2:

- (a) the complaining Party should first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of Annex 20.2; and
- (b) if the complaining Party considers that it is not practicable or effective to suspend benefits in the same sector or sectors, it may suspend benefits in other sectors.

6. The complaining Party may not suspend benefits if, within 30 days after it provides written notice of intent to suspend benefits or, if the panel is reconvened under paragraph 3, within 20 days after the panel provides its determination, the Party complained against provides written notice to the complaining Party that it will pay an annual monetary assessment. The disputing Parties shall consult, beginning no later than ten days after the Party complained against provides notice, with a view to reaching agreement on the amount of the assessment. If the disputing Parties are unable to reach an agreement within 30 days after consultations begin, the amount of the assessment shall be set at a level, in U.S. dollars, equal to 50 percent of the level of the benefits the panel has determined under paragraph 3 to be of equivalent effect or, if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend under paragraph 2.

7. Unless the Commission otherwise decides, a monetary assessment shall be paid to the complaining Party in U.S. dollars, or in an equivalent amount of the currency of the Party

complained against, in equal, quarterly installments beginning 60 days after the Party complained against gives notice that it intends to pay an assessment. Where the circumstances warrant, the Commission may decide that an assessment shall be paid into a fund established by the Commission and expended at the direction of the Commission for appropriate initiatives to facilitate trade between the disputing Parties, including by further reducing unreasonable trade barriers or by assisting a disputing Party in carrying out its obligations under this Agreement.<sup>7</sup>

8. If the Party complained against fails to pay a monetary assessment, the complaining Party may suspend the application to the Party complained against of benefits in accordance with paragraph 4.

9. This Article shall not apply with respect to a matter described in Article 20.17.1.

**Article 20.17: Non-Implementation In Certain Disputes**

1. If, in its final report, a panel determines that a Party has not conformed with its obligations under Article 16.2.1(a) (Enforcement of Labor Laws) or Article 17.2.1(a) (Enforcement of Environmental Laws), and the disputing Parties:

- (a) are unable to reach agreement on a resolution pursuant to Article 20.15 within 45 days of receiving the final report; or
- (b) have agreed on a resolution pursuant to Article 20.15 and a complaining Party considers that the Party complained against has failed to observe the terms of the agreement,

any such complaining Party may at any time thereafter request that the panel be reconvened to impose an annual monetary assessment on the Party complained against. The complaining Party shall deliver its request in writing to the Party complained against. The panel shall reconvene as soon as possible after delivery of the request.

2. The panel shall determine the amount of the monetary assessment in U.S. dollars within 90 days after it reconvenes under paragraph 1. In determining the amount of the assessment, the panel shall take into account:

- (a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;
- (b) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;
- (c) the reasons for the Party's failure to effectively enforce the relevant law, including, where relevant, its failure to observe the terms of an action plan;

<sup>7</sup> For purposes of this paragraph, the Commission shall consist of the cabinet-level representatives of the disputing Parties, as set out in Annex 19.1 (The Free Trade Commission), or their designees.

FINES ONLY, SANCTIONS AVAILABLE OR VIOLATIONS IF COMMERCIAL PROVISIONS (See pg 20-8 Art. 20.16) ARE NOT AVAILABLE TO PUNISH VIOLATIONS OF LABOR OR ENVIRONMENTAL PROVISIONS

ENFORCEMENT OF LABOR, ENVIRONMENTAL PROVISION IS NOT EQUAL TO ENFORCEMENT OF OTHER CAPTA 'COMMERCIAL' PROVISIONS

FINES ONLY, NO TRADE SANCTIONS

- (d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;
- (e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel, including through the implementation of any mutually agreed action plan; and
- (f) any other relevant factors.

**FINES CAPPED TO \$15 MILLION ANNUALLY - MEANS LABOR VIOLATIONS CAN BE SIMPLY 'WRITTEN DOWN' AS**

The amount of the assessment shall not exceed 15 million U.S. dollars annually, adjusted for inflation as specified in Annex 20.17. **CAN BE SIMPLY 'WRITTEN DOWN' AS**

3. On the date on which the panel determines the amount of the monetary assessment under <sup>A</sup> paragraph 2, or at any time thereafter, the complaining Party may provide notice in writing to the **PREDICTIBLE** Party complained against demanding payment of the monetary assessment. The monetary **COST OF DOING BUSINESS** assessment shall be payable in U.S. dollars, or in an equivalent amount of the currency of the **BUSINESS** Party complained against, in equal, quarterly installments beginning 60 days after the complaining Party provides such notice.

4. Assessments shall be paid into a fund established by the Commission and shall be expended at the direction of the Commission for appropriate labor or environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement, as the case may be in the territory of the Party complained against, consistent with its law. In deciding how to expend monies paid into the fund, the Commission shall consider the views of interested persons in the disputing Parties' territories. **FINES ARE "PAID" BY THE VIOLATING COUNTRY BACK TO ITSELF...**

5. If the Party complained against fails to pay a monetary assessment, the complaining Party may take other appropriate steps to collect the assessment or otherwise secure compliance. These steps may include suspending tariff benefits under the Agreement as necessary to collect the assessment, while bearing in mind the Agreement's objective of eliminating barriers to trade and while seeking to avoid unduly affecting parties or interests not party to the dispute. **THE FINE**

**Article 20.18: Compliance Review**

1. Without prejudice to the procedures set out in Article 20.16.3, if the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the complaining Party or Parties. The panel shall issue its report on the matter within 90 days after the Party complained against provides notice.

2. If the panel decides that the Party complained against has eliminated the non-conformity or the nullification or impairment, the complaining Party or Parties shall promptly reinstate any benefits that Party has or those Parties have suspended under Article 20.16 or Article 20.17 and

\* For purposes of this paragraph, the Commission shall consist of the cabinet-level representatives of the disputing Parties, as set out in Annex 19.1 (The Free Trade Commission), or their designees.

the Party complained against shall no longer be required to pay any monetary assessment it has agreed to pay under Article 20.16.6 or that has been imposed on it under Article 20.17.1.

#### **Article 20.19: Five-Year Review**

The Commission shall review the operation and effectiveness of Articles 20.16 and 20.17 not later than five years after the Agreement enters into force, or within six months after benefits have been suspended or monetary assessments have been imposed in five proceedings initiated under this Chapter, whichever occurs first.

### **Section B: Domestic Proceedings and Private Commercial Dispute Settlement**

#### **Article 20.20: Referral of Matters from Judicial or Administrative Proceedings**

1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.
2. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation of the Commission to the court or administrative body in accordance with the rules of that forum.
3. If the Commission is unable to agree, any Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

#### **Article 20.21: Private Rights**

No Party may provide for a right of action under its law against any other Party on the ground that the other Party has failed to conform with its obligations under this Agreement.

#### **Article 20.22: Alternative Dispute Resolution**

1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* or the 1975 *Inter-American Convention on International Commercial Arbitration*.

4. The Commission may establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes.

5. This committee shall:

- (a) report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use, and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area; and
- (b) when the committee considers appropriate, promote technical cooperation between the Parties, in furtherance of the objectives identified in paragraph 1.

## Annex 20.2

### Nullification or Impairment

1. If any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:

- (a) Chapters Three through Five (National Treatment and Market Access for Goods, Rules of Origin and Origin Procedures, and Customs Administration and Trade Facilitation);
- (b) Chapter Seven (Technical Barriers to Trade);
- (c) Chapter Nine (Government Procurement);
- (d) Chapter Eleven (Cross-Border Trade in Services); or
- (e) Chapter Fifteen (Intellectual Property Rights),

is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under this Chapter.

2. A Party may not invoke paragraph 1(d) or (e) with respect to any measure subject to an exception under Article 21.1 (General Exceptions).



Annex 20.17

**Inflation Adjustment Formula for Monetary Assessments**

1. An annual monetary assessment imposed before December 31, 2005 shall not exceed 15 million dollars (U.S.).

2. Beginning January 1, 2006, the 15 million dollar (U.S.) annual cap shall be adjusted for inflation in accordance with paragraphs 3 through 5.

3. The period used for the accumulated inflation adjustment shall be calendar year 2004 through the most recent calendar year preceding the one in which the assessment is owed.

4. The relevant inflation rate shall be the U.S. inflation rate as measured by the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics.

5. The inflation adjustment shall be estimated according to the following formula:

$$\$15 \text{ million} \times (1 + \delta_i) = A$$

$\delta_i$  = accumulated U.S. inflation rate from calendar year 2004 through the most recent calendar year preceding the one in which the assessment is owed.

A = cap for the assessment for the year in question.