

FTAA – Free Trade Area of the Americas

Draft Agreement

Chapter XXIII Dispute Settlement

CHAPTER XXIII Dispute Settlement

Section A General Aspects

Article 1. Definitions¹

1.1. For the purposes of this Chapter, the following definitions shall apply:

[Regional Agreement means a trade agreement between two or more Parties;]

[Perishable goods mean those goods that deteriorate in quality in a brief period of time, like agricultural or fish products, among others. It also includes those products that lose their commercial value past a certain date, like Christmas or seasonal goods, among others;]

[Executive Body for Dispute Settlement² means a body established within the framework of this Agreement to administer the FTAA Chapter on Dispute Settlement comprised of the countries that are signatories to this Agreement;]

Understanding means the Understanding on Rules and Procedures Governing the Settlement of Disputes that forms part of the WTO Agreement;

[Substantial trade interest means]

[Measure means any law, decree, [agreement,] administrative provision or governmental practice, among others [of a central or decentralized authority];]

Consulting Party means the Party that requests consultations and the Party to whom the request for consultations is made;

Party to the Dispute means the complaining Party or the Party complained against;

Party Complained against means the Party against which a claim is made;

Complaining Party means the Party making a claim;

Third Party means a Party that has a [substantial] [trade] interest in the matter in dispute and that is not a Party to the dispute.

Article 2. Scope of Application

2.1. [Except as otherwise provided in this Agreement,] the procedures in this Chapter shall apply:

¹ The NGDS agreed to refer the following terms to the Technical Committee on Institutional Issues for its consideration as appropriate: "FTAA Agreement," "WTO Agreement," and "Party."

² The term "Executive Body for Dispute Settlement" is used throughout the draft chapter without prejudice to the NGDS adopting another term, such as "Institutional Body" or "Monitoring Body" or "Dispute Settlement Body" as the Group advances in its discussion, particularly on the functions to be carried by such a body.

- a) to the [avoidance or to the] settlement of all disputes arising between the Parties regarding the interpretation, or application of this Agreement; [and] [or]
- b) when a Party considers that an actual [or proposed] measure of another Party is [or would be] inconsistent with the obligations of this Agreement [or, even if not inconsistent, would cause nullification or impairment of any benefit that a Party could reasonably have expected to accrue to it under this Agreement in the sense of Article 3 (Non-Violation Nullification or Impairment).]

[Article 3. Non-Violation Nullification or Impairment

3.1. If a Party considers that any benefit it could reasonably have expected to accrue to it under the following provisions:

- a)...

is being nullified or impaired or 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.

3.2. A Party may not invoke:

- a)...

3.3. [To determine the elements of nullification or impairment, the neutral panel may take into account the principles deriving from the jurisprudence on paragraph 1(b) of GATT 1994 Article XXIII.]]

Article 4. Cooperation

4.1. The Parties shall at all times, endeavor through cooperation, to arrive at a prompt settlement of any dispute regarding the interpretation and application of this Agreement and shall make every attempt in good faith to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

Article 5. General Provisions

5.1. [In the settlement of disputes arising between Parties, in addition to principles of international law, other principles shall apply of good faith, confidentiality, prompt resolution, procedural economy, effective access, special and differential treatment, as well as of maintaining a balance between rights and obligations of the Parties.]

5.2. [The dispute settlement procedure established in this Chapter serves to preserve the rights and obligations of the Parties under this Agreement, and to clarify the existing provisions of this Agreement in accordance with customary rules of interpretation of public international law.]

5.3. The reports³ of the neutral panels⁴ [or the Appellate Body] cannot add to or diminish the rights and obligations provided in this Agreement.

³ The term "report" is used throughout this draft chapter without prejudice to the NGDS adopting another term, such as "decision," "ruling," or "award," as the Group advances in its discussion.

⁴ The term "neutral panel" is used throughout the draft chapter without prejudice to the NGDS adopting another term as it advances in its discussion on a dispute settlement system, including on the establishment or not of an appellate review.

5.4. [All solutions to disputes formally raised under the provisions of this Chapter, including arbitration awards, shall be consistent with the provisions of this Agreement, [and shall not at any time nullify or impair benefits accruing to any Party,] nor impede the attainment of the objectives of this Agreement.]

5.5. [Where there is an allegation of violation [or other nullification or impairment of benefits accruing] under this Agreement] a Party shall [refrain from taking unilateral measures] [and] [only suspend benefits or adopt measures of equivalent effect against another Party] after completing proceedings under this chapter.

5.6. [In cases of infringement, it is presumed that the measure constitutes nullification or impairment, and as such, a breach of the rules has an adverse impact on other Parties. In such cases it will be up to the Party complained against to rebut the charge.]

5.7. Each Party may communicate in any official FTAA language in the course of dispute settlement proceedings under this Agreement.

Article 6. Differences in the levels of development and size of economies

6.1. [At all stages of a dispute settlement procedure in which at least one developing country participates as a Party [to the dispute], particular consideration shall be given to its level of development by the Parties and competent bodies, as applicable.]

[Article 7. Effective Access

7.1. Effective access of all FTAA Parties to the dispute settlement system set forth in this chapter shall be ensured. For such purpose, the FTAA Secretariat shall provide legal advice and assistance in respect of dispute settlement to developing country members. To this end, the FTAA Secretariat shall make available a qualified legal expert to any developing country member which so requests, that shall assist it in a manner ensuring the continued impartiality of the FTAA Secretariat. The FTAA Secretariat shall also conduct on a permanent basis special training courses on dispute settlement, so as to enable members' experts to be better informed in this regard.

7.2. In addition, the FTAA Secretariat shall present annually a report on the use of the dispute settlement mechanism during the previous year, as well as the budget of own resources or of technical cooperation from various sources, among which multilateral organizations could be included. Such report shall also contain the activities through which effective participation, particularly of developing countries, would be sought.]

Article 8. Choice of Forum

8.1. Disputes within the scope of application of this Chapter that are also eligible for submission to the dispute settlement system of the World Trade Organization [or that of a regional agreement to which the Parties to the dispute are Party,] may be submitted to any of these fora, at the discretion of the complaining Party.

8.2. Once a Party has initiated dispute settlement proceedings under this Agreement or the Understanding [or a regional agreement], that Party shall not initiate dispute settlement proceedings in any other fora with respect to the same [claim on] [actual or proposed] [measure] [or] [matter].

8.3. [Before a Party initiates a dispute settlement proceeding under the WTO Agreement [or any regional agreement to which the Parties to the dispute are Party] against another Party, [involving a matter which could also be filed in accordance with the FTAA's dispute settlement procedure,] the following rules shall apply:

- a) the complaining Party shall notify the Parties to this Agreement of its intention to do so; and
- [b] if there are multiple complainants regarding the same matter, they shall endeavor to agree on a single forum] .]

8.4. For the purposes of this Article, dispute settlement proceedings are deemed to be initiated:

- a) under the WTO Agreement, when [a Party requests the establishment of a panel] [a panel is established] under Article 6 of the Understanding;
- b) under this Agreement, when [a Party requests the establishment of a neutral panel] [a neutral panel is established] under Article 11 (Establishment of a Neutral Panel)];
- [c) under a regional agreement, when the requirements provided for a panel or similar adjudicative body under such agreement are met.]

Section B Substantive Provisions

Article 9. Consultations

9.1. Any Party may request in writing consultations with another Party regarding any [actual or proposed] measure [or regarding any other matter] that it considers might affect the operation or application of the Agreement.

9.2. The Party requesting consultations shall indicate in the request the [actual or proposed] measure [or any other matter] complained of and the provisions of this Agreement that it considers relevant, and shall deliver the request to the Party to whom the request for consultations is made and the FTAA Secretariat. The FTAA Secretariat shall notify such request within [...] days to all FTAA Parties.

9.3. The Party to which the request is made shall respond to it within ten (10) days, and shall enter into consultations within thirty (30) days of the date on which the Party to which the request is made receives it.

[When the Party to which the request for consultations is made is [a developing country]] [of a lower level of development than the Party requesting consultations], it may have an extension of this time period of up to [thirty (30)] [fifteen (15)] days.] [If the Party to whom the request for consultations was made, considers it necessary to have an extension of the period within which to initiate such consultations, the Party requesting consultations shall give due consideration to this request, taking into account the relevant circumstances, including differences in the level of development and size of economies. Such extension shall be for no more than fifteen (15) days unless otherwise agreed by the Parties.] [The Party to which the request is made may apply to the FTAA Secretariat or the Executive Body for Dispute Settlement for an extension of the period within which it must enter into consultations, provided that such extension shall not exceed [...] days. In considering whether to grant the extension, [the FTAA Secretariat,] [the Director

General of the FTAA Secretariat,] [the Executive Body for Dispute Settlement] [or the Chair of the Executive Body for Dispute Settlement,] shall take into account the differences in levels of development and size of economies.]

9.4. A Party other than the Consulting Parties may join consultations, provided that, within [...] days of the date on which the notification of the request for consultations was received by that Party, it notifies its interest in doing so to all Parties, and that [neither the Party that requested consultations nor the Party to which the request for consultations was made objects] [the Party to which the request for consultations was made does not object] within [...] days.⁵ Such objection to the request to be joined shall be notified to all Parties within [...] days.

9.5. The Parties participating in the consultations shall:

- a) provide sufficient information to enable a full examination of how the [actual or proposed] measure [or other matter], might affect the operation or 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.

9.6. Consultations shall be confidential [, and without prejudice to the rights of any Party in any further proceedings.]

9.7. Consultations shall take place at a venue agreed by the Consulting Parties, or in the absence thereof, [at a venue chosen by the party with the lower level of development] [at the headquarters of the FTAA Secretariat] [in the capital city of the Party to whom the request for consultations was made].

Article 10. Cases of Urgency

10.1. [In cases of urgency and in those which concern perishable goods:]

- a) consultations shall commence within [fifteen (15)] days of the date of receipt of the request by the Party to whom the request for consultation has been made ; and
- b) the Parties [and the competent bodies] shall endeavor to accelerate the proceedings to the greatest extent possible.

Article 11. Establishment of a Neutral Panel

11.1. The Party that requested consultations may request the establishment of a neutral panel:

- a) when the Party to whom the request for consultations has been made does not respond within ten (10) days of the receipt of the request;
- b) when the Party to whom the request for consultations has been made does not enter into consultations within thirty (30) days of the receipt of the request;

⁵ The time periods and when such time periods are deemed to begin shall be determined once the structure of the mechanism has been decided.

- c) when the matter has not been resolved within [sixty 60] [forty-five (45)] [thirty (30)] days [after the delivery of the request for consultations] [after consultations have been initiated]; or
- d) [in cases of urgency and in those which concern perishable goods,]
 - i) when consultations are not entered into within [fifteen (15)] days, or
 - ii) when the matter has not been resolved within [seven (7) days], of the date of receipt of the request by the Party to whom the request for consultation has been made;.
- [e) If the time period is extended pursuant to Article 9.3 (Consultations), such extended period shall be additional to the time period indicated in subparagraphs b) and c)].

11.2. The request for the establishment of the neutral panel shall be made in writing [and, if consultations were held, shall be based on the matters considered during consultations.] It shall indicate whether consultations were held, identify the [specific] measures in dispute [or other matter complained of] and provide a brief summary of the legal and factual basis of the complaint, sufficient to present the dispute clearly.

11.3. The Party that requests the establishment of the neutral panel shall deliver the request to [, the Executive Body for Dispute Settlement and] the FTAA Secretariat. The FTAA Secretariat shall notify the request to all FTAA Parties which have ten (10) days to make known their interest in participating in the procedure as a Third Party.

11.4. The neutral panel shall be established and panel composition shall proceed upon delivery of the request for the establishment of a neutral panel.

Article 12. Roster of Panelists⁶

12.1. The FTAA Secretariat shall maintain an [indicative] roster of up to [...] individuals, from which members of the neutral panels [normally] [shall] [may] be drawn [with the exception of Article 13.3 c) (Composition of the Neutral Panel)].

12.2. To establish the Roster and for its future modifications, the Parties may forward to the FTAA Secretariat the names of [...] candidates, providing information on their qualifications, including their specific areas of expertise in relation to the Agreement according to Article 12 (Roster of Panelists), within [...] months after the entry into force of this Agreement. [The Parties shall have a maximum period of [...] days, from the date of notification of the proposed candidates by the FTAA Secretariat, to indicate in writing via the FTAA Secretariat their reaction to the proposed candidates. The FTAA Secretariat shall communicate to the Parties whose candidates have been duly challenged for failing to meet the qualifications of Article 12 (Roster of Panelists). These Parties shall have [...] days to present their new candidates, without prejudice to the Roster, containing the candidates who have not been challenged pursuant to this paragraph, shall be considered approved.]

⁶ The term "panelist" or "panel member" is used throughout this draft chapter without prejudice to the NGDS adopting another term as it advances in its discussion.

12.3. Each roster member 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) have a well known reputation for objectivity, probity, reliability, sound judgment, and honesty.

12.4. Roster members shall comply with the Code of Conduct established in Annex 2 (Code of Conduct).

12.5. The roster members shall be appointed for terms of [...] years, and may be re-appointed.

Article 13. Composition of the Neutral Panel

13.1. The neutral panel shall be composed within [ten (10)] [fifteen (15)] days of the establishment of the neutral panel.

13.2. Each member of the neutral panel shall possess the qualifications stipulated in Article 12.3 (Roster of Panelists) and shall:

- a) be impartial in the exercise of his/her panel functions, not be affiliated with any of the Parties to the dispute [unless the Parties to the dispute otherwise agree], and not take instructions from any Party
- b) not have participated previously in any capacity in the matter; [and
- c) not be a citizen of a Party to the dispute or a Third Party, unless the Parties to the dispute otherwise agree.]

[Disclosure Form of Code of Conduct in Annex 2 (Code of Conduct)]

13.3. The following procedures shall apply to the composition of the neutral panel:

a) The neutral panel shall be composed of three (3) members, one (1) member of whom shall act as Chair. The number of members can be modified by agreement of the Parties to the dispute.

[b) The FTAA Secretariat shall propose nominations [from the indicative roster] for the Chair and the members of the neutral panel to the Parties to the dispute within a period of ten (10) days following the establishment of the neutral panel. The Parties to the dispute shall not oppose nominations except for duly founded reasons. [The Parties to the dispute shall meet at the headquarters of the FTAA Secretariat or at any other location upon which the Parties agree to compose the neutral panel. The meeting shall take place at a venue chosen by the party with the lower level of development. This meeting shall be held with the Party or Parties that are present.]

[b) The members of the neutral panel shall be selected by mutual agreement of the Parties to the dispute.]

[b) Each Party to the dispute shall select a member of the neutral panel from the [indicative] roster, who shall not be a national of the Party that selects him. The selection may not be opposed by the other Party. The third member, who shall chair the neutral panel, shall be elected by

agreement of the Parties to the dispute. In the event there is no agreement as to the third member, or one of the Parties has not made a selection within a period of [...] days, [upon the request of a Party to the dispute] the Chair of the neutral panel or the member who has not been selected by the Party, shall be selected by lot from among the members on the list who are not nationals of any of the Parties. Prior to a selection by lot, the Parties shall be given [...] days to peruse (a limited number) of experts included in the lists referred to in Article 12 (Roster of Panelists). [The members selected by the Parties to the dispute shall select the Chair of the neutral panel.] Nevertheless, the Parties to the dispute may select a member who is one of their nationals or is not included on the roster.]

[c] This procedure shall apply in cases of multiple complaining Parties, as well as in cases of withdrawal of, and vacancies for, members of the neutral panel.]

[d] If there is no agreement on the members, including the Chair, or if there is partial agreement, within fifteen days from the date on which the FTAA Secretariat submitted the roster referred to in sub-paragraph b), or before the expiration of this period, by mutual agreement between the Parties, the following procedure shall be followed:

At the request of any Party to the dispute, [the Director General], in consultation with [the Chair of the Executive Body for Dispute Settlement], [after consulting with the Parties to the dispute] shall appoint the members of the neutral panel required [by lot]. [The Director General] shall inform the Parties of the composition of the neutral panel thus formed no later than ten days after the date on which such request was made.]

[e] Should the co-complainants, when required to make a selection, fail to agree on a member for selection, the rules of the drawing by lot set out in b) shall apply.]

f) Parties should permit their government officials to serve on neutral panels.

13.4. [When a dispute is between a developing country Party and a developed country Party, the neutral panel shall, if the developing country Party so requests, include at least one member from a developing country Party.]

Article 14. Challenge and Removal

[14.1. In the event that the members of a neutral panel were appointed in accordance with the provisions of Article 13.3 (Composition of the Neutral Panel) sub-paragraph f), the Parties to the dispute may challenge the member or members of the neutral panel on well-founded grounds within [...] days of their appointment.]

[14.2. [The Director General, in consultation with the Chair of the Executive Body for Dispute Settlement] shall make the relevant decision and shall replace –if need be- the member or members of the neutral panel within the [...] -day period following the motion for challenge.]

[14.3. If a disputing Party believes that a member is in violation of the Code of Conduct, the Parties to the dispute shall consult and if they agree, the member shall be removed and a new one shall be selected in accordance with the provisions of Article 13 (Composition of the Neutral Panel).]

Article 15. Terms of Reference of the Neutral Panel

15.1. Unless the disputing Parties otherwise agree within fifteen (15) days after the establishment of the neutral panel, the terms of reference of the neutral panel shall be:

"To examine, in the light of the relevant provisions of this Agreement, the matter submitted for its consideration, under the terms set forth in the request for the establishment of the neutral panel and issue its [Final] Report."

15.2. [If a Party argues that a matter has nullified or impaired benefits in the sense of Article 3 (Non-Violation Nullification or Impairment) the terms of reference shall so indicate.]

15.3. [If a Party wishes the neutral panel to make findings as to the [degree of adverse trade effects] [level of nullification or impairment] of any measure adopted by another Party found not to conform with the obligations of this Agreement or to have caused nullification or impairment in the sense of Article 3 (Non-Violation Nullification or Impairment), the terms of reference shall so indicate.]

Article 16. Rules of Procedure⁷

16.1. [Unless otherwise agreed by the Parties to the dispute,] the proceedings before the neutral panel shall be governed by the provisions of this Chapter and the Rules of Procedure established in Annex 1 (Rules of Procedure). [The Executive Body for Dispute Settlement may amend the Rules of Procedure established in this Article.]

[Article 17. Procedures for Multiple Complainants

17.1. Where more than one Party to this Agreement requests the establishment of neutral panels related to the same matter, whenever feasible, a single neutral panel should be established to examine such complaints taking into account the rights of all interested Parties to the Disputes.

17.2. If one of the disputing parties so requests within [...] days of the establishment of the neutral panel, the neutral panel shall submit separate reports on the dispute concerned.

17.3. [A Party that considers it has a substantial [trade] interest in the matter shall be entitled to join as a complaining Party by notifying the Parties to this Agreement of its intention to participate. The notification shall be made at the earliest possible time, and in any event no later than a week after the date of delivery of a request by a Party for the establishment of a neutral panel.]

17.4. [In the absence of a significant change in the [economic or] [commercial] circumstances, if a Party decides not to join as a [complaining] Party, it shall [normally] refrain thereafter from initiating [or continuing] regarding the same matter:

- a) a dispute settlement procedure under this Chapter [or this Agreement]; or
- b) a dispute settlement proceeding under the Understanding [on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization] [or a regional agreement] [on

⁷ The draft rules contained in the Annex apply only to neutral panels. This approach is without prejudice to an eventual decision on rules applicable to an Appellate Body. If it is decided to have an Appellate Body under the FTAA Agreement, the NGDS will review the rules and determine which of them should apply to the Appellate Body and whether any additional rules are necessary.

grounds that are substantially equivalent to those available to that Party under this Agreement].]

Article 18. Third Parties

18.1. If a Party that is not a Party to the dispute [that has a substantial [trade] interest in the matter before the neutral panel] and so notifies within [...] days of the establishment of the neutral panel, that Party shall be entitled to participate as a Third Party. The notification shall be made through the FTAA Secretariat to all Parties [and the neutral panel].

18.2. [A Third Party may attend hearings of the neutral panel, may make written and oral submissions to the neutral panel, and shall receive any written submissions in accordance with the Rules of Procedure.]

18.3. [If a Third Party considers that a measure already the subject of a neutral panel proceeding nullifies or impairs benefits accruing to it under this Agreement, it may have recourse to normal dispute settlement procedures under this chapter. Such a dispute shall be referred to the original neutral panel wherever possible.]

[Article 19. Provisional Measures

19.1. At the request of a Party to the dispute and to the extent that there are well founded presumptions that maintaining the situation would cause serious and irreparable injury to one of the Parties, the neutral panel may issue provisional measures it considers appropriate, according to the circumstances and under the conditions that the neutral panel itself establishes, in order to prevent such injury.

19.2. The neutral panel may modify or revoke provisional measures as the circumstances justify.]

[Article 20. Preliminary Proceedings

20.1. Any neutral panel having jurisdiction under this Chapter to which a dispute has been referred in accordance with Article 11 (Establishment of a Neutral Panel) and Article 15 (Terms of Reference of the Neutral Panel), shall determine at the request of a party to the dispute, a Party with legitimate third party rights, or proprio motu, whether the claim constitutes an abuse of legal process or whether, prima facie, it is well founded. If the neutral panel determines that the claim constitutes an abuse of legal process or is prima facie, unfounded, it shall take no further action in the case.

20.2. The neutral panel shall establish reasonable time-limits within which determinations of applications shall be made, but at all events, upon receipt of an application, it shall notify the other party or parties to the dispute.

20.3. Nothing in this Article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.]

Article 21. Expert Advice

21.1. On request of a Party to the dispute or on its own initiative, [unless the Parties to the dispute otherwise agree] the neutral panel may seek information and technical advice from any person or organization that it deems appropriate.

Article 22. Withdrawal or Mutually Satisfactory Solution

22.1. [At any stage of the procedure [before the issuance of the [initial] [final] report], a Party may withdraw its claim. The Parties to the Dispute may reach a mutually satisfactory solution at any stage of the procedure. The withdrawal or mutually satisfactory solution shall conclude the dispute and shall be notified to the [Executive Body for Dispute Settlement] [neutral panel] [Appellate Body] [FTAA Secretariat], as appropriate [and any Party may raise any point relating thereto].]

[Article 23. Initial Report

23.1. Unless the Parties to the dispute otherwise agree, the neutral panel shall, within [...] days of the composition of the neutral panel, present to the Parties to the dispute [and to the Third Parties] an initial report. This shall be based on the arguments and submissions of the Parties to the dispute and on any information before it pursuant to [Articles 18 (Third Parties) and] Article 21 (Expert Advice), unless the Parties to the dispute otherwise agree.

23.2. The initial report shall contain:

- a) findings of fact, including any findings pursuant to a request under Article 15 (Terms of Reference of the Neutral Panel), and
- b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of this Agreement, or cause nullification or impairment in the sense of Article 3 (Non-Violation Nullification or Impairment) or any other determination requested in the terms of reference; and
- c) its recommendations, if any, for resolution of the dispute.

[The neutral panel and the Parties shall treat the initial report as confidential.]

23.3. The members of the neutral panel may furnish separate opinions in writing on matters not unanimously agreed.

23.4. The Parties to the dispute [and Third Parties] may submit written comments to the neutral panel on its initial report, within fourteen (14) days of the presentation thereof.

23.5. In such an event, and after considering such written comments, the neutral panel, on its own initiative or at the request of any Party to the dispute, may:

- a) request the views of any participating Party;
- b) reconsider its report; and
- c) take any further action that it considers appropriate.]

Article 24. Final Report

24.1. The neutral panel shall conduct its internal deliberations in private, except that it may allow assistants or staff from the FTAA Secretariat to be present.

24.2. The neutral panel shall [notify] [present to] [the FTAA Secretariat, which shall communicate to] the Parties to the dispute [and Third Parties], its final report in writing, including any opinions on matters not unanimously agreed, within [...] days, of [the presentation of the initial report,] [composition of the neutral panel] unless the Parties agree otherwise.

24.3. Decisions of the neutral panel shall be taken by a majority vote of its members. No neutral panel may disclose which members are associated with majority or minority opinions.

24.4. [Unless otherwise agreed by the Parties to the dispute,] the Secretariat shall publish the final report [immediately] [within [...] days of the [notification] [presentation].]

24.5. [The final report shall necessarily contain the following elements, without prejudice to other elements that the neutral panel may deem appropriate:

- a) indication of the Parties to the dispute;
- b) the name and nationality of each of the members of the neutral panel and the date of its establishment ;
- c) the names of the Parties' representatives;
- d) the matter in dispute;
- e) a report of the implementation of the neutral panel procedure, including a summary of the acts carried out and the allegations of each of the Parties to the dispute, submissions by Third Parties and the report of the independent experts;
- f) the decision on the dispute, detailing the factual and legal basis [and the period within which to implement the report];
- [g) the degree of adverse trade effects caused by the measure in question, when this has been so requested;]
- [h) explicit indication of the way in which the relevant provisions on the treatment of differences in the level of development and size of economies that have been raised by the developing country Party during the dispute settlement proceedings, have been taken into account;]
- i) the date and location it was issued; and
- j) the signature of all members of the neutral panel.]

24.6. [Decisions of the neutral panel shall be final and binding on the Parties to the dispute, [unless it is appealed].]

[Article 25. Appellate Body

25.1. The standing Appellate Body shall hear appeals filed against [final] reports issued by neutral panels. It shall be composed of seven (7) persons, three (3) of whom shall serve on any one case. Persons serving

on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body. Members of the Appellate Body shall be convened and shall meet for every case in which their presence is required.]

[Article 26. Constitution of the Appellate Body

26.1. The Executive Body for Dispute Settlement shall appoint persons to serve on the Appellate Body for a four (4)-year term, and each person may be re-appointed once. However, the terms of three (3) of the seven (7) persons appointed immediately after the entry into force of this Agreement shall expire at the end of two (2) years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

26.2. Members of the Appellate Body shall:

- a) be well-renowned for their accredited technical competence in law, experience in international trade, other matters covered by this Agreement, or in the resolution of disputes arising from international trade agreements;
- b) have a well known reputation for objectivity, probity, reliability, sound judgment, and honesty;
- c) be impartial in the exercise of his/her functions[, not be affiliated with any of the Parties to the dispute unless the Parties to the dispute otherwise agree, or take instructions from any Party]; and
- d) comply with the Code of Conduct in Annex 2 (Code of Conduct).

26.3. Members of the Appellate Body shall, in general terms, be representative of the membership of this Agreement [taking into account the differences in the level of development and size of economies]. No more than one citizen from a Party can be appointed as member of the Appellate Body. At least [...] of the members shall be from [developing country Parties].

26.4. All persons serving on the Appellate Body shall stay abreast of dispute settlement activities and other relevant activities under this Agreement. They shall not participate in the consideration of any disputes that would create a conflict of interest.]

[Article 27. Appeal Procedure

27.1. Parties to the dispute may appeal a [final] report issued by a neutral panel by filing a notice of appeal within thirty (30) days following its notification.

27.2. Third parties which have notified the neutral panel of a substantial trade interest in the matter pursuant to Article 18 (Third Parties) may make written submissions to, and shall be given an opportunity to be heard by, the Appellate Body.

27.3. As a general rule, the proceedings shall not exceed sixty (60) days from the date a Party to the dispute notifies its decision to appeal to the date the Appellate Body circulates its report. When the Appellate Body considers that it cannot take its decision within sixty (60) days, it shall inform the Parties

to the dispute through the FTAA Secretariat in writing of the reasons for the delay, together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ninety (90) days.

27.4. An appeal shall be limited solely to issues of law and legal interpretations covered in the [final] report issued by the neutral panel.]

[Article 28. Reports of the Appellate Body

28.1. The Appellate Body, in its report, may uphold, modify or reverse the legal findings and conclusions of the neutral panel.

28.2. Decisions of the Appellate Body shall be taken by a majority vote of its members. The Appellate Body shall not disclose which members are associated with majority or minority opinions.]

[28.3. Remand]

[Article 29. Recourse to Clarification

29.1. [Any of the Parties to the dispute may request the neutral panel or the Appellate Body, within ten (10) days after notification of the report, to clarify their respective conclusions [or an interpretation on the manner in which implementation is to be carried out]. The request for clarification shall be notified to all Parties through the FTAA Secretariat. The other Party to the dispute may submit comments on the request for clarification within [...] days. These comments shall be notified to all Parties through the FTAA Secretariat. The neutral panel or the Appellate Body, respectively shall make its ruling on the request within fifteen (15) days of its receipt.]

29.2. [The filing of the Recourse to Clarification shall suspend the obligation to comply with the final decision until there is a ruling on such recourse.]]

[Article 30. Nature of the Final Report]

[30.1. The decisions of neutral panels shall be binding on the Parties to the dispute from the moment of their notification and shall, with respect to the Parties to the dispute, have the force of *res judicata* if the time period established in Article 27 (Appeal Procedure) for filing an appeal has lapsed without such an appeal being filed.

30.2. The decisions of the Appellate Body are unappealable, binding on the Parties to the dispute from the moment of their notification, and shall, with respect to the Parties to the dispute, have the force of *res judicata*.]

[Article 31. Implementation of the Final Report]

[31.1. [Neither [the granting of] compensation, nor the suspension of benefits relieve the Parties from the obligation to comply with the obligations under this Agreement as [expressed] [reflected] [ratified] in the report of the neutral panel and/or the Appellate Body, nor do they preclude the possibility of the Parties to the dispute from reaching mutually satisfactory solutions.]

[31.1. The suspension of benefits or other obligations under this Agreement, [, monetary assessments,] and mutually satisfactory solutions including compensation, do not relieve the Party complained against from the obligation to comply with this Agreement as clarified and interpreted by the neutral panel and, when applicable, by the Appellate Body. [Monetary assessments and] the suspension of benefits and obligations under this Agreement do not preclude the possibility of the Parties to the dispute from reaching mutually satisfactory solutions.]

[31.2. The decisions of the neutral panels and the Appellate Body must be implemented within the period established [therein, if there is one].]

[31.3. If a panel has determined that a measure of the Party complained against is not in conformity with this Agreement or is causing nullification or impairment in the sense of Article 3 (Non-Violation Nullification or Impairment), and the Parties to the dispute are unable to reach agreement on a resolution within forty-five (45) days of receiving the final report, or such other period as the Parties to the dispute agree, the Party complained against shall enter into negotiations with the complaining Party or Parties with a view to developing mutually acceptable compensation.]

[31.4. If the Party complained against alleges not to be able to implement the report of the neutral panel and/or the Appellate Body within the established period, it must:

- a) propose, within [...] days of the notification of the decision, an alternative period within which it undertakes to implement said decision; and
- b) on the same occasion, offer effective compensation to the complaining Party.]

[31.5. In the event the complaining Party is a country with a different level of development and size of economy, the compensation offered shall take into account all the pertinent circumstances and considerations related to the application of the measure and its impact on that country's trade. In such cases, another important consideration shall be the appropriate manner of compensation and special consideration shall be given to specific limitations that those countries may encounter in finding effective means of action through the potential withdrawal of benefits or other obligations.]

[31.6. If there are no objections from the other Parties to the Agreement, said compensation may be offered to the exclusive benefit of the complaining Party.]

[31.7. Compensation must be consistent with the obligations assumed by a Party under this Agreement.]

[Article 32. Failure to Compensate]

[32.1. If the complaining Party considers the conditions (form, implementation time and/or compensation) proposed by the Party complained against, in accordance with Article 31.4 (Implementation of the Final Report), to be inadequate, consultations between the Parties in dispute shall be immediately opened with a view to reaching an agreement on mutually satisfactory conditions.]

[32.2. If the Parties to the dispute:

- a) are unable to agree on compensation within thirty (30) days after the period for developing such compensation has begun, or

- b) have agreed on compensation or on a resolution and a complaining Party considers that the Party complained against has failed to observe the terms of the agreement,

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.⁸ Subject to Article 34.1 (Monetary Assessments), the complaining Party may begin suspending benefits thirty (30) days after the later of the date on which it provides notice under this paragraph or the panel issues its determination under paragraph 32.5 , as the case may be.]

[32.3. If no agreement is reached between the Parties to the dispute, the complaining Party may, once the period for the implementation of the decision of the neutral panel or the Appellate Body has lapsed, appeal to the original neutral panel or the Appellate Body, as the case may be, and said panel or body shall determine, within [...] days of the request being submitted by the complaining Party, whether the conditions proposed by the Party complained against are adequate or not. If the neutral panel or Appellate Body determines that said conditions are not adequate, it must establish the level of nullification or impairment.

32.4. Likewise, if the Party complained against neither complies with the decision of the neutral panel and/or the Appellate Body within the decreed period nor, in accordance with Article 31.4 (Implementation of the Final Report), proposes an alternative period or offers compensation, the complaining Party may request that the neutral panel and/or the Appellate Body establish the level of nullification or impairment within [...] days of said request being made.]

[32.5. 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 thirty (30) days after the complaining Party provides notice under paragraph 32.2 , 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 ninety (90) days after it reconvenes to review a request under subparagraph a) or b), or within one hundred twenty (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.]

[32.6. The level of nullification or impairment established in accordance with paragraphs 32.3 or 32.4 shall serve as a reference for the level of compensation that the Parties in dispute must aim to agree to within the [...] days following the notification of the decision of the neutral panel and/or the Appellate Body, in accordance with paragraphs 32.3 or 32.4, or within another mutually agreed to period.

⁸ For greater certainty, the phrase “the level of benefits that the Party proposes to suspend” refers to the level of concessions under the Agreement the suspension of which a complaining Party considers will have an effect equivalent to that of the disputed measure.

32.7. If the negotiations provided for in paragraph 32.6 are not opened, or if in said negotiations the Parties to the dispute do not reach an agreement on the compensation, the complaining Party may request the authorization of the Executive Body for Dispute Settlement to suspend the application to the Party complained against of benefits or other obligations derived from this Agreement.]

[Article 33. Suspension of Benefits or Other Obligations]

[33.1. The complaining Party may suspend benefits up to the level the panel has determined under Article 32.5 (Failure to Compensate) or, if the panel has not determined the level, the level the complaining Party has proposed to suspend under Article 32.2 (Failure to Compensate), unless the panel has determined that the Party complained against has eliminated the non-conformity or the nullification or impairment.]

[33.2. The level of suspension of benefits or other obligations authorized by the Executive Body for Dispute Settlement shall not be higher than the level of nullification or impairment established under Articles 32.3 or 32.4 (Failure to Compensate).

33.3. In considering which benefits or other obligations provided under this Agreement are to be suspended, the complaining Party shall apply the following principles and procedures⁹:

- a) the general principle is that the complaining Party shall first attempt to suspend benefits or other obligations in the same sector (or sectors) in which the neutral panel or the Appellate Body has found a violation or other nullification or impairment;
- b) if the Party considers that it is not practicable or effective to suspend benefits or other obligations in the same sector (or sectors), it may attempt to suspend benefits or other obligations in other sectors within the same chapter;
- c) if the Party considers that it is not practicable or effective to suspend benefits or other obligations with respect to other sectors within the same chapter, and that circumstances are sufficiently serious, it may attempt to suspend benefits or other obligations in another chapter of this Agreement.

33.4. In applying the above principles the Party shall take into account:

- a) the trade in the sector or within the framework of the chapter in which the neutral panel or the Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that Party;
- c) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of benefits or other obligations.

33.5. If the Party decides to suspend benefits or other obligations in light of the provisions of paragraph 33.3, sub-paragraphs b) or c), it shall indicate the reasons behind this decision in its request. When the request is forwarded to the Executive Body for Dispute Settlement, it shall be simultaneously forwarded to the corresponding sectoral bodies.

⁹ Articles 33.3 (Suspension of Benefits or Other Obligations) to 34.2 (Monetary Assessments) must be revised in light of the changes made to the other chapters of the Agreement.

33.6. a) For purposes of this Article, "sector" means ¹⁰:

- i) with respect to goods, all goods;
- ii) with respect to services,;
- iii) with respect to trade-related intellectual property rights,....;

b) For the purposes of this Article, "chapter" means:

- i) with respect to goods,;
- ii) with respect to services,;
- iii) with respect to trade-related intellectual property rights,....

33.7. The measures for the suspension of benefits or other obligations may only be modified in the event that an adjustment of an entirely technical nature is required. All requests for the modification of measures for the suspension of benefits or other obligations, if justified, must be approved by the Executive Body for Dispute Settlement.

33.8. Upon the request of the Party complained against, the original neutral panel or the Appellate Body, as the case may be, shall be reconvened so that, within [...] days of said request being made, it may be determined whether:

- a) the level of benefits or other obligations that the complaining Party has suspended under this Article is higher than the level of nullification or impairment established in accordance with Article 32.3 or 32.4 (Failure to Comply); or
- b) the principles set forth in Articles 33.3 (Suspension of Benefits or Other Obligations) to 34.2 (Monetary Assessments) regarding the application of the suspension of benefits or other obligations have been adhered to.]

[Article 34. Monetary Assessments]

[34.1. The complaining Party may not suspend benefits if, within thirty (30) days after it provides written notice of intent to suspend benefits or, if the panel is reconvened under Article 32.5 (Failure to Compensate), within twenty (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 Parties to the dispute shall consult, beginning no later than ten (10) days after the Party complained against provides notice, with a view to reaching agreement on the amount of the assessment. If the Parties to the dispute are unable to reach an agreement within thirty (30) days after consultations begin, the amount of the assessment shall be set at a level equal to fifty (50) percent of the level of the benefits the panel has determined under Article 32.5 (Failure to Compensate) to be of equivalent effect or, if the panel has not determined the level, fifty (50) percent of the level that the complaining Party has proposed to suspend under Article 32.2 (Failure to Compensate).

34.2. Unless the Parties to the dispute otherwise decide, a monetary assessment shall be paid to the complaining Party in U.S. currency, or in an equivalent amount of the currency of the Party complained against, in equal, quarterly installments beginning sixty (60) days after the Party complained against gives notice that it intends to pay an assessment. Where the circumstances warrant, the Parties to the dispute

¹⁰ Illustrative list. The specific sectors shall be determined at a later date.

may decide that an assessment shall be paid into a fund established by the Parties to the dispute and expended at the direction of disputing Parties for appropriate initiatives to facilitate trade between the Parties to the dispute, including by further reducing unreasonable trade barriers or by assisting a Party in carrying out its obligations under the Agreement.

34.3. 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 Article 33.1 (Suspension of Benefits or Other Obligations).]

[Article 35. Compliance Review]

[35.1. The complaining Party must lift the suspension of benefits or other obligations under this Agreement pursuant to this Article when:

- a) the Parties to the dispute reach a mutually satisfactory solution¹¹ or, by mutual agreement, consider the non-conformity or the nullification or impairment of the benefits derived from the Agreement that were identified in the decision of the neutral panel and/or the Appellate Body to have been eliminated; or
- b) the original neutral panel or the Appellate Body, as the case may be, upon the request of the Party complained against, determines that the non-conformity or the nullification or impairment of the benefits derived from this Agreement that were identified in the decision of the neutral panel and/or the Appellate Body has been eliminated. The complaining Party shall not maintain the suspension of the benefits or other obligations under this Agreement once the neutral panel or the Appellate Body, as the case may be, withdraws the authorization for such suspension.]

[35.2. Without prejudice to the procedures set out in Article 32.5 (Failure to Compensate), 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 ninety (90) days after the Party complained against provides notice.

35.3. 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 such Party or Parties have suspended under [Articles 31.3 (Implementation of the Final Report), 32.2 (Failure to Compensate), and 32.5 (Failure to Compensate)] and the Party complained against shall no longer be required to pay any monetary assessment it has agreed to pay under Article 34.1 (Monetary Assessments).]

[Article 36. Five-Year Review]

[36.1. The Parties shall review the operation and effectiveness of Articles 32 (Failure to Compensate), 33 (Suspension of Benefits or Other Obligations) and 34 (Monetary Assessments) not later than five (5) years after the Agreement enters into force, or within six (6) months after benefits have been suspended or

¹¹ It is understood that according to Article 22.1 (Withdrawal or Mutually Satisfactory Solution), all the other Parties to the Agreement must be notified of all mutually satisfactory solutions.

monetary assessments have been imposed in five (5) proceedings initiated under this Chapter, whichever occurs first.]

[Article 37. Arbitration]

37.1. [With a view to settling the dispute, the parties to the dispute, if they so agree, may submit the dispute to arbitration. The agreement to resort to arbitration shall be notified to all Parties in advance of the actual commencement of the arbitration process. [Once the procedure provided for in this Article has been initiated, the Parties to the dispute may not have recourse to a neutral panel on the same matter.]]

37.2. [Other Parties may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. [The arbitration award shall have the effect of *res judicata* and shall be final. Arbitration awards shall be notified to the [other Parties] [Executive Body for Dispute Settlement and the technical bodies of the relevant chapters], where any Party to the Agreement may raise any point relating thereto.] Article 35 (Compliance Review) shall apply *mutatis mutandis* to arbitral awards.]

Section C Procedures and Institutions

Article 38. Calculation of Time Periods

38.1. The periods referred to in this chapter shall be understood to be in calendar days and shall be calculated starting from the day after [the notification of] the relevant act or occurrence. For these purposes, when the period is calculated from the delivery of a document to a Party, it shall begin the day following the date of receipt of the document. [The communications referred to in this instrument shall be valid provided that they are issued and received by the competent bodies.] If the last day of the period falls on a non-business day¹², the term shall expire on the following business day.

38.2. When a Party receives a document on a date different from that on which the same document was received by another Party, the period shall begin to run as of the date of receipt of the last of said documents.

38.3. [Establish longer or differential time periods in the different stages of the dispute settlement procedure, as well as for complying with obligations.]

38.4. Any time period in proceedings under this Chapter may be extended by mutual agreement of the consulting Parties or Parties to the dispute.

Article 39. Non-Party Participation

[39.1. In no case shall an organization, individual or groups of individuals, on their own initiative, make at any stage of the proceedings, representations or written submissions or appear at hearings before the neutral panel.]

[39.1. The neutral panel [and the Appellate Body] may grant leave to any non-Party to file a written submission directly relevant to any legal or factual issue under consideration by the neutral panel [or the

¹² The meaning of non-business day shall be determined later.

Appellate Body]. [One week after the selection of the last member of the neutral panel, notice shall be provided to the public of the deadline established by the neutral panel for members of the public to submit views on legal or factual issues to the neutral panel.]

39.2. A non-Party wishing to make a written submission to the neutral panel [or the Appellate Body] must apply to the neutral panel [or the Appellate Body] for leave to file the submission within [...] days of the composition of the neutral panel [or [...] days of the date a Party to the dispute formally notifies its decision to appeal].

39.3. The application for leave to file a non-Party written submission shall:

- a) contain a description of the non-Party, including the nature of the non-Party's activities, membership, legal status, and sources of financing;
- b) contain a statement disclosing whether the non-Party has any relationship, direct or indirect, with any Party to the dispute, Third Party or Party to the Agreement, as well as whether it has received, or will receive, any assistance, financial or otherwise, from a Party to the dispute, Third Party or Party to the Agreement in the preparation of the application for leave or the written submission;
- c) identify the specific issues of law or fact under consideration by the neutral panel [or the Appellate Body] that the non-Party intends to address in the submission;
- d) indicate the substantial interest of the non-Party in the proceeding and why the submission would assist the neutral panel [or the Appellate Body] in the determination of a legal or factual issue under consideration by the neutral panel [or Appellate Body] by bringing a perspective, particular knowledge or insight that is different from that of the Parties to the Dispute and Third Parties;
- e) be delivered, along with three (3) hard copies and one digital copy, to the Secretariat¹³;
- f) be dated and signed by the non-Party or the non-Party's representative, and include the address and other contact details of the non-Party;
- g) be no longer than three (3) typed pages¹⁴;
- h) be made in each language being used in the proceeding¹⁵; and
- i) conform with any additional requirements established in the Rules of Procedure.

39.4. The Secretariat shall notify all FTAA Parties of any application for leave to file a non-Party submission that it receives pursuant to paragraph 39.3 of this Article and deliver the application to the neutral panel [or the Appellate Body].

39.5. The neutral panel [or the Appellate Body] may not grant leave to file a written non-Party submission if the application does not conform to the requirements in paragraph 39.3 of this Article.

¹³ This could be moved to Annex 1 (Rules of Procedure)

¹⁴ *Id.*

¹⁵ *Id.*

39.6. Each Party to the dispute has [...] days from the date of notification of an application for leave to file a non-Party written submission to make written comments to the neutral panel [or the Appellate Body] on the application.

39.7. In deciding whether to grant leave, the neutral panel [or the Appellate Body] shall take into account all relevant considerations, including whether:

- a) the submission would assist the neutral panel [or the Appellate Body] in the determination of any legal or factual issue under consideration by the neutral panel [or the Appellate Body] by bringing a perspective, particular knowledge or insight that is different from that of the Parties to the dispute and Third Parties;
- b) the non-Party has a substantial interest in the proceeding; and
- c) there is a public interest in the proceeding.¹⁶

39.8. To minimize the complexity, cost or length of the proceeding, the neutral panel [or the Appellate Body] may direct two (2) or more non-Parties that have filed separate applications for leave to file a single joint non-Party written submission.

39.9. The neutral panel [or the Appellate Body] shall render its decision on an application to file a non-Party written submission within [...] days from the date of delivery of the application to the neutral panel [or the Appellate Body]. The Secretariat shall notify forthwith all FTAA Parties and the non-Party that made the application of the decision of the neutral panel [or the Appellate Body].

39.10. A non-Party granted leave to file a written submission shall deliver the submission to the Secretariat within [...] days from the date the neutral panel's [or the Appellate Body's] decision pursuant to paragraph 39.9 of this Article. The non-Party submission shall:

- a) be dated and signed by the non-Party or the non-Party's representative;
- b) be concise and in no case longer than twenty (20) typed pages, including any appendices*;
- c) contain a summary of the non-Party's position on those legal or factual issues under consideration by the neutral panel [or the Appellate Body] that are addressed in the submission;
- d) be made in each language being used in the proceeding; and
- e) conform with any additional requirements established in the Rules of Procedure.

39.11. The Secretariat shall notify the Parties to the dispute and Third Parties of any submission it receives from a non-Party pursuant to paragraph 39.10 of this Article and deliver the submission to the neutral panel [or the Appellate Body].

¹⁶ For greater certainty, an interest in the development of the "jurisprudence," in the interpretation of the agreement, or in the subject matter of the dispute alone does not suffice in establishing the presence of a substantial interest in the arbitration by a non-Party.

39.12. The neutral panel [or the Appellate Body] may not consider any non-Party written submission that does not conform to requirements set forth in paragraph 39.10 of this Article.

39.13. Each Party to the Dispute has [...] days from the date of notification of a non-Party written submission to make written comments to the neutral panel [or the Appellate Body] on the submission.

39.14. The neutral panel [and the Appellate Body] is not required to address in its report legal or factual arguments made in non-Party submissions.

39.15. This Article does not grant non-Parties any rights or privileges other than those expressly provided for in it.^{17]}

[Proposed timetable for non-Party participation¹⁸:

- | | | |
|--|-------|----------------------------|
| a) composition of the neutral panel [or notification of a decision to appeal] | _____ | |
| b) application(s) for leave to file a non-Party written submission delivered to the neutral panel [or the Appellate Body]: | _____ | within [...] days from a) |
| c) written comments from the Parties to the dispute on those application(s) are delivered to the neutral panel [or the Appellate Body] | _____ | within [...] days from b) |
| d) the Secretariat notifies the applicant(s) and the Parties to the dispute and Third Parties of the neutral panel's [or the Appellate Body's] decision on whether to grant leave to file a non-Party written submission | _____ | within [...] days from c) |
| e) non-Party submission(s) delivered to the Secretariat | _____ | within [...] days from d) |
| f) written comments from the Parties to the dispute concerning the non-Party submission(s) are delivered to the neutral panel [or the Appellate Body] | _____ | within [...] days from e)] |

¹⁷ This is aimed at preventing panels (or the Appellate Body) from "reading in" any incidental or additional rights or privileges, such as: (i) permitting a non-Party to make a supplemental written submission addressing the submission of a party made pursuant to paragraph 39.13; (ii) permitting non-Parties to obtain copies of any written submissions that have not been made available to the public; or (iii) permitting non-Parties to speak at a panel (or Appellate Body) hearing.

¹⁸ This could be moved to Annex 1 (Rules of Procedure)

Article 40. [Public Access to Documents]

[40.1. All documents and actions related to the procedure established in this chapter, including the hearings before the neutral panel, deliberations, and all written submissions and communications made to the group, as well as meetings of the neutral panel [and of the Appellate Body], shall be confidential, [except for the final reports.]

40.2. [Non-governmental participation in the dispute settlement system in this Chapter shall not be permitted.] [In no case may an organization, individual or groups of individuals, on its/their own initiative, make during any stage of the proceeding a presentation or written submission, or attend the hearings of the neutral panel.]]

[40.1. Subject to paragraph 40.2, all documents submitted to, or issued by, a neutral panel [or the Appellate Body] and all notifications made pursuant to this Chapter are public. The Secretariat shall make such documents and notifications available to the public as soon as is reasonably possible after they are received by the Secretariat.

40.2. The following documents are confidential and may not be made available to the public:

- a) an initial report presented to the Parties to the dispute pursuant to Article 23 (Initial Report), or any comments on an initial report; and
- b) any document submitted to a neutral panel [or the Appellate Body] by a Party to the dispute or Third Party that contains information designated by the Party as confidential.

40.3. Where a Party to the dispute or Third Party designates information contained in a document it submits to the neutral panel [or the Appellate Body] as confidential, it shall within [...] days of submitting the document provide the Secretariat with a redacted version of the document that can be made available to the public.^{19]}

Article 41. [Public Access to Hearings]

[41.1. In no case may an organization, individual or groups of individuals, on its/their own initiative, make during any stage of the proceeding a presentation or attend the hearings of the neutral panel.]

[41.1. All hearings of the neutral panel [and the Appellate Body] shall be open for the public to observe.²⁰

41.2. A Party to the dispute or Third Party that wishes to submit confidential information during a hearing of the neutral panel [or the Appellate Body] shall inform the neutral panel [or the Appellate Body] prior to so doing. The neutral panel [or the Appellate Body] shall close the hearing to observation by the public for the duration of the submission and any discussion of such confidential information.

41.3. The deliberations of the neutral panel [and the Appellate Body] shall be conducted in private and kept confidential.]

¹⁹ Under no circumstances shall an entire submission or significant parts of it be designated as confidential information. To the extent possible, confidential information should be submitted in an exhibit or annex to a submission.

²⁰ The expression "observe" does not require physical presence at the hearing. To facilitate public observation of hearings of the neutral panel [and the Appellate Body], such hearings may be transmitted simultaneously to a public viewing location designated by the Secretariat.

Article 42. [Business Confidential Information]

42.1. [A Party to the dispute may designate information that it submits to the neutral panel as business confidential information. Information so designated shall be treated in accordance with the procedures in Annex 3 (Procedures Governing the Treatment of Business Confidential Information.)]

42.2. [The Executive Body for Dispute Settlement may amend the Procedures Governing the Treatment of Business Confidential Information established in Annex 3.]

[Article 43. Remuneration and Payment of Expenses

43.1. The remuneration and expenses of the neutral panel [, the Appellate Body] and independent experts shall be [borne [equally] by the Parties to the dispute [, unless the neutral panel [or Appellate Body], taking into consideration the circumstances of the case, determines otherwise]] [paid from the FTAA Budget].

43.2. [The Executive Body for Dispute Settlement shall establish the amounts of remuneration and expenses to be paid to the members of neutral panels [, the Appellate Body] and independent experts.]

43.3. [Where a third party intervenes in the proceedings, this party shall bear the costs associated with the intervention] [unless the neutral panel [or Appellate Body] taking into account the circumstances of the case, determines otherwise].]

Article 44. Good Offices, Conciliation and Mediation

44.1. Good offices, conciliation and mediation are alternative methods for settling disputes that may be undertaken voluntarily at any time if the consulting Parties or Parties to the dispute so agree.

44.2. Proceedings involving good offices, conciliation and mediation, in particular positions taken by parties during the proceedings, shall be [confidential and] without prejudice to the rights of the parties in any further proceedings.

[Article 45. Interpretation of the FTAA Agreement in Judicial or Administrative Proceedings

45.1. If an issue of interpretation or application of this Agreement arises, in a domestic judicial or administrative proceeding of a Party, that any Party considers would merit its intervention, or if a judicial or administrative body solicits the views of one of the Parties, that Party shall notify the FTAA Secretariat, which shall notify the other Parties. The Executive Body for Dispute Settlement shall endeavor to agree, [by consensus,] on an appropriate [non-binding] response [in its next session] [as expeditiously as possible].

45.2. The Party in whose territory the judicial or administrative body is located shall submit the interpretation of the Executive Body for Dispute Settlement to the judicial or administrative body in accordance with the rules of that body.

45.3. If the Executive Body for Dispute Settlement is unable to agree on an interpretation any of the Parties may submit its own views to the judicial or administrative body in accordance with the rules of that body. [In such case, the Party shall notify these views to the FTAA Secretariat, which shall notify the other Parties.]]

Article 46. Private Rights

46.1. No Party may provide for a right of action [for private persons] under its legislation against any other Party on the ground that a measure of another Party is inconsistent with this Agreement.

[Article 47. Alternative Dispute Resolution Between Private Parties

47.1. 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.

47.2. [To this end, each Party shall provide for appropriate procedures to ensure observance of [international arbitration conventions] [agreements to arbitrate] [that have been ratified] and the recognition and enforcement of arbitral awards granted in those disputes. [A Party shall be deemed to be in compliance with this paragraph if it is 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].]

47.3. The Parties may establish an Advisory Committee on Private Commercial Disputes, comprising persons with expertise or experience in the resolution of international private commercial disputes. The Committee shall present reports and recommendations of a general nature respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of these disputes in the FTAA.]

Article 48. Dispute Settlement Institutions

[48.1. The FTAA Secretariat shall provide the Appellate Body with the administrative and legal support it requires.]

Annex 1 Rules of Procedure to Article 16 Rules of Procedure)²¹

GENERAL

1. [The [Chair of the] neutral panel shall be authorized to make [administrative and procedural decisions..].]
2. [The neutral panel may, in consultation with the Parties to the dispute, modify any time period applicable in the neutral panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding.]
3. Regarding procedural questions not covered in these rules, the neutral panel may adopt, in consultation with Parties to the dispute, an appropriate procedure that is not inconsistent with this Agreement.
4. [The Parties to the dispute may modify any of the provisions of the Rules of Procedure by mutual agreement for a particular proceeding [, except for those provisions requiring public hearings, providing for submissions by third Parties, providing opportunities for interested persons to submit views to the neutral panel, or requiring that all submissions be made available to the public.]]

NOTIFICATIONS

5. Notifications shall be made in writing through the FTAA Secretariat which shall send the notifications to the representatives designated by the Parties.

[BURDEN OF PROOF

6. A Party asserting that a measure of another Party is inconsistent with the provisions of this Agreement [or, even if not inconsistent, would cause nullification or impairment of any benefit that a Party could reasonably have expected to accrue to it under this Agreement in the sense of Article 3 (Non-Violation Nullification or Impairment)] shall have the burden of establishing such inconsistency.
7. A Party asserting that a measure is subject to an exception under this Agreement shall have the burden of establishing that the exception applies.]

RECOMPOSITION OF NEUTRAL PANEL

8. If a member of a neutral panel withdraws, is removed, is unable to serve or is incapacitated, a replacement shall be selected as expeditiously as possible in accordance with the selection procedure under Article 13 (Composition of the Neutral Panel) and any time period applicable to the neutral panel proceeding shall be suspended until the date the replacement is selected.

WRITTEN SUBMISSIONS

9. [Within ten (10) days after the date of the hearing, each Party to the dispute may deliver to the [FTAA Secretariat] a supplementary written submission responding to any matter that arose during the hearing.]

[Written briefs]

²¹ See footnote 7.

[Distribution of submissions by FTAA Secretariat]

HEARINGS

10. The hearings shall be held [at the headquarters of the FTAA Secretariat] [unless otherwise agreed by the Parties to the dispute] [in the capital city of the Party complained against].

[Timetable]

11. [The neutral panel shall fix within [...] days of its composition, the date and time of the [initial] hearing in consultation with the Parties to the dispute and in coordination with the FTAA Secretariat.]

12. All members of the neutral panel shall be present at hearings. [The following may also attend a hearing:

- a) representatives of the Parties to the dispute;
- [b) representatives of Third Parties;]
- c) [FTAA Secretariat] personnel and stenographers; and
- d) assistants to the members of the neutral panel.]

The absence of representatives of any of the Parties that have been duly notified shall not prevent the holding of the hearing or any other proceeding.

13. After consulting with the Parties to the dispute, the neutral panel may convene additional hearings [unless the Parties to the dispute agree otherwise].

14. [No later than five (5) days before the date of a hearing, each Party to the dispute [and any Third Party] shall notify to the neutral panel a list of the names of those persons who will make oral arguments or presentations at the hearing on behalf of that Party and of other representatives or advisers who will be attending the hearing.]

15. [The neutral panel shall conduct the hearing in the following manner, ensuring that the complaining Part(y)(ies) and the Party complained against are afforded equal time:

- a) Argument -
 - i) Argument of the complaining Party
 - ii) Argument of the Party complained against.
 - [iii) Argument of the Third Part (y) (ies)]
- b) Rebuttal Argument -
 - i) Reply of the complaining Party
 - ii) Counter-reply of the Party complained against.]

16. The neutral panel may at any time during a proceeding address questions in writing to any Party to the dispute or Third Party, and shall determine the time period for the reply. Each [of these Parties] [Party to

the dispute] shall be given the opportunity to provide written comments on the reply within a time period determined by the neutral panel. The distribution of questions and responses shall be made through the FTAA Secretariat.

17. [The [FTAA Secretariat] [neutral panel] shall arrange for a [recording] [transcript] of each hearing to be prepared and shall, as soon as possible after it is prepared, deliver a copy of the [recording] [transcript] to the [Parties to the dispute] [Third Parties] [and] the neutral panel.]

EXPERTS

18. On request of a Party to the dispute or on its own initiative, unless both Parties otherwise agree, the neutral panel may request a written report on any technical or scientific issue [including concerning environmental, health, safety or other scientific matters,] from highly qualified, independent experts in the matter , [subject to such terms and conditions as the Parties may agree]. Nothing in this Article shall be construed to limit the information that a Party may choose to include in its own submissions.

19. The independent experts shall be selected by the neutral panel, after consultation with the Parties to the dispute and in accordance with the Rules of Procedure.

20. The Parties to the dispute shall be provided:

- a) advance notice and a reasonable period of time to provide comments to the neutral panel on the issues to be referred to the independent experts; and
- b) a copy of the independent experts' report and the opportunity to provide comments on the report to the neutral panel. These comments shall be delivered to the other Party to the dispute.

21. Independent experts shall be governed by the following rules and procedures:

- a) independent experts shall be under the authority of the neutral panel, which shall decide the terms of reference;
- [b) only persons of professional standing and experience in the field in question may serve as independent experts;]
- [c) citizens of Parties to the dispute shall not serve as independent experts without the consent of the other disputing Party;]
- d) independent experts may consult and seek information from any source they deem appropriate. [Before obtaining such information or advice from any source within the jurisdiction of a Party, they shall inform the government of that Party, which shall respond promptly and fully to any request addressed to it];
- [e) the Parties shall have access to all relevant information provided to the independent experts, unless it is of a confidential nature. Confidential information provided shall not be released without formal authorization from the government, organization or person providing it. Where such information is requested from the independent experts, but release of such information by the independent experts is not authorized, a non-confidential summary of the

information will be provided by the government, organization or person supplying the information;]

f) the report of the independent experts shall be advisory only; and

[g) the expenses for assistance shall be borne equally by the Parties to the dispute.]

[TRANSLATION]

[INTERPRETATION]

[Annex 2 (Code of Conduct)]

Definitions

1. In this Code of Conduct,

“**appointing party**” means the disputing party appointing an arbitrator pursuant to [cite relevant provisions of the Agreement];

“**candidate**” means a person being considered for appointment as a member pursuant to [cite relevant provisions of the Agreement];

“**decision**” means any determination of a question in the proceeding including an interim, interlocutory or final decision or award;

“**former member**” means a member who has concluded their service as a panelist;

“**member**” means a member of a panel;

“**panel**” means a panel constituted pursuant to [cite relevant provisions of the Agreement]; and

“**party-appointed arbitrator**” means a member selected by a disputing party pursuant to [cite relevant provisions of the Agreement].

I. Scope and Coverage

2. This Code of Conduct applies to every person requested to serve, serving or having served as a member of a panel²² in a dispute settlement proceeding under this Agreement.

II. General Rule

[3. Every candidate, member and former member shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved.]

III. Independence and Impartiality

[4. A member shall be independent and impartial and shall avoid creating any appearance of impropriety or any apprehension of bias.²³]

5. A member shall not be influenced by self-interest, outside pressure, political considerations, public clamour or fear of criticism.

²² The code presently refers to “a panel” in a dispute settlement proceeding. The scope and coverage of the code will be developed in accordance with the institutional provisions of the agreement in question. The scope and coverage of the code would depend, for example, on whether the agreement provided for an Appellate Body, [investor-State arbitral tribunal] or expert groups.

²³ An appearance of impropriety or an apprehension of bias is created where a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate’s or member’s ability to carry out the duties with integrity, impartiality and competence is impaired. These disclosure requirements shall not extend to the identification of interests, relationships or matters whose relevance to the issues to be considered in the proceeding would be insignificant. They shall be interpreted and applied in light of the need to respect the personal privacy of those to whom these requirements apply and shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve as members.

6. A member shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of the member's duties.

7. A member shall not use their position to advance any personal or private interests. All members shall avoid actions that could create the impression that others are in a special position to influence the member. A member shall make every effort to prevent or discourage others from representing themselves as being in such a position.

8. A member shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the member's conduct or judgment. A member shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect or could give rise to justifiable doubts as to the member's independence and impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias.

9. A former member shall avoid actions that could create the impression that the member was biased in carrying out the member's duties or received, or expected to receive, a benefit from a disputing party as a result of the manner in which the member carried out the member's duties. For a period of one (1) year after the conclusion of the proceeding, a former member shall not personally advise or represent any of the parties to the proceeding with regard to any matter.

IV. Disclosure

10. A candidate shall disclose any interest, relationship or matter that is likely to affect or give rise to justifiable doubts as to the candidate's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such circumstances.

11. Without limiting the generality of the foregoing, candidates shall disclose:

- a) any direct or indirect financial or personal interest of the candidate in the proceeding or in its outcome;
- b) any direct or indirect financial or personal interest of the candidate's employer, partner, business associate or family member in the proceeding or in its outcome;
- c) any past or existing financial, business, professional, family or social relationship with any interested parties in the proceeding, or their counsel, or any such relationship involving a candidate's employer, partner, business associate or family member; and
- d) any public advocacy, legal or other representation, or considered statements of personal opinion concerning any issue in dispute in the proceeding for which the candidate is under consideration.

12. A candidate shall disclose any circumstances of the kind referred to in paragraphs 10 (Annex 2) and 11 (Annex 2) prior to the candidate's appointment as a member. A candidate shall disclose such circumstances by completing the Disclosure Form included in this Code.

13. Once appointed, a member shall continue to make all reasonable efforts to become aware of and shall disclose any circumstance covered by paragraphs 10 (Annex 2) and 11 (Annex 2). The obligation to disclose is a continuing duty that requires a member to disclose any such circumstance that may arise during any stage of the proceeding.

V. Performance of Duties

14. A member shall be available and competent to perform, and shall perform, the member's duties diligently, thoroughly and expeditiously throughout the course of the proceeding.

15. A member shall devote such time and attention to the proceeding as is required.

16. A member shall ensure that they can be contacted at all reasonable times to conduct business relating to the proceeding.

17. A member shall not delegate the duty to decide any issue in dispute in the proceeding to any other person.

18. A member shall take all reasonable steps to ensure that persons engaged to assist the member with the performance of the member's duties comply with the provisions of this Code of Conduct.

VI. Confidentiality

19. A candidate, member or former member shall not disclose, or use, any confidential information concerning the proceeding, or acquired during the proceeding, except for the purposes of the proceeding.

20. A member shall not disclose any decision prior to its issuance to the parties.

21. A member or former member shall maintain at all times the confidentiality of the deliberations of a panel²⁴ in a dispute settlement proceeding under this Agreement.

VII. Communications

22. A member shall not engage in any *ex parte* communication concerning the proceeding.

23. A person requested to serve as a party-appointed arbitrator may communicate with the appointing party solely for the purpose of determining whether the individual is able to comply with parts III (Independence and Impartiality), IV (Disclosure), V (Performance of Duties) and VI (Confidentiality). No person requested to serve as a party-appointed arbitrator may engage in any communication with the appointing party concerning the merits of the case or offer statements of their opinion on an issue relevant to the dispute in question.

24. A candidate, member or former member shall refrain from making any public statements about the proceeding, or the issues in dispute, prior to the conclusion of the proceeding.

²⁴ Please see previous footnote.

VIII. Acceptance of Appointment

25. A candidate shall not accept appointment as a member unless the candidate is fully satisfied of the candidate's ability to comply with the requirements of this Code of Conduct.

IX. Assistants²⁵

26. This Code of Conduct applies to persons engaged to assist a member with the performance of the member's duties.

²⁵ The scope and coverage of Article IX will be developed in accordance with the institutional provisions of the agreement in question.

FORM

FREE TRADE AREA OF THE AMERICAS AGREEMENT
DISCLOSURE FORM

In the Matter of:

I have read the *Code of Conduct for Dispute Settlement Procedures under the Free Trade Area of the Americas Agreement* (Code of Conduct) and affirm that I comply with the standards set out in that Code.

To the best of my knowledge there is no reason why I should not accept appointment as a member in this proceeding.

I am fully aware that Part IV of the Code of Conduct requires that I disclose any interests, relationships and matters that are likely to affect or could give rise to justifiable doubts as to my independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in this proceeding. I have disclosed all interests, relationships and matters of the kind referred to in paragraphs 10 and 11 of Part IV of Annex 2 (Code of Conduct) in the statement attached hereto.

I recognize that, once appointed, I have a continuing duty to make all reasonable efforts to become aware of any interest, relationship or matter within the scope of Part IV of the Code of Conduct that may arise during any stage of this proceeding and disclose it in writing as and when I become aware of it.

Signature

Name (typed)

Date]

[Annex 3. **Procedures Governing the Treatment of Business Confidential Information**

Definitions

1. In this Annex,

“approved person” means: a person who is (i) an authorized representative of a Party to the dispute or an authorized employee of the Secretariat, designated in accordance with paragraphs 11 and 12 of this Annex; (ii) an expert appointed by the neutral panel in accordance with paragraphs 11 and 12 of this Annex; or (iii) a member of the neutral panel.

“authorized employee of the Secretariat” means a person employed or appointed by the Secretariat who has been authorized by the Secretariat to work on the dispute, and includes translators and interpreters and transcribers present at the neutral panel hearings.

“authorized representative” means:

- a) an employee of a Party to the dispute; or
- b) a legal counsel or other advisor or consultant of a Party to the dispute who has been authorized by the Party to act on its behalf in the course of the dispute and whose authorization has been notified to the Secretariat and to the other Parties to the dispute,

but excludes in all circumstances a person or an employee, officer or agent of any entity that could reasonably be expected to benefit from the receipt of the business confidential information.

“business confidential information” means any proprietary or commercially sensitive information that is not available in the public domain.

“conclusion of the neutral panel proceeding” means [to be completed when other provisions of the Chapter are clearer].

“document” includes any written matter, whether in printed or binary-encoded form.

“information” means information however recorded or stored, including in printed documents and binary-encoded files, and spoken information.

“record” means any medium on which information is recorded or stored.

General Principles

2. Each Party to the dispute shall ensure that its authorized representatives comply with the procedures set forth in this Annex. The Secretariat shall ensure that all other approved persons comply with these procedures.

3. Each Party to the dispute shall exercise the utmost restraint in designating information as business confidential.²⁶

²⁶ The treatment of information as business confidential under this Article imposes a substantial burden on the neutral panel [, the Appellate Body] and the Parties to the dispute. The indiscriminate designation of information as business confidential could limit the ability of a Party to

Identification of Business Confidential Information

4. A Party that designates information as business confidential information shall identify business confidential information by:
- a) clearly marking information recorded in printed records, with the notation ‘BUSINESS CONFIDENTIAL INFORMATION’;
 - b) clearly marking information recorded in binary-encoded files with the notation ‘BUSINESS CONFIDENTIAL INFORMATION’ on a label on the record and by clearly annotating the information where it appears in the files with the notation ‘BUSINESS CONFIDENTIAL INFORMATION’; and
 - c) declaring spoken information to be “Business Confidential Information” prior to its disclosure.
5. Where a Party to the dispute submits business confidential information first submitted by another Party to the dispute, it shall identify that information as business confidential information by:
- a) clearly marking the information recorded in printed records with the notation ‘BUSINESS CONFIDENTIAL INFORMATION’ and with the name of the Party to the Dispute that first submitted the information;
 - b) clearly marking the information recorded in binary-encoded files with the notation ‘BUSINESS CONFIDENTIAL INFORMATION’ on a label on the record and by clearly annotating the information where it appears in the files with the notation ‘BUSINESS CONFIDENTIAL INFORMATION’ and with the name of the Party to the Dispute that first submitted the information; and
 - c) prior to its disclosure, declaring spoken information to be “Business Confidential Information” and identifying the Party to the Dispute that first submitted the information.

Submission of Business Confidential Information by a Party to the Dispute

6. A Party to the dispute submitting an exhibit containing business confidential information shall submit one (1) copy of the exhibit to the Secretariat, and two (2) copies of the exhibit to every other Party to the dispute.
7. If a Party to the dispute objects to the designation of information as business confidential information, the neutral panel shall decide if the information meets the definition of business confidential information in paragraph 1 of this Annex. If the neutral panel considers that the information does not meet the definition, the Party to the dispute submitting the information may:
- a) withdraw the information, in which case the neutral panel and the other Parties to the dispute shall promptly return any record containing the information to the Party to the dispute submitting it; or

the dispute to fully include in its litigation team individuals who have particular knowledge and expertise relevant to presenting its case, impede the work of the neutral panel and complicate the neutral panel’s task in formulating credible public findings and conclusions.

- b) withdraw the designation of the information as business confidential information.

8. A Party to the dispute submitting a document containing business confidential information shall also provide, as soon as is reasonably possible:

- a) a version of the document edited to remove the business confidential information, redacted in such a manner as to convey a reasonable understanding of the substance of the business confidential information; or
- b) in exceptional circumstances, a written statement that:
 - i) an edited version cannot be made, or
 - ii) an edited version would disclose facts that the Party has a proper reason for wishing to keep confidential.

9. If the neutral panel considers that an edited version of a document does not fulfill the requirements of paragraph 8a) or that exceptional circumstances do not exist to justify a statement pursuant to paragraph 8b), the neutral panel may decline to consider the business confidential information in question. In such a case, the Party to the dispute submitting the information may:

- a) withdraw the information, in which case the Secretariat and the other Parties to the dispute shall promptly return the document containing the information to the Party to the dispute submitting it; or
- b) comply with the provisions of paragraph 8 of this Annex to the satisfaction of the neutral panel.

Approved Persons

10. Each Party to the dispute shall submit to the other Party to the dispute and the neutral panel a list of its authorized representatives who need access to business confidential information submitted by the other Party to the dispute and whom it wishes to have designated as approved persons. Each Party to the dispute shall keep the number of persons on its list as limited as possible, taking into account its administrative and political structures. The [Director General] shall, in the same manner, submit to the Parties to the dispute and to the neutral panel a list of the authorized employees of the Secretariat who need access to business confidential information in the dispute. The Parties to the dispute or the [Director General] may submit amendments to their lists at any time.

11. Subject to paragraph 12 of this Annex, the neutral panel:

- a) shall designate the persons on the lists submitted under paragraph 10 of this Annex as approved persons for the dispute; and
- b) may designate as an approved person for the dispute any expert who in the opinion of the neutral panel requires access to business confidential information to assist the neutral panel, and who has filed with the Secretariat the Declaration of Non-Disclosure included in this Annex.

12. In the event that a Party to the dispute submitting business confidential information objects to a person being designated an approved person, the neutral panel shall decide on the objection forthwith. If the neutral panel allows the designation, the information may not be disclosed to the approved person until the Party to the dispute submitting the information has had a reasonable opportunity to:

- a) withdraw the information, in which case the neutral panel and the other Parties to the dispute shall promptly return any record containing the information to the Party submitting it; or
- b) withdraw the designation of the information as business confidential.

Rules for Use and Storage of Business Confidential Information Governed by this Annex

13. Records containing business confidential information shall not be copied, distributed or removed from a locked storage receptacle, except as specifically provided in these procedures.

14. Each Party to the dispute and the Secretariat shall store in a locked storage receptacle to which only approved persons have access any record containing business confidential information submitted to it by a Party to the dispute.

15. An approved person shall take all necessary precautions to safeguard business confidential information when a record containing the information is in use or being stored.

16. Only approved persons may view or hear business confidential information. No approved person who views or hears business confidential information may disclose it, or allow it to be disclosed, to any person other than another approved person for the dispute.

17. Approved persons who view or hear business confidential information shall use that information only for the purposes of the neutral panel proceedings and for no other purposes.

18. The neutral panel shall not disclose business confidential information in its report, but may state conclusions drawn from that information.

19. An approved person viewing or hearing business confidential information may take written summary notes of that information for the sole purpose of the neutral panel proceeding. Those notes are subject to the requirements of paragraphs 14, 15 and 23 of this Annex.

20. A Party to the dispute may bring with it to a neutral panel hearing, for the sole purpose of that hearing, records containing business confidential information that it has received from another Party to the dispute, but shall immediately thereafter return those records to their locked storage receptacle.

21. A neutral panel member may make and remove from the Secretariat's locked storage receptacle a copy of any record containing business confidential information. The neutral panel member alone may use the copy exclusively for the purpose of the dispute and shall return it to the Secretariat upon conclusion of the neutral panel proceeding. The neutral panel member shall store the copy in a locked storage receptacle and safeguard the copy as required by paragraph 15 of this Annex.

22. A Party to the dispute that intends to submit business confidential information during a neutral panel hearing shall inform the neutral panel prior to so doing. Only approved persons may attend or observe the hearing for the duration of the submission and discussion of that information.

Disposal of Business Confidential Information

23. After the conclusion of the neutral panel proceeding, within a period fixed by the neutral panel, the Secretariat and any Party to the dispute shall return to the Party to the dispute that first submitted business confidential information any record containing the business confidential information, unless the Party to the dispute that first submitted the business confidential information agrees otherwise. The Secretariat may retain one (1) copy of any record containing the business confidential information for the archives of the FTAA.

[24. If the report of the neutral panel is appealed, the Secretariat shall transmit to the Appellate Body any record containing business confidential information that is an essential part of the record of the neutral panel proceeding. The Secretariat shall transmit such records to the Appellate Body separately from the rest of the record of the neutral panel proceeding.]²⁷

Additional or Alternative Procedures

25. The neutral panel may apply any additional procedures that it considers necessary to protect the confidentiality of business confidential information.

26. The neutral panel may, at the request of or with the consent of the Parties to the dispute, modify or waive any part of the procedures set forth in this Annex.

²⁷ If paragraph 24 is retained, modifications would need to be made to other paragraphs to make the rules concerning BCI apply to in connection with the Appellate Body and its members. To avoid confusion between the defined term "record" and "the record of the neutral panel proceeding," it might be necessary to define "the record of the neutral panel proceeding."

DECLARATION OF NON-DISCLOSURE FORM

1. I acknowledge having received a copy of the procedures governing the treatment of business confidential information (the "Procedures") found in Annex 3, "Procedures Governing the Treatment of Business Confidential Information" of Chapter XXIII [Dispute Settlement of the FTAA Agreement].
2. I acknowledge having read and understood the Procedures.
3. I agree to be bound by, and to adhere to, the provisions of the Procedures and, accordingly, without limitation, to treat confidentially all business confidential information that I may view or hear from time to time in accordance with the Procedures.

Executed on this _____ day of _____, 200x.

BY: _____(signature)_____
Name:]