

## **THE CAFTA, AN OVERVIEW**

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**Introduction.**

The Central American Free Trade Agreement (CAFTA) has just been negotiated and in fact some of its annexes and side letters, among other things, are yet to be published. The full text awaits legal review, so that in short, it is still subject to marginal changes and adjustments. This notwithstanding, it is already possible to try to give a general overview or to venture a synthesis of the Agreement. Of necessity, details and particulars must be left out when conducting such exercises. Therefore, this document shall not be used but only in order to get a grasp of the full treaty. We are certain that, due to the wide variety of legal and technical matters covered by the CAFTA, some particular aspects that probably seemed to us dispensable may be considered essential by the specialist. Again, the purpose here is not more than to provide the reader with an impressionist sketch of the Agreement. The subsequent stages in the process to the finalization and entry into force of the CAFTA will require, to be sure, revisions and precisions.

**I) Preamble.**

The CAFTA states a fairly large number of goals and objectives, not uncommon for this kind of document. It includes the promotion of free trade among the Parties, making import-export procedures and customs obligations more transparent and efficient, advancing competitiveness, social and economic development; providing for the protection of the environment, etcetera. It is important to mention, however, that the CAFTA specifically describes itself as a contribution to the integration of the hemisphere and to provide an impetus for the establishment of the *Free Trade Area of the Americas*.

**II) General Structure.**

The CAFTA has twenty two chapters, as follows:

1. Initial Provisions.
2. General Definitions.
3. National Treatment and Market Access for Goods.
4. Rules of Origin and Origin Procedures.
5. Customs Administration and Trade Facilitation.
6. Sanitary and Phytosanitary Measures.
7. Technical Barriers to Trade.
8. Trade Remedies.
9. Government Procurement.
10. Investment.
11. Cross-Border Trade in Services.
12. Financial Services.
13. Telecommunications.
14. Electronic Commerce.
15. Intellectual Property Rights.
16. Labor.
17. Environment.

18. Transparency.
19. Administration of the Agreement.
20. Dispute Settlement.
21. Exceptions.
22. Final Provisions.

There are, in addition, several annexes to specific chapters (some of them yet to be published<sup>1</sup>) and some general ones as follows:

- I. Annex I (Services/Investment Non-Conforming Measures)
- II. Annex II (Services/Investment Non-Conforming Measures)
- III. Annex III (Financial Services Non-Conforming Measures)

In order to accommodate some circumstances very specific to one or more of the Parties to the Agreement, some Side Letters shall be executed and will be posted on the USTR and the other Parties' websites in the near future.

### **III) Parties to the Agreement.**

The CAFTA was negotiated by and among the governments of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the United States of America. The five former conform a *Common Market* governed by a series of treaties and protocols and the CAFTA recognizes their interest in strengthening their economic integration. In fact, to an important extent, the Central American nations negotiated the Agreement as a block, although where specific interests or circumstances made this impracticable, negotiations became individualized.

### **IV) Relation of CAFTA with other Agreements.**

The CAFTA expressly indicates that the Parties to it confirm their rights and obligations pursuant to the WTO Agreement and other such agreements to which they are signatories. According with paragraphs four through ten of Article XXIV of WTO Agreement, this agreement does not prevent the establishment of customs unions and free trade areas provided a number of specified conditions are met. These include requirements that customs duties and other barriers to trade should be eliminated on substantially all trade among the signatory countries, and that barriers to trade with non-signatories should not be increased.<sup>ii</sup>

### **V) National Treatment and Access to Markets.**

The CAFTA provides for the obligation of every Party to give the goods of the other Parties national treatment. This in conformity and pursuant to Article III of the GATT, that became incorporated *mutatis mutandis* to the CAFTA, including its interpretative notes.<sup>iii</sup>

The Parties to the CAFTA shall not increase any customs duties or create new ones on originating goods and shall eliminate their customs duties on the same, according to Annex

3.3. This latter consists of the definition of eight categories of goods included in an equal number of lists (from “A” to “H”). Each one of these categories of goods is subject to the elimination of customs duties in a different period and on different terms and conditions, such that goods included in List A, for example, shall become duty free immediately while goods included in List H, shall continue to enjoy “most favored nation treatment”. The goods in List “G” are subject to the longest period (twenty years).

The Agreement covers in this area a number of aspects related to special regimes (such as temporary imports) and non-tariff measures, as provided for in Article XI of the GATT, which become incorporated together with its interpretative notes. Among other things, there are specific provisions related to restrictions on trade concerning the granting of import licenses, the requirement that the exporter must have a distributor in the jurisdiction of the Party where the goods are exported, or administrative fees and formalities.

Something similar occurs regarding the section on Agriculture. The Agreement subjects tariff-rate quota implementation and administration to Article XIII of the GATT and the WTO Agreement on Import Licensing Procedures. The quotas for each Party are contained in their respective list and must be administrated transparently, on non-discriminatory basis, responding to market conditions, minimally burdensome to trade, and reflecting end-user preferences.<sup>iv</sup> Concerning agricultural subsidies, the Parties commit to their multilateral elimination within WTO system.<sup>v</sup>

As to be expected, the provisions on agriculture are numerous and complex and there is no room here to refer to all of them. However, it is interesting that Article 3.15 allows for the United States to choose a mechanism in order to compensate sugar exporters of the other Parties for their lost rents, rather than according duty free treatment to sugar exports from those other Parties.

Section G refers to Textiles and Apparel with a similar structure. It should be mentioned, however, that each Party commits to give preferential tariff treatment to the Textiles and Apparel contained in their respective Annex 3.3 (Tariff Elimination) schedule. The United States undertakes the obligation to eliminate existing Agreement on Textiles and Clothing quantitative restrictions on imports from Costa Rica, El Salvador and Guatemala. The emphasis in this section is on the origin of Textiles and Apparel goods; therefore, the document develops lengthy and complex provisions pertaining to claims of origin and verification regarding such origin. The rules of origin are contained in the Textile and Apparel Product-Specific Rules of Origin, but there are instances where the rules do not apply, such as for example where there is no commercial availability in the United States market.

Lastly, the Parties to the Agreement provided for the creation of the Committee on Trade in Goods, composed of one representative for each Party in order to, broadly speaking, consider any matter arising under this Chapter and Chapter Four (Rules of Origin and Origin Procedures) or Chapter Five (Customs Administration).

## **VI) Rules of Origin and Origin Procedures**

The Chapter on Rules of Origin and Origin Procedures contains several technical provisions in order to determine that the goods traded among the Parties originate in their respective territories. Some of them refer to materials, others to accessories, parts, containers, and so on. The point of departure is that the Agreement covers those goods wholly obtained or produced entirely in territory of one or more of the Parties, but there are important qualifications related to whether, for example, non-originating materials undergo an applicable change in tariff classification specified in Annex 4.1, or as a result of the application of the “Regional Value Content” formulae. According to Article 4.6, each Party shall provide that a good that does not undergo a change in the tariff classification pursuant to Annex 4.1 is nonetheless an originating good if the non-originating materials used in the production of the former do not exceed ten percent of the adjusted value of the good.

Concerning Origin Procedures, the Agreement provides for the kinds of certificates of origin that may be requested by the authorities of each of the Parties, upon a claim of any importer for preferential tariff treatment. There are also obligations for the exporters to issue certificates of origin and to keep them for up to five years in order to allow for verification procedures that may include written reports, questionnaires, or visits to the premises of the exporter.

## **VII) Customs Administration**

Chapter Five of the Agreement contains a series of provisions concerning customs administration and facilitation of trade. These include:

- a) The publication of customs rules and procedures of each Party, including on the Internet;
- b) The release of goods, including procedures allowing for their release prior to the final determination by the customs authorities of the tariff, taxes, and duties applicable to the goods;
- c) The automation of customs procedures following the World Customs Organization’s Customs Data Model;
- d) Risk administration systems regarding verification activities;
- e) Several provisions for the cooperation of the Parties in order to facilitate *inter alia* the efficient operation of the Agreement, the laws and regulations of each Party and the implementation and operation of the WTO Agreement on the Implementation of Article VII of the GATT 1994;
- f) The handling of confidential information supplied by one Party to another, for purposes of the enforcement of customs legislation and regulations;
- g) The adoption of procedures in order to expedite express shipments;
- h) The obligation of the Parties to provide importers access to independent administrative and judicial review of decisions of lower Customs officials;
- i) The adoption of measures tending to the application of administrative, civil, and where appropriate, criminal sanctions in case of customs’ laws or regulations violations;
- j) The rules concerning Advance Rulings; and

- k) The time periods for implementation of some of the provisions of the Chapter by the Central American Parties and the creation of a Committee on Trade Capacity Building.

### **VIII) Sanitary and Phytosanitary Measures**

Chapter Six covers the obligations of the Parties for the protection of health conditions for persons and animals and the preservation of vegetables in the respective territories of each one of them, by means of the application of the SPS Agreement of the WTO and the creation of the Committee on Sanitary and Phytosanitary Matters. This Committee shall be composed of representatives of each one of the Parties from the several governmental agencies indicated for each Party in Annex 6.3.

### **IX) Technical Barriers**

Chapter Seven refers to those matters related with technical barriers to trade, in order to eliminate those deemed unnecessary. This is devised mainly by reference to the implementation of the TBT Agreement (Technical Barriers Agreement) of the WTO system. The Chapter applies to all standards, technical regulations and procedures concerning conformity assessment, including those relative to metrology, which might affect, directly or indirectly, trade in goods among the Parties. The basic objective in this context is to promote the application of internationally recognized standards and procedures, and to that effect the Agreement provides for the creation of the Committee on Technical Barriers to Trade, composed of representatives of the several Parties.

### **X) Trade Remedies**

In Chapter Eight, the Agreement covers the regime of safeguards, antidumping and countervailing duties. In both cases, the Parties retain their rights and obligations under the GATT 1994 and the WTO Agreements, respectively. Safeguard measures, as it is well known, are devised to address circumstances where the domestic industry in anyone of the Parties suffers or may come to suffer serious injury, as a result of a reduction or elimination of a duty, pursuant to the Agreement, which gives rise (in absolute or relative terms) to the imports of the same (or directly competitive) goods. Antidumping and countervailing duties refer to the practice of selling a product into a foreign market at a price less than that charged for the product in the exporter's market<sup>vi</sup> and this is referred to the rights and obligations of the Parties under WTO Agreement.

Safeguard measures may result either in the suspension of the feature reductions of the tariff rate established in the Agreement or in increasing the tariff rate to the lowest off the MFN Rate existing as of the date the measure is adopted, or that applicable as of the day immediately prior to the date the Agreement enters into force. The Parties cannot adopt a safeguard measure for a period longer than four years, and in any case the measure can only remain in place if the circumstances justify it. To this effect, any safeguard measure for a period longer than one year, must be progressively liberalized along the period it remains in

place. The adoption of any safeguard measure requires the Party who adopts it, to notify the other Parties upon the initiation of the proceedings and to start consultations upon request.

Any Party who adopts a safeguard measure must, in consultation with the other Parties, provide a mutually agreed compensation either in terms of substantially equivalent trade effects, or in terms of the value of the expected additional tax income as a result of the measure adopted. Absent such mutual agreement in a period of thirty days, the affected Party may suspend the application of substantially equivalent concessions in respect of its imports of goods originating from the Party who adopted the safeguard measure.

The Agreement provides for very specific rules for the administration of the procedures relative to safeguard measures, including the obligation of the competent local authority to announce the initiation of the same, to conduct hearings, to gather information, and to publish a report on the results of the investigation and of reasoned conclusions.

### ***XI) Government Procurement***

Chapter Nine of the Agreement provides for the general principle that: “With respect to measures and procurement each Party and each procuring entity shall accord to the goods and services of another Party, and to the suppliers of another Party of such goods and services, treatment no less favorable than the most favorable treatment the Party or procuring entity accords to its own goods, services and suppliers”<sup>vii</sup>. The Chapter generally applies to procurement by any contractual means and thus it excludes matters such as hiring of government employees, acquisition of fiscal agency or depository services, sale and distribution services for government debt, and purchases for the direct purpose of providing foreign assistances.

The Parties must, pursuant to this Chapter, publish their respective laws and regulations, as well as judicial decisions and administrative rulings of general application governing procurement; and shall also publish notices inviting interested suppliers to submit tenders. The time period between publication and tendering shall not be less than forty calendar days.

In general, other provisions contained here, require transparency, equal opportunity and fair rules and procedures such that the suppliers of all the Parties may submit their tenders and documentation without burdens, either technical or procedural, that might put them at a disadvantage *vis a vis* local suppliers. To this effect, the Agreement provides for a number of requirements concerning independent administrative or judicial review related with the obligations of the Parties in this Chapter.

### ***XII) Investment and Cross-Border Trade in Services***

Chapter Ten of the Agreement applies to the measures adopted or maintained by a Party relative to the investors of other Party, to investments existing at the time of the entering into force of the Agreement, to those made or expanded thereafter (“Covered Investments”), but it does not apply to acts or facts that took place prior to the date when the Agreement enters into

force. In case of inconsistency between this and other Chapters of the Agreement, the others shall prevail and it does not apply to financial services.

The main purpose of the Chapter on investment is that investors of another Party shall be accorded a treatment no less favorable than that accorded to the investors of the Party where the investment is made. Each Party is obligated to grant the covered investments a treatment no less favorable than that accorded to investments in their territory made by their own investors. Each Party is obligated also to accord the investors of another Party a treatment no less favorable than that accorded to the investors or any other Party, or any other country not a Party to the Agreement, in reference to the establishment, acquisition, expansion, administration, management, conduct and sale or other disposition of an investment. Moreover, as a minimum standard, each Party must accord covered investments a treatment consistent with international customary law.

The fundamental system put in place in order to enforce the provisions for the protection of investments, pursuant to Chapter Ten, is commercial arbitration. The Agreement allows for several options including submission to arbitration under the ICSID rules and system or to the UNCITRAL rules. This, notwithstanding, there are certain rules regarding consent to arbitration, statutes of limitation, selection of arbitrators, conduct of the arbitration, transparency of arbitral proceedings, applicable law, awards and other matters.

If the Chapter on Investments deals basically with some sort of establishment by an entity of one of the Parties in the territory of another Party, cross-border trade in services refers to the provision and delivery of services in a situation where the supplier basically remains in its original jurisdiction, and either this services or those who deliver them “cross the border” into the territory of another Party. Chapter Twelve deals with these matters, excluding financial services, air services, procurement, subsidies and grants. Services supplied in the exercise of governmental authority, are also excluded. The two fundamental standards are (a) the obligation of each Party to accord service suppliers of another Party treatment no less favorable than that it accords to its own service suppliers; and (b) the obligation of each Party to accord service suppliers of another Party treatment no less favorable than that it accords to service suppliers of a non-Party.

A corollary of such obligations is that a Party shall not require a service supplier of another Party to establish or maintain a representative’s office or any form of an enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.

Chapter Twelve governs matters related in general to the requirement of licenses, certifications, and similar requirements for service providers. Regarding professional service providers in particular, the Agreement basically calls for the Parties to encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of the same, and to provide recommendations on mutual recognition to the Commission.

### ***XIII) Financial Services***

Financial services are covered by Chapter Thirteen. This Chapter takes precedence over the general Chapters on investment and cross-border trade in services, which provisions only apply if specifically incorporated into this Chapter. In general, public retirement plans (Social Security) or activities or services conducted for the account or with the guarantee or using the financial resources of any Party, are not covered by the Financial Services Chapter. Again, the standards of “National Treatment” and “Most-Favored-Nation Treatment” apply to both (a) investors of another Party; and (b) financial institutions of another Party, as well as to cross-border financial services. The Parties are not required, but may recognize prudential measures of another Party in the application of measures covered by this Chapter.

One of the basic commitments under this Chapter for the Parties is to abstain from adopting or maintaining quantitative or qualitative constraints that might constitute barriers to trade in financial services. In connection with cross-border financial services each Party shall permit persons located in its territory, and its nationals wherever located, to purchase financial services from cross-border financial service suppliers of another Party located in the territory of the other Party or of another Party. This obligation does not require a Party to permit such suppliers to do business or solicit in its territory.

Regarding prudential measures, the Parties may adopt or maintain such measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system, provided such measures are not used as means of avoiding the Party’s commitments or obligations under such provisions. Furthermore, the Parties commit to promote regulatory transparency in financial services and to apply their own law and regulations on a non discriminatory basis, reasonably and impartiality.

Given the technical character of financial services and their regulation, it is just natural that this Chapter provides for the establishment of a Financial Services Committee, and a specific body of panelists, in order to settle dispute arising out of its provisions. Lastly, this Chapter includes several sections having to do with certain financial services for some of the Parties and the scope of regulatory activities for each case.

### ***XIV) Telecommunications***

This Chapter applies to matters related with access to and use of public telecommunications services, the obligations of suppliers of public telecommunications services, the provision of information services, and public telecommunications networks. The structure of the telecommunications Chapter very much reflects that of the Telecommunications Act of 1934 (as amended) and thus, most of the obligations assumed by the Parties will require the Central American nations to adjust their laws and regulations, in varying degrees, to the Agreement. This Chapter makes a distinction between (a) Major suppliers of telecommunications services; (b) Suppliers of commercial mobile services; and (c) Rural telephone companies. The distinction relates to the fact that nor mobile suppliers neither rural telephone companies are subject to the obligations contained in this Chapter, just as broadcast or cable distribution of

radio or television programming, and information services are also excluded; in this latter case however, a Party maintain actions in order to prevent anti-competitive behavior or to otherwise promote competition or safeguard the interests of consumers.

In general, the Parties commit to ensure that enterprises of another Party have access of and use of any telecommunications service, including leased circuits, offered in its territory or across its borders, on reasonable and non-discriminatory terms and conditions.

Concerning suppliers, there are two sets of obligations; one pertaining to any public telecommunications service supplier and another for major suppliers. Each Party shall ensure that the former are required to provide interconnection with the suppliers of another Party; that they do not impose unreasonable or discriminatory conditions or limitations on the resale of public telecommunications services, and that they provide dialing parity to suppliers of public telecommunications services of another Party, as well as non-discriminatory access to telephone numbers and related services with no unreasonable dialing delays. Regarding major suppliers, each Party shall ensure that they accord suppliers of another Party non less favorable treatment than such major supplier accords to its subsidiaries, its affiliates, or any non-affiliate service supplier, concerning the availability provisioning, rates, or quality of like public telecommunications services; and the availability of technical interfaces necessary for interconnection. Each Party shall also maintain appropriate measures to prevent major suppliers from engaging in or continuing anti-competitive practices and in order that they offer resale of public telecommunications services on reasonable and non-discriminatory conditions, as well as access to network elements on an unbundled basis on terms and conditions and at cost-oriented rates that are reasonable, non-discriminatory, and transparent.

Concerning interconnection in general, each Party shall ensure that a major supplier in its territory provides interconnection for the facilities and equipment of supplies of public telecommunications services of another Party under non-discriminatory terms, conditions and rates, in a timely fashion, at cost oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled. Each Party shall ensure also, reasonably and non-discriminatory treatment for access to submarine cable system in its territory.

From an institutional perspective, the Parties shall ensure that their telecommunications regulatory body is independent from any supplier, impartial, and competent to enforce law and regulation in this area, including the resolution of domestic telecommunications disputes and judicial review.

## ***XV) Electronic Commerce***

This relatively short Chapter, but very important, basically underlies the applicability of WTO rules to electronic commerce, and makes electronic means one more way for the provision of services covered in the Chapters on Investment, Cross-Border Trade Services, and Financial Services. Although this Chapter does not prevent a Party from imposing internal taxes on digital products, a Party shall not impose customs duties or other duties, fees, or charges on or in connection with the importation or exportation of digital products by electronic transmission. For purposes of determining applicable customs duties, each Party shall

determine the customs value of an imported carrier medium bearing a digital product according to the cost or value of the carrier medium alone, without regard to the cost or value of digital product stored on the carrier medium. Basically, the Parties are subject to meet National Treatment and Most Favored Nation Standards to both the products and their creators.

### **XVI) Intellectual Property Rights**

Intellectual Property Rights has been and remains a very important topic concerning global and international trade, and therefore Chapter fifteen is one of the longest and broadest. Among other things, it requires each Party to ratify or accede to the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonographs Treaty (1996) by the date of entry into force of the Agreement; to ratify or accede to the following agreements by January 1, 2006: The Patent Cooperation Treaty (1970), the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980); by January 1, 2008: The Convention Relating to the Distribution of Programmed-Carrying Signals Transmitted by Satellite (1974) and the Trademark Law Treaty (1994). Additionally, each Party shall ratify or accede to UPOV Convention 1991 and each Party shall make all reasonable efforts to ratify or accede to: The Patent Law Treaty (2000), the Hague Agreement Concerning the International Registration of Industrial Designs (1999); and the Protocol relating to the Madrid Agreement Concerning the International Registration of Marks (1989).

On the other hand, nothing in this Chapter shall be construed to derogate from the obligations and rights of one Party with respect to the other by virtue of the TRIPS Agreement or multilateral intellectual property agreements concluded or administered under the auspices of the WIPO.

Generally, this Chapter requires each Party to accord to nationals of the other Parties treatment not less favorable than it accords to its own nationals with regard to the protection and enjoyment of such Intellectual Property rights and any benefits derived from such rights.

Concerning trademarks each Party shall provide that they shall include collective, certifications and sound marks, and may include geographical indications and scent marks. Each Party shall provide that the owner of a registered trademark shall have the exclusive right to prevent all third Parties not having the owner's consent from using in the course of trade identically or similar signs, including geographical indications, for goods or services that are related to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusions. The Paris Convention for the Protection of Industrial Property (1967) applies *mutatis mutandis* to goods or services that are not identical or similar, but that would indicate a connection between those goods or services and the goods or services of the owner of a well-known trademark.

Under this Chapter, each Party shall make patents available for any invention, whether a product or a process, in all fields of technology, provided that the invention is new, involves an inventive step and is capable of industrial application. Nothing in this Chapter precludes a Party from excluding inventions from patentability as defined in the TRIPS Agreement, and

any Party that does not provide patent protection for plants shall undertake all reasonable efforts to make such patent protection available.

As indicated above, this Chapter is broad and covers a wide variety of subjects related with intellectual property rights, and their enforcement, descending to details such as procedures for suspension of suspected counterfeit or confusingly similar trademark goods and the obligation to provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright related rights piracy on a commercial scale. There is no room here for addressing every particular aspect.

### ***XVII) Labor***

The structure of the Chapter on labor seems somewhat disproportionate to the concern that this issue raised along the way. It starts with a reaffirmation of the Parties' obligations as members of the International Labor Organization and their commitments under the ILO Declaration on Fundamental Principles and Rights at work and its Follow-up (1988). It then goes on to recognize the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws. Each Party, additionally commits to strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 16.8, which includes:

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

It is fair to say that this Chapter emphasizes enforcement of labor laws and regulations and to that effect it contains several provisions directed to achieve this objective. From an institutional prospective, it creates the Labor Affairs Counsel that shall coordinate the activities of the Labor Cooperation and Capacity Building Mechanism, in order to address a wide array of matters including labor administration and tribunals, inspection systems, alternative dispute resolution, working conditions, etc.

### ***XVIII) Environment***

This has been another controversial issue within the context of CAFTA. The balance required seems to have been reached by means of recognizing the right of each Party to establish its own levels of environmental protection and environmental development policies and priorities, but at the same time stating the obligation of each Party to ensure that its laws and policies provide for and encourage high levels of environmental protection.

Naturally, taking that as a premise, the focus shifts to the enforcement of environmental laws. In this respect, there is again a compromise where on the one hand, a Party shall not fail to

effectively enforce its environmental laws, but on the other it retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources. In this connection, there is an interesting statement that nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement in the territory of another Party.

The Chapter touches on procedural matters (judicial and administrative proceedings); measures to enhance environmental performance (incentives and voluntary actions); and it creates the Environmental Affairs Council, in order to oversee the implementation and review progress under this Chapter and to consider the status of cooperation activities developed under the "United States – Central America Environmental Cooperation Agreement" (ECA). This Chapter also refers to the submissions on enforcement matters, so that any person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with the competent body as designated by each Party.

The Parties shall establish within six months after the date of entry into force of this Agreement and maintain a roster of a certain number of individuals who are willing and able to serve as panelists in disputes arising under Article 17.2.1a, namely whether a Party has failed to effectively enforce its environmental laws.

The ECA is still subject to further revision and has not been signed by the Parties. We, therefore, direct any interested reader to its contents on the "USTR" website. This, notwithstanding, it should be noted that its main objective is to establish a framework for cooperation among the Parties in order to protect, improve and conserve the environment, including natural resources.

### ***XIX) Transparency***

Chapter eighteen broadly refers to the Parties' obligations in order to (a) make publicly available the laws, regulations and procedures that relate with the CAFTA and its application; (b) facilitate communication between the Parties on any matter covered by the Agreement; (c) notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might affect the operation of the Agreement or the interest of the other Party under the Agreement; (d) to provide reasonable notice and opportunity to present facts and arguments to persons of another Party in matters arising under the Agreement; (e) to provide for appropriate judicial review and appeal concerning all those matters; and (f) to adopt and maintain measures (including criminal sanctions) to eliminate bribery and corruption in international trade and investment.

### ***XX) Administration of the Agreement***

The main institutions charged with the administration of the Agreement is the "Free Trade Commission", comprising cabinet level representatives of the Parties, as set out in Annex 19.1 (the USTR and Cabinet Ministers, respectively), or their designees. The Commission shall supervise the implementation and oversee the further elaboration of the Agreement; each shall

seek to resolve disputes that may arise regarding the interpretation or application of the Agreement and supervise the work of all committees and working groups. The Commission may modify the schedules attached to Annex 3.3 (Tariff elimination), by accelerating tariff elimination; and it may also modify the rules of origin, the Common Guidelines and Annex 9.1 concerning government procurement. Additionally, the Commission may issue interpretations of the provisions of the Agreement and seek advice of non-governmental persons or groups.

The decisions of the Commission shall be taken by consensus, except as the Commission may otherwise agree and shall convene at least once a year in regular sessions.

Additionally, each Party shall appoint a free trade agreement coordinator, as set out in Annex 19.2. The coordinators shall work jointly to develop agendas and make other preparations for Commission meetings and shall follow up on Commission decisions.

Perhaps, one of the most important administrative elements of the Agreement is the office that each Party shall designate in order to provide administrative assistance to the panels established under Chapter twenty. Each Party shall be responsible for the remuneration and payment of expenses of panelists and experts, as set out in Annex 19.3.

Finally, the Agreement creates the Committee on Trade Capacity Building, comprising representatives of each Party, in order to, generally, focus on the economic development side of the Agreement.

### ***XXI) Dispute Settlement***

Chapter Twenty basically provides for a process to resolve disputes arising under the Agreement composed of (a) consultations directly between the Parties; (b) in case such consultation shall fail, referral to the Commission; and (c) after a certain period of time (no longer than 75 days) if the dispute is not resolved by the Commission, a request for an Arbitral Panel.

The Parties shall establish, within six months of the entry into force of the Agreement, and maintain a roster of up to 60 individuals who are willing and able to serve as panelists. Unless the Parties otherwise agree, the roster shall include up to 12 individuals who are not nationals of the Parties. The roster members shall be appointed by consensus and may be reappointed. A roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new one.

A panel shall comprise three members, that shall normally be selected from the roster; each Party to a dispute shall select one panelist (a national of the Party) and both Parties to a dispute shall select the Chair by agreement. In general, failure to select the chair or the other panelists shall be resolved by the selection by lot from among roster members, of those that were not selected.

Arbitration shall be conducted according with The Model Rules of Procedure, which the commission shall establish by the date of entry into force of the Agreement. Panels are expected to present an initial report within 120 days after the last panelist is selected or such other period as the Model Rules of Procedure may provide, including recommendations, if the Parties have requested them. The Parties may then submit written comments on the initial report and, within 30 days of presentation of the initial report, the panel shall present its final report, including the determinations and recommendations, if any. The Parties shall conform to both, unless they may agree on a mutually satisfactory action plan to resolve the dispute. If the disputing Parties are unable to reach agreement on a resolution within 45 days of receiving the final report, the Party complained against shall enter into negotiations with the complaining Party or Parties with a view to developing mutually acceptable compensations. Failure to compensate appropriately allows the complaining Party to suspend the application, to the Party complained against, of benefits of equivalent effect. Any disagreement between the Parties on the appropriateness of this measure shall be taken again to the panel for its determination of the level of benefits it considers to be of equivalent effect. Even in this latter case, the Party complained against may choose to pay a monetary assessment. A monetary assessment, however, may also be determined by the panel if the Party complained against has failed to observe the terms of its agreement with the complaining Party (with a cap of 15 million U.S. dollars annually, adjusted for inflation). Assessments shall be paid into a fund established by the Commission.

If the Party complained against fails to pay a monetary assessment, the complaining Party may take other steps, including suspending tariff benefits under the Agreement, as necessary to collect the assessment.

No Party may provide for a right of action under its domestic law against any other Party on the grounds that a measure of another Party is inconsistent with the Agreement.

### ***XXII) Exceptions***

This Chapter contains some general exceptions having to do with the incorporation of certain articles of the GATT 1994 and the understanding of the Parties that such provisions include environmental measures necessary to protect human, animal, or plant life or health; all this, in relation to Chapters Three through Seven and Eleven, Thirteen, and Fourteen of the Agreement.

In addition to that, there are exceptions related with essential security, taxation, balance of payments measures on trading goods, and disclosure of information.

### ***XXIII) Final Provisions***

There are two interesting provisions of this Chapter. One, that the Agreement shall enter into force following the exchange of written notifications by the United States and at least one other signatory; the other, that any country or group of countries may accede to the Agreement subject to such terms and conditions as may be agreed between such country or

countries and the Commission and following approval in accordance with the applicable legal procedures of each country.

By Eduardo R. Mayora  
© Guatemala, February 2004.

**ENDNOTES:**

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<sup>i</sup> As of February 7, 2004.

<sup>ii</sup> Thomas, Jeffrey S., Meyer, Michael A., *THE NEW RULES OF GLOBAL TRADE*, Carswell, 1997.

<sup>iii</sup> CAFTA, Chap., Three, Section A, Article 3.2.

<sup>iv</sup> CAFTA, Chap., Three, Section F, Article 3.12

<sup>v</sup> *Idem*.

<sup>vi</sup> *THE NEW RULES*, Pg. 131

<sup>vii</sup> Article 9.2, Chapter Nine.