Inter-American Development Bank

Organization of American States

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A Comparative Guide to the Chile-United States Free Trade Agreement and the Dominican Republic-Central America-United States Free Trade Agreement

A STUDY BY THE TRIPARTITE COMMITTEE

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This publication is a joint project of the Integration and Regional Programs Department of the Inter-American Development Bank (IDB), the Trade Unit of the General Secretariat of the Organization of American States (OAS), and the Washington Office of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC).

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The opinions expressed herein are those of the authors and do not necessarily reflect the official position of the ECLAC, OAS and/or the IDB, or the member countries of these institutions.

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Table of Contents

Introduction

This document was prepared by the three institutions of the Tripartite Committee (the United Nations Economic Commission for Latin America and the Caribbean –ECLAC-, the Trade Unit of the General Secretariat of the Organization of American States –OAS-, and the Inter-American Development Bank -IDB) with the purpose of making a publicly available tool for comparing the legal texts of two recent North-South trade agreements in the Americas, namely, the Free Trade Agreement between Chile and the United States (hereinafter the "Chile-U.S. FTA"), and the Dominican Republic-Central America-United States Free Trade Agreement (hereinafter "DR-CAFTA").

The document consists of two main parts: a comparative study of the provisions in the Agreements and a comparative –side-by-side- matrix of the legal texts of the Agreements. Both parts are electronically linked so that the user may read the comparison and go back and forth to the relevant provisions in the matrices by clicking on the heading of the comparative text.

The base texts used in the preparation of this document were the English versions of the two Agreements available on the website of the Office of the United States Trade Representative (USTR). The reader should be aware that the version of DR-CAFTA used in this document is the version made publicly available after signature by the Trade Ministers of the Dominican Republic, the five Central American countries and the United States on August 5, 2004.

The reader should bear in mind that a number of side-letters and understandings were signed by the governments on the occasion of the signing of the Agreements. Those instruments refer to matters closely related to several provisions of the Agreements but are not an integral part of the legal texts. Therefore, they have not been included in this study. Those who wish to learn more of the issues under the Agreements should read those side-letters and understandings.

This is not an analysis of the two trade Agreements per se. Rather, it seeks to function as a tool to facilitate *that* type of comparative analysis by academics, negotiators, trade officials, students, etc. With this document, the Tripartite Committee launches a series of comparative documents which will eventually include other trade agreements signed within the Americas and between countries in the Americas and their extra-hemispheric partners.

The Chile-U.S. FTA is the reference text in this document and both the comparative study and the matrices follow the same order of the chapters in that Agreement. The comparative study is available in CD-ROM in both English and Spanish. The matrices, however, are only available in English.

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Preamble

The Chile-U.S. FTA preamble and that of DR-CAFTA are fairly similar, both lay out the underlying political, social and economic precepts for engaging in a Free Trade Agreement. Both Agreements address concepts regarding: cooperation between nations, development and expansion of world trade, expansion of markets for goods and services, World Trade Organization rights and obligations, competitiveness in global markets, innovation promotion, increasing employment and bettering workers' rights, business facilitation measures, the environment, safeguarding the public welfare, and finally, working towards a Free Trade Area of the Americas.

DR-CAFTA addresses the areas of facilitation of regional trade, opportunities for economic and social development, and transparency and efforts to eliminate bribery and corruption in international trade and investment. DR-CAFTA also recognizes the differences in size and level of development of the Parties' economies. It also notes the interest of the Central American countries in advancing their regional economic integration.

Chapter One

Initial Provisions

Aside from one additional paragraph within DR-CAFTA with regard to regional integration (second paragraph of Art.1.3), both the Chile-U.S. FTA and DR-CAFTA (Article one in both) mirror each other in that they declare that the respective FTA is consistent with Article XXIV of GATT (1994) and Article V of the GATS (Art.1.1). The Initial Provisions Chapter goes on to describe the objectives (Art.1.2), relation to other Agreements (Art.1.3) and the extent of obligations that encompass the Agreements (Art.1.4).

Including national treatment, most-favored-nation treatment, and transparency, the Agreements also enumerate seven basic objectives (Art.1.2) that include: the expansion and diversification of trade, elimination of barriers to and facilitation of trade in goods and services, promotion of fair competition, increased investment opportunities, protection of intellectual property rights, establishment and effective use of dispute resolution mechanisms and work towards further bilateral, regional, and multilateral cooperation in the betterment of their respective Agreements.

The Parties in both Agreements affirm their existing obligations under the WTO Agreement and other multilateral accords (Art.1.3). The Parties also undertake to do all that is necessary to ensure that state governments, unless otherwise enumerated, give effect to the Agreements (Art.1.4).

As noted before, DR-CAFTA includes a paragraph providing "greater certainty," in affirming that nothing in DR-CAFTA shall prevent the Central American Parties from further developing regional integration provided that such instruments and measures are not inconsistent with the Agreement (Art.1.3.2).

Chapter Two

General Definitions

Both Agreements set forth in their respective Chapters on General Definitions (Chapter 2 in both), a common set of terminology frequently used throughout the text of the respective FTA. Each Chapter includes descriptions for: central level of government, Commission, customs authority, covered investment, customs duty, Customs Valuation Agreement, days, enterprise, enterprise of a Party, existing, GATS, GATT 1994, Harmonized System (HS), heading, measure, national, originating, person, person of a Party, preferential tariff treatment, procurement, regional level of government, Safeguards Agreement, SPS Agreement, state enterprise, subheading, territory, TRIPS Agreement and WTO Agreement.

In addition, the Chile-U.S. FTA includes a definition for the TBT Agreement.

DR-CAFTA includes definitions for Central America, Party, and sanitary or phytosanitary measures.

While both texts include a similar definition for the term "goods of a Party", the Chile-U.S. FTA stipulates that "A good of a Party may include materials of other countries".

Both Agreements also include an annex that includes country-specific definitions regarding territorial limits and the definition of a natural person who has the nationality of a Party as set in domestic legislation.

Chapter Three

National Treatment and Market Access for Goods

In both the Chile-U.S. FTA and DR-CAFTA, the issue of national treatment and market access for goods is treated under Chapter 3. There are many structural similarities in both texts, but there are also other distinctive features. Both texts contain the same nine sections:

A. National Treatment
B. Tariff Elimination
C. Special Regimes
D. Non-Tariff Measures
E. Other Measures
F. Agriculture
G. Textiles and Apparel
H. Institutional Provisions
I. Definitions

The Chile-U.S. FTA has twenty-four Articles. DR-CAFTA has thirty-one. Despite substantial differences in the content of many of the Articles, both texts have full Articles on issues related to Scope and Coverage, National Treatment, Tariff Elimination, Waiver of Customs Duties, Temporary Admission of Goods, Goods Re-entered after Repair or Alteration, Duty-Free Entry of Commercial Samples of Negligible Value and Printed Advertising Materials, Import and Export Restrictions, Administrative Fees and Formalities, Export Taxes, Distinctive Products, Agricultural Export Subsidies, Agricultural Safeguard Measures, Textile Safeguards, Rules of Origin and Related Matters (for textiles and apparel), Customs Cooperation (on textiles and apparel matters), Committee on Trade in Goods and Definitions. In spite of similarities in the names and often substance of these common Articles, there are also many substantial differences in their content, as will be detailed below.

In addition, the Chile-U.S. FTA includes Articles on Used Goods, Customs Valuation of Carrier Media, Drawback and Duty Deferral Programs, Luxury Tax, and Agricultural Marketing and Grading Standards.

DR-CAFTA, on the other hand, has Articles on Administration and Implementation of Tariff-Rate Quotas, Import Licensing, Sugar Compensation Mechanism, Consultations on Trade in Chicken, Agriculture Review Commission and Committee on Agricultural Trade. For textiles and apparel only, DR-CAFTA also includes Articles on Refund of Customs Duties, Duty-Free Treatment for Certain Goods, Elimination of Existing Quantitative Restrictions, Most-Favored-Nation Rates of Duty on Certain Goods, Preferential Tariff Treatment for Wool Apparel Goods Assembled in Costa Rica, and Preferential Tariff Treatment for Non-Originating Apparel Goods of Nicaragua.

The Chile-U.S. FTA has three Annexes and two Appendices. DR-CAFTA has eleven Annexes and two Appendices (3.3.6 and 3.3.6.4).

There are important similarities in basic structure in both Agreements. These similarities are more significant than the structural differences. The structure of the sections is identical and most of the Articles have important similarities as well. This analysis will be confirmed when the main issues of substance in the texts are scrutinized below. The tariff elimination programs of both Agreements also have the following structural similarities: they are very comprehensive and, for tariff elimination commitments other than immediate zero tariff, they both follow a residual (as opposed to preferential) approach to phasing out a fixed base tariff over time. DR-CAFTA includes a tariff elimination program to be applied on trade among the Dominican Republic and the five Central American countries. These commitments basically reflect the trade commitments previously agreed upon by those six countries in their free trade agreement of 1998. So, in DR-CAFTA, the six countries consolidated the legal instrument that previously regulated their trade relations. Both Agreements have recourse to tariff-rate quotas, in particular for agricultural products. The Chile-U.S. FTA does not exclude any products from the tariff elimination commitments. DR-CAFTA has very few exclusions, although this may not be the most appropriate term to use. There are a small number of products subject to tariff-rate quotas where the quantities eligible for duty-free preferential access never truly become unlimited, but rather continue to grow in perpetuity. These are not true exclusions given that the treatment of these products will be quite restrictive for the foreseeable future as goods entered in excess of the small quotas agreed upon are subject to continued most-favored-nation treatment. The products subject to this treatment include white corn in the cases of El Salvador, Guatemala, Honduras, and Nicaragua, fresh potatoes and fresh onions in the case of Costa Rica, and sugar in the case of the United States. No similar treatment is granted to specific products by the Dominican Republic. There are additionally a small number of sensitive products that are excluded from tariff elimination within Central America as well as between Central America and the Dominican Republic.

DR-CAFTA has more extensive commitments on textiles and apparel. The Chile-U.S. FTA includes advanced disciplines on some agricultural issues such as marketing and grading standards and mutual recognition of grading programs for beef. Furthermore, DR-CAFTA has special provisions for the administration and implementation of tariff-rate quotas, sugar compensation, consultations on trade in chicken and an agriculture review commission. A more detailed analysis below will point out other important differences regarding tariff elimination in both Agreements.

Scope and Coverage: in identical terms both texts (Art.3.1) state that, except as otherwise provided, the Chapter applies to trade in goods of a Party. Both Agreements define "goods of a Party", under general definitions found in Chapter Two (Art.2.1), as including originating goods and domestic products as understood in the GATT 1994 or such goods as the Parties may agree. The Chile-U.S. FTA definition goes further to state that a good of a party may include materials of other countries. There are some instances in both Chapters where disciplines cover goods that may not be goods of a Party, even regulating therefore trade in goods that do not necessarily have to be originating goods, such as in the Chile-U.S. FTA Arts. 3.7(d), 3.9 and 3.10 or DR-CAFTA Arts. 3.5, 3.6 and 3.7 (respectively, temporary admission, goods re-entered after repair or alteration, and duty-free entry of commercial samples and printed advertising materials).

National Treatment: by making reference to Article III of GATT 1994 and its interpretative notes, both texts have identical approaches to the national treatment clause (Art.3.2). The only difference is with regard to the different nature of DR-CAFTA as an agreement among multiple Parties therefore using the form "goods of another Party", as opposed to the bilateral formula "goods of the other Party" used in the Chile-U.S. FTA. This key difference can be observed throughout the Agreements. Both Agreements provide for annexes of exceptions to the national treatment clause. U.S. exceptions are identical in both Agreements as they relate to the exportation of logs of all species, maritime transportation and restrictions on textiles and clothing as allowed by the WTO Agreement on Textiles and Clothing. Chile exempts the importation of used vehicles and any measure authorized by the Dispute Settlement Body of the WTO. The latter exemption was also lodged by all DR-CAFTA countries. Costa Rica exempts the importation of crude oil and its derivatives; the exportation of wood in logs and boards, hydrocarbons and coffee; the importation or exportation of ethanol and crude rums; and minimum export prices for bananas. The Dominican Republic exempts controls on importation of crude oil and oil derivatives, exports of wood in logs and boards, hydrocarbons and coffee, imports and exports of ethanol, and minimum export prices for bananas. El Salvador exempts controls on arms and ammunitions; the importation of motor vehicles older than 8 years and trucks and buses older than 15 years; and the importation of jute sacks and bags and similar textile fabrics, but this exemption is to be phased out 10 years after the date of entry into force of the Agreement. Guatemala exempts controls on the exportation of timber and coffee and the importation of weapons. Honduras exempts the exportation of some woods, and the importation of arms and ammunitions; and motor vehicles older than 7 years and buses older than 10 years. Nicaragua exempts controls on the exportation of basic foodstuff in cases of critical shortage; the importation of motor vehicles older than 7 years; and, for 10 years only, controls on the importation of some used goods (mainly tires, pneumatics, clothing and other textiles).

Tariff Elimination: both Agreements establish a transitional program for the creation of a free trade zone (Art.3.3). There are similarities in language in both Agreements regarding prohibitions to increase existing customs duties or adoptions of any new customs duties. Both Agreements subject the elimination of tariffs to the schedule of tariff commitments included in Annex 3.3 of each Agreement. Both Agreements provide for the acceleration of the elimination of tariffs with the only difference being derived from the plurilateral nature of DR-CAFTA: any DR-CAFTA Party shall be notified of the terms of acceleration agreed upon by other DR-CAFTA Parties. DR-CAFTA also provides that any Central American Party can provide preferential tariff treatment to another Central American Party in accordance with Central American integration instruments, provided that the good meets the rules of origin under those instruments. Both Agreements contemplate the possibility of raising tariffs to the levels agreed in Annex 3.3 if the tariffs had previously been unilaterally reduced, and of maintaining or increasing a tariff as authorized by the WTO Dispute Settlement Body. In addition, DR-CAFTA incorporates a tariff elimination program applicable only among the Dominican Republic and the five Central American countries. This program fundamentally mirrors the commitments acquired by those six countries in the context of their 1998 free trade agreement. This program provides for basically free trade across the board with the exception of a few sensitive products. DR-CAFTA, in Annex 3.3.6, sets out tariff elimination commitments for most of those products.

Annex 3.1 of this analysis provides a comparative summary of the different tariff elimination categories in DR-CAFTA and the Chile-U.S. FTA. Annex 3.2 shows tariff elimination staging categories used by the United States for individual wine products in the Chile-U.S. FTA. The charts in Annex 3.3 illustrate the different trajectories and relative dispersions of the tariff elimination categories in both Agreements. Trade and the prevalence of tariff lines by tariff elimination category is shown in Annexes 3.4 and 3.5. The tariff elimination commitments include the opening of tariff-rate quotas (TRQs) in many cases. The tables in Annex 3.6 include the product categories subject to TRQs (Figure 3.3), brief descriptions of the TRQ measures (Figures 3.4 through 3.9), and the number of tariff lines by Chapter of the Harmonized System where TRQs are found as well as the total number of tariff lines subject to TRQs in DR-CAFTA and the Chile-U.S. FTA (Figures 3.10 and 3.11).

Used Goods: the Chile-U.S. FTA includes a commitment by Chile to immediately eliminate the 50% surcharge applied, with a few exceptions, on the importation of all used goods (Art.3.4). There is no similar provision under DR-CAFTA, although, as will be described below, other provisions in Chapter 3 of DR-CAFTA eliminate restrictions applied by three Central American countries on the importation of some used goods.

Customs Valuation of Carrier Media: there are only a few provisions in these Chapters regarding Customs Valuation. The Chile-U.S. FTA establishes that carrier media bearing content (CDs, diskettes and other carrier media classified under HS 8523 and 8524) should be valued on the cost or value of the carrier media alone (Art.3.5). The Chile-U.S. FTA also states in the same Article that the tax basis for the imposition of any internal tax, whether direct or indirect, shall be determined according to the domestic laws of the Parties. There are no similar provisions in DR-CAFTA. The only Customs Valuation provisions in Chapter 3 of DR-CAFTA deal with disciplines on the dutiability of certain textiles and apparel based on value added only (Art.3.26), as will be described below.

Waiver of Customs Duties: there are important similarities but also important differences in the way both Agreements deal with this issue (Chile-U.S. FTA Art.3.6 and DR-CAFTA Art.3.4). In broad terms, both provisions state that the Parties may not adopt any new, or continue or expand any currently existing, waivers of customs duties that are contingent upon the fulfillment of a performance requirement. In the Definitions section (Chile-U.S. FTA Art.3.24 and DR-CAFTA Art.3.31), the definitions of performance requirements include requirements that a given percentage of goods or services be exported; that domestic goods be substituted for imported goods upon granting a waiver or issuing a license; that domestic goods, or any level or percentage of domestic content are to be preferred as a condition to grant a waiver or issue an import license; or that relates the volume or value of imports to the volume or value of exports or the amount of foreign exchange inflows. Besides the above, the DR-CAFTA definition outlines what a requirement does not include. Among those excluded are requirements that an imported good be subsequently exported and that an imported good be used as a material in the production of another good that is subsequently exported. DR-CAFTA also has additional provisions regarding two issues: i) the possibility of Costa Rica, the Dominican Republic, El Salvador and Guatemala maintaining until December 31, 2009, measures that are inconsistent with the aforementioned provisions if they are maintained in accordance with Article 27.4 of the WTO Agreement on Subsidies and Countervailing Measures, and ii) the possibility of Nicaragua and

Honduras maintaining measures that are inconsistent with the aforementioned provisions as long as they are provided for under Annex VII of the WTO Agreement on Subsidies and Countervailing Measures (least developed countries or countries with less than $1000 annual GNP per capita). Thereafter, Nicaragua and Honduras are to maintain any such measures in accordance with Article 27.4 of the WTO Agreement on Subsidies and Countervailing Measures. These provisions have an impact mainly on the ability of Central American countries and the Dominican Republic to maintain some key features of export processing zones, including the possibility of granting some export subsidies at least in the conditions and terms renegotiated during the Doha Ministerial Meeting of WTO in November 2001. The Chile-U.S. FTA text does not contain similar provisions. Instead in Article 3.8, it provides that drawback and duty deferral programs are not subject to disciplines under this Article 3.6. DR-CAFTA, as will be indicated below, does not contain an Article similar to the Chile-U.S. FTA Article 3.8.

DR-CAFTA contains provisions regarding the treatment of merchandise produced under export processing zones or under another special tax or customs regime for trade among the Dominican Republic and the five Central American countries. These rules provide that such merchandise will receive restrictive treatment in terms of tariff preferences. That treatment will be similar to the treatment that merchandise produced under those regimes in a country is granted when imported into the national territory of that same country. In other words, it is some kind of national treatment: merchandise produced under those regimes in a given country can be imported into another country only and to the extent that this country allows imports into its territory of merchandise produced under its own special regimes.

Temporary Admission of Goods: except for very few minor details in drafting, both the Chile-U.S. FTA and DR-CAFTA texts on this issue (Art.3.7 and Art.3.5 respectively) are identical. The texts establish the conditions and limits for the duty free temporary admission for a list of types of goods, including professional equipment, goods intended for display or demonstration, commercial samples, advertising films and recordings, and goods admitted for sports purposes. The Chile-U.S. FTA text states that the origin of those sporting goods is not relevant for purposes of this Article. A similar sentiment is present in DR-CAFTA but applicable to all of the goods subject to temporary admission, not only to sporting goods. Furthermore, both texts contain identical disciplines on temporary admission of vehicles and containers used in international traffic.

Drawback and Duty Deferral Programs: only the Chile-U.S. FTA has provisions on this issue (Art.3.8). Central American countries apply drawback and have some duty deferral programs such as export processing zones. As discussed earlier, some aspects of these programs are dealt with under Article 3.4, Waiver of Customs Duties. In general, these provisions prohibit refunds, waivers or reductions of customs duties for a good which are conditioned on the subsequent exportation of that good to the other Party or used in the production of another good that is to be exported to the other Party, or is substituted by an identical or similar good used as input for a good that is to be exported to the other Party. On condition of export, no Party may refund, waive or reduce antidumping or countervailing duties, or a premium collected out of any tendering system used in administration of TRQs or tariff preference levels (TPLs) or customs duties paid or owed on a good imported and further substituted by an identical or similar good used as input for a good that is to be exported to the other Party. The Article also lays out several

exceptions. The prohibitions under this Article take effect from the eighth year of entry into force of the Chile-U.S. FTA by progressively phasing out the reductions, waivers or refunds until complete elimination on the twelfth year.

Goods Re-entered after Repair or Alteration: both texts are virtually identical on the issue of re-entry of goods after repair or alteration (Chile-U.S. FTA Art.3.9 and DR-CAFTA Art.3.6) with the exception of differences pertinent to the multilateral nature of DR-CAFTA (the Party/Parties question). The Agreements basically provide for the duty-free re-entry of goods into the territory of one Party that had been previously exported to the territory of the other Party for repairs or alteration. For purposes of this re-entry, considerations on both the origin of the good and the fact that such repairs or alterations can be made in the territory of the Party in which the good is re-entered are immaterial.

Duty-Free Entry of Commercial Samples of Negligible Value and Printed Advertising Materials: provisions on this issue in both texts are identical except for the "Party/another Party" question that arises from the multilateral nature of DR-CAFTA (Chile-U.S. FTA Art.3.10 and DR-CAFTA Art.3.7). The texts outline the conditions and limitations for granting duty-free treatment to commercial samples of negligible value and printed advertising materials.

Import and Export Restrictions: there are similarities and differences in the way both texts regulate these restrictions (Chile-U.S. FTA Art.3.11 and DR-CAFTA Art.3.8). In broad terms, commonalities include the prohibition on Parties to adopt or maintain import or export bans or other restrictions on trade between them except in accordance with Article XI of GATT 1994 and its interpretative notes. Only DR-CAFTA clarifies that such prohibition applies also to remanufactured goods. The texts further clarify that these prohibitions include import/export price requirements with a few exceptions, import licensing conditioned on the fulfillment of a performance requirement (save, in the case of DR-CAFTA, for exceptions regarding administration of TRQs included in the tariff elimination program of Annex 3.3), and WTO-inconsistent voluntary export restraints. DR-CAFTA specific provisions on import licensing are outlined in Article 3.9. In addition, both Agreements also regulate situations where a Party maintains trade restrictions (such as trade embargoes) with a non-Party. Both Agreements contemplate exceptions that are lodged in an annex and they mirror the exceptions lodged under the national treatment provisions in Annex 3.2 of each Agreement. DR-CAFTA also has additional provisions that are not in the Chile-U.S. FTA text regarding: i) the prohibition -on the Central American countries and the Dominican Republic only- of requiring a person of another Party to establish or maintain a contractual or other relationship with a dealer in the importing country, and ii) a prohibition, -again on the Central American countries and the Dominican Republic only- to restrict or ban imports from another Party as a remedy for a violation (real or alleged) of any law or regulation regarding importer/dealer relationships. In DR-CAFTA, the final paragraph of this Article defines what is meant by the terms "dealer" and "remedy".

Import Licensing: only DR-CAFTA contains an Article on import licensing (Art.3.9) which involves disciplines for the notification and treatment of import licensing procedures within the parameters of the WTO Agreement on Import Licensing Procedures.

Administrative Fees and Formalities: texts on these issues are very similar in both Agreements (Chile-U.S. FTA Art.3.12 and DR-CAFTA Art.3.10). In broad terms, it is stated that fees and charges of whatever nature imposed on or in connection with importation or exportation should be limited in cost to the services rendered and that they should not be used as disguised protection or as a source of fiscal revenue. This provision does not apply to custom duties, internal taxes or other internal charges compatible with Article III.2 of GATT 1994. In both texts, all Parties agree to not require consular transactions including related fees and charges in connection with importation. The U.S. is also committed to eliminating its Merchandise Processing Fee on originating goods from Chile and from Central American countries. All the Parties have agreed to make available via Internet (in the case of DR-CAFTA) or via Internet or other comparable computer-based telecommunications network (in the case of the Chile-U.S. FTA) a list of fees and charges imposed in connection with importation.

Export Taxes: there are similarities and differences in the way both texts deal with this issue (Chile-U.S. FTA Art.3.13 and DR-CAFTA Art.3.11). The texts are similar in that export taxes cannot be charged on exports to the other Parties unless such taxes are also imposed on such goods when destined for domestic consumption. DR-CAFTA, however, is more permissive by: i) adding that export taxes on exports of a good to another Party can be applied when the same tax is applied to exports destined to any other Party in the Agreement; and ii) adding the possibility of lodging exceptions to this Article in an Annex 3.11. This Annex only contemplates export taxes imposed by Costa Rica on bananas, coffee and meat.

Luxury Tax: only the Chile-U.S. FTA has a provision on this issue (Art.3.14) which eliminates the Luxury Tax in Chile in 4 years according to a phase out mechanism established in Annex 3.14.

Distinctive Products: while the Chile-U.S. FTA text establishes rules for distinctive products as well as a list of distinctive products (Art.3.15), DR-CAFTA only states the same rules and lists the distinctive products of the U.S., but contemplates the possibility of the Committee on Trade in Goods recommending that the Parties amend the Agreement in order to designate as distinctive other products at the request of a Party (presumably Central American or the Dominican Republic) (DR-CAFTA Art.3.12). The U.S. designated Bourbon Whisky and Tennessee Whisky as distinctive products. Chile did the same for Pisco Chileno, Pajarete and Vino Asoleado. According to the rules, distinctive products cannot be sold in the territory of a Party unless they have been produced in the other Party pursuant to their specific manufacturing regulations.

Provisions on Agriculture:

As explained before, both DR-CAFTA and the Chile-U.S. FTA have specific sections dealing with provisions on agricultural trade. The two common thematic areas in both Agreements are export subsidies and agricultural safeguards. Beyond these common areas, DR-CAFTA presents provisions dealing with tariff rate quota implementation and administration; a sugar compensation mechanism; consultation on trade in chicken; and an agriculture review commission. The Chile-U.S. FTA presents additional provisions dealing with agriculture

marketing and grading standards; mutual recognition of grading programs for marketing of beef; and product lists and trigger prices for agricultural safeguards.

Export Subsidies: the treatment of export subsidies in both Agreements (Chile-U.S. FTA Art.3.16 and DR-CAFTA Art.3.14) is similar and is based on the principle that no Party would introduce or maintain any export subsidy on any agricultural good destined for the territory of the other Party except when a non-Party is exporting an agricultural good with the benefit of export subsidies. In the latter case, the importing Party will consult with the exporting Party with a view of agreeing on specific measures that the importing Party may adopt to counter the effect of such subsidized imports. If the importing Party adopts the agreed upon measures, the exporting Party would refrain from applying export subsidies. Beyond this central provision, the Parties also share the objective of the multilateral elimination of export subsidies for agricultural goods.

Agricultural Safeguard Measures: in both Agreements agricultural safeguards are applied on a specific list of products and only during the transition period. In the Chile-U.S. FTA (Art.3.18), agricultural safeguard measures are price based using trigger price mechanisms. The product lists[1] and trigger prices are contained in Annex 3.18 and provision is made for the Parties to periodically evaluate and update trigger prices. The agricultural safeguard measures in DR-CAFTA[2] (Art.3.15) are based on trigger volumes and are related to the TRQ regime in effect as per the Parties' Schedules (Annex 3.15). To determine the duty to be imposed, both Agreements use the lesser of MFN applied rate which is in effect or in effect the date preceding the entry into force of the Agreement. Both DR-CAFTA and the Chile-U.S. FTA also define that at any one time only one safeguard measure may be used on a good, that is, safeguard measures under the Chapter on trade remedies or under Article XIX of the GATT 1994 may not be used simultaneously. Transparency of the process of imposing any safeguard measure is addressed in both Agreements. Parties imposing a measure are given 60 days to notify the Party subject to the measure in writing. Provision is also made for consultation between the Parties concerning the use of agricultural safeguards. Upon the accession of the Dominican Republic to CAFTA, this country negotiated with the Central American countries new terms for the adoption of agricultural safeguards (Annex 3.15).

Provisions on Tariff-Rate Quotas: in DR-CAFTA and the Chile-U.S. FTA, the vast majority of TRQs are focused on agricultural products. Under both Agreements, the central characteristics of

[1] Chilean products on which the U.S. may use agricultural safeguards include vegetables (among others, broccoli, carrots, celery, spinach, sweet corn, Chinese water chestnuts, brussels sprouts, asparagus, artichokes), mushrooms, onion powder or flour, dried onions, garlic powder or flour, dried garlic, avocados, melons, cherries (sweet and tart), pears, apricots, fruit and fruit mixtures, nuts, tomatoes (whole, pieces, puree, paste, sauce), and orange juice and pulp. U.S. products on the safeguard product list for Chile include meat (of primates, whales, dolphins, porpoises, reptiles and other such meat), birds' eggs in shell (fresh, preserved or cooked), rice (rough, milled and broken), rice flour, wheat, wheat starch and wheat gluten.

[2] Central American countries and the Dominican Republic list the following U.S. products on which agricultural safeguards may be applied: garlic, glucose, dairy products (cheese, butter, milk powder, ice cream, liquid dairy and other dairy); chicken (leg quarters); rice (rough and milled); sweet peppers; tomatoes; carrots; onions; potatoes; beans; corn (white and yellow); high fructose corn syrup; vegetable oil; pork; beef; sorghum; meat (canned and processed); and wheat flour. Products from Central America and the Dominican Republic on which the U.S. may use agricultural safeguards include dairy products (cheese, butter, ice cream, fluid fresh and sour cream and other dairy), peanuts and peanut butter.

agricultural TRQs are: (i) TRQs are bilateral market access concessions by which a country provides to another country access according to certain quotas which typically have a percentage growth factor over a period of time[3]; (ii) in-quota tariff rates in the U.S.-Central America, and U.S.-Chile TRQs are zero[4], while the in-quota tariff rates for the TRQs between the Dominican Republic and Costa Rica and Nicaragua are non-zero; and (iii) over-quota tariff rates are generally eliminated over a period of time by means of linear, non-linear or back-loading methods, although there are a small number of products where the over-quota tariff rates remain at most favored nation levels. Under DR-CAFTA, the treatment given to this issue is much more detailed than what is mentioned in the Chile-U.S. FTA reflecting that a much larger set of product groups and tariff lines are subject to TRQs in DR-CAFTA (see tables in Figures 3.3-3.11 in Annex 3.6 of this analysis). The first Article in the section on agriculture in DR-CAFTA (Art.3.13) thus deals with how TRQs are to be treated in the schedules as well as in accordance with Article XIII of the GATT 1994 and the WTO Agreement on Import Licensing Procedures.

The U.S.' TRQ market access commitments for countries under DR-CAFTA are on beef, dairy products, sugar, peanuts, peanut butter and ethyl alcohol. The product categories that are included in Central American countries' TRQs for the U.S. are beef, dairy products, pork, chicken, rice (rough and milled), fresh potatoes, fresh onions, frozen french fries, corn (yellow and white) and sorghum. The product categories and exact number of tariff lines that are subject to TRQs vary by each Central American country regarding both U.S. market access commitments with Central America and vice-versa. The Dominican Republic additionally applies TRQs on beans, turkey meat, and glucose products from the United States. The Dominican Republic applies TRQs on chicken breasts and milk powder from Costa Rica as well as beans, chicken breasts, and onions and shallots from Nicaragua. Costa Rica and Nicaragua each reciprocally apply TRQs on the aforementioned products from the Dominican Republic. Under the Chile-U.S. FTA, Chile applies TRQs on beef and chicken and turkey. The products included in the U.S. TRQs for Chile are beef, dairy products, sugar, tobacco, avocados, processed artichokes and poultry[5]. Within these groups of TRQs in DR-CAFTA, countries have reciprocal application of TRQs on some dairy products, while Chile and the U.S. apply reciprocally TRQs on beef and chicken/poultry.

Agricultural Marketing and Grading Standards: classification of agricultural products (Art.3.17) is found only in the Chile-U.S. FTA as this issue is of particular connotation to Chile-U.S. trade in beef. The Agreement contains a detailed annex on the mutual recognition of grading programs for the purpose of marketing beef (Annex 3.17). Further details on beef classifications are outlined in Appendix 3.17-A in a comparative beef cut nomenclature table as well as in Appendix 3.17-B on the comparison of Chilean beef norms and USDA beef quality grades.

Sugar Compensation Mechanism: in DR-CAFTA, the United States sugar compensation mechanism (Art.3.16) provides compensation in the case that, in any year, the United States may

[3] Different growth factors include, for example, linear and compounded growth, fixed quantities, and variable quantities.
[4] The Dominican Republic's TRQ on milk powder from the United States has a non-zero in-quota rate.
[5] In addition to these agricultural products, the United States applies TRQs on some non-agricultural products such as tires, copper, and hotel or restaurant chinaware.

decide to compensate in lieu of granting duty-free treatment to some or to all of the duty-free quantity of sugar goods. The compensation would be equivalent to the estimated economic rents that a Party's exporters would have obtained. Sugar goods are listed in subparagraph 3 (c) of Appendix I to the Schedule of the United States to Annex 3.3. The Chile-U.S. FTA contains no corresponding mechanism for sugar but makes market access concessions dependent on a status of surplus condition for sugar.

Consultations on Trade in Chicken: under DR-CAFTA (Art.3.17), the Parties agreed to consult and review the implementation and operation of the Agreement concerning trade in chicken in the ninth year after the date of entry into force of the Agreement. In the Chile-U.S. FTA, there was an exchange of side letters indicating that both governments had agreed to urge the respective specialized agencies to implement work that would be dedicated to achieving market access in poultry products for the mutual benefit of both Parties. Under DR-CAFTA, Costa Rica and El Salvador also exchanged similar side letters on this issue with the United States.

Working Groups, Committees and Commissions on Agricultural Trade: DR-CAFTA and the Chile-U.S. FTA have different approaches to deal with institutional issues for trade in agricultural products. In the Chile-U.S. FTA, Article 3.17 establishes a Working Group on Agricultural Trade, which reports to the Committee in Trade in Goods (Art.3.23), but only for (i) overseeing the operation of agricultural grade and quality standards and programs and (ii) for coordinating with the Committee on Technical Barriers to Trade. Under DR-CAFTA, provisions are made for two bodies. First, the Agreement provides for the establishment of an Agriculture Review Commission in the 14th year after the date of entry into force of the Agreement to review the implementation and operation of the Agreement (Art.3.18). Secondly, a Committee on Agricultural Trade is established in Article 3.19 with wider terms of reference as the mechanism through which Parties would deal with issues of consultation and cooperation.

Provisions on Textiles and Apparel:

Section G of both texts has special provisions on textiles and apparel. In the Chile-U.S. FTA those provisions deal with safeguards, rules of origin, customs cooperation and definitions. DR-CAFTA contains provisions on those issues as well as provisions on refund of customs duties, duty-free treatment for certain goods, elimination of certain quantitative restrictions, most-favored-nation rates of duty on certain goods, preferential tariff treatment for wool apparel goods assembled in Costa Rica, and preferential tariff treatment for non-originating apparel goods of Nicaragua. These provisions are explained below.

Refund of Customs Duties: paragraph 1 of this provision (Art.3.20), present in DR-CAFTA only, provides for refunds of excess customs duties paid in connection with the importation of an originating textile or apparel good between January 1, 2004 and the date of entry into force of the Agreement, that is, retroactively. Paragraphs 2 and 3 outline the conditions and timeframes affecting compliance with paragraph 1, each stating respectively that, (a) paragraph 1 shall not apply if by no later than 90 days before the date of entry into force of the Agreement for the Party concerned, written notice is provided to the other Parties informing that it will not comply with paragraph 1; and (b) notwithstanding paragraph 2, paragraph 1 shall apply if by no later

than 90 days before the date of entry into force of the Agreement for the Party concerned, written notice is provided to the other Parties with respect to a benefit that has been agreed to by the Parties as equivalent to the benefit provided for in paragraph 1. Paragraph 4 further states that this Article shall not apply to a textile or apparel good that qualifies for preferential tariff treatment under Articles 3.21, 3.27, or 3.28.

Duty-Free Treatment for Certain Goods: DR-CAFTA Article 3.21 provides that the Parties will, at any time, grant duty-free access to certified goods that fall within the following categories: hand-loomed fabrics of a cottage industry, hand-made cottage industry goods made of such hand-loomed fabrics, and traditional folklore handicraft goods.

Elimination of Existing Quantitative Restrictions: DR-CAFTA Article 3.22 provides for the elimination in the U.S. of any quantitative restrictions this country maintains under the WTO Agreement on Textiles and Clothing that affect exports of textiles and apparel from Costa Rica, the Dominican Republic, El Salvador and Guatemala. The specific products that benefit from this provision are contained in Annex 3.22.

Safeguard Measures for Textiles and Apparel: both the Chile-U.S. FTA (Art.3.19) and DR-CAFTA (Art.3.23) provide for emergency import relief in specific cases and under certain conditions. In DR-CAFTA, a safeguard measure can be imposed only during the transition period (defined as a period of 5 years beginning on the date the Agreement enters into force). In the Chile-U.S. FTA text, no measure can be maintained beyond the eighth year after the tariff for that product has reached the zero level. According to both texts, any importing Party may impose a safeguard measure, after carrying out an investigation, if the importation is causing serious damage or actual threat thereof to the domestic production of like or directly competitive products. The safeguard measure shall consist of a tariff raised up to the lesser of the MFN level at the time the Agreement entered into force or the MFN level at the time the measure is imposed. The measure can be in effect for a maximum period of 3 years. Both texts state the elements that must be observed in order to determine whether serious damage or actual threat thereof does indeed exist. These elements include changes in output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment, but cannot include changes in technology or in consumer preferences. Both texts establish rules for notification and consultation, but DR-CAFTA is more detailed in this regard. Both texts establish that a safeguard on a given product can be imposed only once. There is a difference regarding the level to which the tariff should return on termination of the safeguard measure: in the Chile-U.S. FTA text, such level is zero, duty-free treatment; in DR-CAFTA, the level is the rate set out in the tariff elimination program of the Party imposing the measure as if the safeguard measure had never been applied. Both texts then go on to establish compensation and retaliation rights. Compensation may consist of concessions having substantially equivalent trade effects, or equivalent to the value of the additional duties expected to result from the safeguard measure. If (in DR-CAFTA, after 30 days) the Parties cannot agree on compensation, the affected Party may retaliate by taking tariff action having trade effects substantially equivalent to the trade effect of the safeguard measure. Such retaliation can be imposed on any goods of the Party applying the measure. Albeit with different language, both texts state that the Parties maintain their rights and obligations under WTO to impose GATT Article XIX safeguards. The Chile-U.S. FTA, but not DR-CAFTA, also includes the possibility of applying

safeguards under the Agreement on Textiles and Clothing. Finally, both texts also establish that the Parties cannot apply, with respect to the same good at the same time, a textile safeguard measure and any WTO safeguard, and in the case of DR-CAFTA, another safeguard measure under DR-CAFTA.

Customs Cooperation: (Chile-U.S. FTA Art.3.21 and DR-CAFTA Art.3.24) see analysis for Chapter 5 on Customs Administration.

Rules of Origin and Related Matters for Textiles and Apparel: (Chile-U.S. FTA Art.3.20 and DR-CAFTA Art.3.25) see analysis for Chapter 4 on Rules of Origin and Origin Procedures.

Most-Favored-Nation Rates of Duty on Certain Goods: DR-CAFTA provides that in the case of products in HS Chapters 61 through 63 that is not an originating good, the U.S. will apply the MFN rate of duty only to the value of the assembled goods minus the value of the fabrics formed in the U.S., the components knit-to-shape in the U.S., and any other materials of U.S. origin used in the production of such a good (Art.3.26).

Preferential Tariff Treatment for Wool Apparel Goods Assembled in Costa Rica: DR-CAFTA provides a 50% preference of the duty rate of column 1 of the Harmonized Tariff Schedule of the U.S. to men's, boys', women's and girls' tailored wool apparel that are both cut and sewn or otherwise assembled in Costa Rica from fabric produced outside the DR-CAFTA territory (Article and Annex 3.27). The preferential treatments on non-originating goods are quantitatively restricted to 500,000 square meter equivalents (SME) during each of the first 2 years after the date of entry into force of the Agreement. Both Costa Rica and the U.S. agreed to consult after 18 months after the date of entry into force on the Agreement regarding the operation of this Annex and the availability of wool in the region.

Preferential Tariff Treatment for Non-Originating Apparel Goods of Nicaragua: DR-CAFTA provides to some non-originating goods from Nicaragua the same treatment that it provides to the same originating goods. This treatment is limited to cotton and man-made fiber apparel in HS Chapters 61 and 62 (Article and Annex 3.28). The preferential treatments on non-originating goods are quantitatively restricted to 100,000,000 square meter equivalents (SME) during each of the first 5 years; and then subject to progressive and linear reductions until the ninth year, at which time the quota amounts to 20,000,000 SME. The Annex ceases to apply beginning the tenth year after the date of entry into force of the Agreement.

Definitions for the provisions on textiles and apparel: both the Chile-U.S. FTA and DR-CAFTA provide for definitions for this Section of Chapter 3. There are similarities and differences in the definitions (Chile-U.S. FTA Art.3.22 and DR-CAFTA Art.3.29). The Chile-U.S. FTA defines claim of origin, exporting Party, importing Party, square meter equivalents, and textile or apparel good. DR-CAFTA defines claim of origin, exporting Party, importing Party, interested entity, textile or apparel good, textile safeguard measure and transition period.

Institutional Provisions: both Agreements establish a Committee on Trade in Goods (Chile-U.S. FTA Art.3.23 and DR-CAFTA Art.3.30) comprising representatives of each Party. It can meet at the request of either Party or of the cabinet-level Free Trade Commission to consider

matters arising under this Chapter or the Chapters on Rules of Origin and Customs Administration. The main functions relate to trade promotion and addressing barriers to trade, in particular non-tariff barriers. DR-CAFTA also includes functions on providing advice and recommendations to the Committee on Trade Capacity Building on technical assistance needs in areas related to market access, rules of origin and customs administration.

Definitions: there are similar definitions in the texts for the following terms: AD Agreement, advertising films and recordings, Agreement on Textiles and Clothing, agricultural goods, commercial samples of negligible value, consular transactions, consumed, duty-free, export subsidies, goods intended for display or demonstration, goods temporarily admitted for sports purposes, import licensing, performance requirement, printed advertising materials, and SCM Agreement (Chile-U.S. FTA Art.3.24 and DR-CAFTA Art.3.31). The Chile-U.S. FTA also has definitions for Articles eligible for duty free treatment under the U.S. Generalized System of Preferences, carrier media, and duty deferral program. DR-CAFTA includes a definition for Import Licensing Agreement. DR-CAFTA includes a definition for carrier medium in Chapter 15, Electronic Commerce.

Annex 3.1
Stylized Tariff Elimination Staging Categories in DR-CAFTA and the Chile-U.S. FTA

DR-CAFTA		CHILE-U.S.	
Staging Category	**Countries Using Staging Category (According to Annexes)**	**Staging Category**	**Countries Using Staging Category (According to Annexes)**
(a) Staging category A: immediate elimination • (January 1, 2004 for textile/apparel goods to which Article 3.20.1 applies);	Common	(a) Staging category A: immediate elimination;	Common
(b) Staging category B: linear removal in 5 years;	Common	(b) Staging category B: linear removal in 4 years;	Common
(c) Staging category C: linear removal in 10 years;	Common	(c) Staging category C: linear removal in 8 years;	Common
(d) Staging category D: linear removal in 15 years;	Common	(d) Staging category D: linear removal in 10 years;	Common
(e) Staging category E: • Duties remain at base rates through year 6. • Years 7-10, 8.25% annual reduction of base rate. • Years 11-15, 13.4% annual reduction of base rate. • Duty-free as of year 15;	Common	(e) Staging category E: linear removal in 12 years;	Common
(f) Staging category F: • Duties remain at base rates through year 10. • Years 11-20, linear removal in 10 years;	Common	(f) Staging category F: continued duty-free treatment;	Common
(g) Staging category G: continued duty-free treatment;	Common	(g) Staging category G: • Duties remain at base rates through year 4. • Years 5-8, 8.3% reduction each year. • Years 9-12, 16.7% reduction each year. Duty-free as of year 12;	Common
(h) Staging category H: continued MFN treatment.	Common	(h) Staging category H: • Duties remain at base rates through year two. • Years 3-10, linear removal in 8 years;	Common

DR-CAFTA		CHILE-U.S.	
Staging Category	**Countries Using Staging Category (According to Annexes)**	**Staging Category**	**Countries Using Staging Category (According to Annexes)**
(i) Staging category I: base rate of duty shall reflect the HTSUS Column 1 Special Rates of Duty designated under the Caribbean Basin Trade Partnership Act ("R"), in effect January 1, 2005. • Years 1-2: 2% annual reduction of base rate. • Years 3-6: 8% annual reduction of base rate. • Years 7-10: 16% annual reduction of base rate. • Duty-free as of year 10;	USA	(i)	(Not assigned)
(j) Staging category J: immediate removal in accordance with existing WTO duty-elimination commitments;	USA	(j) Staging category J: • Duties remain at base rates through year 7. • Years 8-12, linear removal in 5 years;	USA
(k) Staging category K: Staging category K: duty-free (and without bond) as of year 1;	USA	(k) Staging category K: linear removal in 2 years;	USA
(l) Staging category L: shall be subject to the staging obligations set out for the appropriate provision in Chapters 1 to 97 of the US schedule during the tariff elimination period until year 10, at which time such goods shall be free of duty;	USA	(l) Staging category L: • Years 1-6, 5% reduction each year. • Years 7-9, 10% reduction each year • Duty-free as of year 10;	USA
(m) Staging category M: • Years 1-2: 2% annual reduction of base rate. • Years 3-6: 8% annual reduction of base rate. • Year 7-9: 16% annual reduction of base rate. • Duty-free as of year 10;	CRI, DOM, GTM, HND, NIC, SLV	(m) Staging category M: shall be subject to the staging obligations set forth for the appropriate provision in Chapters 1 to 97 of the US schedule during the tariff elimination period until year 10, at which time such goods shall be free of duty;	USA
(n) Staging category N: linear removal in 12 years;	CRI, DOM, GTM, HND, NIC, SLV	(n) Staging category N: duty-free (and without bond) as of entry into force;	USA
(o) Staging category O (as applied by Guatemala, El Salvador, and Honduras): • Duties remain at base rates through year 6. • Years 7-11, 8% annual reduction of base rate. • Years 12-14, 15% annual reduction of base rate. • Duty-free as of year 15;	GTM, HND, SLV	(o) Staging category O: • Duties remain at base rates through year 2. • Duty-free as of year 3;	CHL
(o) Staging category O (as applied by Dominican Republic):	DOM		

DR-CAFTA		CHILE-U.S.	
Staging Category	**Countries Using Staging Category (According to Annexes)**	**Staging Category**	**Countries Using Staging Category (According to Annexes)**
• Duties remain at base rates through year 6. • Years 7-10, 10% annual reduction of base rate. • Years 11-14, 12% annual reduction of base rate. • Duty-free as of year 15;			
(p) Staging category P: • Duties remain at base rates through year 10 • Years 11-14, 8.25% annual reduction of base rate. • Years 15-17, 16.75% annual reduction of base rate. • Duty-free as of year 18;	GTM, HND, NIC, SLV	(p) Staging category P: • As of entry into force, duties reduced by 80%. • As of year 2, duties reduced by 90%. • Duty-free as of year 3;[1]	CHL
(q) Staging category Q: • Duties reduced to 15 percent in year 1, and remain at 15 percent through year 3. • Years 4-8, 6.6% annual reduction of 15 percent tariff. • Years 9-14, 9.6% annual reduction of 15 percent tariff. • Duty-free as of year 15;	NIC, SLV	(q)	(Not assigned)
(r) Staging category R: • Duties remain at base rates through year 6. • Years 7-15, linear removal in 9 years;	CRI	(r)	(Not assigned)
(s) Staging category S: • Duties remain at base rates through year 5. • Years 6-10, 8% annual reduction of base rate. • Years 11-14, 12% annual reduction of base rate. • Duty-free as of year 15;	CRI	(s)	(Not assigned)
(t) Staging category T: • Duties remain at base rates through year 4. • Years 5-9, 8% annual reduction of base rate. • Years 10-14, 10% annual reduction of base rate. • Duty-free as of year 15;	CRI	(t)	(Not assigned)

DR-CAFTA		CHILE-U.S.	
Staging Category	**Countries Using Staging Category (According to Annexes)**	**Staging Category**	**Countries Using Staging Category (According to Annexes)**
(u) Staging category U: • Duties remain at base rates through year 10. • Year 11, 13.4% annual reduction of base rate. • Years 12-13, 13.3% annual reduction of base rate. • Years 14-16, 15% annual reduction of base rate. • Duty-free as of year 17;	CRI	(u)	(Not assigned)
(v) Staging category V: • Duties remain at base rates through year 10. • Years 11-15, 8% annual reduction of base rate. • Years 16-19, 12% annual reduction of base rate. • Duty-free as of year 20.	CRI, DOM	(v) Staging category V: • Duties remain at base rates through year 6. • Year 7, duties reduced by 3.3%. • Year 8, duties reduced by 21.7%. • Year 9, duties reduced by 40.0%. • Year 10, duties reduced by 58.3%. • Year 11, duties reduced by 76.7%. • Duty-free as of year 12.	CHL
(w) Staging category W: linear removal in 4 years;	DOM		
(x) Staging category X: • Duties remain at base rates through year 1. • Years 2-5, linear removal in 5 years;	DOM		
(y) Staging category Y: • Years 1-5: 15% annual reduction of base rate. • Years 6-9, 5% annual reduction of base rate. • Duty-free as of year 10;	DOM	(*) Additional staging categories for individual wine products	

[1] "If this Agreement enters into force before January 1 of 2004, the rate of duty for such goods shall be reduced by 70 percent in year one and shall be duty free effective January 1 of year four."

Annex 3.2
Tariff Elimination Staging Categories Used by the United States for Individual Wine Products in the Chile-U.S. FTA

CHILE-U.S. Full Texts from Annex 3.3 General Notes - Tariff Schedule of the United States *Staging Category*[1]
(a) Product AG22042120: Effervescent grape wine, in containers holding 2 liters or less "The duty on goods provided for in Table 1 provision AG22042120 shall remain at the base rate for years one through eight. Beginning January 1 of year nine, the duty shall be reduced by 7.7 percent from the base rate. Beginning January 1 of year 10, the duty shall be reduced by 35.9 percent from the base rate. Beginning January 1 of year 11, the duty shall be reduced by 64.1 percent from the base rate. Such goods shall be duty-free effective January 1 of year 12." (b) Product AG22042150: Wine other than Tokay (not carbonated), not over 14% alcohol, in containers not over 2 liters "The duty on goods provided for in Table 1 provision AG22042150 shall remain at the base rate for years one through 11. Such goods shall be duty-free effective January 1 of year 12." (c) Product AG22042920: Grape wine, other than sparkling, not over 14% vol. alcohol, in containers holding over 2 but not over 4 liters "The duty on goods provided for in Table 1 provision AG22042920 shall remain at the base rate for years one through eight. Beginning January 1 of year nine, the duty shall be reduced by 2.7 percent from the base rate. Beginning January 1 of year 10, the duty shall be reduced by 32.4 percent from the base rate. Beginning January 1 of year 11, the duty shall be reduced by 62.2 percent from the base rate. Such goods shall be duty-free effective January 1 of year 12." (d) Product AG22042940: Grape wine, other than sparkling, over 14% vol. alcohol, in containers holding over 2 but not over 4 liters "The duty on goods provided for in Table 1 provision AG22042940 shall remain at the base rate for years one through 10. Beginning January 1 of year 11, the duty shall be reduced by 41.7 percent from the base rate. Such goods shall be duty-free effective January 1 of year 12." (e) Product AG22042960: Grape wine, other than sparkling, not over 14% vol. alcohol, in containers holding over 4 liters "The duty on goods provided for in Table 1 provision AG22042960 shall be reduced by 8.1 percent from the base rate beginning on the date this Agreement enters into force. Beginning January 1 of year two, the duty shall be reduced by 16.3 percent from the base rate. Beginning January 1 of year three, the duty shall be reduced by 24.4 percent from the base rate. Beginning January 1 of year four the duty shall be reduced by 32.6 percent from the base rate. Beginning January 1 of year five, the duty shall be reduced by 40.7 percent from the base rate. Beginning January 1 of year six, the duty shall be reduced by 48.8 percent from the base rate. Beginning January 1 of year seven, the duty shall be reduced by 57.0 percent from the base rate. Beginning January 1 of year eight, the duty shall be reduced by 65.1 percent from the base rate. Beginning January 1 of year nine, the duty shall be reduced by 73.3 percent from the base rate. Beginning January 1 of year 10, the duty shall be reduced by 81.4 percent from the base rate. Beginning January 1 of year 11, the duty shall be reduced by 89.6 percent from the base rate. Such goods shall be duty-free effective January 1 of year 12." (f) Product AG22042980: Grape wine, other than sparkling, over 14% vol. alcohol, in containers holding over 4 liters "The duty on goods provided for in Table 1 provision AG22042980 shall be reduced by 6.1 percent from the base rate beginning on the date this Agreement enters into force. Beginning January 1 of year two, the duty shall be reduced by 14.2 percent from the base rate. Beginning January 1 of year three, the duty shall be reduced by 22.9 percent from the base rate. Beginning January 1 of year four the duty shall be reduced by 31.0 percent from the base rate. Beginning January 1 of year five, the duty shall be reduced by 39.7 percent from the base rate. Beginning January 1 of year six, the duty shall be reduced by 47.3 percent from the base rate. Beginning January 1 of year seven, the duty shall be reduced by 55.7 percent from the base rate. Beginning January 1 of year eight, the duty shall be reduced by 63.8 percent from the base rate. Beginning January 1 of year nine, the duty shall be reduced by 72.5 percent from the base rate. Beginning January 1 of year 10, the duty shall be reduced by 80.6 percent from the base rate. Beginning January 1 of year 11, the duty shall be reduced by 89.3 percent from the base rate. Such goods shall be duty-free effective January 1 of year 12." (g) Product AG22043000: Grape must, nesi, in fermentation or with fermentation arrested otherwise than by addition of alcohol "The duty on goods provided for in Table 1 provision AG22043000 shall remain at the base rate for years one through 10. Beginning January 1 of year eleven the duty shall be reduced by 33.3 percent from the base rate. Such goods shall be duty-free effective January 1 of year 12."

[1] "If, subsequent to the date of the signing of this Agreement, a Party grants to a non-Party wine producing country market access conditions more favorable than those agreed under subparagraphs 16 (a)-(g), such Party shall apply the same conditions to the other Party."

Annex 3.3

Figure 3.1: Chile-U.S. FTA Tariff Elimination Staging Categories: Reductions Over Time Relative to the Base Tariff

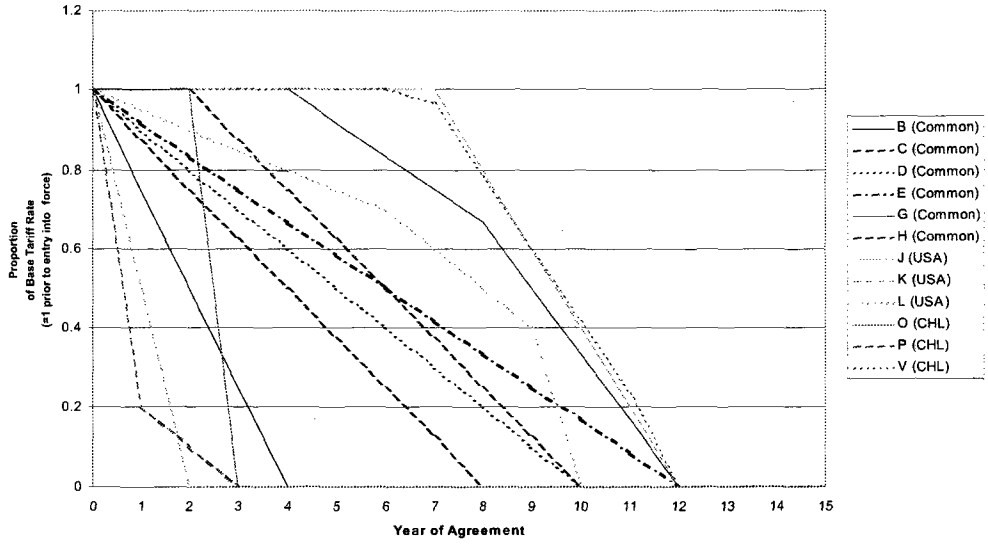
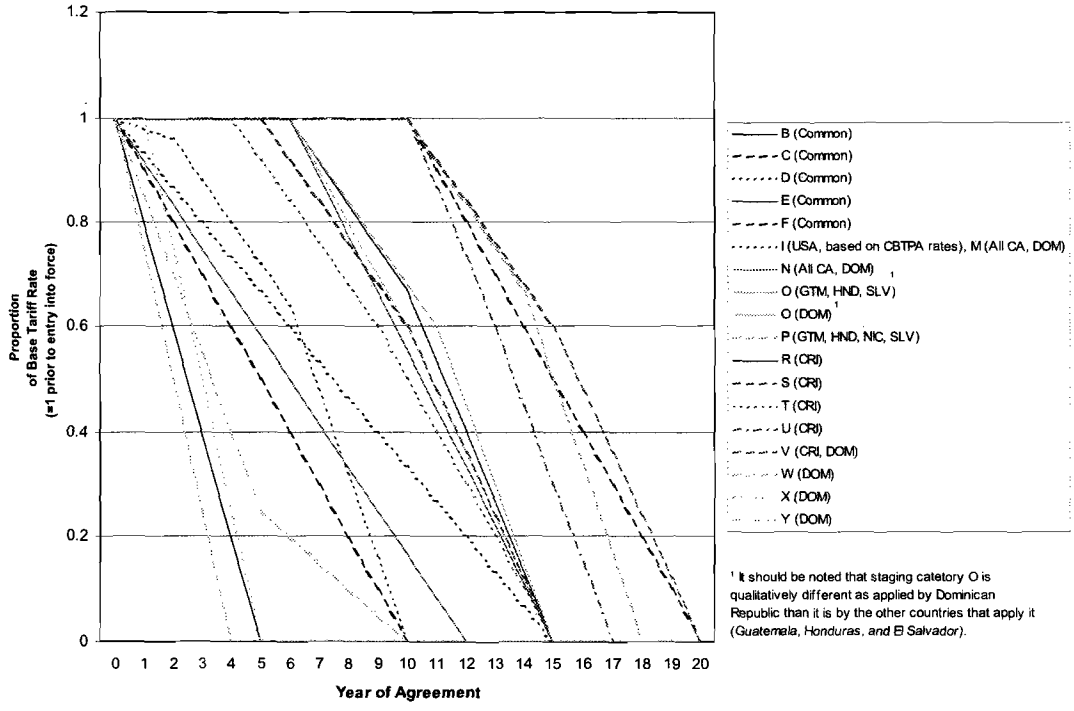


Figure 3.2: DR-CAFTA Tariff Elimination Staging Categories: Reductions Over Time Relative to the Base Tariff



[1] It should be noted that staging catetory O is qualitatively different as applied by Dominican Republic than it is by the other countries that apply it (*Guatemala, Honduras, and El Salvador*).

Annex 3.4
Staging Categories in the Chile-U.S. FTA: Prevalence of Tariff Lines and Imports by Country

Staging Category†	Chile			United States[1]		
		Imports from US[2]		Tariff	Imports from Chile[2]	
	Tariff Lines	Value	%	Lines	Value	%
A (Immediate)[3]	5297	2509214	86.9	6391	968350	30.6
B (4-year, linear)	284	178611	6.2	192	5996	0.2
C (8-year, linear)	134	59967	2.1	141	17420	0.5
D (10-year, linear)			0.0	50	248	0.0
E (12-year, linear)	73	1320	0.0	43	11	0.0
F (Continued duty-free)[3]			0.0	3246	1720589	54.3
G (12-year, non-linear, 4-year grace period)	31	5080	0.2	16	3193	0.1
H (10-year, linear, 2-year grace period)			0.0			0.0
J (12-year, linear, 7-year grace period)			0.0	3		0.0
K (2-year, linear)			0.0			0.0
L (10-year, non-linear)			0.0	17		0.0
M (10-year, refer to appropriate provision of Chapters 1 to 97)			0.0	4		0.0
N (Immediate, removal of bonds)			0.0	23		0.0
O (elimination following 2-year grace period)	6	5010	0.2			0.0
P (3-year, non-linear, front-loaded reduction)	17	67523	2.3			0.0
V (12-year, non-linear, 6-year grace period)	5	22	0.0			0.0
Accumulated Staging Categories for Individual Wine Products			0.0	7	137103	4.3
Accumulated Split Products and Products s.t. Side Note‡	110	59490	2.1	195	315101	9.9
Staging Category is Null in Schedule*	5	1808	0.1			0.0
Import Data Does not Concord with Tariff Elimination Schedule**		493	0.0			0.0
N/A***			0.0	20		0.0
Total	5962	2888538	100	10348	3168011	100

Source: Chile-US tariff schedules on USTR web site; DataIntal

1 The Schedule of the United States has a multiple break-out on a single tariff line that is signified by a letter following the tariff line. In this case, the product is treated as a single tariff line when counting the tariff lines, and the import value is treated as corresponding to a split product / s.t. side note.

2 Import data correspond to the year 2001 and are in thousands of US Dollars.

3 It should be noted that in the case of Chile there are a number of products with zero base tariffs that are assigned staging category A (Immediate), rather than staging category F (Continued duty-free).

† In the cases of staging categories with grace periods, the number of years in the description of the basket includes the grace period as well as the period of liberalization.

‡ This category includes products where there are notes (such as exceptions or tariff rate quotas) in the staging category or in a separate column. In some cases staging categories in the table will be empty because all the products subject to that staging category are subject to such a note.

* These are instances where the tariff elimination staging category in the tariff schedule is null.

** These are instances where a tariff line in the import data does not correspond with a tariff line in the tariff schedule.

*** Verbatim from US Schedule

Annex 3.5: Staging Categories in DR-CAFTA: Prevalence of Tariff Lines and Imports by Country

Staging Category†	Costa Rica[1,2]			Dominican Republic			El Salvador[2]			Guatemala[1,2]			Honduras[1,2]			Nicaragua[1,2,3]			United States		
	Tariff Lines	Imports from US[4] Value	%	Tariff Lines	Imports from US[4] Value	%	Tariff Lines	Imports from US[4] Value	%	Tariff Lines	Imports from US[4] Value	%	Tariff Lines	Imports from US[4] Value	%	Tariff Lines	Imports from US[4] Value	%	Tariff Lines	Imports from CA+DR[4] Value	%
A (Immediate)	4396	1441200	40.4	4326	2094454	58.3	1960	269582	20.9	2087	358623	16.3	1720	142138	11.9	1649	51391	10.4	6404	11857276	76.3
B (5-year, linear)	285	80432	2.3	381	134595	3.7	422	60053	4.6	233	33740	1.5	392	39746	3.3	549	17722	3.6	6		0.0
C (10-year, linear)	587	244487	6.8	692	272791	7.6	660	86802	6.7	783	119603	5.4	936	109678	9.2	926	40272	8.1	8	254	0.0
D (15-year, linear)	211	21712	0.6	117	30050	0.8	85	5261	0.4	89	8961	0.4	133	16611	1.4	134	6009	1.2	13		0.0
E (15-year, non-linear, 6-year grace period)			0.0			0.0			0.0			0.0			0.0	1		0.0			0.0
F (20-year, linear, 10-year grace period)	5	11	0.0			0.0			0.0	4	71	0.0	7	78	0.0	11	6	0.0			0.0
G (Continued duty-free)	115	1416166	39.7	903	557413	15.5	2924	710699	55.0	2924	1357939	61.9	2940	598553	50.0	3068	282641	57.0	3261	3455323	22.2
H (Continued MFN)			0.0			0.0			0.0			0.0			0.0			0.0			0.0
I (10-year, non-linear, CBTPA base rate)			0.0			0.0			0.0			0.0			0.0			0.0	18	4797	0.0
J (Immediate in accordance with existing WTO commitments)			0.0			0.0			0.0			0.0			0.0			0.0	730	194649	1.3
K (Immediate, removal of bonds)			0.0			0.0			0.0			0.0			0.0			0.0	17		0.0
L (10-year, refer to appropriate provision of Chapters 1 to 97)			0.0			0.0			0.0			0.0			0.0			0.0	1		0.0
M (10-year, non-linear)	601	128323	3.6	313	92747	2.6	152	8702	0.7	114	163134	7.4	78	87847	7.3	184	12493	2.5			0.0
N (12-year, linear)	33	15827	0.4	22	1848	0.1	17	5378	0.4	4	718	0.0	10	4510	0.4	27	1551	0.3			0.0
O (15-year, non-linear, 6-year grace period)‡			0.0			0.0			0.0			0.0			0.0			0.0			0.0
P (18-year, non-linear, 10-year grace period)			0.0			0.0			0.0			0.0			0.0			0.0			0.0
Q (15-year, non-linear, duties reduced to 15% in year 1)			0.0			0.0			0.0			0.0			0.0	2		0.0			0.0
R (15-year, linear, 6-year grace period)			0.0			0.0			0.0			0.0			0.0			0.0			0.0
S (15-year, non-linear, 5-year grace period)	9	2385	0.1			0.0			0.0			0.0			0.0			0.0			0.0
T (15-year, non-linear, 4-year grace period)			0.0			0.0			0.0			0.0			0.0			0.0			0.0
U (17-year, non-linear, 10-year grace period)			0.0			0.0			0.0			0.0			0.0			0.0			0.0
V (20-year, non-linear, 10-year grace period)			0.0	2	0	0.0			0.0			0.0			0.0			0.0			0.0
W (4-year, linear)			0.0	2	452	0.0			0.0			0.0			0.0			0.0			0.0
X (5-year, linear, 1-year grace period)			0.0	21	356390	9.9			0.0			0.0			0.0			0.0			0.0
Y (10-year, non-linear)			0.0	2	145	0.0			0.0			0.0			0.0			0.0			0.0
Accumulated Split Products and Products s.t. Side Note*	49	18962	0.5	52	47390	1.3	51	64591	5.0	49	107068	4.9	45	52081	4.4	55	14913	3.0	178	21461	0.1
Import Data Concords to Multiple Staging Categories**		162428	4.5			0.0			0.0		26489	1.2		143727	12.0		36435	7.4			0.0
Import Data Does not Concord with Tariff Elimination Schedule***		38605	1.1		4632	0.1		80458	6.2		19098	0.9		990	0.1		32013	6.5		1	0.0
Total	6291	3570538	100	6833	3592907	100	6271	1291526	100	6287	2195444	100	6261	1195959	100	6606	495446	100	10636	15533761	100

Source: DR-CAFTA tariff schedules on USTR web site; DataIntal; Official Dominican Republic Import Data

1 The tariff elimination schedules are in the Harmonized System 2002 nomenclature, while import data for Costa Rica, Guatemala, Honduras, and Nicaragua are either in the HS1996 nomenclature or a mixture of HS1996 and HS2002. For each of these countries, a concordance table is used to convert import data from HS1996 to HS2002 so that imports will correspond to the tariff schedule. In instances where an import tariff line correlates to multiple staging categories, such incidences where the multiple staging categories include at least one A and at least one G and no other staging categories for a given import tariff line are treated as G (Continued duty-free).

2 The Central American nations exhibited a significant amount of trade where there was an imported product that did not correlate to the country's tariff schedule on products for which no changes were listed in the correlation tables, particularly in HS Headings 8702, 8703, and 8704. Uncorrelated tariff lines that ended in (a) trailing zero(s) in the import data were correlated with all possible breakouts on each tariff line in the tariff elimination schedule. If all of the corresponding tariff lines in the tariff elimination schedule were associated with a single tariff elimination staging category, the import values for these tariff lines were accorded to that staging category, rather than being treated as not correlating with the tariff elimination schedule. If the corresponding tariff lines in the tariff schedule were associated with different tariff elimination staging categories, the import values were treated as not correlating with the tariff elimination schedule.

Similarly, any uncorrelated tariff lines in the import data that were breakouts on a single tariff line ending in (a) trailing zero(s) in the market access schedule were accorded the staging category corresponding to the associated tariff line root in the tariff elimination schedule.

3 In the case of Nicaragua import data are disaggregated at 8 digits, while the tariff schedule is at 10 digits. The files were correlated at 8 digits, with tests performed to find multiple staging categories among 10-digit products within a given 8-digit product.

4 Import data correspond to the year 2002 and are in thousands of US Dollars. It should be noted that although this Agreement is of a plurilateral nature, the import values of the Central American nations and the Dominican Republic only reflect each country's imports from the United States, not trade within Central America or between Central America and the Dominican Republic. US imports include Central America plus the Dominican Republic.

† In the cases of staging categories with grace periods, the number of years in the description of the staging category includes the grace period as well as the period of liberalization.

‡ it should be noted that staging category O is qualitatively different as applied by Dominican Republic than it is by the other countries that apply it (Guatemala, Honduras, and El Salvador). Category O appears empty in the table for each of these countries as all tariff lines where category O is applied are subject to tariff rate quotas.

* This category includes products where there are references to the reporting country's tariff rate quota (TRQ) annex notes in the staging category, as well as those subject to footnotes regarding different staging categories within a given tariff line. This does not include safeguards, however, and products subject to safeguards but not TRQs will be included in the appropriate lettered staging category. In some cases staging categories in the table will be empty because all the products subject to that staging category are subject to such a note. Furthermore, the schedules for the Central American nations have multiple breakouts on some individual tariff lines that are signified by a letter following the tariff line. In these cases, the tariff line and any corresponding import values are treated as corresponding to a split product / s.t. side note.

** These are instances where a single tariff line in the import data corresponds with more than one tariff line in the tariff schedule, and these tariff lines in turn are associated with different tariff elimination staging categories.

*** These are instances where a tariff line in the import data does not correspond with a tariff line in the tariff schedule, either directly or via the country's Harmonized System concordance table, as well as instances where the staging category in the tariff schedule is null.

Annex 3.6

Figure 3.3: Products where a Country subjects Access to its Markets through Tariff Rate Quotas - DR-CAFTA and Chile-U.S. FTA

Product Categories	DR-CAFTA																Chile-U.S. FTA	
	TRQs of USA to:						TRQs of DOM & CA to USA:						TRQs of DOM to:		TRQs of CRI to:	TRQs of NIC to:	USA to CHL	CHL to USA
	CRI	DOM	SLV	GTM	HND	NIC	CRI	DOM	SLV	GTM	HND	NIC	CRI	NIC	DOM	DOM		
avocados																	x	
bacon								x										
beans								x						x		x		
beef	x	x	x		x	x			x	x							x	x
beef, prime and choice								x										
beef, trimmings								x										
butter	x		x		x		x	x	x	x	x	x					x	
buttermilk, curdled cream, and yogurt									x									
cheese	x	x	x	x	x	x	x		x	x	x	x					x	
cheese, cheddar								x										
cheese, mozzarella								x										
cheeses, other								x										
chicken and turkey																		x
chicken breasts													x	x	x	x		
chicken meat, mechanically de-boned								x										
chicken leg quarters							x	x	x	x	x	x						
condensed milk																	x	
corn, white									x	x	x	x						
corn, yellow									x	x	x	x						
ethyl alcohol	x	x	x	x	x	x												
fluid fresh milk and cream, and sour cream	x		x	x	x	x												
fresh onions							x											
fresh potatoes							x											
frozen french fries							x											
glucose								x										
ice cream	x	x	x	x	x	x	x	x	x	x	x	x						
liquid dairy									x									
liquid milk								x										
milk powder	x						x	x	x	x	x	x	x		x		x	
onions and shallots														x		x		
other dairy products	x	x	x	x		x	x		x	x	x	x					x	
peanut butter						x												
peanuts			x			x												
pig fat								x										
pork							x		x	x	x	x						
pork cuts								x										
poultry																	x	
processed artichokes																	x	
rice, brown								x										
rice, milled							x	x	x	x	x	x						
rice, rough							x		x	x	x	x						
sorghum									x									
sugar	x	x	x	x	x	x											x	
tobacco																	x	
turkey meat								x										
yogurt								x										
tires																	x	
copper																	x	
hotel or restaurant chinaware																	x	

Figure 3.4: Products Subject to Tariff Rate Quotas in Chile-U.S. FTA: United States Tariff Quotas on products entered from Chile

	Tariff Elimination Staging Category					
Product Category	**In-Quota Treatment**	**Out of Quota Treatment**	**Initial Quantity[1]**	**Unit**	**Years to Unlimited Quantity**
Beef	free of duty	B (4-year, linear)	1,000	Metric tons	4
Cheese	free of duty	J (12-year, linear, 7-year grace period)	1,432	Metric tons	12
Milk powder	free of duty	J (12-year, linear, 7-year grace period)	828	Metric tons	12
Butter	free of duty	J (12-year, linear, 7-year grace period)	300	Metric tons	12
Condensed milk	free of duty	J (12-year, linear, 7-year grace period)	489	Metric tons	12
Other Dairy Products	free of duty	J (12-year, linear, 7-year grace period)	452	Metric tons	12
Sugar[2]	free of duty	E (12-year, linear)	2,000	Metric tons	12
Tobacco	free of duty	E (12-year, linear)	617	Metric tons	12
Avocados	free of duty	G (12-year, non-linear, 4-year grace period)	34,000 / 15,000[3]	Metric tons	12
Processed Artichokes	free of duty	E (12-year, linear)	950,000[1]	Kilograms	12
Poultry	free of duty	H (10-year, linear, 2-year grace period)	0	Metric tons	10
Tires (used on motor cars)	free of duty	C (8-year, linear)	4.8	Millions of units	8
Tires (used on buses or trucks)	free of duty	C (8-year, linear)	3.0	Millions of units	8
Copper	free of duty	K (2-year, linear)	55,000	Metric tons	2
Hotel or restaurant chinaware	free of duty	D (10-year, linear)	10,000	dozens of units	10

Source: Annex 3.3 General Notes to the Chile-U.S. FTA

1 With the exception of imports of "Processed Artichokes", for which the duty-free quantity is fixed at 950,000 kilograms until it becomes unlimited in year 12, access quantities will be subject to growth over time.

2 TRQ access based on trade surplus condition.

3 Initial quantity of avocados is 34,000 metric tons entered October 1 through December 31 and 15,000 metric tons entered January 1 through September 30.

Figure 3.5: Products Subject to Tariff Rate Quotas in Chile-U.S. FTA: Chile Tariff Quotas on products entered from United States

Product Category	Tariff Elimination Staging Category: In-Quota Treatment	Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited Quantity
Beef	free of duty	B (4-year, linear)	1,000	Metric tons	4
Chicken and Turkey	free of duty	H (10-year, linear, 2-year grace period)	0	Metric tons	10

Source: Annex 3.3 General Notes to the Chile-U.S. FTA

1 Access quantities will be subject to growth over time.

Figure 3.6: Products Subject to Tariff Rate Quotas in DR-CAFTA: Central America and Dominican Republic Tariff Quotas on products entered from United States

Costa Rica on products entered from United States:

Product Category	Tariff Elimination Staging Category: In-Quota Treatment	Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Pork	Free of duty	R (15-year, linear, 6-year grace period)	1,100	Metric tons	15
Chicken Leg Quarters	Free of duty	U (17-year, non-linear, 10-year grace period)	330	Metric tons	17
Milk Powder	Free of duty	F (20-year, linear, 10-year grace period)	200	Metric tons	20
Butter	Free of duty	F (20-year, linear, 10-year grace period)	150	Metric tons	20
Cheese	Free of duty	F (20-year, linear, 10-year grace period)	410	Metric tons	20
Ice Cream	Free of duty	F (20-year, linear, 10-year grace period)	150	Metric tons	20
Other Dairy Products	Free of duty	F (20-year, linear, 10-year grace period)	140	Metric tons	20
Rough Rice[4]	Free of duty	V (20-year, non-linear, 10-year grace period)	51,000	Metric tons	20
Milled Rice	Free of duty	V (20-year, non-linear, 10-year grace period)	5,250	Metric tons	20
Fresh Potatoes	Free of duty	H (Continued MFN)	300	Metric tons	n.a.
Fresh Onions	Free of duty	H (Continued MFN)	300	Metric tons	n.a.
Frozen French Fries	Free of duty	B (5-year, linear)	2,631	Metric tons	5

Dominican Republic on products entered from United States:

Product Category	Tariff Elimination Staging Category: In-Quota Treatment	Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Prime and Choice Beef	Free of duty	D (15-year, linear)	1,100	Metric tons	15
Beef Trimmings	Free of duty	D (15-year, linear)	220	Metric tons	15
Pork Cuts	Free of duty	O (15-year, non-linear, 6-year grace period)	3,465	Metric tons	15
Bacon	Free of duty	C (10-year, linear)	220	Metric tons	10
Chicken Leg Quarters	Free of duty	V (20-year, non-linear, 10-year grace period)	550	Metric tons	20
Mechanically De-Boned Chicken Meat	Free of duty	C (10-year, linear)	440	Metric tons	10
Turkey Meat	Free of duty	N (12-year, linear)	3,850	Metric tons	12
Liquid Milk	Free of duty	C (10-year, linear)	220	Metric tons	10
Milk Powder	X (5-year, linear, 1-year grace period)	F (20-year, linear, 10-year grace period)	2,970	Metric tons	20
Butter	Free of duty	C (10-year, linear)	220	Metric tons	10
Mozzarella Cheese	Free of duty	V (20-year, non-linear, 10-year grace period)	138	Metric tons	20
Cheddar Cheese	Free of duty	D (15-year, linear)	138	Metric tons	15
Other Cheeses	Free of duty	C (10-year, linear)	138	Metric tons	10
Ice Cream	Free of duty	N (12-year, linear)	165	Metric tons	12
Yogurt	Free of duty	F (20-year, linear, 10-year grace period)	110	Metric tons	20
Brown Rice	Free of duty	V (20-year, non-linear, 10-year grace period)	2,140	Metric tons	20
Milled Rice	Free of duty	V (20-year, non-linear, 10-year grace period)	8,560	Metric tons	20
Beans	Free of duty	D (15-year, linear)	8,560	Metric tons	15
Glucose	Free of duty	N (12-year, linear)	1,320	Metric tons	12
Pig Fat	Free of duty	N (12-year, linear)	550	Metric tons	12

El Salvador on products entered from United States:

Product Category	In-Quota Treatment	Tariff Elimination Staging Category Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Beef	Free of duty	Q (15-year, non-linear, duties reduced to 15% in year 1)	105	Metric tons	15
Pork[2]	Free of duty	O (15-year, non-linear, 6-year grace period)	1,650	Metric tons	15
Liquid Dairy	Free of duty	F (20-year, linear, 10-year grace period)	10	Metric tons	20
Milk Powder	Free of duty	F (20-year, linear, 10-year grace period)	300	Metric tons	20
Buttermilk, Curdled Cream, and Yogurt	Free of duty	F (20-year, linear, 10-year grace period)	10	Metric tons	20
Butter	Free of duty	F (20-year, linear, 10-year grace period)	100	Metric tons	20
Cheese	Free of duty	F (20-year, linear, 10-year grace period)	410	Metric tons	20
Ice Cream	Free of duty	F (20-year, linear, 10-year grace period)	120	Metric tons	20
Other Dairy Products	Free of duty	F (20-year, linear, 10-year grace period)	120	Metric tons	20
Yellow Corn[2]	Free of duty	O (15-year, non-linear, 6-year grace period)	367,500	Metric tons	15
White Corn[2]	Free of duty	H (Continued MFN)	35,700	Metric tons	n.a.
Sorghum	Free of duty	D (15-year, linear)	263	Metric tons	15
Chicken Leg Quarters	Free of duty	P (18-year, non-linear, 10-year grace period)	0	Metric tons	18
Rough Rice[2,3]	Free of duty	P (18-year, non-linear, 10-year grace period)	62,220	Metric tons	18
Milled Rice	Free of duty	P (18-year, non-linear, 10-year grace period)	5,625	Metric tons	18

Guatemala on products entered from United States:

Product Category	In-Quota Treatment	Tariff Elimination Staging Category Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Beef	Free of duty	C (10-year, linear)	1,060	Metric tons	10
Cheese	Free of duty	F (20-year, linear, 10-year grace period)	450	Metric tons	20
Milk Powder	Free of duty	F (20-year, linear, 10-year grace period)	400	Metric tons	20
Butter	Free of duty	F (20-year, linear, 10-year grace period)	100	Metric tons	20
Ice Cream	Free of duty	F (20-year, linear, 10-year grace period)	160	Metric tons	20
Other Dairy Products	Free of duty	C (10-year, linear)	182	Metric tons	10
Pork	Free of duty	D (15-year, linear)	4,148	Metric tons	15
Yellow Corn	Free of duty	C (10-year, linear)	525,000	Metric tons	10
White Corn	Free of duty	H (Continued MFN)	20,400	Metric tons	n.a.
Rough Rice[2]	Free of duty	P (18-year, non-linear, 10-year grace period)	54,600	Metric tons	18
Milled Rice	Free of duty	P (18-year, non-linear, 10-year grace period)	10,500	Metric tons	18
Chicken Leg Quarters	Free of duty	P (18-year, non-linear, 10-year grace period)	21,810[1]	Metric tons	18

Honduras on products entered from United States:

Product Category	In-Quota Treatment	Tariff Elimination Staging Category Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Pork	Free of duty	O (15-year, non-linear, 6-year grace period)	2,150	Metric tons	15
Chicken Leg Quarters	Free of duty	P (18-year, non-linear, 10-year grace period)	0	Metric tons	18
Milk Powder	Free of duty	F (20-year, linear, 10-year grace period)	300	Metric tons	20
Butter	Free of duty	F (20-year, linear, 10-year grace period)	100	Metric tons	20
Cheese	Free of duty	F (20-year, linear, 10-year grace period)	410	Metric tons	20
Ice Cream	Free of duty	F (20-year, linear, 10-year grace period)	100	Metric tons	20
Other Dairy Products	Free of duty	F (20-year, linear, 10-year grace period)	140	Metric tons	20
Rough Rice[2]	Free of duty	P (18-year, non-linear, 10-year grace period)	91,800	Metric tons	18
Milled Rice	Free of duty	P (18-year, non-linear, 10-year grace period)	8,925	Metric tons	18
Yellow Corn	Free of duty	E (15-year, non-linear, 6-year grace period)	190,509	Metric tons	15
White Corn	Free of duty	H (Continued MFN)	23,460	Metric tons	n.a.

Nicaragua on products entered from United States:

Product Category	In-Quota Treatment	Tariff Elimination Staging Category Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Pork	Free of duty	D (15-year, linear)	1,100	Metric tons	15
Chicken Leg Quarters	Free of duty	P (18-year, non-linear, 10-year grace period)	0	Metric tons	18
Milk Powder	Free of duty	F (20-year, linear, 10-year grace period)	650	Metric tons	20
Butter	Free of duty	F (20-year, linear, 10-year grace period)	150	Metric tons	20
Cheese	Free of duty	F (20-year, linear, 10-year grace period)	575	Metric tons	20
Ice Cream	Free of duty	F (20-year, linear, 10-year grace period)	72,815	Liters	20
Other Dairy Products	Free of duty	F (20-year, linear, 10-year grace period)	50	Metric tons	20
Yellow Corn	Free of duty	E (15-year, non-linear, 6-year grace period)	68,250	Metric tons	15
White Corn	Free of duty	H (Continued MFN)	5,100	Metric tons	n.a.
Rough Rice[2]	Free of duty	P (18-year, non-linear, 10-year grace period)	92,700	Metric tons	18
Milled Rice	Free of duty	P (18-year, non-linear, 10-year grace period)	13,650	Metric tons	18

NOTES:

Source: TRQ Annexes to DR-CAFTA

1 With the exception of imports of "Chicken Leg Quarters" by Guatemala from the United States, where there are reductions in the duty-free quantity in several years, followed by unlimited access in year 18, access quantities will be subject to growth over time.

2 May be subject to performance requirements.

3 The aggregate quantity of goods entered into El Salvador from the United States under SAC provision 1006 shall be free of duty in any calendar year specified, "and shall not exceed 3,000 MT for 'parboiled rough' rice or its equivalent 'parboiled milled' rice quantity in any such year. Parboiled milled equivalency shall be calculated according to a 0.7 conversion factor, where 1 MT of parboiled rough rice is equivalent to 0.7 MT of parboiled milled rice."

Figure 3.7: Products Subject to Tariff Rate Quotas in DR-CAFTA: Central America Tariff Quotas on products entered from Dominican Republic

Costa Rica on products entered from Dominican Republic:

Product Category	In-Quota Treatment	Tariff Elimination Staging Category Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Chicken Breasts	12.5%	See note 7(b) of Costa Rica's General Notes[4]	2,070	metric tons	pending[5]
Milk Powder	20% s.t. staged elimination[2]	See note 7(b) of Costa Rica's General Notes[4]	2,200	metric tons	pending[5]

Nicaragua on products entered from Dominican Republic:

Product Category	In-Quota Treatment	Tariff Elimination Staging Category Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Chicken Breasts	10%	See note 7(b) of Nicaragua's General Notes[4]	443	metric tons	pending[5]
Onions and Shallots	7.5%	See note 7(b) of Nicaragua's General Notes[4]	375	metric tons	pending[5]
Beans	20% s.t. staged elimination[3]	See note 7(b) of Nicaragua's General Notes[4]	1,800	metric tons	pending[5]

Source: TRQ Annexes to DR-CAFTA

1 Quantities remain fixed in the case of all TRQs involving Central American commitments with the Dominican Republic.

2 "...Beginning on the date this Agreement enters into force, duties shall be 20 percent *ad valorem*. Duties shall be removed in seven equal annual stages beginning January 1 of year two, and such goods shall be duty-free effective January 1 of year eight."

3 "(i) For beans provided for in subheading 0713.32, beginning on the date this Agreement enters into force, duties shall be 20 percent *ad valorem*. Duties shall be removed in four equal annual stages beginning January 1 of year two, and such goods shall be duty-free effective January 1 of year five."

"(ii) For beans provided for in subheading 0713.31 and 0713.33, beginning on the date this Agreement enters into force, duties shall be 20 percent *ad valorem*. Duties shall be removed in two equal annual stages beginning January 1 of year two, and such goods shall be duty-free effective January 1 of year three."

4 Negotiations are set to conclude on preferential tariff treatment. If an agreement has not been reached as of one year after entry into force, duties will be reduced in a manner analogous to staging category V as used by Costa Rica and the Dominican Republic (20-year, non-linear, 10-year grace period).

5 Fixed quantities, but tariffs completely eliminated by year 20 if Parties have not reached an agreement regarding tariff treatment as of one year after entry into force.

Figure 3.8: Products Subject to Tariff Rate Quotas in DR-CAFTA: Dominican Republic Tariff Quotas on products entered from Central America

Dominican Republic on products entered from Costa Rica:

Product Category	In-Quota Treatment	Tariff Elimination Staging Category Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Chicken Breasts	12.5%	See note 7(b) of the Dominican Republic's General Notes[4]	2,070	metric tons	pending[5]
Milk Powder	20% s.t. staged elimination[2]	See note 7(b) of the Dominican Republic's General Notes[4]	2,200	metric tons	pending[5]

Dominican Republic on products entered from Nicaragua:

Product Category	In-Quota Treatment	Tariff Elimination Staging Category Out of Quota Treatment	Initial Quantity[1]	Unit	Years to Unlimited
Chicken Breasts	10%	See note 11(b) of the Dominican Republic's General Notes[4]	443	metric tons	pending[5]
Onions and Shallots	7.5%	See note 11(b) of the Dominican Republic's General Notes[4]	375	metric tons	pending[5]
Beans	20% s.t. staged elimination[3]	See note 11(b) of the Dominican Republic's General Notes[4]	1,800	metric tons	pending[5]

Source: TRQ Annexes to DR-CAFTA

1 Quantities remain fixed in the case of all TRQs involving Dominican Republic commitments with Central America.

2 "...Beginning January 1 of year one, duties shall be 20 percent *ad valorem*. Duties shall be removed in seven equal annual stages beginning January 1 of year two, and such goods shall be duty-free effective January 1 of year eight."

3 "(i) For beans provided for in subheading 0713.32, beginning on the date this Agreement enters into force, duties shall be 20 percent *ad valorem*. Duties shall be removed in four equal annual stages beginning January 1 of year two, and such goods shall be duty-free effective January 1 of year five."

"(ii) For beans provided for in subheading 0713.31 and 0713.33, beginning on the date this Agreement enters into force, duties shall be 20 percent *ad valorem*. Duties shall be removed in two equal annual stages beginning January 1 of year two, and such goods shall be duty-free effective January 1 of year three."

4 Negotiations are set to conclude on preferential tariff treatment. If an agreement has not been reached as of one year after entry into force, duties will be reduced in a manner analogous to staging category V as used by Costa Rica and the Dominican Republic (20-year, non-linear, 10-year grace period).

5 Fixed quantities, but tariffs completely eliminated by year 20 if Parties have not reached an agreement regarding tariff treatment as of one year after entry into force.

Figure 3.9: Products Subject to Tariff Rate Quotas in DR-CAFTA: United States Tariff Quotas on products entered from Central America and Dominican Republic

	Tariff Elimination Staging Category		Initial Quantity[1]							Years to
Product Category	**In-Quota Treatment**	**Out of Quota Treatment**	**CRI**	**DOM**	**SLV**	**GTM**	**HND**	**NIC**	**Unit**	**Unlimited Quantity**
Beef	Free of duty	D (15-year, linear)	10,536	1,320	105	*	525	10,500	Metric tons	15
Sugar[2]	Free of duty	H (Continued MFN)	11,000	10,000	24,000	32,000	8,000	22,000	Metric tons	n.a.
Sugar (Organic)[3]	Free of duty	H (Continued MFN)	2,000[1]	*	*	*	*	*	Metric tons	n.a.
Peanuts	Free of duty	E (15-year, non-linear, 6-year grace period	*	*	500	*	*	10,000	Metric tons	15
Peanut Butter	Free of duty	D (15-year, linear)	*	*	*	*	*	280	Metric tons	15
Cheese	Free of duty	F (20-year, linear, 10-year grace period)	300	413	450	500	350	625 (250[4])	Metric tons	20
Milk Powder	Free of duty	F (20-year, linear, 10-year grace period)	50	*	*	*	*	*	Metric tons	20
Butter	Free of duty	F (20-year, linear, 10-year grace period)	50	*	60	*	100	*	Metric tons	20
Other Dairy Products	Free of duty	F (20-year, linear, 10-year grace period)	150	110 (220[5])	120	250	*	100	Metric tons	20
Ice Cream	Free of duty	F (20-year, linear, 10-year grace period)	97,087	160,194	77,670	194,174	48,544	266,989	Liters	20
Fluid Fresh Milk and Cream, and Sour Cream	Free of duty	F (20-year, linear, 10-year grace period)	407,461	*	366,715	305,596	560,259	254,663	Liters	20
Ethyl Alcohol (Central America originating)	Free of duty	A (Immediate)	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Gallons	0
Ethyl Alcohol (non-Central America originating)	Free of duty	Most Favored Nation	31,000,000[1]	*	6,604,322[6]	*	*	*	Gallons	n.a.

Source: TRQ Annexes to DR-CAFTA

1 With the exceptions of imports of "Sugar (Organic)" and "Ethyl Alcohol (non-Central America originating)" from Costa Rica, which remain fixed, access quantities will be subject to growth over time.

2 TRQ access based on trade surplus condition.

3 A fixed 2,000 MT TRQ was allocated by the U.S. to Costa Rica for organic sugar under the U.S. specialty sugar TRQ, and applies to tariff lines AG17011110, AG17011210, AG17019110, AG17019910, AG17029010, and AG21069044.

4 In the case of Nicaragua, an additional initial quantity of 250 metric tons applies to 5 tariff lines of the 52 total tariff lines making up the entire Cheese TRQ.

5 In the case of the Dominican Republic, an additional initial quantity of 220 metric tons applies to 4 tariff lines of the 46 total tariff lines making up the entire Other Dairy Products TRQ.

6 Or 10 percent of the base quantity of dehydrated alcohol and mixtures established under Section 423, whichever is lesser.

*No TRQ.

Figure 3.10: Number of Products Subject to Tariff Rate Quotas, by Chapter: DR-CAFTA

Chapter	Brief Chapter Description (Unofficial)	DR-CAFTA																			
		TRQs of Central American Countries to :								TRQs of the United States to:							TRQs of the Dominican Republic to:			
		the United States:[1]						the D.R.:													
		CRI	SLV	GTM	HND	NIC	of # lines[2]	CRI	NIC	of # lines[2]	CRI	DOM	SLV	GTM	HND	NIC	of # lines[3]	CRI	NIC	USA	of # lines[4]
01	Live Animals						27			27							28				33
02	Meat and Edible Meat Offal	8	12	12	8	10	74	2	2	74	6	6	6		6	6	99	2	2	20	81
04	Dairy, Eggs, Honey, etc.	15	21	18	15	16	40	6		40	77	62	71	64	60	64	251	6		20	36
05	Products of Animal Origin, n.e.s.						21			21							21				28
06	Live Trees, Bulbs, Roots, Flowers, etc.						33			33							28				16
07	Edible Vegetables and Roots	5					84		11	84							167		4	3	91
08	Edible Fruit and Nuts, Edible Peels						71			71							118				83
09	Coffee, Tea, Mate and Spices						40			40							47				58
10	Cereals	5	8	7	7	7	23			23							21			2	16
11	Milled Products, Malt, Starches, etc.						39			39							38				36
12	Oil Seeds, etc.; Misc. Grains, Seeds and Fruit; etc.						56			56			2			2	61				75
13	Lac; Gums, Resins, Other Vegetable Saps / Extracts						14			14							15				20
14	Vegetable Plaiting Materials; Vegetables, n.e.s.						11			11							13				14
15	Animal or Vegetable Fats, Oils, and Waxes						53			53	1	1	1	1		1	68			1	65
16	Preparations of Meat, Fish or Aquatic Invertebrates		1	1	1	1	37			37							90				34
17	Sugars and Sugar Confectionery						20			20	21	16	16	16	15	16	66			1	31
18	Cocoa and Cocoa Preparations						12			12	32	32	32	32	12	32	78				14
19	Preparations of Cereals, Flour, Starch or Milk, etc.					2	26			26	15	15	15	15	7	15	70				26
20	Preparations of Vegetables, Fruit, Nuts, etc.	1					65			65			2			3	183				94
21	Miscellaneous Edible Preparations	1	2	1	1	1	25			25	22	19	21	19	17	19	89			1	30
22	Beverages, Spirits and Vinegar	1		1	1	2	30			30	3	1	3	1		1	73				34
23	Food Residues and Waste, Animal Fodder						35			35	2						37				35
24	Tobacco and Manufactured Tobacco Substitutes						19			19							56				10
	Total	36	44	40	33	39	855	8	13	855	179	152	169	148	117	159	1717	8	6	48	960

Source: TRQ Annexes to DR-CAFTA

1 If a tariff line is only partially covered by a tariff rate quota (a partial line signified by a letter following the tariff line), one full tariff line is still counted towards the count in the corresponding chapter. In the case of Nicaragua, the counts of tariff lines subject to TRQs may be slightly higher due in part to the fact that the tariff elimination schedule is at a 10-digit level of disaggregation while it is at 8 digits for the other countries.

2 These columns reflect the number of overall tariff lines in the Central American Common Market nomenclature, by Chapter of the 2002 Harmonized System. Note that Nicaragua exhibits slightly higher tariff line counts in some Chapters due to the use of a higher level of disaggregation.

3 This column reflects the number of overall tariff lines in the United States tariff nomenclature, by Chapter of the 2002 Harmonized System.

4 This column reflects the number of overall tariff lines in the Dominican Republic tariff nomenclature, by Chapter of the 2002 Harmonized System.

Figure 3.11: Number of Products Subject to Tariff Rate Quotas, by Chapter: Chile-U.S. FTA

Chapter	Brief Chapter Description (Unofficial)	Chile - U.S. FTA			
		TRQs of USA to CHL	of # lines[1]	TRQs of CHL to USA	of # lines[1]
01	Live Animals		23		19
02	Meat and Edible Meat Offal	10	93	10	53
04	Dairy, Eggs, Honey, etc.	75	251		44
05	Products of Animal Origin, n.e.s.		21		19
06	Live Trees, Bulbs, Roots, Flowers, etc.		28		12
07	Edible Vegetables and Roots		155		63
08	Edible Fruit and Nuts, Edible Peels	1	116		63
09	Coffee, Tea, Mate and Spices		47		32
10	Cereals		21		16
11	Milled Products, Malt, Starches, etc.		38		34
12	Oil Seeds, etc.; Misc. Grains, Seeds and Fruit; etc.		58		52
13	Lac; Gums, Resins, Other Vegetable Saps / Extracts		15		12
14	Vegetable Plaiting Materials; Vegetables, n.e.s.		14		11
15	Animal or Vegetable Fats, Oils, and Waxes	1	66		51
16	Preparations of Meat, Fish or Aquatic Invertebrates		90		51
17	Sugars and Sugar Confectionery	16	66		17
18	Cocoa and Cocoa Preparations	32	78		12
19	Preparations of Cereals, Flour, Starch or Milk, etc.	15	68		17
20	Preparations of Vegetables, Fruit, Nuts, etc.	1	170		51
21	Miscellaneous Edible Preparations	20	88		19
22	Beverages, Spirits and Vinegar	1	73		26
23	Food Residues and Waste, Animal Fodder	2	36		29
24	Tobacco and Manufactured Tobacco Substitutes	7	56		9
40	Rubber and Articles Thereof	2	129		91
69	Ceramic Products	1	63		34
74	Copper and Articles Thereof	1	99		65
	Total	185	1962	10	902

Source: Annex 3.3 General Notes to the Chile-U.S. FTA

1 This column reflects the number of overall tariff lines in a country's tariff nomenclature, by Chapter of the 1996 Harmonized System.

Chapter Four

Rules of Origin and Origin Procedures

The two Agreements have fairly similar structures in that rules of origin issues are addressed in a similar manner in various Chapters. In both Agreements, the general regime is dealt with in Chapter 4 (Rule of Origin and Origin Procedures). In this Chapter, both Agreements have an Annex on Specific Rules that includes the requirements that each product must fulfill in order to be considered originating (Annex 4.1). The annexes on specific rules are structurally different since DR-CAFTA uses the 2002 version of the Harmonized System (HS) whereas the Chile-U.S. FTA uses HS 96.

Both Agreements include origin matters related to textile and clothing products in Section G of Chapter 3 (National Treatment and Market Access). Likewise, certain origin-related customs procedures are taken up in a general way with other customs procedures in Chapter 5 (Customs Administration) of each Agreement.

Moreover Annex 3.25 of DR-CAFTA, "Short Supply List", contains a list of non-originating textiles inputs that, in the event of supply problems among the Parties, can form part of goods that will not be deemed to be non-originating. This list is subject to change so that items may be added or removed. In the Chile-U.S. FTA this flexibility that only covers cotton fabrics and artificial textile fibers is included in the Articles of Section G and does not admit future modifications.

DR-CAFTA's Appendix 4.1-B, under certain conditions, allows the accumulation of textile products of Chapter 62 from Mexico and Canada. The Chile-U.S. FTA does not have this facility. Likewise in DR-CAFTA, the detail included in Annex 4.6 on exceptions to the Article on *de minimis* (Article 4.6) is not in the Chile-U.S. FTA since the exceptions do not have a special annex but are included directly in the text of the Article defining "*de minimis*".

Given the subsequent addition of the Dominican Republic, DR-CAFTA incorporated some annexes and appendices that apply exclusively to the Central American countries' trade with the Dominican Republic. This allowed for the inclusion of what was negotiated by these countries in the Agreement that preceded DR-CAFTA. Appendix 3.3.6, "Special Rules of Origin", comprises a set of rules of origin for each tariff heading that are different to those contained in Annex 4.1 on Specific Rules mentioned above.

Interrelation of the regimes and rules of origin of DR-CAFTA

The final version of the general regime in Chapter 4 of DR-CAFTA regulates trade among the seven countries; additionally the Central American origin regime may also be optionally applied to trade among the five members of the Central American Common Market (CACM). DR-CAFTA also provides for the use of three systems of rules of origin per product that may be applied in some cases according to the products being traded and the countries involved.

Regarding United States' trade with the Central American countries and the Dominican Republic, the general regime and Annex 4.1 on specific rules are applied except in the case of sugar, coffee and products negotiated with quotas. In the cases mentioned, although the rule for each product is the same as that of Annex 4.1, the scope is exclusively bilateral since it applies between the United States and each one of the other members of DR-CAFTA. As a result, with respect to the products mentioned, the text does not provide for accumulation of inputs from a third country party to the Agreement. This regime also applies to intra-Central American trade and trade from these countries with the Dominican Republic.

However, in trade among the Central American countries there is additionally the option to apply the entire regime and specific rules of origin of DR-CAFTA. At the same time, when the preferences negotiated in the scope of the CACM are equal to or greater than those of DR-CAFTA, the importer/exporter may choose to apply the Central American origin regime.

Another option is Appendix 3.3.6 on Special Rules of Origin, Parts I and II applied exclusively to trade between a Central American country and the Dominican Republic[6]. Part IV, which establishes the requirements for assembly, also has the same scope. Part III contains bilateral rules of origin that would take precedence over the requirements established in Part II for some products from a Central American country in trade with the Dominican Republic.

With respect to trade between the United States and the Dominican Republic, Appendix 4.1-D provides for special rules of origin that differ from the rules in Annex 4.1 for a few products (for example, mineral fuels, plastics, iron and steel). These rules shall apply for a period of two years after the date of entry into force of the Agreement, after which time the rules of Annex 4.1 shall apply.

The following section examines the conceptual differences between the two Agreements in their treatment of rules of origin and origin procedures. It should be noted that the concepts are included in different Articles of the Agreements and under different titles, hence the need in some cases, to divide some Articles for the purposes of comparison and analysis. Likewise, the differences included herein are exclusively those that entail distinct conceptual perspectives unlike other Chapters in this study, and do not focus on differences in wording as those differences are way too many. This analysis covers Chapter 4 in both Agreements (origin regime) and part of Chapter 3 (on origin related to textiles). The analysis regarding issues related to customs cooperation and customs procedures in origin, regardless of where they may be included in the Agreements, may be found under Chapter 5 on Customs Administration.

Section A: Rules of origin

Both Agreements establish the manner in which goods are to be classified from the perspective of origin.

Originating goods: these goods are defined in Article 4.1 in both Agreements.

[6] According to the footnote in Annex 3.3.6, with respect to trade in duty-free products among countries, the regime in Annex 4.1 may also optionally be applied. As regards excepted products or products in the process of being liberalised, this option does not exist since the rules of origin of Appendix 3.3.6 will be exclusively applied.

a) Goods wholly obtained or produced entirely in the territory of one or both of the Parties. This concept is the same in both Agreements, except that they differ slightly in specifying the scope in the corresponding Articles on definitions. In essence, the definitions are ordered and worded differently. Moreover, as regards fish, shellfish and other marine life, DR-CAFTA allows them to be caught "outside the territory of one or more of the Parties".

b) Goods produced exclusively from materials originating from the territory of the Parties. There are no differences.

c) Goods produced from originating and non-originating materials. Although the wording is similar in both Agreements, the norms set out in the respective annexes on specific rules of origin differ in ways that are beyond the scope of this document.

   Additionally in this Article, the Chile-U.S. FTA includes the concept of operations that do not confer origin. It establishes that dilution with water or another substance that does not materially alter the characteristics of the original good, or simple combining or packaging operations, do not confer origin. DR-CAFTA makes no provision in this regard and therefore does not identify this type of operation.

Regional value content: both Agreements (Art.4.2) use the build-down and build-up methods. Additionally, DR-CAFTA adds another option for calculation by including the net cost method for a set of tariff lines and sub-lines of Chapters 84 and 87, related to the automotive industry. Furthermore, DR-CAFTA stipulates that all costs considered for the calculation of regional value content shall be recorded and maintained in conformity with Generally Accepted Accounting Principles.

Value of materials: (Art.4.3 in both Agreements) for a material acquired in the territory where the good is produced, the Chile-U.S. FTA states that its value is the price that the producer actually paid, while DR-CAFTA sets the value in accordance with Articles 1 through 8, Article 15 and the corresponding interpretative notes of the WTO Agreement on Customs Valuation.

The Chile-U.S. FTA, moreover, establishes criteria for determining the value of a material provided to the producer without charge; this criterion is not included in DR-CAFTA. The two Agreements coincide on the matters to be considered in calculating the value of a self-produced good, but DR-CAFTA confines the amount to profits by making it equivalent to the gains added in the normal course of trade.

Adjustments to the value of materials: (Chile-U.S. FTA Art.4.3.2 and DR-CAFTA Art.4.4) there are practically no differences since both are similar on the means of adjusting the value of originating and non-originating materials. The Chile-U.S. FTA further states that this Article shall apply for the purposes of the *de minimis* rule, an aspect that is not included in DR-CAFTA.

Accessories, spare parts, and tools: (Chile-U.S. FTA Art.4.4 and DR-CAFTA Art.4.8) the Chile-U.S. FTA states that these products will be regarded as a material used in the production of the good provided certain conditions are met; DR-CAFTA stipulates that, in the same circumstances,

accessories, spare parts or tools shall be considered as originating if the good is originating, and shall be disregarded if they are non-originating in determining the origin of the good to which they correspond when the rule is based on a change in tariff classification. DR-CAFTA further states that if a good is subject to a regional value content requirement, the value of accessories, spare parts, or tools shall be taken into account as originating or non-originating materials, as the case may be, in calculating the regional value content of the good.

Fungible goods and materials: (Chile-U.S. FTA Art.4.5 and DR-CAFTA Art.4.7) there are no differences; both Agreements regard these products as originating and they coincide on the inventory management methods that can be applied to them.

Accumulation: (Chile-U.S. FTA Art.4.6 and DR-CAFTA Art.4.5) there are no differences between each Agreement's Chapter 4 on the origin regime. Appendix 4.1-B of DR-CAFTA, nonetheless, allows accumulation from Mexico and Canada for certain textile products in Chapter 62. This is not included in the Chile-U.S. FTA. The Annex establishes the conditions that must be satisfied in order to be able to accumulate; the Dominican Republic is also granted this flexibility.

Additionally, given the plurilateral nature of DR-CAFTA, in the case of sensitive products or products with quotas already mentioned, the application of the principle of accumulation is a bilateral issue, that is, an issue exclusively between the exporting country and the importing country.

***De minimis*:** (Chile-U.S. FTA Art.4.7 and DR-CAFTA Art.4.6 and its Annex) the value of the exception (10%) and its means of application are the same in the two Agreements, but they differ in some of their exceptions. DR-CAFTA's exceptions to the *de minimis* rule for headings 09.01, 11.02, 11.03, 19 04.90 and 21.01 are not included in the Chile-U.S. FTA. DR-CAFTA's exceptions for their application in all the products of Chapter 15 are confined in the Chile-U.S. FTA to headings 1501 to 1508, 1512, 1514 and 1515. The Chile-U.S. FTA excepts the application of *de minimis* to non-originating materials of heading 1805 when they are used in the production of goods provided for in heading 1806.10, and the material provided for in headings 2203 through 2208 used in the production of a good provided for in heading 2207 or 2208.

The Chapter on textiles includes the levels and means of applying the *de minimis* criterion to such products, which is different from what was previously mentioned.

Indirect materials used in production: (Chile-U.S. FTA Art.4.8 and DR-CAFTA Art.4.11) both Agreements regard indirect materials as originating regardless of their origin.

Packaging Materials and Containers for Retail Sale: (Art.4.9 in both Agreements) both Agreements make the same provisions for the treatment of containers and packaging material for retail sale. These containers shall be disregarded in determining the origin of a good if they undergo the applicable change in tariff classification, and they will be taken into account in establishing the origin of a good when the good is subject to a regional value content requirement.

Packing Materials and Containers for Shipment: (Art.4.10 in both Agreements) containers and packaging materials for shipment are considered originating in both Agreements, regardless of their origin.

Transit and transshipment: (Chile-U.S. FTA Art.4.11 and DR-CAFTA Art.4.12) in both Agreements, a good does not cease to be originating if, outside the territories of the Parties, it undergoes unloading, loading or any other process necessary to preserve it in good condition or to transport it to the territory of a Party. A condition of this in DR-CAFTA is that the good does not remain under customs authority control in the territory of a non-member of the Agreement.

Articles in this section included in only one of the Agreements

DR-CAFTA includes an Article on the treatment of goods classified as a set (Art.4.13); the Chile-U.S. FTA does not. DR-CAFTA also has an Article, absent from the Chile-U.S. FTA, on consultation and modifications (Art.4.14) for the Agreement's uniform application and interpretation, and on changes to the specific rules of origin.

Section B: Origin Procedures

A general feature of this section is that while the titles are similar in both Agreements, the concepts are distributed differently. Hence the need in some cases to combine different titles and Articles.

Claims of origin: (Chile-U.S. FTA Art.4.12, "Claims of Origin", and DR-CAFTA Art.4.15, "Obligations Relating to Importations", paragraphs 1, 2, 3, and 5) under various Articles with different titles, both Agreements contain similar paragraphs on obligations of importers related to declaration of origin, availability of the certificate, corrections to incorrect declarations and request for refund of duties paid on previously imported goods.

Both Agreements state that each Party may require the importer making a claim for preferential tariff treatment to present a declaration stating that the good is originating. Likewise, where required by the customs authority of the importing Party, the importer shall present a written certification. Customs authorities may require the importer to demonstrate that the good that is qualified as originating satisfies the established requirements to meet such a condition.

Both Agreements establish the requirements that the importers will have to satisfy in order to be able to request the refund of tariffs paid on the importation of negotiated goods; the deadline for this request is fixed at no later than one year after the date of importation of the goods.

Certification of origin: (Chile-U.S. FTA Art.4.13 and DR-CAFTA Art.4.16 and Art.4.17, "Exceptions") the Chile-U.S. FTA establishes that the exporter or importer may issue a certificate of origin based on a certificate of the producer of the good or with the knowledge that the good qualifies as originating. DR-CAFTA establishes that the exporter will issue a certification based on the knowledge of the origin of the good, or based on reasonable reliance on the certification issued by the producer. As a result, the difference between the two is that in the case of the exporter issuing the certificate based on the certificate of the producer, DR-

CAFTA requires that in addition to having the certificate, the exporter is to have reasonable reliance on the information. With respect to the importer issuing the certificate, DR-CAFTA does not establish anything specific and only refers to requests for preferential treatment. This request can be made by the importer based on the knowledge that the good is originating and/or reasonable reliance on the information regarding the good satisfying the established requirements.

Another difference in DR-CAFTA is that no Party may require an exporter or producer to provide a written or electronic certification to another person.

Obligations relating to importations: (Chile-U.S. FTA Art.4.14, and DR-CAFTA Arts. 4.15 and 4.19, "Record Keeping Requirement") DR-CAFTA establishes that on making a declaration of origin, the importer is to have a certificate of origin in his possession and provide a copy of it to the importing Party's customs authority. In cases involving a certificate issued by the exporter or producer, on request of the importing Party's customs authority, the importer must make arrangements for the producer or exporter to provide all the information used in making the certification. The Chile-U.S. FTA establishes that the importer is responsible for presenting the certificate of origin or other information demonstrating that the good qualifies as originating and for the truthfulness of the data and information provided. This Agreement is different from DR-CAFTA in that it extends the responsibility of the importer to include cases where the importer would have issued the certificate of origin based on data provided by the exporter or producer.

The Chile-U.S. FTA requires importers to maintain, for five years, a certificate of origin and all documentation demonstrating that the good qualifies as originating as well as documents related to the importation of the good. Among this information, the importer must maintain records associated with the purchase, cost, value and payment for the goods and where appropriate, the purchase, cost, value and payment for materials, including information on recovered goods, indirect materials and production processes.

DR-CAFTA establishes a minimum period of five years for maintaining all records and documentation.

Obligations relating to exportations: (Chile-U.S. FTA Art.4.15 and DR-CAFTA Arts. 4.18 and 4.19. "Record Keeping Requirement") both Agreements state that the exporter must provide a copy of the certificates to the Party's customs authority upon request (Chile-U.S. FTA Art.4.19.2 and DR-CAFTA Art.4.18.1(a)). According to both, moreover, an exporter or producer who has issued a certificate of origin shall maintain, for a period of at least five years, all records needed to demonstrate the good's eligibility, including those related to the cost, value of, and payment for the good exported, information on the inputs used and, when necessary, on the production process (Chile-U.S. FTA paragraph 2 and DR-CAFTA Art.4.19.1).

Both also state that the exporter must notify every person to whom the certificate has been issued of any change that could affect the accuracy or validity of the certificate. Neither Party may impose penalties on an exporter or producer for issuing an incorrect certificate if such notification is voluntarily provided (Chile-U.S. FTA paragraph 3 and DR-CAFTA Arts. 4.18.1(c) and 4.18.2).

According to DR-CAFTA, the Parties will provide that a false certification by an exporter will have the same legal consequences, with appropriate modifications, as would apply to an importer making false statements or representations (Art.4.18.1(c)).

Both Agreements provide that the Parties will not impose penalties on producers or exporters who provide an incorrect certificate of origin once written notification about the error is voluntarily provided. This notification would have to be sent to all the people to whom the certificate would have been given.

Procedures for verification of origin: (Chile-U.S. FTA Art.4.16 and DR-CAFTA Art.4.15 "Obligations relating to Importations" and Art.4.20 "Verification") the Chile-U.S. FTA stipulates that the importing Party may, through its customs authority, verify the origin in accordance with its customs laws and regulations (paragraph 2). DR-CAFTA states that the importing Party may conduct a verification of origin in accordance with a series of procedures that the importing Party may follow to this end (written requests and questionnaires, visits or inspections). It also makes provision for the two Parties to agree on other verification procedures (Art.4.20.1).

According to the Chile-U.S. FTA, when a Party denies a claim for preferential tariff treatment it shall issue a written determination containing findings of fact and the legal basis for its determination (paragraph 3). DR-CAFTA establishes that when a Party denies a request for preferential treatment or conducts a verification of origin, it shall provide a written determination of whether the good is an originating good, which shall include factual findings and the legal basis for its determination (Art.4.15.1 and Art.4.20.3).

In DR-CAFTA, moreover, a Party may deny preferential tariff treatment to an imported good when the exporter, producer, or importer fails to respond to written requests for information or questionnaires within a reasonable period as established by the importing Party's domestic law, or when the exporter or producer does not provide written consent for a verification visit (paragraphs 2a and 2b). In DR-CAFTA, a Party may deny preferential tariff treatment to an imported good when it finds a pattern of conduct indicating that an importer, exporter, or producer has provided false or unfounded declarations about a good imported into its territory (Art.4.20.2(c)).

In the Chile-U.S. FTA, when a Party determines through verification that an importer has certified more than once, falsely or without substantiation, that a good qualifies as originating, the Party may suspend preferential tariff treatment to identical goods imported by that person until the latter proves to have complied with the Party's laws and regulations (paragraph 5). DR-CAFTA states that when the importing Party determines through verification that an importer, exporter, or producer has engaged in a pattern of conduct in providing false or unsupported statements or declarations, the importing Party may suspend preferential tariff treatment with respect to identical goods covered by subsequent declarations or certifications until the Party determines that the importer, exporter, or producer is complying with the requirements of this Chapter (paragraph 5 in both Agreements).

In the Chile-U.S. FTA, a Party conducting a verification of origin shall use generally accepted accounting principles and apply them in the manner as they are applied in the exporting Party (paragraph 6).

In DR-CAFTA, if the importing Party determines that a good is not originating, the Party shall not apply that determination to an importation made before the date of the determination, provided that the customs authority of the exporting Party has issued an advance ruling, prior to the determination of origin, on which a person is entitled to rely (paragraph 4).

Common guidelines: (Chile-U.S. FTA Art.4.17 and DR-CAFTA Art.4.21) in both Agreements the Parties agree to publish common guidelines for the interpretation, application, and administration of this Chapter and the relevant provisions of others; in the Chile-U.S. FTA these activities will be undertaken before the Agreement enters into force, whereas in DR-CAFTA the Parties will endeavor to do so on the date the Agreement enters into force. Both Agreements stipulate that the Parties may modify the common guidelines. DR-CAFTA states that the Parties will endeavor to develop a framework for conducting verifications pursuant to Article 4.20.1(c).

Definitions: (Chile-U.S. FTA Art.4.18 and DR-CAFTA Art.4.22) the concepts listed and the definition of concepts in both Agreements sometimes differ.

Provisions in Chapter 3 on Rules of Origin and Related Matters for Textiles and Apparel:

Scope of application and coverage: (Chile-U.S. FTA Arts. 3.20.1 and Arts. 3.20.2 and DR-CAFTA Art.3.19) the definition of products in this section differs. In the Chile-U.S. FTA a textile and apparel good means a product listed in the Annex to the Agreement on Textiles and Clothing. In DR-CAFTA a textile and apparel good means a product listed in the Annex to the WTO Agreement on Textiles and Clothing except for goods included in Annex 3.29.

The Chile-U.S. FTA states that except as provided for in this section, Chapter Four (Rules of Origin and Origin Procedures) applies to textile and apparel goods, and that this Agreement's rules of origin shall not apply in determining the country of origin of a textile or apparel good for non-preferential purposes.

Consultation: (Chile-U.S. FTA Arts. 3.20.3-3.20.5 and DR-CAFTA Arts. 3.25.1-3.25.3) the two Agreements provide for similar systems of consultation and review of their rules for textile products, such that the Parties may determine if there is significant or substantial production in their territory and make the necessary changes in line with the procedures established in the Agreements on modifications. The schedules for the various phases of this process differ in the two Agreements. Additionally, DR-CAFTA establishes steps and deadlines that the United States must follow in order to add a fabric, fiber, or yarn in an unrestricted or restricted quantity to the list in Annex 3.25.

***De minimis*:** for the goods in Chapters 50 to 63 of the Harmonized System, the two Agreements make provision for flexibility according to the weight of the fibers. The Chile-U.S. FTA sets a ceiling of 7% and DR-CAFTA a ceiling of 10% for the weight of the non-originating fibers or yarns that do not comply with the tariff classification but that may be included in a good which will still be regarded as originating. In the case of elastomeric yarns, both Agreements limit the application of the concept of "de minimis".

The general *de minimis* regime is in Chapter 4.

Treatment of sets: in both Agreements, sets comprising originating goods and those in which the value of the non-originating goods in the set does not exceed 10% of the value shall be regarded as originating. The Agreements calculate this on differing bases: the customs value of the set in the Chile-U.S. FTA, and the adjusted value of the set in DR-CAFTA. DR-CAFTA's general regime on sets is in Chapter 4.

Special flexibility for meeting the origin requirements of textiles products: (Chile-U.S. FTA Arts. 3.20.8-3.20.11 and DR-CAFTA Arts. 3.25.4-3.25.7) the Chile-U.S. FTA stipulates that the following goods will be regarded as originating: cotton or man-made fiber fabric goods provided for in Chapters 52, 54, 55, 58, and 60 of the Harmonized System that are wholly formed in the territory of a Party from yarn produced or obtained outside the territory of a Party; and cotton or man-made fiber fabric goods provided for in the annex on specific rules of origin that are wholly formed in the territory of a Party from yarn spun in the territory of a Party from non-originating fiber. This flexibility to use non-originating inputs is limited to a total annual quantity of 1 million SME. The same criterion is applied to cotton or man-made fiber apparel goods provided for in Chapters 61 and 62 of the Harmonized System that are cut or knit to shape and otherwise assembled in the territory of a Party from non-originating fibers. This ceiling on this flexibility is 2 million SME in the first ten years and 1 million from the eleventh year onwards.

The Parties, through their competent authorities, may require that an importer claiming preferential tariff treatment for such textile or apparel goods present a certification of eligibility, including information demonstrating that the good meets the requirements for preferential tariff treatment.

According to DR-CAFTA, notwithstanding the provisions on specific rules of origin, textile and apparel goods will be regarded as originating even if they are produced using non-originating fabric, yarns or fibers included in Annex 3.25. The United States may unilaterally include or exclude the textiles products mentioned in the annex and fix or change the volumes. The criterion for inclusion is that the goods include fabrics, yarns or fibers that are not available in commercial quantities and to whose inclusion there is no objection. The Agreement defines the criteria for determining the availability or otherwise of the fabrics and yarns. DR-CAFTA makes provision for some flexibility for nylon filament yarn.

Provisions in Chapter 3 Annex 3.3.6 and Appendix 3.3.6 - Trade between the Dominican Republic and Central America:

Annex 3.3.6 of DR-CAFTA establishes the conditions that will be applied to trade among the Central American countries and the Dominican Republic, both with reference to tariff elimination and origin. With respect to the latter, the Agreement states that the regime to be applied will be set out in Chapter 4 of the Agreement. The rules of origin governing each product contained in Appendix 3.3.6 "Special Rules of Origin", differ from those in Annex 4.1.

Additionally Annex 3.3.6 grants duty-free treatment to trade among these countries except for a series of products, edible oils, derivatives from petroleum and the lists in Appendix 3.3.6.4. For all duty-free products, the importer/exporter has the option to carry out the operation under the

rules of origin established in Annex 4.1,"Specific Rules of Origin" or in accordance with the rules in Appendix 3.3.6, "Special Rules of Origin". Nevertheless, for the excepted products, Appendix 3.3.6 "Special Rules of Origin" is exclusively applied.

Chapter Five

Customs Administration

The two Agreements have very similar structures in the customs area. All the provisions are concentrated in a single Chapter and the Articles are presented in the same order. In the Chile-U.S. FTA this Chapter is entitled "Customs Administration", while DR-CAFTA more ambitiously terms it "Customs Administration and Trade Facilitation". At the start of the text both include a Chapter on "General Definitions", which includes a definition of *customs authority*.

Publication: the structure and substance of this Article in both Agreements are very similar. Both texts establish the obligation to publish customs laws and regulations, the means and the timing of the dissemination of that information, and the designation of inquiry points to address inquiries from interested persons concerning customs matters.

Release of goods: although the form of the two Articles is different in both Agreements, both make provisions for the simplification of procedures as a prime element of the release of goods.

Automation: both the Chile-U.S. FTA and DR-CAFTA contemplate the automation of procedures as a means of facilitating and expediting processes in customs. DR-CAFTA is more specific in establishing the elements to be considered when deciding on the type of information technology to be used for this purpose.

In both Agreements the Articles on risk management, cooperation, confidentiality, express shipments, review and appeal, penalties and advance rulings are presented in the same order.

Implementation: both Agreements feature this Article, where certain provisions are deferred for a given period following the Agreement's entry into force. Chile and the Central American countries shall defer some provisions of the Articles on publication, express shipment and advance ruling, but the Central American countries will also defer, those related to release of goods, risk management and automation.

Institutional management: only DR-CAFTA has these provisions, which propose that the working group on customs administration and trade facilitation should work on the implementation of this Chapter in light of its importance for trade and on any other priorities that the Committee on Trade designates.

In the Chapters on "Customs Administration" or "Customs Administration and Trade Facilitation" the Agreements reveal no major conceptual differences in the area of customs procedures. The principles are the same in each of them, although in some cases there is greater detail about the application of some of those principles. From the viewpoint of coverage, and apart from the apparently more ambitious title of the Article in DR-CAFTA, the Agreements address the same issues, the details of which are as follows:

Publication: in essence, the following concepts are posited in these Articles: a) Internet publication as the medium for disclosing the laws and customs regulations for all the

Agreements. The Chile-U.S. FTA allows the use of comparable alternative media for publishing laws, regulations and procedures, however, in the DR-CAFTA text, publication on the internet is mandatory; b) advance publication of any regulation on customs matters prior to the Agreement's entry into force when possible; c) the Parties shall designate and maintain contact points to which those interested can send enquiries on customs matters.

Both Agreements include an Article on *implementation* that defers the date for applying some subsections of this Article. For Chile the publication of regulations on the Internet and the designation of contact points is postponed for three years after the Agreement's entry into force, and for Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic these matters are deferred for two years after the entry into force.

Release of goods: both Agreements make provision for the simplification of procedures as a chief element of the release of goods, and establish a period of less than 48 hours as desirable. For that purpose, various steps based on similar principles define the procedures: i) to release goods at their point of arrival without temporary transfer to warehouses; ii) to release goods prior to the final determination of the duties and taxes to be paid.

Automation: both make provision for this issue as a means of facilitating and expediting procedures; the latter should be designed in a way that takes account of international standards. DR-CAFTA adds that the electronic systems should meet certain conditions: i) they should be accessible to the trading community; ii) the information should be processed before the goods arrive; iii) systems for risk analysis and targeting should be used; iv) the systems should be compatible, so as to facilitate government-to-government exchange of international trade data; and v) the Parties should work towards a set of common data in accordance with the recommendations and guidelines of the World Customs Organization (WCO) and the World Trade Organization (WTO).

According to DR-CAFTA's Article on **implementation**, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic should implement this Article within three years of the Agreement's entry into force.

Risk management: the Agreements make provision for risk analysis systems as a crucial means of focusing inspection activities on high-risk goods, thereby simplifying procedures for clearances of low-risk goods. While the issue is addressed in the same level of detail in both Agreements, DR-CAFTA highlights the importance of the confidential nature of the information obtained through such activities.

According to DR-CAFTA's Article on **implementation**, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic should implement this Article within two years of the Agreement's entry into force.

Cooperation: with a greater or lesser degree of detail, the two Agreements express the same desire for cooperation. In both cases, cooperation refers to the exchange of information and the provision of technical assistance in particular areas, including: i) risk assessment techniques; ii) simplifying procedures; and iii) upgrading personnel skills. The Agreements enter into a similar

level of detail about the kind of information to be provided, how to ask for it, and how the country from which the information is requested should respond. The Articles also make provision for the countries to analyze and explore other channels of communication for the purpose of facilitating the secure and rapid exchange of information.

The areas of cooperation mentioned in each of the Agreements are the same: everything related to the Agreement, rules of origin, origin procedures, customs valuation and other customs matters as the Parties may agree.

Confidentiality: these Articles are practically identical in the Chile-U.S. FTA and DR-CAFTA. They specify how confidential information should be handled by each Party, and when a Party can decline to provide such information to another if the other has failed to comply with the principle of confidentiality. They further state that the Parties should adopt procedures to ensure the confidentiality of the information, especially when the competitive position of the person providing the information might be prejudiced by its disclosure.

Express shipments: the two Agreements mention the need for a simplified procedure for such shipments, and stipulate the conditions in which these operations should be handled: there should be a separate manifest, preferably electronic, processed before the transport arrives; and, under normal circumstances, the goods should be cleared within six hours of arrival at customs.

Again, the Article on **implementation** postpones application of this provision for some countries. In Chile's case the requirement of a separate electronic manifest for such shipments is deferred for three years following the Agreement's entry into force. For Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic, implementation of the whole Article is deferred for a year.

Review and appeal: from a conceptual standpoint the two Agreements are identical in this regard. They guarantee that importers in the Parties' territory will have access to an administrative review independent of the office issuing the determination, and a judicial review of any decision taken at the highest administrative level.

Penalties: the Agreements are very similar in this area; there are no differences. They impose civil and administrative penalties, and criminal sanctions where appropriate, for violations of some laws and regulations related to tariff classification, customs valuation, country of origin, and claims for preferential treatment under the Agreement.

Advance rulings: both Agreements stipulate that each Party's customs authority can issue advance rulings on the goods to be imported at the request of importers in their own country, or exporters and producers in the territory of another Party. Both Agreements accept these rulings on tariff classification, the application of customs valuation and origin criteria.

Advance rulings shall be in force from their date of issue or a date stipulated in the ruling, provided that the circumstances on which the ruling is based are unchanged. A Party may modify or revoke an advance ruling when it has been based on inaccurate or false information.

The main difference between the Agreements concerns the matters on which an advance ruling can be requested, an area in which DR-CAFTA goes further than the Chile-U.S. FTA. They concur in stipulating that the customs authority shall also issue advance rulings for the application of quotas, duty drawback and such other matters as the Parties may agree.

As regards these Articles' entry into force, the **implementation** Article states that: a) for Chile, advance rulings on valuation matters will begin three years after the Agreement's entry into force. Within 120 days of the entry into force the Parties will consult on the procedures that Chile must adopt to implement this Article, and on the technical assistance that the United States should provide so that it can be implemented. Within 18 months of the Agreement's entry into force the Parties will analyze the progress that Chile has made on implementation, and will assess the need for further cooperation; and b) Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic will implement this Article within two years of the Agreement's entry into force.

Implementation: each of the Articles defines the implementation schedules of the Chile-U.S. FTA and DR-CAFTA. Both Agreements postpone the entry into force of some provisions related to publication, express shipment and advance rulings. DR-CAFTA also postpones some provisions related to the release of goods, risk management and automation.

Institutional management: only DR-CAFTA has these provisions, which establish that the working group on customs administration and trade facilitation should prioritize the implementation of this Chapter in light of its importance for trade.

In both Agreements, Chapter 2 on "General Definitions", defines *customs authority* as the competent authority responsible under the law of a Party for the administration of customs laws and regulations.

Regarding the issue of **Customs Cooperation**, which is included in both Agreements in Chapter 3, *National Treatment and Market Access for Goods*, there are no differences between Article 3.24 of DR-CAFTA and Article 3.21 of the Chile-U.S. FTA, from the standpoint of content on a general level. Both establish cooperation between customs authorities to enforce the application of laws, regulations and procedures that affect trade in textile and apparel goods, and to ensure the accuracy of claims of origin of these goods. Both Agreements establish inspection visits for verification of origin. On comparing the texts, DR-CAFTA is much more specific and detailed than is the Chile-U.S. FTA, in outlining the procedures to be followed in terms of the steps and deadlines that must be respected for the verification visits.

Chapter Six

Sanitary and Phytosanitary (SPS) Measures

In addition to the agriculture provisions explained before, both DR-CAFTA and the Chile-U.S. FTA contain brief Chapters on sanitary and phytosanitary measures (Chapter 6 in each Agreement).

Objectives: under DR-CAFTA and the Chile-U.S. FTA, the Chapters on SPS measures are based on enhancing the implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (referred to as the SPS Agreement), with the ultimate aim of expanding trade opportunities among the Parties.

Scope and Coverage and General Provisions: the Articles on scope and coverage contain similar provisions in both Agreements (the Chapters apply to SPS measures that may, directly or indirectly, affect trade among the Parties). Additionally, for any matter arising under these Chapters, both Agreements disallow recourse to the dispute settlement provisions outlined in DR-CAFTA and in the Chile-U.S. FTA. The Parties' rights and obligations contained in the WTO SPS Agreement are reaffirmed as a general provision under the Chile-U.S. FTA (Art.6.2.1) but included as a separate Article under DR-CAFTA (Art.6.1).

Committee on Sanitary and Phytosanitary Matters: similar provisions guiding the establishment of Committees on sanitary and phytosanitary measures appear in both Agreements where said Committees are to be established no later than 30 days after the date of entry into force of the respective Agreements. Annex 6.3 of DR-CAFTA defines the representatives of the agencies and/or ministries from each Party to form the Committee. In the Chile-U.S. FTA the members of the Committee from each Party are outlined in the Committee's terms of reference.

The objectives and responsibilities of the Committees in both Agreements are largely similar. The mandate is to meet at least once a year unless the Parties otherwise agree. Among other functions, the respective Committees would serve as a means through which Parties consult on issues, positions and agendas for meetings of international and regional fora on food safety, human, animal and plant health. The multilateral nature of DR-CAFTA, however, is highlighted in one paragraph in particular where emphasis is placed on promoting communication between the Parties' agencies, facilitating responses to written requests for information with minimal delay, as well as ensuring that Parties are informed at the earliest opportunity about responding to a request. The DR-CAFTA Committee is also specifically charged with being a forum for addressing bilateral and plurilateral SPS matters. The Chile-U.S. FTA mentions improving bilateral understanding between the Parties. Another point of departure between the texts of both Agreements is related to the coordination of technical cooperation programs on SPS matters, which while being charged to Committees in both Agreements, is treated slightly differently under DR-CAFTA since the recommendations are made to the Committee on Trade Capacity Building. Provision is also made in both Agreements for the establishment of *ad hoc* working groups in accordance with each Committee's terms of reference. SPS specific definitions are included as Article 6.4 in the Chile-U.S. FTA, however, the same definitions area included under general definitions of Chapter 2 in DR-CAFTA.

Chapter Seven

Technical Barriers to Trade

The structure and the content of Chapter 7 on Technical Barriers to Trade of the Chile-U.S. FTA and DR-CAFTA are very similar. Both contain provisions on trade facilitation, technical regulations, conformity assessment, and transparency. Both establish a committee on technical barriers to trade and obligate countries to ensure a timely exchange of information. Both have as their objective "to increase and facilitate trade through the improvement of the implementation of the TBT Agreement, the elimination of unnecessary technical barriers to trade, and the enhancement of bilateral cooperation".

Relationship with the TBT Agreement: both Agreements affirm the Parties' rights and obligations under the TBT Agreement.

Scope and Coverage: in terms of the scope and coverage, both Agreements cover standards, technical regulations and conformity assessment procedures (as defined in the WTO TBT Agreement) that may directly or indirectly affect trade in goods between the Parties. In both Agreements it is specified that the TBT Chapter applies only to central government bodies and that the Chapter does not cover sanitary and phytosanitary measures or government procurement. The main difference in this section is that DR-CAFTA specifies in a footnote that any reference to standards, technical regulations and conformity assessment procedures include those related to metrology.

International Standards: both Agreements invoke the document on *Decisions and Recommendations adopted by the Committee since 1 January 1995*, Section IX (*Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement*) issued by the WTO Committee on Technical Barriers to Trade as the source for principles for use in determining the existence of an international standard. These principles concern transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests. The Chile-U.S. FTA references G/TBT/1/Rev.7, 28 November 2000, while DR-CAFTA references the more recent version of this document, G/TBT/1/Rev. 8, 23 May 2002.

Trade Facilitation: the two Agreements include an Article on trade facilitation, encouraging the parties to intensify their joint work in this area with a view to facilitating market access (DR-CAFTA) or trade between the Parties (DR-CAFTA) and to seek to identify bilateral initiatives as appropriate, including cooperation on regulatory issues, alignment with international standards, reliance on supplier's declaration of conformity and use of accreditation to qualify conformity assessment bodies. The Chile-U.S. FTA includes mutual recognition as a cooperation mechanism, while DR-CAFTA does not. DR-CAFTA calls for Parties to favorably consider sector-specific cooperation proposals. This same language is included in the Chile-U.S. FTA, but in the section addressing the Committee on TBT.

Technical Regulations: in both Agreements, if the Party does not accept a technical regulation of the other Party (or of another Party, in the case of the multi-country DR-CAFTA) as equivalent to a particular technical regulation of its own, the Party is obliged to provide, upon request, an explanation of the reasons for not doing so, in cases where the Party provides for equivalency of foreign technical regulations, and is urged to provide such an explanation, upon request, in cases where it does not.

Conformity Assessment: the objective of the Article on conformity assessment in both Agreements is not to set out guidelines for conformity assessment procedures, as this is done in the WTO TBT Agreement, but to foster acceptance of each other's procedures. For instance in the Chile-U.S. FTA, the Agreement provides for facilitating "the acceptance of conformity assessment results". DR-CAFTA likewise provides "to facilitate the acceptance of conformity assessment procedures conducted in another Party's territory." Parties are urged to intensify their exchange of information on mechanisms available to fulfill this. In cases where Parties do not accept the results of conformity assessment procedures of their counterparts, they are obliged, upon request, to explain the reasons. Parties are to accredit, approve, license, or otherwise recognize that conformity assessment bodies in the territory of the other Party on the same terms as accorded to such bodies in their own territory. In cases where this is not done, the Party shall, upon request, explain the reasons for such refusal.

Transparency: both Agreements provide for persons of the other Party to participate in standards, technical regulations and conformity assessment procedures development. Nongovernmental standardizing bodies in the territory of the Parties will also be recommended to follow this procedure.

Each Agreement states that Parties shall provide, upon request, information regarding the objective and rationale for a standard, technical regulation or conformity assessment procedure that the Party has adopted or is proposing to adopt and also provides for specific notification procedures related to the notifications made to the WTO:

- When publishing a notice under Articles 2.9 or 5.6 of the TBT Agreement (a notice of intent to introduce a particular technical regulation or conformity assessment procedure in the case when a relevant international standard or relevant guide or recommendation issued by an international standardizing body does not exist), the Party shall include in this notice a statement describing the objective and rationale of the proposal and transmit this electronically to the other Part(y)(ies) through the TBT inquiry points at the time it makes its WTO notification, and shall allow at least 60 days for persons and the other Part(y)(ies) to make comments on this proposal.

- When making a notification under Articles 2.10 or 5.7 of the TBT Agreement (notification of adoption of a technical regulation or conformity assessment procedure due to urgent problems of safety, health, environmental protection or national security or threats thereof) the Party shall transmit the notification electronically to the other Part(y)(ies).

Parties are to publish responses to significant comments. The time period for the Chile-U.S. FTA is at the same time as the publication of the final technical regulation or conformity procedure, while in DR-CAFTA, these are to be published no later than this publication date.

DR-CAFTA includes a provision, absent from the Chile-U.S. FTA, that requires Parties to immediately notify the importer when detaining goods due to a perceived failure to comply with technical regulations.

These transparency provisions are, in both Agreements, to be implemented as soon as possible, no later than five years form the date of entry into force of the Agreement (for the Chile-U.S. FTA this would be January 1, 2009).

Committee on Technical Barriers to Trade: both the Chile-U.S. FTA and DR-CAFTA establish a TBT Committee that is to meet at least once a year, unless otherwise agreed. The functions of the TBT Committee include monitoring the implementation and administration of the Chapter, consulting on matters arising under the Chapter, reviewing the Chapter in light of developments under the WTO TBT Agreement, and reporting to the Commission on the implementation of the Chapter; addressing issues Parties raise with respect to the development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures; enhancing cooperation in the development and improvement of standards, technical regulations or conformity assessment procedures; facilitating sectoral cooperation among governmental and nongovernmental conformity assessment bodies, and exchanging information on developments in non-governmental, regional and multilateral fora; and taking any other steps Parties consider useful in assisting them in meeting the objectives of implementing the TBT Agreement and facilitating trade among the Parties. DR-CAFTA includes an additional element, adding the designing and proposal of mechanisms for technical assistance, as set forth under Article 11 of the WTO TBT Agreement.

Information Exchange: in both Agreements, Parties agree to provide information or explanation requested, pursuant to the provisions of the Chapter, within a reasonable amount of time. DR-CAFTA operationalizes "reasonable" as being within 60 days.

Definitions: both Agreements adopt the definitions of the TBT Agreement for the terms central government body, conformity assessment procedures, standard and technical regulation. DR-CAFTA specifies that the term TBT Agreement refers to the WTO Agreement on Technical Barriers to Trade.

Chapter Eight

Trade Remedies

Chapter 8 of both Agreements deals with Trade Remedies, that is, Safeguard Measures in Section A and Antidumping and Countervailing Duties in Section B. The structure of Section A of these Chapters is identical. They each contain 7 Articles with the same titles. The only structural difference lies in the fact that DR-CAFTA has two additional Annexes, one with substantial provisions on the administration of safeguard proceedings, and the other with country-specific definitions. Important differences of detail are described below. With respect to Section B regarding Antidumping and Countervailing Duties, DR-CAFTA contains an additional provision relating to the continuation of special beneficiary status of the DR-CAFTA countries with respect to cumulation in determining material injury under U.S. domestic law.

Section A. Safeguards

Imposition of a Safeguard Measure: both Agreements recognize that in certain circumstances, a safeguard measure may be imposed on originating goods (Art.8.1). The safeguard measure can only be imposed during the transition period. Both Agreements define what is meant by "transition period" (Art.8.7). For the Chile-U.S. FTA, transition period means a term of 10 years except in those cases where a good is subject to tariff phase out in a 12-year period, in which case the transition period runs for those 12 years. In the case of DR-CAFTA, the transition period is for 10 years also, except for those goods subject to longer tariff phase outs, in which case the transition period is equal to the phase out period for that particular good. Further, the measure can only be imposed if there is an increase in imports, that is, a result of the reduction or elimination of a tariff pursuant to these Agreements. Such increase can be in absolute terms or relative to domestic production, and under such conditions as to constitute a substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive good. The measure can be imposed to prevent or remedy the serious injury or threat thereof and to facilitate adjustment. The measure cannot be a quantitative restriction or a tariff rate quota. It can only consist of a suspension of the tariff phase out or the increase of the tariff to a level not to exceed the lesser of the MFN applied rate of duty at the time the action is taken or the same rate in effect the day of entry into force of the Agreement. Given its multilateral nature, DR-CAFTA includes additional disciplines on the imposition of safeguards among the multiple Parties to the Agreement. In principle, DR-CAFTA states that a measure must be imposed irrespective of its source, but there are two caveats to this. A Party may exclude goods of another Party from the imposition of a safeguard if there is an Agreement between those two Parties which subjected that particular good to free trade during the previous three-year period. In other words, those goods that enjoyed free trade due to, for example, intra-Central American free trade, may be excluded from the application of a safeguard. The second caveat is that when the imports of a Party do not amount to more than 3 percent of total imports of that good into the territory of another Party, the safeguard measure cannot affect those imports. However, this is valid only when the collective imports of those countries with less than 3 percent amount to less than 9 percent of total imports.

Standards for a Safeguard Measure: the Agreements further establish basic standards for the application of a measure (Art.8.2). First, the measure cannot be applied for more than 3 years in

the case of the Chile-U.S. FTA and 4 years in the case of DR-CAFTA, and must be terminated at the end of the transition period. However, DR-CAFTA includes provisions to extend the application of the measure when there is a clear determination by the competent investigating authority that the industry is adjusting and that the measure is required to prevent or remedy serious injury and to facilitate adjustment. This provision is not included in the Chile-U.S. FTA. Both Agreements state that any measure applied for more than one year should be progressively liberalized and that a safeguard cannot be imposed more than once on the same good. The Chile-U.S. FTA establishes that a Party that imposes a safeguard measure on a good cannot impose or maintain a multilateral safeguard measure (WTO Agreement on Safeguards) on that good. DR-CAFTA does not include this provision here, but has a somewhat similar provision in paragraph 3 of Article 8.6. Lastly, the Agreements establish in similar terms the conditions for the continuation of the tariff phase out once the safeguard comes to an end.

Administration of Safeguard Proceedings: there are interesting differences in the way both Agreements deal with the administration of safeguard proceedings (Art.8.3). The Chile-U.S. FTA refers to investigation procedures and transparency requirements whereas DR-CAFTA refers more broadly to administration of safeguard proceedings. The Chile-U.S. FTA basically makes reference to specific disciplines in the WTO Agreement on Safeguards on investigation procedures and transparency. DR-CAFTA, instead, spells out the disciplines in the text and in an annex to Article 8.3. That Annex includes provisions on the institution of a proceeding, the specific content of a petition or complaint, the requirements for a public notice, the obligation to hold a public hearing to allow interested Parties and consumers to express their interest and views on the proposed measure, procedures for confidential information, rules of evidence of injury and causation, and provisions on the deliberation and publication of the findings of the investigation in the final report.

Notification and Consultation: both Agreements specify the different types of notifications that should be made between and among the Parties (Art.8.4). Both provide for notification of the initiation of a proceeding, the finding of serious injury or threat thereof, and the decision to apply or extend a safeguard. The Chile-U.S. FTA also specifies that the decision to modify a safeguard previously undertaken should be notified as well. DR-CAFTA does not include that provision. Both Agreements provide that a copy of the final report should be submitted to the other Parties. DR-CAFTA stipulates that there should be consultations among the Parties when there is a notification on the initiation of a proceeding or a finding of serious injury or threat thereof or when there is a final report coming out of an investigation. The Chile-U.S. FTA does not provide for this in the text.

Compensation: compensation and retaliation are two features of the safeguard mechanisms in both Agreements (Art.8.5). Despite minor drafting differences between the texts, the rights and obligations are basically the same in both substance and procedure. A Party applying a safeguard measure must provide compensation in the form of trade liberalizing concessions of equivalent commercial value or equivalent to the additional duties expected to result from the measure. Consultations should be carried out no later than 30 days after the application of the safeguard measure. However, if after those consultations there is no agreement on compensation, the affected Party may retaliate by suspending the application of substantially equivalent concessions to the trade of the safeguarding Party. The suspending Party should notify this action

to the safeguarding Party at least 30 days in advance. Lastly, the Article establishes the conditions under which the obligation to provide compensation and the right to suspend concessions cease: compensation is not due and suspension of concessions must end on the later of the termination of the safeguard measure or the date on which the rate of duty returns to the rate of duty set out in the Party's tariff elimination program in Annex 3.3.

Global Actions: both Agreements state that each Party retains its rights and obligations under Article XIX of GATT 1994 and the Safeguards Agreement (Art.8.6). The Chile-U.S. FTA states that this bilateral Agreement does not confer any additional rights and obligations with regard to action taken under the Article XIX of the GATT 1994 and the Safeguards Agreement. DR-CAFTA provides for the same, but has an important exception: a Party taking action under the GATT and/or the Safeguards Agreement may exclude imports of an originating good of another Party if such imports are not a substantial cause of serious injury or threat thereof. This provision is not contained in the Chile-U.S. FTA. Lastly, similar to the Chile-U.S. FTA Article 8.2.4, DR-CAFTA includes here a prohibition of applying simultaneously on the same good a safeguard measure under DR-CAFTA and a safeguard under Article XIX of the GATT 1994 and/or the Safeguards Agreement.

Definitions: specific terms are defined at the end of Chapter 8 (Art.8.7). Both Agreements include the same definitions for domestic industry, safeguard measure, serious injury, substantial cause, threat of serious injury, and transition period. With the exception of the differences in the definition of transition period pointed out above, the rest are identical. DR-CAFTA, however, includes a unique definition of "competent investigating authority", which is further defined in Annex 8.7, Country-Specific Definitions. This Annex defines the authority in each DR-CAFTA country that is in charge of administering safeguard proceedings.

Section B. Antidumping and Countervailing Duties

Both Agreements reaffirm that each Party retains its WTO rights and obligations with regard to the application of antidumping and countervailing duties (Art.8.8). Both also specify expressly that there are no rights or obligations created with respect to these measures, including recourse to dispute settlement procedures, under the respective FTA. DR-CAFTA provides as well that the United States shall continue to treat each other Party as a beneficiary country under the Caribbean Basin Economic Recovery Act subject to special rules on cumulation in the determination of material injury by the United States International Trade Commission (19 USC 1677(7)(G)(ii)(III) and 1677(7)(H) and any successor provisions) (Art.8.8.1 of DR-CAFTA). Essentially then, the Agreements do not add to or diminish the existing rights and obligations that the Parties concerned have under the WTO or U.S. domestic law.

Chapter Nine

Government Procurement

The Chile-U.S. FTA text consists of twenty Articles, including one on definitions and one Annex. A short preamble states the objectives of the Chapter. The only Annex (Annex 9.1) is divided into 8 sections[7] which list thresholds, entities at the central, sub-central level and other covered entities separately under each section. It also lists goods, services and construction services, provides threshold adjustment formulas and general notes. This last section is used to list each Party's horizontal exceptions to coverage. The text makes no cross-references to the WTO Government Procurement Agreement (GPA), (Chile has not signed the GPA but has observer status to the WTO GPA Committee).

The structure of DR-CAFTA is very similar to that of the Chile-U.S. FTA. The text consists of seventeen Articles including definitions and three Annexes. Annex 9.1.2(b)(i) applies between the U.S. and each other Party and Annex 9.1.2(b)(ii) applies between the Central American Parties. Annex 9.1.2(b)(iii) applies between the Central American Parties and the Dominican Republic. Annexes 9.1.2(b)(i) and Annex 9.1.2(b)(ii) are divided into nine sections while Annex 9.1.2(b)(iii) is divided into 5 sections[8]. The Chapter does not state any objectives. It also does not include provisions regarding issues such as the treatment of public information, the operation of a Committee on Procurement and further negotiations. Among all the Parties to this Agreement, only the U.S. is a signatory to the WTO GPA, consequently, as in the Chile-U.S. FTA text, this Agreement does not make any cross-references to the WTO Government Procurement Agreement.

Scope and Application and Exceptions: there are some differences in the content and language of this Article regarding the application of the Chapter and the obligation of the Parties to ensure that their entities comply with the Chapter. The Chile-U.S. FTA establishes the scope as applicable to *any measure* adopted or maintained by a Party as it relates to a procurement by any contractual means, undertaken by a listed entity and subject to the conditions established in the Annex. In contrast DR-CAFTA, seems to expand the scope to *any measure, including any act or guideline* of a Party, regarding a covered procurement. It then defines a "covered procurement" as a procurement of goods, services or both by any contractual means that is subject to the conditions specified in the Annex, as applicable among the respective Parties, that is conducted by a procuring entity and is not excluded from coverage. The exclusions to the Scope and Coverage of the Chapter in the Agreements are basically the same; however, for procurements between the U.S. and the other Parties, DR-CAFTA also excludes any good or service component of any contract of a procuring entity that is not listed under the covered entities in Annexes. In addition, DR-CAFTA also excludes firesales, or purchases made under

[7] Annex 9.1 - Section A: Central Level Government Entities; Section B: Sub-Federal or Sub-Central Level Government Entities; Section C: Other Covered Entities; Section D: Goods; Section E: Services; Section F: Construction Services; Section G: Threshold Adjustment Formulas; Section H: General Notes

[8] Annex 9.1.2 (b)(i) and Annex 9.1.2 (b)(ii)- Section A: Central Level Government Entities; Section B: Sub-Central Level Government Entities; Section C: Other Covered Entities; Section D: Goods; Section E: Services; Section F: Construction Services; Section G: General Notes; Section H: Threshold Adjustment Formulas; Section F: Transition Mechanisms. Annex 9.1.2 (b)(iii) - Section A: Entities; Section B: Goods; Section C: Services; Section D: Construction Services; Section E: General Notes.

exceptionally advantageous conditions such as a business in liquidation. Articles 9.16 and 9.14 concerning Exceptions in both Chile and DR-CAFTA respectively, replicate the same text, allowing the use of restrictive trade measures on grounds that the measure is necessary to protect public morals, human, animal or plant life, intellectual property and goods and services made by handicapped persons, philanthropic institutions and prison labor.

General Principles: the Chile-U.S. FTA organizes this Article into four sections: (1) National Treatment and Non-Discrimination; (2) Determination of Rules of Origin; (3) Offsets and (4) Measures Not Specific to Procurement. Although DR-CAFTA does not use subheadings, it respects the order almost exactly and mirrors most of the same Chile-U.S. FTA text. The difference between the Agreements is found in the subsection dealing with Determination of Rules of Origin. The Chile-U.S. FTA is the only FTA that establishes that non-preferential rules should be used as the basis for the application of provisions of non-discrimination. In contrast, DR-CAFTA states that the determination of origin shall be consistent with the Chapter on Rules of Origin, which are preferential in nature.

Publication of Procurement Measures: while the spirit of disclosure is the same in Article 9.3 of both FTAs, the scope differs. The Chile-U.S. FTA stipulates that "measures of general application" and "any changes in such measures" shall be published, whereas DR-CAFTA stipulates that "any law and regulation and the modification thereof", and "any procedure, judicial decision or administrative ruling of general application relating to procurement" shall be published. DR-CAFTA also adds a subparagraph that requires a Party to provide to the other Party, upon request, a copy of a procedure, judicial decision or administrative ruling relating to procurement.

Publication of Notice of Intended Procurement: the content of the Notice of Intended Procurement for procurement covered by the Agreements is very similar, but there are a few differences. The Chile-U.S. FTA sets forth the type of information that is to be included in the notice, which is essentially the same for both Agreements. In contrast, DR-CAFTA explicitly gives the procuring entity flexibility to provide additional information in the notice so long as the minimum requirements enumerated by this Article are included. DR-CAFTA also requires the procuring entity to indicate that the procurement is covered by the Agreement, to provide notice for any fee associated with the purchase of the tender documentation as well as to provide the address for the submission of tenders. Concerning the duration of the publication, Chile states that the notice "shall be accessible during the entire period established for tendering for the relevant procurement" whereas DR-CAFTA is silent on the matter. Additionally, DR-CAFTA adds a paragraph encouraging entities to publish future procurement plans as early as possible in the fiscal year. Chile locates this provision in Article 9.17.3 on Public Information.

Time Limits: the Chile-U.S. FTA establishes a 30-day time period between publication of the Notice of Intended Procurement and the submission of tenders. DR-CAFTA provides for 40 days for the same. DR-CAFTA does not include a provision for recurring procurement.

Information on Intended Procurement/or Tender Documentation: the texts are essentially the same and present only minor differences. DR-CAFTA adds a short sentence whereby a procuring entity may satisfy the dissemination requirement by publishing the tender

documentation by electronic means that is accessible to all interested suppliers. In a departure from the Chile-U.S. FTA, DR-CAFTA makes one important change to the timing of modifications in a footnote. The five Central American countries may make modifications to the information provided to suppliers prior to the opening of tenders whereas the U.S. may make modifications prior to the award of contracts. The Chile-U.S. FTA is silent on the matter.

Technical Specifications and Conditions for Participation: there are no substantive differences between the texts in these sections. The Articles on Technical Specifications establish that entities shall not prepare, adopt, or apply any technical specification (TS) with the purpose or the effect of creating unnecessary obstacles to trade between the Parties. In addition, the Article on Conditions for Participation incorporates some stylistic changes in the language in DR-CAFTA, while preserving the primary intent. These Articles stipulate the procedures for qualification of suppliers and prohibits certain barriers that limit the participation of suppliers.

Tendering Procedures: both the Chile-U.S. FTA and DR-CAFTA establish the use of open tendering procedures as the default methodology; however, Article 9.9.2 of both Agreements describe the conditions and circumstances where alternative tendering procedures are allowed. It should be noted that Article 9.17 defines "Open Tendering" as "any type of procurement method of a Party, except direct purchasing methods as specified in Article 9.9.2".

Awarding Contracts/Information on Contract Awards: both FTAs prescribe similar procedures, although there are some stylistic differences such as the elimination of subheadings under DR-CAFTA in this Article. The Article establishes the conditions for a tender to be considered for award, specifying that an entity shall award the contract to the supplier considered to be fully capable of performing in accordance with the criteria provided in the tender documentation. Paragraph three stipulates that an entity may not cancel procurement, or terminate or modify a contract that has been awarded in order to avoid the obligations of the Chapter. Both Agreements require that participating suppliers be notified of decisions concerning contract awards and provide information to suppliers who were not selected. Both Agreements also require the publication of information concerning the winning contract award. In addition, a record-keeping requirement is established for a period of no less than three years.

Ensuring Integrity in Procurement Practices: both Agreements contain an Article on this subject; however, there are major differences between the two. The Chile–U.S. FTA criminalizes actions by procurement officials, of any Party, that solicit or accept any gift, article, money or any benefit. Also, actions by any individual, directly or indirectly, in exchange for actions affecting procurement officials' decisions are made illegal. In contrast, DR-CAFTA does not make violations of this Article a criminal offense but rather precludes a supplier from participating in the procurement. The Article requires each Party to adopt or maintain procedures, pursuant to Article 18.8 concerning Anti-Corruption Measures, that would have the effect of declaring ineligible for participation in the Party's procurements, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions relating to procurement. DR-CAFTA also provides for the exchange of the information among the Parties regarding those suppliers.

Domestic Review and Challenge Mechanisms: there are differences between the two Articles concerning interim measures that may be taken by the impartial authority. The Chile-U.S. FTA states that the authority must act "to preserve the supplier's opportunity to participate in the procurement and to ensure that the Party complies with its measures implementing this Chapter." In contrast, DR-CAFTA states that the authority may take prompt interim measures "to preserve the opportunity to correct potential breaches of this Chapter."

Modifications and Rectifications: regarding the procedures for modifications and rectifications, DR-CAFTA uses the Chile text as the model and makes some adjustments. First, DR-CAFTA adds the word "technical" to qualify "rectifications of a purely formal nature." Second, in the Chile-U.S. FTA case, where the Parties agree to a proposed modification, rectification or minor amendment, where there have been no objections with the 30 day period established for such modifications and rectifications, the Commission shall immediately reflect such changes in coverage in the Annex. In contrast, DR-CAFTA does not require agreement among the Parties, but rather proceeds directly to action undertaken by the Commission.

Non-Disclosure of Information: paragraph 1 of both Articles serves as the basis for the protection of confidential information unless disclosure is formally authorized or the conditions established in paragraph 2 are met. Article 9.15 (2) of the Chile-U.S. FTA states that "Nothing in this Chapter *shall be construed* as requiring a Party or its entities *to disclose confidential information* the disclosure of which *would impede law enforcement* or *otherwise be contrary to the public interest*". DR-CAFTA redrafts this paragraph and expands the instances under which information may be released without the consent of the source of the information. Article 9.12 (2) of DR-CAFTA states that "Nothing in this Chapter *shall prevent* a Party or their procuring entities *from withholding the release of information where release might impede law enforcement; ...or otherwise be contrary to the public interest...*". In addition to the two elements established in the Chile-U.S. FTA, DR-CAFTA determines that "the prejudice of fair competition between suppliers and the prejudice of the legitimate commercial interests of particular suppliers or entities, including the protection of intellectual property" are also justification for withholding the release of information.

Definitions: both Agreements contain basically the same definitions. DR-CAFTA adds definitions for "Open Tendering Procedures"; "Procuring Entity"; and "Services." DR-CAFTA does not include a definition for "International Standard," and "Procurement Official" as the Chile-U.S. FTA does. Both the Chile-U.S. FTA and DR-CAFTA employ the same definition for "Entity" and "Procuring Entity," respectively.

Market Access

- **Thresholds**

This Chapter covers a contract only if its value is the same or above thresholds specified in the corresponding annexes. The following is a summary table of the established thresholds by levels of governments in each Agreement:

TABLE 9.1: Thresholds for Goods, Services and Construction Services

	Federal Level *Threshold for Goods and Services*	**Sub-Federal Level** *Threshold for Goods and Services*	**Other Entities** *Threshold for Goods and Services*	**All levels** *Threshold for Construction Services*
Chile–U.S. FTA	US$56,190	US$460,000	US$280,951 US$518,000[1]	US$6,481,000
DR-CAFTA	US$58,550 US$117,100 *	US$477,000 US$650,000 *	US$250,000 US$538,000[1]	US$6,725,000 US$8,000,000*

* For Central American Countries and the Dominican Republic for a 3-year-period.
1. For specified American entities (List B)

The calculations of thresholds of goods and services shall be made in accordance with **Section G for Chile and Section H for DR-CAFTA**: **Threshold Adjustment Formulas**. There are differences between both Agreements. Paragraph 2 for Chile, and paragraphs 2 and 3 for DR-CAFTA establish that thresholds for goods and services in Sections A through C shall be adjusted according to inflation, calculated by a given formula and measured by the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics and will be adjusted in two year intervals. Chile also applies the formula to construction services. DR-CAFTA establishes that thresholds for construction services in Section A and thresholds to List B entities in Sections B and C are the same as in the U.S. Appendix 1 to the GPA[9], and they shall be adjusted based on the daily conversion rates of the U.S. dollar in terms of Special Drawing Right (SDR). Chile does not have such provision. All Parties, except for El Salvador, which will use the value expressed by the United States in U.S. dollars, shall convert the U.S. dollar into its own currency. Adjustments should also be made every two years.

- **Covered Entities**

In accordance with the reference to the Annexes established under the Articles 9.1 concerning the Scope and Coverage of the Agreements, the following table lists the number of covered entities according to the level of governments, for each Party, for each Agreement.

[9] WTO Government Procurement Agreement

TABLE 9.2: Number of Covered Entities

	Federal level	Sub-Federal level	Other Entities
Chile	20 central agencies 52 regional governments	341 Municipalities	11
United States in the Chile-U.S. FTA	79	36 States	16
Costa Rica	22	81 Municipalities	13
Dominican Republic	22	31 States	15
El Salvador	11	25 Municipalities	58
Guatemala	35	30 Municipalities	19
Honduras	16	142 Municipalities	10
Nicaragua	15	88 Municipalities	32
United States in DR-CAFTA	79	23 States[A] 17 States[B]	7

A. Costa Rica, the Dominican Republic, El Salvador, Guatemala and Nicaragua will have access to the sub-central government entities included in List A.
B. Honduras will only have access to the sub-central government entities included in List B.

- **Goods and Services Covered (Sections D, E, F)**

Both FTAs use negative lists for goods and services including construction services. Chile's only exception in goods or services, including construction is financial services. In addition to lists in Sections D, E, and F, the five Central American countries, DR and the United States utilize notes to Sections A-C (entities) to list other goods and services that are not to be procured by specific entities covered by the Agreement. Among goods often exempted from the procurement of specific entities by the five Central American countries and DR are food products, beverages and tobacco, textiles, apparel, and leather products. Country's list of services varies. El Salvador excludes no services.

- **Horizontal Exclusions from Market Access Commitments (Section H in Chile, Section G in DR-CAFTA: General Notes)**

The United States excludes set-asides for small and minority programs in both Chile and DR-CAFTA. Set asides include any form of preference, such as the exclusive right to provide a good or service and price preferences. Chile has no exclusions. All Central American countries and the Dominican Republic exclude purchases between government entities. In addition, Costa Rica and the Dominican Republic exclude programs for Small, Medium and Micro enterprises. This last country also excludes government procurement programs of public health, in support of human feeding programs, to promote the alleviation of poverty, the protection of women, children or adolescents, the border with Haiti and the disposal of toxic waste. Guatemala excludes procurement of unrefined minerals naturally occurring in Guatemala and the construction of public works. Nicaragua may apply a price preference program for small, medium and micro enterprises whose characteristics are described in the Chapter. If, following the entry into force of this Agreement between the United States and

Nicaragua, Nicaragua proposes to implement a procurement measure that is intended to promote the development of its small, medium and micro enterprises, but that would not be consistent with this Chapter, Nicaragua shall consult with the United States. If the United States and Nicaragua agree on the need and terms and conditions for such a measure, Nicaragua shall be permitted to implement the measure.

- **Transition Mechanisms (Section I)**

DR-CAFTA provides for differential thresholds for the five Central American countries and the Dominican Republic for a 3-year-period. For the three years following the entry into force of the GP Chapter, the thresholds for procurement of goods, services and construction services by the covered entities shall be higher than for the U.S. (*see table of Thresholds*). At the end of the three-year period, the thresholds shall be the same threshold applied by the United States for the procurement of goods, services and construction services by the covered entities. Chile does not include a similar provision. Also, the Agreement establishes that each Party will make its best effort during the two years following the date of entry into force to comply with the obligations in this Section; after that, all Parties shall fully comply with the Agreement.

Other transition mechanisms for the five Central American countries are:

Costa Rica (during the two years following the entry into force of this Agreement)
1. Article 9.4.2 (inclusion of an indication that the procurement is covered by this Chapter in the notice of intended procurement)
2. Article 9.5.1 (40 days time limit for the tendering process)
3. Article 9.6.3 (written communication of modification to tender documentation)
4. Article 9.11.2 (publication of a notice regarding the contract award)
5. Article 9.15.6(a) (period provided to suppliers to prepare and submit written challenges)

Costa Rica
1. Article 9.5.1: For the tendering process set out in Article 9.5.1, Costa Rica shall provide at least 30 days for procurement made through the *Licitación Pública* and at least ten days for procurement made through the *Licitación por registro.*
2. Article 9.15.6(a): Costa Rica shall provide at least three days for suppliers to prepare and submit written challenges under Article 9.15.6(a).

Dominican Republic
1. Article 9.3 (make publicly available judicial decisions and administrative rulings of general application governing procurement)
2. Article 9.4.2 (inclusion of an indication that the procurement is covered by this Chapter in the notice of intended procurement)
3. Article 9.5.1 (40-days time limit for the tendering process)
4. Article 9.9.3 (only for preparation of written reports for the awarding of contracts using direct purchasing)
5. Article 9.11.2 (publication of a notice regarding the contract award)

6. Article 9.13 (establishment and maintenance of procedures that declare a supplier ineligible for participation)

Notes to the Dominican Republic Schedule
1. Article 9.3: The Dominican Republic shall provide to the other Parties any judicial decision and administrative ruling of general application governing procurement.
2. Article 9.5.1: The Dominican Republic shall provide at least 30 days for the tendering process set out in Article 9.5.1.

Guatemala (during the two years following the entry into force of this Agreement)
1. Article 9.4.2 (inclusion of an indication that the procurement is covered by this Chapter in the notice of intended procurement)
2. Article 9.5.1 (40 days time limit for the tendering process)
3. Article 9.6.3 (written communication of modification to tender documentation)
4. Article 9.11.2 (publication of a notice regarding the contract award)
5. Article 9.13 (establishment and maintenance of systems that declare a supplier ineligible for participants)
6. Article 9.15.6(a) (period provided to suppliers to prepare and submit written challenges)

Notes to Guatemala
1. Article 9.5.1: For the tendering process set out in Article 9.5.1,Guatemala shall provide at least eight days for suppliers to submit tenders following the publication of the notice of intended procurement.
2. Article 9.13: Guatemala shall not adopt any measure that weakens its current practice with respect to Article 9.13.

Honduras (during the two years following the entry into force of this Agreement)
1. Article 9.4.2 (inclusion of an indication that the procurement is covered by this Chapter in the notice of intended procurement)
2. Article 9.5.1 (40 days time limit for the tendering process)
3. Article 9.6.3 (written communication of modification to tender documentation)
4. Article 9.11.2 (publication of a notice regarding the contract award)
5. Article 9.15.6(a) (period provided to suppliers to prepare and submit written challenges)

Honduras
1. Article 9.5.1: Honduras shall provide at least 15 days for the tendering process set out in Article 9.5.1, except for build-operate-transfer or public works concession contracts, in which case Honduras shall provide at least 30 days for the tendering process.
2. Article 9.15.6(a): Honduras shall provide at least five days for the period provided to suppliers to prepare and submit written challenges set out in Article 9.15.6(a).

Nicaragua (during the two years following the entry into force of this Agreement)
1. Article 9.4.2 (inclusion of an indication that the procurement is covered by this Chapter in the notice of intended procurement)
2. Article 9.5.1 (40 days time limit for the tendering process)
3. Article 9.6.3 (written communication of modification to tender documentation)

4. Article 9.11.2 (publication of a notice regarding the contract award)
5. Article 9.13 (establishment and maintenance of systems that declare a supplier ineligible for participants)

- **Transition Mechanisms for Coverage of Construction Services – The Dominican Republic (Section J)**

This Section allows the Dominican Republic to maintain these specific offsets:
(a) a requirement that a foreign supplier seeking to participate in a procurement covered by this Chapter must be associated with an enterprise established under the laws of the Dominican Republic, that is capitalized with Dominican or mixed Dominican and foreign capital, and where the share held by the foreign supplier in the association is limited to no more than 50 percent, which may be increased to 70 percent depending on the availability of Dominican capital; and
(b) a requirement that 50 percent of the management of a procurement covered by this Chapter be comprised of Dominican nationals.

The offsets can be applied using the following guidelines:
(a) shall clearly describe the offset in the notice of intended procurement or notice inviting suppliers to participate in the procurement and in relevant tender documentation;
(b) shall conduct the procurement in accordance with the procedures in this Chapter;
(c) shall apply the offset in a non-discriminatory manner that does not provide U.S. suppliers with treatment that is less favorable than the treatment given to suppliers of any other foreign country; and
(d) may not require suppliers to purchase goods or services on non-competitive terms or of substandard quality, or to take any action that is not justified from a commercial standpoint.

The limitations permitted under paragraph 1 shall be reduced over a period of 15 years as follows:
(a) 40 percent for any procurement initiated after the beginning of the sixth year after the date of entry into force of this Agreement and until the end of the tenth year after the date of entry into force of this Agreement;
(b) 30 percent for any procurement initiated after the beginning of the 11th year after the date of entry into force of this Agreement and until the end of 12th year after the date of entry into force of this Agreement; and
(c) 20 percent for any procurement initiated after the beginning of 13th year after the entry into force of this Agreement.

During the 13th year after the date of entry into force of this Agreement, the Dominican Republic and the United States shall enter into consultations with regard to the treatment of the offsets described in paragraph 1, following the end of the 15-year period referred to in paragraph 3, with a view to the elimination of the offsets. The consultations shall take into consideration, *inter alia*, the general and economic developments in the Dominican Republic, its implementation of this Chapter, and the need to maintain the offsets. If, by the end of the 15th year after the date of entry into force of this Agreement, the Dominican Republic and the United States are unable to reach agreement on the treatment of the offsets from the end

of the 15th year, the United States may reduce the access that it accords to the Dominican Republic, as set out in the Schedules of the United States to this Annex.

At the end of each period specified in paragraph 3, the Dominican Republic shall provide written reports to the United States on the implementation of the transitional mechanism provided for in this Section.

Chapter Ten

Investment

In the Chile-U.S. FTA and DR-CAFTA, the investment provisions are set forth in Chapter 10, which is divided into three sections, in addition to the annexes to the Chapter. Section A contains the substantive obligations of the Chapter, whereas Section B includes the investor-State dispute settlement procedures and Section C the Chapter's definitions.

While both Chapters are very similar in terms of substance and structure, there are a few notable differences. Section A in the Chile-U.S. FTA contains thirteen Articles and in DR-CAFTA fourteen. Both Agreements include Articles on scope and coverage (Chile-U.S. FTA Art.10.1 and DR-CAFTA Art.10.1), national treatment (Chile-U.S. FTA Art.10.2 and DR-CAFTA Art.10.3), most-favored-nation (MFN) treatment (Chile-U.S. FTA Art.10.3 and DR-CAFTA Art.10.4), minimum standard of treatment (Chile-U.S. FTA Art.10.4 and DR-CAFTA Art.10.5), performance requirements (Chile-U.S. FTA Art.10.5 and DR-CAFTA Art.10.9), senior management and boards of directors (Chile-U.S. FTA Art.10.6 and DR-CAFTA Art.10.10), non-conforming measures (Chile-U.S. FTA Art.10.7 and DR-CAFTA Art.10.13), transfers (Chile-U.S. FTA Art.10.8 and DR-CAFTA Art.10.8), expropriation and consultation (Chile-U.S. FTA Art.10.9 and DR-CAFTA Art.10.7), special formalities and information requirements (Chile-U.S. FTA Art.10.10 and DR-CAFTA Art.10.14), denial of benefits (Chile-U.S. FTA Art.10.10 and DR-CAFTA Art.10.12), and investment and environment (Chile-U.S. FTA Art.10.12. and DR-CAFTA Art.10.11). DR-CAFTA also contains an Article entitled Relation to Other Chapters (Art.10.2). This issue is covered under scope and coverage (Art.10.1) in the Chile-U.S. FTA. DR-CAFTA also contains an Article on treatment in case of strife (Art.10.6). This issue is covered in the Article on minimum standard of treatment (Art.10.4) in the Chile-U.S. FTA. Finally, an Article on implementation is included in the Chile-U.S. FTA (Art.10.13) but not in DR-CAFTA.

Section B contains thirteen Articles detailing the investor-State dispute settlement procedures. These Articles cover the following issues: consultation and negotiation (Chile-U.S. FTA Art.10.14, and DR-CAFTA Art.10.15), submission of a claim to arbitration (Chile-U.S. FTA Art.10.15 and DR-CAFTA Art.10.16), consent of each Party to arbitration (Chile-U.S. FTA Art.10.16 and DR-CAFTA Art.10.17), conditions and limitations on consent of each Party (Chile-U.S. FTA Art.10.17 and DR-CAFTA Art.10.18), selection of arbitrators (Chile-U.S. FTA Art.10.18 and DR-CAFTA Art.10.19), conduct of the arbitration (Chile-U.S. FTA Art.10.19 and DR-CAFTA Art.10.20), transparency of arbitral proceedings (Chile-U.S. FTA Art.10.20 and DR-CAFTA Art.10.21), governing law (Chile-U.S. FTA Art.10.21 and DR-CAFTA Art.10.22), interpretation of annexes (Chile-U.S. FTA Art.10.22 and DR-CAFTA Art.10.23), expert reports (Chile-U.S. FTA Art.10.23 and DR-CAFTA Art.10.24), consolidation (Chile-U.S. FTA Art.10.24 and DR-CAFTA Art.10.25), awards (Chile-U.S. FTA Art.10.25 and DR-CAFTA Art.10.26), and service of documents (Chile-U.S. FTA Art.10.26 and DR-CAFTA Art.10.27).

Section C on definitions (Chile-U.S. FTA Art.10.27 and DR-CAFTA Art.10.28) covers the following terms: Centre, claimant, disputing Parties, disputing party, enterprise, enterprise of a Party, freely usable currency, ICSID Additional Facility Rules, ICSID Convention, Inter-

American Convention, investment, investment authorization, investor of a non-Party, investor of a Party, New York Convention, non-disputing Party, respondent, Secretary-General, tribunal, and UNCITRAL Arbitration Rules. The Chile-U.S. FTA also includes a definition of the term "monopoly," whereas DR-CAFTA includes a definition of the term "protected information".

The Chile-U.S. FTA contains eight annexes, whereas DR-CAFTA has seven. Both Agreements include annexes on customary international law, public debt, expropriation, submission of a claim to arbitration, service of documents on a Party under Section B, and appellate body or similar mechanism. The Chile-U.S. FTA also contains an annex on special dispute settlement provisions (Chile) and an annex on Chile's investment law (*Decreto Ley 600 de 1974*), whereas DR-CAFTA has a special annex on treatment in case of strife for Guatemala.

Section A: Investment

Scope and Coverage and Relation to Other Chapters: while all elements of scope and coverage are addressed in one single provision, Article 10.1, in the Chile-U.S. FTA, DR-CAFTA contains scope-related issues in Article 10.1 on scope and coverage and Article 10.2 on relation to other Chapters. Both Agreements set in identical terms that the Investment Chapter applies to measures adopted or maintained by a Party relating to: investors of another Party, covered investments, and with respect to performance requirements and investment and environment all investment in the territory of the Party (Art.10.1.1 in both texts). The provision on scope in the Chile-U.S. FTA and the provision on relation to other Chapters in DR-CAFTA also clearly state that in the case of a requirement by a Party that a service provider of another Party post a bond or other form of financial security as a condition "of providing a service into its territory" (Chile-U.S. FTA Art.10.1.3) or "of the cross-border supply of a service" (DR-CAFTA Art.10.2.2), the Investment Chapter will apply "to that Party's treatment of the posted bond or financial security"(Chile-U.S. FTA Art.10.1.3) or "to the extent that such bond or financial security is a covered investment" (DR-CAFTA Art.10.2.2). Exempted from the scope of the Chapter are measures adopted or maintained by a Party to the extent that they are covered by the Chapter on Financial Services (Chile-U.S. FTA Art.10.1.4 and DR-CAFTA Art.10.2.3). The provision on scope also states that the Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of the Agreement (Chile-U.S. FTA ftnt. 1 and DR-CAFTA Art.10.1.3). DR-CAFTA includes an additional provision in the provision on scope stating that a Party's obligations under Section A shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party (DR-CAFTA Art.10.1.2). The provision on scope in the Chile-U.S. FTA and the provision on relation to other Chapters in DR-CAFTA state that in the event of any inconsistency between the Investment Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency (Chile-U.S. FTA Art.10.1.2 and DR-CAFTA Art.10.2.1).

National Treatment: the provision is identical in both Agreements (Chile-U.S. FTA Art.10.2 and DR-CAFTA Art.10.3). It sets out the requirements to accord to investors of another Party and to covered investments "treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments..." National

treatment is granted in all phases of an investment. With respect to a regional level of government, the treatment afforded is "no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part".

Most-Favored-Nation (MFN) Treatment: the Chile-U.S. FTA Art.10.3 sets out the requirements to accord to investors of another Party and to covered investments "treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments...". The wording of DR-CAFTA Art.10.4 also covers other Parties and states the requirements to accord to investors of another Party and to covered investments "treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments". MFN treatment is granted in all phases of an investment.

Minimum Standard of Treatment: the provision on minimum standard of treatment is identical in both Agreements. It states that each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security (Chile-U.S. FTA Art.10.4.1 and DR-CAFTA Art.10.5.1). The provision prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The Agreements clarify that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights (Chile-U.S. FTA Art.10.4.2 and DR-CAFTA Art.10.5.2). The Chapter also states that a determination that there has been a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article (Chile-U.S. FTA Art.10.4.3 and DR-CAFTA Art.10.4.3). Both Agreements state that the Article on minimum standard of treatment shall be interpreted in accordance with the Annex on Customary International Law (Chile-U.S. FTA ftnt. 2 and DR-CAFTA ftnt. 1).

Treatment in Case of Strife: the treatment in case of strife is included in the provision on minimum standard of treatment in the Chile-U.S. FTA, whereas there is an Article on treatment in case of strife in DR-CAFTA (Art.10.6). The text states that each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife (Chile-U.S. FTA Art.10.4.4 and DR-CAFTA Art.10.6.1). Exempted are existing measures relating to subsidies or grants (Chile-U.S. FTA Art.10.4.6 and DR-CAFTA Art.10.6.3).

Both Agreements call for restitution or compensation to the investor when he suffers a loss in the territory of another Party resulting from requisitioning of its covered investment or part thereof by the latter's forces or authorities; or destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation. The Chile-U.S. FTA states that compensation has to be "prompt, adequate, and effective" (Chile-U.S. FTA Art.10.4.5), whereas DR-CAFTA states that it "shall be in accordance with customary

international law" (DR-CAFTA Art.10.6.2). Annex 10-D of DR-CAFTA sets out limitations for the submission to arbitration under Section B of a claim alleging a breach of paragraph 10.6.2. It states that no investor may submit to arbitration under Section B of the Investment Chapter a claim alleging that Guatemala has breached the Article on treatment in case of strife as a result of an armed movement or civil disturbance and that the investor has incurred loss or damage by reason of or arising out of such movement or disturbance. A similar provision exists for investors of Guatemala with respect to other Parties.

Performance Requirements: both Chapters (Chile-U.S. FTA Art.10.5 and DR-CAFTA Art.10.9) prohibit a list of seven performance requirements as a condition or requirement imposed on an investor of a Party or of a non-Party in all phases of an investment. Some of these performance requirements (requirements to locate production, supply a service, train or employ workers, construct or expand particular facilities or carry out research and development) may be allowed when they condition the conferral of an advantage.

The prohibition on requiring to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory does not apply when a Party authorizes use of an intellectual property right in accordance with Article 31 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.

The Article on performance requirements in both Chapters provide that requirements to achieve given levels of domestic content or to purchase local goods and services are allowed, provided that they are not applied in an arbitrary or unjustifiable manner or do not constitute a disguised restriction, if these measures are necessary: to secure compliance with laws and regulations that are not inconsistent with the provisions of the Agreement; to protect human, animal or plant life or health; or for the conservation of exhaustible natural resources.

Finally, the provision on performance requirements does not apply to some of the prohibited requirements with respect to export promotion and foreign aid programs, procurement to a state enterprise, as well as the content of goods necessary to qualify for preferential tariffs or preferential quotas, in the case of an importing Party.

Senior Management and Boards of Directors: the text is identical in both Chapters (Chile-U.S. FTA Art.10.6 and DR-CAFTA Art.10.10) and states that no Party may require that an enterprise of that Party appoint to senior management positions individuals of any particular nationality. These Agreements also mention that a Party may require that a majority of the board of directors of an enterprise that is an investment under the Agreement be of a particular nationality, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Non-Conforming Measures: the text is identical in both Agreements (Chile-U.S. FTA Art.10.7 and DR-CAFTA Art.10.13) and allows for the maintenance of existing non-conforming measures with respect to the core disciplines of the Investment Chapter as set out in the Articles on national treatment, MFN treatment, performance requirements, and senior management and boards of directors. Such non-conforming measures may be maintained at the central level of government, the regional level of government, and the local level of government. Existing non-conforming measures maintained at the first two levels of government must be specified in an annex to the Agreements (Annex I). Future non-conforming measures (to which the Articles on national treatment, MFN treatment, performance requirements, and senior management and boards of directors do not apply) are set out in another annex to the Agreement (Annex II). These latter measures that apply to sectors, sub-sectors or activities, effectively constitute permanent exceptions to the Agreement.

If an existing non-conforming measure set out in Annex I is made less non-conforming or eliminated, it cannot subsequently be amended by or replaced with a new measure that is more non-conforming ("ratcheting").

Both Agreements also state that the Articles on national treatment, MFN treatment, and senior management and boards of directors do not apply to procurement, or subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance. Moreover, the Articles on national treatment and MFN treatment do not apply to any measure that is an exception to, or derogation from, the obligations under the Article on general provisions in the Chapter on Intellectual Property Rights.

Transfers: both Agreements (Chile-U.S. FTA Art.10.8 and DR-CAFTA Art.10.8) state that each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Parties must allow transfers to be made in a freely usable currency (as defined in the IMF Articles of Agreement) at the market rate of exchange prevailing on the date of transfer. Both the Chile-U.S. FTA and DR-CAFTA allow for exceptions or limitations. Hence, a Party may prevent a transfer through the equitable, nondiscriminatory, and good faith application of its laws relating to: bankruptcy, insolvency, or the protection of the rights of creditors; issuing, trading, or dealing in securities, futures, or derivatives; criminal or penal offenses; financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or ensuring compliance with orders or judgments in judicial or administrative proceedings (Chile-U.S. FTA Art.10.8.5 and DR-CAFTA Art.10.8.4). The Chapters permit returns in kind and the Chile-U.S. FTA allows for limitations to the transfers of returns in kind.

Expropriation and Compensation: both Agreements include a provision (Chile-U.S. FTA Art.10.9 and DR-CAFTA Art.10.7) that prohibits a Party from expropriating or nationalizing a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization except when done for a public purpose, in a non-discriminatory manner, on payment of a prompt, adequate, and effective compensation, and in accordance with due process of law. Compensation must: be paid without delay, be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"), not reflect any change in value occurring because the intended expropriation had

become known earlier; and be fully realizable and freely transferable. The Article on expropriation and compensation does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such revocation, limitation, or creation is consistent with the Chapter on Intellectual Property Rights. The Article on expropriation and compensation must also be interpreted in accordance with the Annex on Customary International Law and the Annex on Expropriation.

Special Formalities and Information Requirements: both Agreements (Chile-U.S. FTA Art.10.10 and DR-CAFTA Art.10.14) states that nothing in the Article on national treatment must be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to the Investment Chapter. Moreover, notwithstanding the Articles on national treatment and MFN treatment, a Party may require an investor of another Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes.

Denial of Benefits: both Agreements (Chile-U.S. FTA Art.10.11 and DR-CAFTA Art.10.12) state that a Party may deny the benefits of the Investment Chapter to an investor of another Party that is an enterprise of such other Party and to the investments of that enterprise if an investor of a non-Party owns or controls the enterprise and the denying Party does not maintain diplomatic relations with the non-Party; or adopts or maintains measures with respect to the non-Party or an investor of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the Investment Chapter were accorded to the enterprise or to its investments. Although the wording is a bit different, both Agreements state that a Party may deny the benefits of the Investment Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and investors of a non-Party, or of the denying Party, own or control the enterprise.

Investment and Environment: both Agreements (Chile-U.S. FTA Art.10.12 and DR-CAFTA Art.10.11) state that nothing in the Investment Chapter is construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with the Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Implementation: the Chile-U.S. FTA (Art.10.13) states that the Parties must consult annually to review the implementation of the Investment Chapter and consider any investment matter of mutual interest.

Section B: Investor-State Dispute Settlement Procedures

Consultation and Negotiation: in the event of an investment dispute, both Agreements (Chile-U.S. FTA Art.10.14 and DR-CAFTA Art.10.15) call for the claimant and the respondent to initially seek to resolve the dispute through consultation and negotiation.

Submission of a Claim to Arbitration: both Agreements (Chile-U.S. FTA Art.10.15 and DR-CAFTA Art.10.16) stipulate that in the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation, the claimant may submit to arbitration under Section B of the Investment Chapter a claim that the respondent has breached a substantive obligation under Section A (or Annex 10-F in the Chile-U.S. FTA), an investment authorization, or an investment Agreement; and that the claimant has incurred loss or damage by reason of, or arising out of, that breach. The Chile-U.S. FTA (Art.10.15.2) also states that a claimant may submit to arbitration under Section B a claim that the respondent has breached an obligation under Section A or Annex 10-F through the actions of a designated monopoly or a state enterprise exercising delegated government authority as described in Article 16.3.3(a) (Designated Monopolies) and Article 16.4.2 (State Enterprises), respectively.

At least 90 days before submitting any claim to arbitration under Section B, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (Chile-U.S. FTA Art.10.15.4 and DR-CAFTA Art.10.16.2). Provided that six months have elapsed since the events giving rise to a claim, both Agreements (Chile-U.S. FTA Art.10.15.5 and DR-CAFTA Art.10.16.3) state that a claimant may submit a claim: 1) under the ICSID Convention, provided that both the non-disputing Party and the respondent are Parties to the ICSID Convention; 2) under the ICSID Additional Facility Rules, provided that either the non-disputing Party or the respondent, but not both, is a party to the ICSID Convention; or 3) under the UNCITRAL Arbitration Rules. The Chile-U.S. FTA also states that if the disputing Parties agree, a claimant must submit his claim to any other arbitration institution or under any other arbitration rules (Chile-U.S. FTA Art.10.15.4(d)).

Consent of Each Party to Arbitration: each Party consents to the submission of a claim to arbitration under Section B in accordance with the Agreement (Chile-U.S. FTA Art.10.16 and DR-CAFTA Art.10. 17).

Conditions and Limitations on Consent of Each Party: both Agreements (Chile-U.S. FTA Art.10.17.1 and DR-CAFTA Art.10.18.1) state that no claim may be submitted to arbitration under Section B if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the alleged breach.

No claim may be submitted to arbitration under Section B unless the claimant consents in writing to arbitration in accordance with the procedures set out in the FTA; and the notice of arbitration is accompanied, by the claimant's written waiver, of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach (Chile-U.S. FTA Art.10.17.2 and DR-CAFTA Art.10.18.2). However, a claimant may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of

monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration (Chile-U.S. FTA Art.10.17.1 and DR-CAFTA Art.10.18.3). DR-CAFTA (Art.10.18.4) also stipulates that no claim may be submitted to arbitration for a breach of an investment authorization or of an investment Agreement if the claimant has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other dispute settlement procedures, for adjudication or resolution.

Selection of Arbitrators: unless the disputing Parties otherwise agree, the tribunal comprises three arbitrators, one arbitrator appointed by each of the disputing Parties and the third, who will be the presiding arbitrator, appointed by Agreement of the disputing Parties (Chile-U.S. FTA Art.10.18.1 and DR-CAFTA Art.10.19.1). If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General of ICSID, on the request of a disputing party, must appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

Conduct of the Arbitration: both Agreements (Chile-U.S. FTA Art.10.19.1 and DR-CAFTA Art.10.20.1) state that the disputing Parties may agree on the legal place of any arbitration under the applicable arbitral rules. If the disputing Parties fail to reach agreement, the tribunal must determine the place in accordance with the applicable arbitral rules, provided that the place is in the territory of a State that is a party to the New York Convention.

Submission of *Amicus Curiae*: both Agreements state that the tribunal has the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party (Chile-U.S. FTA Art.10.19.3 and DR-CAFTA Art.10.20.3). The Chile-U.S. FTA (Art.10.19.3) also stipulates that the submissions must be in both Spanish and English, and must identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission.

Expedited Process: in the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis any objection that the dispute is not within the tribunal's competence (Chile-U.S. FTA Art.10.19.5 and DR-CAFTA Art.10.20.5).

Frivolous Claims: when it decides a respondent's objection, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal must consider whether either the claimant's claim or the respondent's objection was frivolous, and must provide the disputing Parties a reasonable opportunity to comment (Chile-U.S. FTA Art.10.19.6 and DR-CAFTA Art.10.20.6).

Transmission of Proposed Award: at the request of a disputing party, a tribunal must, before issuing an award on liability, transmit its proposed award to the disputing Parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed award, only the disputing Parties may submit written comments to the tribunal concerning any aspect of its proposed award. The tribunal shall consider any such comments and issue its award not later

than 45 days after the expiration of the 60-day comment period (Chile-U.S. FTA Art.10.19.9 and DR-CAFTA Art.10.20.9).

Transparency of Arbitral Proceedings: the following documents must be transmitted by the respondent to the non-disputing Party and make them available to the public in general: notice of intent; the notice of arbitration; pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions; and minutes or transcripts of hearings of the tribunal (Chile-U.S. FTA Art.10.20.1 and DR-CAFTA Art.10.21.1).

Open Hearings: the tribunal must conduct hearings open to the public (Chile-U.S. FTA Art.10.20.2 and DR-CAFTA Art.10.21.2).

Confidential or Protected Business Information: it should be protected from disclosure, if such information is submitted to the tribunal (Chile-U.S. FTA Art.10.20.2-10.20.5 and DR-CAFTA Art.10.21.2-10.21.5).

Governing Law: when a claim is submitted, the tribunal must decide the issues in dispute in accordance with the Agreement and applicable rules of international law (Chile-U.S. FTA Art.10.21.1 and DR-CAFTA Art.10.22.1).

Interpretation of a Provision by Trade Ministers: a decision of the Free Trade Commission declaring its interpretation of a provision of the Agreement is binding on a tribunal established under Section B, and any award must be consistent with that decision (Chile-U.S. FTA Art.10.21.3 and DR-CAFTA Art.10.22.3).

Interpretation of Annexes: where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of Annex I (Existing Non-Conforming Measures) or Annex II (Future Non-Conforming Measures), the tribunal must, on request of the respondent, request the interpretation of the Commission on the issue. The Commission must submit in writing any decision to the tribunal within 60 days of delivery of the request (Chile-U.S. FTA Art.10.22.1 and DR-CAFTA Art.10.23.1). A decision issued by the Commission is binding on the tribunal, and any award must be consistent with that decision. If the Commission fails to issue such a decision within 60 days, the tribunal shall decide the issue (Chile-U.S. FTA Art.10.22.2 and DR-CAFTA Art.10.23.2).

Expert Reports: without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing Parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing Parties may agree (Chile-U.S. FTA Art.10.23 and DR-CAFTA Art.10.24).

Consolidation: where two or more claims have been submitted separately to arbitration and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the

Agreement of all the disputing Parties sought to be covered (Chile-U.S. FTA Art.10.24 and DR-CAFTA Art.10.25).

Awards: where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs and attorneys' fees in accordance with this Section and the applicable arbitration rules (Chile-U.S. FTA Art.10.25.1 and DR-CAFTA Art.10.26.1). No punitive damages are allowed (Chile-U.S. FTA Art.10.25.3 and DR-CAFTA Art.10.26.3).

Enforcement of Awards: each Party shall provide for the enforcement of an award in its territory (Chile-U.S. FTA Art.10.25.7 and DR-CAFTA Art.10.26.7). If the respondent fails to abide by or comply with a final award, a panel must be established under the State-to-State Dispute Settlement Mechanism of the Agreement. The requesting Party may seek in such proceedings a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and a recommendation that the respondent abide by or comply with the final award (Chile-U.S. FTA Art.10.25.8 and DR-CAFTA Art.10.26.8). A disputing party may also seek enforcement of an arbitration award under the ICSID Convention, the New York Convention, or the Inter-American Convention (Chile-U.S. FTA Art.10.25.9 and DR-CAFTA Art.10.26.9).

Appellate Body: both Agreements state that if a separate multilateral Agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment Agreements to hear investment disputes, the Parties shall strive to reach an Agreement that would have such appellate body review awards (Chile-U.S. FTA Art.10.19.10 and DR-CAFTA Art.10.20.10).

Section C: Definitions

Section C on definitions (Chile-U.S. FTA Art.10.27 and DR-CAFTA Art.10.28) covers the following terms: Centre, claimant, disputing Parties, disputing party, enterprise, enterprise of a Party, freely usable currency, ICSID Additional Facility Rules, ICSID Convention, Inter-American Convention, investment, investment authorization, investor of a non-Party, investor of a Party, New York Convention, non-disputing Party, respondent, Secretary-General, tribunal, and UNCITRAL Arbitration Rules. The Chile-U.S. FTA also includes a definition of the term "monopoly," whereas DR-CAFTA includes a definition of the term "protected information."

The terms "investment" and "investor of a Party" are the key elements of the scope of the Investment Chapter. They are the main parameters identifying which investment and which investor will benefit from the provisions of the Chapter. Both Agreements define "investment" as every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. While the Chile-U.S. FTA states that some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, and other forms of debt, such as claims to payment that are immediately due and result from the sale of goods and services, are less likely to have such characteristics (Chile-U.S. FTA ftnt. 10), DR-

CAFTA states that claims to payment that are immediately due and result from the sale of goods and services are not investments (DR-CAFTA ftnt. 9). Both Agreements include the same definition for the term "investor of a Party," which includes natural and juridical persons that attempt to make, are making, or have made an investment in the territory of another Party. Both Agreements also specify that a natural person who is a dual national must be deemed to be exclusively a national of the State of his/her dominant and effective nationality.

Annexes to the Investment Chapter

Customary International Law: the Parties confirm their shared understanding that "customary international law" generally, and as specifically referenced in the Articles on minimum standard of treatment and expropriation and compensation, results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to the Article on minimum standard of treatment, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens (Chile-U.S. FTA Annex 10-A and DR-CAFTA Annex 10-B).

Public Debt: the rescheduling of debts of Chile and the Central American countries owed to the United States and the rescheduling of their debts to creditors in general are not subject to any provision of Section A, except national treatment and MFN treatment (Chile-U.S. FTA Annex 10-B and DR-CAFTA Annex 10-A).

Expropriation: the determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and the character of the government action. The Annex also states that except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations (Chile-U.S. FTA Annex 10-D and DR-CAFTA Annex 10-C).

Submission of a Claim to Arbitration: both Agreements state that an investor of the United States may not submit to arbitration under Section B a claim that Chile or a Central American country has breached an obligation under Section A (or Annex 10-F in the case of the Chile-U.S. FTA) if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A (or Annex 10-F in the case of the Chile-U.S. FTA) in proceedings before a court or an administrative tribunal of Chile (Chile-U.S. FTA Annex 10-E and DR-CAFTA Annex 10-E). The Chile-U.S. FTA includes the same wording in the case of an investment agreement or investment authorization (Chile-U.S. FTA Annex 10-E, 1.b). For greater certainty, both Agreements state that if an investor of the United States elects to submit a claim of the type described in the Annex on Submission of a Claim to Arbitration to a court or administrative tribunal of Chile, that election shall be definitive and the investor may not thereafter submit the

claim to arbitration under Section B (Chile-U.S. FTA Annex 10-E, 2 and DR-CAFTA Annex 10-E, 2).

Appellate Body or Similar Mechanism: the Chile-U.S. FTA (Annex 10-H) states that within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered in arbitrations commenced after they establish the appellate body or similar mechanism. DR-CAFTA (Annex 10-F) states that within three months of the date of entry into force of the Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under the Investment Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement. The Commission shall direct the Negotiating Group to take into account the following issues, among others: the nature and composition of an appellate body or similar mechanism; the applicable scope and standard of review; transparency of proceedings of an appellate body or similar mechanism; the effect of decisions by an appellate body or similar mechanism; the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected; and the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards. The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism.

Services of Documents on a Party under Section B: this Annex informs on the address where notices and other documents in disputes shall be served (Chile-U.S. FTA Annex 10-G and DR-CAFTA Annex 10-G).

Special Dispute Settlement Provisions: Annex 10-C of the Chile-U.S. FTA states that where a claimant submits a claim alleging that Chile has breached an obligation under Section A, other than the MFN obligation, that arises from its imposition of restrictive measures with regard to payments and transfers, Section B applies but under certain conditions. For instance, a claimant may submit a claim only after one year has elapsed since the events giving rise to the claim.

DL 600: Annex 10-F of the Chile-U.S. FTA states that an investor of the United States or a covered investment that is a party to an investment contract under Chile's *Estatuto de la Inversión Extranjera, Decreto Ley 600 de 1974* shall receive the better of the treatment requirement under the Agreement or the investment contract.

Treatment in Case of Strife: Annex 10-D of DR-CAFTA states that no investor may submit to arbitration under Section B of the Investment Chapter a claim alleging that Guatemala has breached the Article on treatment in case of strife as a result of an armed movement or civil disturbance and that the investor has incurred loss or damage by reason of or arising out of such movement or disturbance. A similar provision exists for investors of Guatemala with respect to other Parties.

Chapter Eleven

Cross-Border Trade in Services

In both the Chile-U.S. FTA and DR-CAFTA, the Chapter on Cross Border Trade in Services covers modes 1 and 2 of services trade, namely cross-border services transactions and consumption abroad (when the service consumer travels to another country to purchase the service). The supply of services through investment (which includes mode 3, or commercial presence), is covered in Chapter Ten on Investment in both Agreements, while mode 4, or the Temporary Entry for Business Persons, is covered in Chapter Fourteen (Chile-U.S. FTA).

In the Chapter on Cross Border Trade in Services there is a great deal of similarity as between the two Agreements with respect to the substance of the main Articles in the text. However, there are also a few notable differences, particularly in the depth of obligations for professional service providers, as well as some structural differences in the treatment of annexes to the Chapter.

Both Agreements contain the same eleven core Articles on Scope and Coverage, National Treatment, Most-Favored Nation Treatment, Local Presence, Non-conforming Measures, Market Access, Transparency in the Development and Application of Regulations, Domestic Regulation, Mutual Recognition, Implementation, Denial of Benefits and Definitions. DR-CAFTA contains an additional Article on Transfers and Payments.

In both Agreements there is an Annex on Professional Services to the Cross-Border Trade in Services Chapter, which includes provisions on the development of professional standards, temporary licensing and review. Additionally, in the Chile-U.S. FTA, this Annex includes specific sections on Foreign Legal Consultants and Temporary Licensing of Engineers. In both Agreements there is text on Express Delivery Services, which takes the form of an Article in DR-CAFTA and an additional annex in the Chile-U.S. FTA.

In total, the Chile-U.S. FTA contains twelve Articles plus two Annexes in the Cross Border Trade in Services Chapter, while the DR-CAFTA text contains fourteen Articles and two Annexes. The similarities between the two Agreements are more important than the differences.

Scope and Coverage: set out in identical terms in both texts (Art.11.1 in both Agreements), defining which measures are covered within the scope of the cross-border Chapter. In both cases the coverage of measures extends to those maintained by central, regional, or local governments and authorities. Exempted from the scope of the Chapter are:

- financial services (which are covered in the Chapter on Financial Services)
- air transport services (other than aircraft repair and maintenance services and specialty air services)
- procurement (covered in the Chapter on Procurement)
- subsidies or grants.

In both Agreements there is an Article indicating that the provisions on Market Access (Art.11.4), Transparency in Development and Application of Regulations (Art.11.7) and Domestic Regulation (Art.11.8) also apply to services supplied by an investor as defined in the Chapter on Investment.

The Chapter does not apply to services provided by governments on a non-commercial, non-competitive basis. Nor does it cover any aspects of employment or access to labor markets.

National Treatment: identical in both Agreements (Art.11.2), sets out the requirement to accord service suppliers of the other Party treatment "no less favorable than it accords, in like circumstances, to its own service suppliers". This covers treatment of service suppliers both at the time that they enter the market as well as after they have entered within a national territory. Unlike the WTO General Agreement on Trade in Services (GATS) this obligation is of generalized application and unconditional.

Most-Favored-Nation Treatment: identical in both Agreements (Art.11.3), sets out the requirement to accord to service suppliers of the other Party treatment "no less favorable than that it accords, in like circumstances, to service suppliers of a non-Party".

Market Access: identical in both Agreements (Art.11.4), sets out four types of quantitative measures which Parties are not allowed to maintain against service suppliers from other Parties, as well as a specific type of legal measure which Parties are not allowed to use to restrict service suppliers from other Parties. These five measures are the same as those found in Article XVI of the WTO GATS.

Local Presence: identical in both Agreements (Art.11.5), sets out a prohibition on the establishment of maintenance of a requirement to establish a commercial presence (in the form of a representative office or enterprise) as a condition to provide services on a cross-border basis. This effectively guarantees the freedom of cross-border trade in services.

Non-conforming Measures: identical in both Agreements (Art.11.6), allows for the maintenance of non-conforming measures (or reservations to the core disciplines of the Cross-Border Trade in Services Chapter as set out in Arts. 11.2, 11.3, 11.4 and 11.5). Such non-conforming measures may be maintained at:

- the central level of government
- the regional level of government
- the local level of government.

Non-conforming measures maintained at the first two levels of government must be specified in an annex to the Agreements (Annex I), while non-conforming measures maintained at the local level of government do not need to be set out in an annex.

An additional category of non-conforming measures (to which the core disciplines of the Agreement do not apply) may be set out in another annex (Annex II). These latter measures that

may apply to sectors, sub-sectors or services activities, effectively constitute permanent exceptions to the Agreement.

Transparency in Development and Application of Regulations: identical in both Agreements (Art.11.7), sets out various procedural requirements with respect to the process for developing and applying regulations. These include the requirement for each Party to respond to enquiries regarding their regulations, to address in writing the comments received on proposed regulations at the time of their adoption, and a reasonable period of time between the publication of regulations and their application.

Domestic Regulation: identical in both Agreements (Art.11.8), reproduces part of the text of the WTO GATS Article VI on Domestic Regulation (paragraphs VI.3 and VI.4) with some adjustments. The Article requires Parties to provide information concerning the status of an application waiting on authorization to provide a service, as well as the requirement that any such measures that a Party adopts or maintains are based on "objective and transparent criteria", and are "not more burdensome than necessary to ensure the quality of the service".

Mutual Recognition: identical in both Agreements (Art.11.9), sets out the possibility for Parties to recognize the "education or experience obtained, requirements met, or licenses or certifications granted in a particular country". Such recognition may be realized through harmonization, through mutual Agreement, or accorded autonomously. Parties must also give the opportunity to each other to try and meet the requirements established in mutual recognition Agreements with third countries.

Implementation: similar in both Agreements (Chile-U.S. FTA Art.11.10 and DR-CAFTA Art.11.11), commits the Parties to consult annually to review the implementation of the Cross-Border Trade in Services Chapter, and other issues of mutual interest. In the Chile-U.S. FTA, there is an additional paragraph which is not found in the DR-CAFTA text that obliges the Parties to consult on the feasibility of "removing any remaining citizenship or permanent residency requirement for the licensing or certification of each other's services suppliers".

Transfers and Payments: provision found only in the DR-CAFTA text (Art.11.10), obliging all Parties to allow transfers and payments relating to the cross-border supply of services to be effected freely and without delay and in a freely usable currency. A similar but not identical Article on Transfers (Art.10.8) is found in the Investment Chapter in both Agreements.

Denial of Benefits: similar provision found in both Agreements (Chile-U.S. FTA Art.11.11 and DR-CAFTA Art.11.12), the Article sets out the conditions under which service suppliers from the Parties can benefit from the Agreement. This is similar to a provision on rules of origin for trade in goods. Basically, benefits can be denied when:

- the service is supplied by an enterprise that is owned or controlled by persons of a non-Party, and
- the enterprise has no substantial business activities in the territory of that other Party.

Additionally, benefits can be denied when the service is supplied by a enterprise owned or controlled by persons of a non-Party when the denying Party does not maintain diplomatic relations with the non-Party or has in place measures that do not allow for transactions to be conducted by enterprises of the non-Party.

Definitions: nearly identical in both Agreements (Chile-U.S. FTA Art.11.12 and DR-CAFTA Art.11.14), sets out the same definitions for the following terms:

- cross-border trade in services or cross-border supply of services
- enterprise
- enterprise of a Party
- professional services
- service supplier of a Party
- specialty air services

Annex on Professional Services: similar in both Agreements (Annex 11.9), sets out provisions which are specific to professional services in the areas of:

- development of professional standards
- temporary licensing
- review

The purpose of these provisions is to facilitate the development of mutually acceptable standards and criteria for licensing and certification of professional service providers from the other Parties. A review of the implementation of these provisions is to occur in both instances at least once every three years.

Additionally, the Chile-U.S. FTA contains text that does not appear in DR-CAFTA that requires the Commission on Services to review as well any differences in regulatory approaches between the Parties and to raise issues connected with the development of international standards for professional services.

The Chile-U.S. FTA also contains two sections on Foreign Legal Consultants and on the Temporary Licensing of Engineers within this Annex that do not appear in DR-CAFTA. These sections aim to facilitate the practice of these two professional services in the territory of the other Party. Work programs are to be established in order to develop common procedures for the authorization of Foreign Legal Consultants and for the temporary licensing of foreign Engineers. The relevant professional bodies are to be consulted and involved in this process.

The Chile-U.S. FTA also contains an Appendix to Annex 11.9 on Professional Services specifying that the rights set out in the section on Engineers apply to Civil Engineers in Chile and to any other engineering specialties that Chile may designate.

Express Delivery Services: similar in both Agreements but different in form. In the Chile-U.S. FTA this text is set out as Annex 11.6 (entitled Express Delivery), while in DR-CAFTA it is included as Article 11.13 (entitled Specific Commitments, with a sub-title on Express Delivery

Services). The text brings Express Delivery Services explicitly under the scope of the Agreement, defines such services, and requires the Parties to maintain open market access for these services.

Further provisions confirm the intention of the Parties not to direct revenues from their postal monopolies to benefit express delivery services. DR-CAFTA contains additional text (Art.11.13.1.(d)) that requires Parties with monopoly suppliers of postal services, not to abuse their monopoly positions when competing in the supply of express delivery services outside of their monopoly rights. Specific commitments in this regard are contained in the Schedules of the Parties to DR-CAFTA.

Annex 11.13 on Specific Commitments: the DR-CAFTA Chapter on Cross-Border Trade in Services contains an Annex of Specific Commitments (Annex 11.13) with sections relevant to Costa Rica (Section A) and to the Dominican Republic (Section B) in which these two countries formalize their commitment to repeal an existing regime in the area of contract law and to enact a new legal regime applicable to contracts of representation, distribution, or production (in the case of Costa Rica) or to any covered contract signed after the date of entry into force of the Agreement (for the Dominican Republic). For Costa Rica, this concerns Law No. 6209 and Law No. 3284, and for the Dominican Republic this concerns Law No. 173. The new regime in each country must conform to certain specific conditions set out in the Annex.

Chapter Twelve

Financial Services

Financial services have virtually identical treatment in the Chile-U.S. FTA and DR-CAFTA, except for a limited number of provisions. Both Agreements contain a separate Chapter on Financial Services, which incorporates by reference selected Articles from other Chapters in the Agreement.

Except for an Article on Domestic Regulation (Art.12.14) in DR-CAFTA, both Chapters contain an identical list of Articles, including on: Scope and Coverage (Art.12.1); National Treatment (Art.12.2); Most-Favored-Nation Treatment (Art.12.3); Market Access for Financial Institutions (Art.12.4); Cross-Border Trade (Art.12.5); New Financial Services (Art.12.6); Treatment of Certain Information (Art.12.7); Senior Management and Board of Directors (Art.12.8); Non-Conforming Measures (Art.12.9); Exceptions (Art.12.10); Transparency (Art.12.11); Self-Regulatory Organizations (Art.12.12); Payment and Clearing Systems (Art.12.13); Expedited Availability of Insurance Services (Chile-U.S. FTA Art.12.14 and DR-CAFTA Art.12.15); Financial Services Committee (Chile-U.S. FTA Art.12.15 and DR-CAFTA Art.12.16); Consultations (Chile-U.S. FTA Art.12.16 and DR-CAFTA Art.12.17); Dispute Settlement (Chile-U.S. FTA Art.12.17 and DR-CAFTA Art.12.18); Investment Disputes in Financial Services (Chile-U.S. FTA Art.12.18 and DR-CAFTA Art.12.19); and Definitions (Chile-U.S. FTA Art.12.19 and DR-CAFTA Art.12.20).

The texts also contain annexes on cross-border trade (Chile-U.S. FTA Annex12.5 and DR-CAFTA Annex12.5.1) and specific commitments (Chile-U.S. FTA Annex12.9 and DR-CAFTA Annex12.9.1). In addition, Annex 12.11 to the Chile-U.S. FTA Chapter clarifies Chile's application of Article 12.11 on Transparency, whereas DR-CAFTA includes Annex 12.9.3 on additional information regarding financial services measures. Authorities responsible for financial services are set out in Annex 12.15 to the Chile-U.S. FTA Chapter and in Annex 12.16.1 (entitled Financial Services Committee) to DR-CAFTA.

As regards market opening, both Chapters follow a positive list approach for cross-border trade in financial services (Chile-U.S. FTA Annex 12.5 and DR-CAFTA Annex 12.5.1) and a negative list approach for investments in financial services, except Chile for future measures on insurance services –where non-conforming measures are listed for a positive list of subsectors.

Scope and Coverage: both Chapters cover (Art.12.1) measures related to a) financial institutions of another Party, b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory, and c) cross-border trade in financial services. Financial services include (Chile-U.S. FTA Art.12.19 and DR-CAFTA Art.12.20) all insurance and insurance-related services and all banking and other financial services (excluding insurance), as well as services incidental or auxiliary to a service of a financial nature. Covered financial institutions must be authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located. Investments in non-regulated institutions are covered under the Investment Chapter. In addition, the provision on scope and coverage in both Chapters incorporates by reference a number of Articles from the

Chapters Cross-Border Trade in Services (Denial of Benefits) and Investment (Transfers, Expropriation and Compensation, Special Formalities and Information Requirements, Denial of Benefits and Investment and Environment). The texts differ in that DR-CAFTA, but not the Chile-U.S. FTA, incorporates an obligation to permit bilateral transfers and payments related to cross-border trade in financial services (Art.11.10).[10] Another significant difference between the two texts is a paragraph in DR-CAFTA stating that unless the Dominican Republic and each of Costa Rica, El Salvador, Honduras, or Nicaragua agree on a set of reciprocal non-conforming measures, the Chapter does not apply to financial institutions to the extent they supply banking services, investments of such investors, in such financial institutions, or cross-border trade in banking services between the Dominican Republic and each of these Central American countries. A similar provision applies more broadly to financial services between the Dominican Republic and Guatemala.

Non-Discriminatory Treatment: both Chapters re-state the National Treatment (Art.12.2) and Most-Favored-Nation treatment (Art.12.3) obligations to address the special sensitivities of financial services. The two obligations are of general application and extend to both cross-border financial services suppliers (or modes one, two and four) and investments (encompassing (a) and (b) above) in financial services. When membership, participation or access to self-regulatory organizations is required for the supply of financial services, these organizations must also comply with the national treatment and most-favored-nation obligations (Art.12.12). The national treatment obligation applies for the entire life cycle of the investment (Art.12.2.1 and 12.2.2) and to the cross-border supply of the financial services specified in a separate annex (Chile-U.S. FTA Art.12.5 and DR-CAFTA Art.12.5.1). The MFN text in DR-CAFTA is modified to acknowledge the plurilateral context of the Agreement (this is done throughout the Agreement).

Recognition of Prudential Regulations: recognition of prudential regulations of a non-Party is allowed under the MFN Article (Art.12.3) in both texts. DR-CAFTA also permits recognition of prudential measures of another Party. Recognition may be accorded unilaterally, through harmonization or via a mutual arrangement.

Transparency and Administration of Domestic Regulations: both texts recognize the importance of transparent regulations and policies governing the activities of financial institutions and financial service suppliers for market access and their operations (Art.12.11). In DR-CAFTA the promotion of regulatory transparency is an obligation, whereas in the Chile-U.S. FTA it is not. DR-CAFTA also contains a transparency clause (Art.12.9.3) with respect to which the Parties list (in Annex 12.9.3) supplementary information regarding certain aspects of financial services measures of a Party that the Party considers are not inconsistent with its obligations. The Chile-U.S. FTA text also recognizes the importance for market access (and operations) of reasonable, objective and impartial administration governing the activities of financial institutions and financial service suppliers. DR-CAFTA omits this text from the relevant Article, but includes a broader obligation in a separate Article (Art.12.14) under which all measures of general application to which the Chapter applies shall be administered as above. Both texts incorporate best endeavors clauses relating to the prior publication and prior comment

[10] DR-CAFTA also incorporates an obligation to permit transfers and payments related to cross-border trade in services.

on proposed regulations, which to the extent practicable, should be addressed in writing. They also acknowledge the importance and commit to ensure transparency in the rules of general application adopted by self-regulatory institutions (Art.12.11) and highlight the relevance of maintaining and developing regulatory procedures to expedite the offering of insurance services by licensed suppliers (Chile-U.S. FTA Art.12.14 and DR-CAFTA Art.12.15).

Disclosure of Information: neither text requires its Parties to disclose information relating to the financial affairs and accounts of individual customers of financial service suppliers, or confidential information relevant for law enforcement or the commercial interests of enterprises (Art.12.7).

New Financial Services: both Chapters on financial services permit (under Art.12.6) foreign financial institutions to supply any new financial service that domestic financial institutions are allowed to provide. The Chile-U.S. FTA allows the provision of such services, provided that their introduction does not require the Party to adopt a new law or modify an existing law. The text in DR-CAFTA is slightly different as it requires that the foreign provision of the new service be made "without additional legislative action," without specifying the scope of such term. The obligation to allow the provision of new financial services is also subject to request or notification to the relevant regulator in the Chile-U.S. FTA, but not in DR-CAFTA. The Article allows, in both Agreements, that the Parties determine the institutional and juridical form through which the new financial service may be supplied. Although not explicitly mentioned in the Chile-U.S. FTA, such a prerogative is limited in both Agreements by a prohibition to "restrict or require specific types of legal entity or joint venture through which a financial institution may supply a service" (Art.12.4(b)). Under both texts the Parties are required to make a decision about the authorization of a new financial service in reasonable time and allow refusal only for prudential reasons. This applies in the Chile-U.S. FTA when the Party "would permit the new financial service and authorization is required", whereas in DR-CAFTA it applies only when "authorization is required".

Exceptions: exceptions for the adoption of prudential measures, measures taken in pursuit of monetary and related credit policies or exchange rate policies, limits on transfers and measures relating to the prevention of deceptive and fraudulent practices or to deal with the effects of default on financial services contracts are permitted under both Agreements (Art.12.10). Obligations with regard to financial services (Chapter 12), investment (Chapter 10), telecommunications (Chile-U.S. FTA Chapter 13 and DR-CAFTA Chapter 14) and electronic commerce (Chile-U.S. FTA Chapter 15 and DR-CAFTA Chapter 13) do not limit non-discriminatory measures taken in pursuit of monetary and related credit policies or exchange rate policies, but they do limit prudential measures to the extent that they are used to avoid a Party's obligations under such provisions. This is also the case with the provisions on competition policy, designated monopolies and state enterprises (Chapter 16) and cross-border trade in services (Chapter 11) in the Chile-U.S. FTA, but not in DR-CAFTA -except for the cross-border provisions on market access, domestic regulation and transparency in developing and applying domestic regulations that apply to covered investments (Art.11.1.3). Under both Agreements, measures taken by a public entity in pursuit of monetary and related credit policies or exchange rate policies shall not affect a Party's obligations with respect to performance requirements (Chile-U.S. FTA Art.10.5 and DR-CAFTA Art.10.9) and transfers (Art.10.8) on investments. In

DR-CAFTA, such measures shall also not affect obligations with respect to transfers and payments on cross-border supply of services (Art.11.10). However, for prudential reasons, members to both Agreements may indeed limit transfers on investment (notwithstanding Art.10.8 "Transfers" in both FTAs) and cross-border supply of financial services (notwithstanding Art.11.10 "Transfers and Payments" of DR-CAFTA). Note that in the Chile-U.S. FTA there is no obligation to permit transfers and payments on cross-border transactions and that prudential measures are defined very broadly. They may be taken through regulatory or administrative authorities, as well as those who have regulatory responsibilities with respect to financial institutions, such as ministries or departments of labor (ftnt. 4, Art.12.10).

Dispute Settlement: dispute settlement is covered in both texts under four different Articles. These are analyzed in turn below.

Financial Services Committee: a Financial Services Committee is established in both the Chile-U.S. FTA and DR-CAFTA (Arts.12.15 and 12.16, respectively). In the Chile-U.S. FTA, however, the Committee is subject to supervision by the Free Trade Commission (established under Art.21.2(d)), whereas in DR-CAFTA the Committee is required to merely inform the Commission (established under Art.19.1) of the results of each meeting. Another difference in the texts is that in the Chile-U.S. FTA, the Committee shall participate in both state-state and investor-state disputes, while in DR-CAFTA the Committee is excluded from state-state disputes.

Consultations: Article 12.16 in the Chile-U.S. FTA and 12.17 in DR-CAFTA allows Parties to request (in writing in the Chile-U.S. FTA text) consultations with another Party regarding any matter arising under the Agreements that affects financial services. For Chile and the U.S., such consultations are subject to the provisions in the Dispute Settlement Chapter (Art.12.17.2) only to the extent that the Parties do not agree otherwise. In DR-CAFTA, consultations are always subject to the dispute settlement provisions in the financial services Chapter.

State-to-State disputes: a separate Article in both Chapters (Chile-U.S. FTA Art.12.17 and DR-CAFTA Art.12.18) reformulates the State-to-State dispute resolution procedures under Art.22 (Chile-U.S. FTA) and Art.20 (DR-CAFTA) to address the special sensitivities of financial services. The texts differ in a number of ways. In DR-CAFTA, for instance, rules dealing with "Domestic Proceedings and Private Commercial Dispute Settlement" of Chapter 20 (Section B) do not apply to financial services. The Chile-U.S. FTA text contains a paragraph on consultations (see Consultations above), which is excluded from the relevant Article in DR-CAFTA. Differences are also found in the procedures for panel selection. Both texts apply the procedures for panel selection in Article 20.9 (Chile-U.S. FTA) and Article 22.9 (DR-CAFTA) and modify them to incorporate the qualifications for financial services roster members (and also financial services panelists in DR-CAFTA) established in Article 12.17 (Chile-U.S. FTA) or Article 12.18 (DR-CAFTA). On such qualifications both texts establish similar rules. Differences are also found in the number of nationals and non-nationals that must compose the roster of individuals eligible for a dispute settlement panel and in that DR-CAFTA, and not the Chile-U.S. FTA, incorporates the possibility of appointing a replacement where a roster member is no longer available to serve. Both texts

permit the Parties to agree that the panel not be composed entirely of panelists versed in financial services, but only DR-CAFTA establishes the selection procedures to be followed in these cases. Finally, both texts establish that where a panel finds the measure to be inconsistent with the obligations of the Agreement, benefits may be suspended under certain conditions (Chile-U.S. FTA Art.12.7.6 and DR-CAFTA Art.12.8.5). Although the drafting differs, the scope of the provisions seems to be the same.

Investor-State Disputes: with minor differences in language the Chile-U.S. FTA and DR-CAFTA establish (under Arts. 12.18 and 12.19, respectively) that investor-state disputes are subject to the provisions in the investment Chapter, unless the disputing party invokes the Article on exceptions (12.10) of the financial services chapter. In such cases, the tribunal shall refer the matter in writing to the Financial Services Committee for a decision. Here, DR-CAFTA introduces a significant change in text by which the Financial Services Committee may allow the financial services authorities of the relevant Parties to decide whether Article 12.10 applies. DR-CAFTA also clarifies in Article 12.19.6 that arbitration "tribunal" is to be understood in terms of Article 10.9 of the investment Chapter. This definition is found in Article 12.19 (Definitions) in the Chile-U.S. FTA Chapter.

Market Access Commitments: the Chapters distinguish between market access for cross-border trade in financial services and investments (as defined above) in financial services. Different approaches are also followed for banking and insurance services.

Cross-border trade: cross-border trade in financial services is allowed under Article 12.5, which is virtually identical in both texts. According to this Article, the Parties shall permit, under terms and conditions that accord national treatment, cross-border financial service suppliers of another Party to supply the services specified in a separate annex (Chile-U.S. FTA Art.12.5 and DR-CAFTA Art.12.5.1) – i.e. a positive list approach. It also permits the purchase of financial services from cross-border financial service suppliers by persons located in a Party's territory and its nationals wherever located. A Party may subject cross-border suppliers to prudential regulations and require registration of the supplier and financial instruments. Specific commitments with respect to the cross-border supply of investment advice and portfolio management services supplied to domestic collective investment schemes (Chile-U.S. FTA Annex 12.9 and DR-CAFTA Annex 12.9.2)[11] supplement the commitments made in the cross-border Annex. Said Annex distinguishes between insurance and insurance-related services and banking and other financial services (excluding insurance) and between modes of supply as shown in the tables below. For the sectors listed in the respective Annexes, non-conforming measures are scheduled (Art.12.9) in Annex III (see section Annexes on Non-Conforming Measures below).

Investment: for market access on investments in financial services, both Chapters follow a negative list approach, except Chile for future measures on insurance services, supplemented

[11] The Dominican Republic and El Salvador will implement their commitments regarding investment advice and portfolio management services, no later than four years after the entry into force of the Agreement, by adopting a special laws regulating collective investment schemes. Guatemala and Nicaragua committed to adopting in the future laws allowing insurance companies (Guatemala) and pension funds (Nicaragua) to manage collective investment schemes.

by specific commitments in separate Annexes (Chile-U.S. FTA Annex 12.9 and DR-CAFTA Annex 12.9.2). Non-conforming measures are listed in Annex III, pursuant to Article 12.9 (see section Annexes on Non-Conforming Measures below). Specific commitments contained in the respective annexes include: voluntary savings plans in Chile (by March 1, 2005) and foreign banking in El Salvador[12]. Member countries to both Agreements also commit to expedite the availability of insurance services and allow branching in insurance three to four years (Costa Rica by January 2008 for most insurance services) after the agreement enters into force.[13] In addition, both texts grant to established financial institutions access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business -this excludes access to lender of last resort facilities (Art.12.13).

For future measure on insurance services, Chile combines a positive list of subsectors with non-conforming measures with respect to market access (Art.12.4). Chile scheduled life and general insurance, insurance brokerage and reinsurance and retrocession (including brokerage).

Article 12.4 in both Agreements lists the types of quantitative restrictions and limits on restrictions or requirement of a specific type of legal entity or joint venture for the supply of the service, that a Party may not adopt or maintain with respect to investors (Chile-U.S. FTA) or financial institutions (DR-CAFTA) of the other Party. DR-CAFTA clarifies that "financial institutions of another Party" includes financial institutions that investors of another Party seek to establish in the territory of the Party.' This text incorporates a similar concept to that found in the definition of "investor of a Party" in the Chile-U.S. FTA Chapter, which states that an investors of a Party includes an investor that "attempts to make, is making, or has made an investment in the territory of the other Party...".

For Costa Rica and members to the Chile-U.S. FTA, the Market Access provision needs to be read in conjunction with the right of establishment granted to foreign providers with respect to certain financial services (Section A of the Annex in the Chile-U.S. FTA and Section H.III.2 in DR-CAFTA). Members to the Chile-U.S. FTA grant the right of establishment in banking and other financial services (excluding insurance). Chile also grants this right in Pension Fund Management Services (Administradoras de Fondos de Pensiones). In DR-CAFTA, Costa Rica grants the right of establishment in insurance services supplied directly to the consumer. This commitment applies by January 1, 2011.

[12] El Salvador will develop and issue prudential and other requirements that must be met by Salvadorian banks in order for them to receive authorization to apply for the establishment of branches in the United States.

[13] Honduras and the United States (subject to state restrictions) already permitted insurance branching in the WTO. In addition, Chile reserved the right to establish requirements such as on capital and ownership, technical reserves, branch-parent relationship and transfers-investments and risky patrimony relationship. The United States, in turn, committed to review regulations that do not allow entry of non-U.S. insurance companies as a branch in a number of States.

Table 12.1: Insurance and insurance-related services

Insurance and insurance-related services									
	Chile	*U.S. (Chile-U.S. FTA)*	*U.S. (DR-CAFTA)*	*Costa Rica*	*Dominican Republic*	*El Salvador*	*Guatemala*	*Honduras*	*Nicaragua*
From the territory of one Party into the territory of the other Party (i.e. mode 1)									
1.MAT insurance[14]	*X*[15]	*X*	*X*	*X*	*X*	*X*	*X*	*X*	*X*
2.Reinsurance and retrocession[16]	*X*	*X*	*X*	*X*	*X*	*X*	*X*	*X*	*X*
3.Insurance intermediation									
Brokerage	*X*[17]	*X*	*X*	*X**	*X*	*X*	*X*	*X*	*X*
Agency		*X*	*X*	*X**			*X*	*X*	
4.Services auxiliary to insurance[18]									
Consultancy	*X*	*X*	*X*	*X**	*X*	*X*	*X*	*X*	*X*
Actuarial services	*X*	*X*	*X*	*X**	*X*	*X*	*X*	*X*	*X*
Risk assessment services	*X*	*X*	*X*	*X**	*X*	*X*	*X*	*X*	*X*
Claim settlement services		*X*	*X*	*X**	*X*	*X*	*X*	*X*	*X*
By a national of a Party in the territory of the other Party, but does not include the supply of a service in the territory of a Party by an investment in that territory (i.e. mode 4)									
1.Insurance (1,2,3,4 above)		*X*[19]	*X*	*X*	*X*	*X*	*X*	*X*	*X*

[14] Maritime shipping and commercial aviation and space launching and freight (including satellites); goods in international transit.

[15] Specifies that the commitment refers to "international" MAT insurance and uses the wording "maritime transport" instead of "maritime shipping." It also excludes space launching and freight (including satellites).

[16] Costa Rica also allows the cross-border supply of surplus lines of insurance.

[17] Brokerage of insurance risks (excluding reinsurance brokerage) apply one year after the entry into force of the Agreement or when Chile has made and implemented the necessary amendments to its pertinent legislation.

* Costa Rica allows the cross-border provision of these services as related to MAT insurance, reinsurance and retrocession and surplus lines as of entry into force of the agreement. For all other lines of insurance, these services will be permitted by July 1, 2007.

[18] Services auxiliary to insurance provided to an insurance supplier only.

[19] The U.S. commitment in the Chile-U.S. FTA is not limited to the insurance services listed for mode 1.

Table 12.2: Banking and other financial services (excluding insurance)

Banking and other financial services (excluding insurance) (all cross-border modes)									
	Chile	*U.S. (Chile-U.S. FTA)*	*U.S. (DR-CAFTA)*	*Costa Rica*	*Dominican Republic*	*El Salvador*	*Guatemala*	*Honduras*	*Nicaragua*
Provision and transfer of financial information	X	X	X	X	X	X	X	X	X
Financial data processing	X[20,21]	X	X	X	X	X[22,23]	X	X	X[24,25]
Related software			X	X	X		X	X	
Intermediation									
Auxiliary financial services	X	X	X	X	X	X	X	X	X
Credit reference and analysis[26]		X	X	X	X	X	X	X	
Investment research and advice	X	X	X	X	X	X	X	X	X
Portfolio research and advice	X	X	X	X	X	X	X	X	X
Advice on acquisitions and on corporate restructuring and strategy	X	X	X	X	X	X	X	X	X
Other advisory services	X	X	X	X	X	X	X	X	X

[20] Subject to prior authorization by the relevant regulator.
[21] Where financial information or financial data involve personal data, the treatment of such personal data shall be in accordance with the host country law regulating the protection of such data.
[22] See footnote 22.
[23] See footnote 23.
[24] See footnote 22.
[25] See footnote 23.
[26] Chile reserved the right to allow the cross-border supply of credit reference and analysis services in the future. Should Chile decide to allow the provision of such services, it is entitled to reverse this measure in the future.

Chapter Thirteen

Telecommunications

Telecommunication services are covered under Chapter 13 of both the Chile-U.S. FTA and DR-CAFTA. The Chapters cover regulatory principles in telecommunication services, whereas the provisions in the Chapters on cross-border trade and investment govern market opening.

Both texts follow the same basic structure to the coverage of telecommunications services. They contain 17 Articles and two (Chile-U.S. FTA) and four (DR-CAFTA) Annexes. The main issues covered in each Chapter are described below.

Scope and Coverage: the telecommunications Chapter in DR-CAFTA does not apply to Costa Rica; instead the country undertook specific commitments set out in Annex 13. The Chapter in the Chile-U.S. FTA applies to measures adopted or maintained by a Party relating to a) access to and use of the public telecommunications *network* and services and b) obligations of *major suppliers* of public telecommunications services. DR-CAFTA uses identical language except that it does not apply to public telecommunications networks in (a)[27] above and the obligation in (b) above is not limited to major suppliers, but instead it applies to suppliers of telecommunications services more broadly. Both Chapters also apply to (c) the provision of information services; and d) other measures relating to public telecommunication networks or services. Measures relating to broadcast or cable distribution of radio or television programming are excluded from coverage, except to ensure that enterprises operating broadcast stations and cable systems have continued access to and use of public telecommunications networks (Chile-U.S. FTA only) and services.

Access to and Use of Public Telecommunications *Networks* and Services: pursuant to Article 13.2 of both Agreements enterprises of another Party must have access to and use of any public telecommunications service, including leased circuits, offered in the territory of a Party or across its borders, on reasonable and non-discriminatory terms and conditions. Each Party shall also ensure that enterprises of another Party are able to use public telecommunications services for the movement of information contained in databases or stored in machine-readable form. Member countries to both Agreements are also permitted to take measures to (a) ensure the security and confidentiality of messages or (b) protect the privacy of non-public personal data of subscribers to public telecommunications services, as long as these measures are non-discriminatory. The only conditions that a Party may impose on access to and use of public telecommunications networks or services are those related to safeguarding the public services responsibilities of providers of public telecommunications networks or services, in particular those related to universal service, and to protect the technical integrity of public telecommunications networks or services. Such conditions may include: (a) a requirement to use specified technical interfaces and (b) a licensing, permit, registration, or notification procedure which is transparent and applications filed thereunder are processed expeditiously. DR-CAFTA clarifies that applications have to be filed in "accordance with the Party's national law or regulation".

[27] DR-CAFTA also excludes from Article 13.17 (Definitions) a definition of public telecommunications network (and also private network).

Interconnection and Obligations of Major Suppliers: obligations relating to interconnection with suppliers of public telecommunication services and those relating to major suppliers are covered under Articles 13.3 and 13.4 of each FTA.

Interconnection: under both texts suppliers of public telecommunications services in the territory of a Party must be able to provide, directly or indirectly, interconnection with the suppliers of public telecommunications services of another Party (Chile-U.S. FTA Arts. 13.3.1 and 13.3.2 and DR-CAFTA Art.13.3.1). These suppliers must be required to "take reasonable steps" to protect the confidentiality of commercially sensitive information of, or relating to, suppliers and end-users of public telecommunications services and only use such information for the purposes of providing those services. The Chile-U.S. FTA clarifies that this is to be done in accordance with the Party's domestic law. DR-CAFTA requires each Party to provide its telecommunications regulatory body the authority to require public telecommunications suppliers to file their interconnection contracts. Both Chapters also define (a) the general terms and conditions for interconnection between *major* suppliers and the facilities and equipment of suppliers of public telecommunications services; (b) options for interconnecting with major suppliers; (c) public availability of interconnection offers; (d) public availability of the procedures for interconnection; and (e) public availability of interconnection agreements with major suppliers (Chile-U.S. FTA Art.13.4.8 and DR-CAFTA Art.13.4.5). For a DR-CAFTA Party that does not have an existing commitment under GATS to ensure that a major supplier in its territory provides interconnection at cost-oriented rates, an equivalent obligation in DR-CAFTA becomes effective two years after the date of entry into force of the Agreement or January 1, 2007; whichever is earlier. The Agreement goes on to establish conditions for setting interconnection rates in the transition period (Annex 13.4.5).

Treatment of Major Suppliers: under DR-CAFTA and the Chile-U.S. FTA major suppliers are required to accord suppliers of public telecommunications services of another Party non-discriminatory treatment. Such treatment is not qualified in the Chile-U.S. FTA, whereas in DR-CAFTA it should be no less favorable than that accorded to the major supplier's subsidiaries, their affiliates, or any non-affiliated service supplier.

Competitive Safeguards: using similar language, both texts limit anti-competitive practices by major suppliers, such as anti-competitive cross-subsidization, using information obtained from competitors with anti-competitive results and not making available, on a timely basis, to suppliers of public telecommunications services, technical information about essential facilities and commercially relevant information.

Unbundling of Network Elements: major suppliers are required, under both texts, to provide suppliers of public telecommunications services of another other Party access to network elements, including leased circuit services, on an unbundled basis on terms and conditions and at cost-oriented rates that are reasonable and non-discriminatory for the supply of public telecommunications services. In addition, DR-CAFTA requires the terms, conditions and cost-oriented rates to be transparent. The Parties to both Agreements are free to determine which network elements may be required to be made available in their

territories and the suppliers that may obtain such elements, as long as this is done in accordance with national law and regulations. The Chile-U.S. FTA further limits this provision by specifying the criteria that should be applied by the competent body in determining the network elements to be made available. It states that at a minimum a Party's competent authority shall consider "whether access to such network elements as are proprietary in nature is necessary, and whether the failure to provide access to such network elements would impair the ability of suppliers to public telecommunications services of the other Party to provide the services they seek to offer; or other factors as established in national law or regulation, as that body construes these factors".

Co-Location: under both Agreements major suppliers must provide to suppliers of public telecommunications services of another Party physical co-location of equipment necessary for interconnection on terms, conditions, and at cost-oriented rates that are reasonable and non-discriminatory (Chile-U.S. FTA Art.13.4.4 and DR-CAFTA Art.13.4.7). The texts differ, however, in that DR-CAFTA requires that the terms and conditions of supply also be transparent. Chile-U.S, on the other hand, stipulates that major suppliers must also provide to suppliers of public telecommunications services access to unbundled network elements on terms, conditions and at cost-oriented rates that are reasonable and non-discriminatory.

Resale: both texts (Chile-U.S. FTA Art.13.4.5 and DR-CAFTA Art.13.4.3) require their Parties to ensure that major suppliers in their territories offer for resale, at reasonable rates, to suppliers of public telecommunications services of another Party, public telecommunications services that such major suppliers provide at retail to end-users that are not suppliers of public telecommunication services. The texts differ in the conditions set out for satisfying the standard of reasonableness in this paragraph. In DR-CAFTA, wholesale rates set pursuant to a Party's law and regulation satisfy the standard, whereas in the Chile-U.S. FTA rates that satisfy the standard include, but are not limited to, said wholesale rates. Both texts also require that major suppliers in their territories do not impose unreasonable or discriminatory conditions or limitations on the resale of such services. An equivalent obligation that applies to suppliers (as opposed to major suppliers) of telecommunications services is set out in a separate Article in DR-CAFTA (Art.13.3.2). In an Annex (13.4(5)(b)) to the Chile-U.S. FTA Chapter on Telecommunications, the U.S. establishes that a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers may be prohibited from offering such service to a different category of subscribers. In DR-CAFTA, this type of limitation may be imposed by all members to the Agreement (Footnote 7).

Number Portability and Dialing Party: both texts establish that major suppliers must provide number portability to the extent technically feasible and dialing party to suppliers of public telecommunications services of another Party under two different Articles —13.4.6 and 13.4.7 in the Chile-U.S. FTA and 13.3.3 and 13.3.4 in DR-CAFTA. Number portability is to be provided on a timely basis, and on reasonable terms and conditions. El Salvador, Guatemala, Honduras, and Nicaragua may take into account the economic feasibility of providing number portability. Major suppliers must also afford suppliers of public telecommunications services of another Party non-discriminatory access to telephone numbers and related services with no unreasonable dialing delays.

Access to Rights-of-Way: DR-CAFTA incorporates an additional provision (Art.13.4.8) by which major suppliers have to afford to their poles, ducts, conduits, and rights-of-way to suppliers of public telecommunications services of another Party on terms, conditions and at rates that are reasonable and non-discriminatory. For El Salvador, this provision will apply when its law provides that poles, ducts, conducts, and rights-of-way constitute essential resources (Annex 13.4.8).

Except for the provisions on interconnection that are not related to major suppliers (i.e. (a) to (e) under *interconnection* above), none of the provisions above apply to suppliers of commercial mobile services in member countries to both Agreements (footnote to Art.13.4) or to rural telephone companies in the United States (Chile-U.S. FTA Annex 13.4(1) and DR-CAFTA Annex 13.3). Under both Agreements, a state regulatory authority in the United States may exempt a rural local exchange carrier from these obligations. El Salvador, Guatemala, Honduras, and Nicaragua may also designate and exempt a rural telephone company in its territory from such obligations, provided that the rural telephone company supplies public telecommunications services to fewer than two percent of the subscriber lines installed in the Party's territory. These provisions do not preclude an authority of a Party member to either Agreement from imposing the above measures upon suppliers of commercial mobile services or on rural telephone companies.

Submarine Cable Systems: using different language both Chapters establish that providers of submarine cable systems must accord non-discriminatory treatment for access to such systems (Article 13.5). In DR-CAFTA, the treatment provided by operators of submarine cable systems must also be "reasonable", although no definition is provided for this term. The obligation applies to a supplier authorized to operate submarine cable systems as a public telecommunications service in DR-CAFTA. In the Chile-U.S. FTA, on the other hand, the Parties are free to classify a submarine cable system within their territories as a public telecommunications service supplier and on that basis decide whether or not to apply the obligation.

Conditions for Supplying Information Services: using virtually identical language, both texts establish the information requirements that may not be imposed on an enterprise in a Party's territory that it classifies as a supplier of information services and that supplies such services over facilities that it does not own (Art.13.6). Notwithstanding this provision, a Party is allowed to take appropriate action to remedy the anti-competitive behavior of an information service supplier or to promote competition or safeguard the interest of consumers.

Independent Regulatory Bodies and Government-Owned Telecommunications Suppliers: according to Article 13.7 in both Chapters the Parties commit to having an independent telecommunications regulatory body and to ensure that its decisions and procedures are impartial with respect to all interested persons. In addition, DR-CAFTA rules out discriminatory treatment in favor of government-owned suppliers of public telecommunications services or information services and its Parties commit to endeavor to ensure that their telecommunications regulatory body has adequate resources to carry out its functions.

Universal Service: Article 13.8 of both Chapters establishes that any universal service obligation *maintained* by a Party must be administered in a transparent, non-discriminatory, and competitively neutral manner and should not be more burdensome than necessary for the kind of universal service defined. Under the Chile-U.S. FTA the obligation also applies to universal service obligations that a Party adopts, thereby allowing the Parties to impose new such obligations.

Licenses and Other Authorizations: both texts permit that a Party requires a supplier of public telecommunications services to have a license to supply the service. DR-CAFTA also permits its Parties to require concession, permit, registration, or other type of authorization. Article 13.9 of both Chapters also lists the type of information that shall be made publicly available when a license or other type of authorization is required.

Allocation and Use of Scarce Resources: according to Article 13.10 of both Chapters, each Party shall administer its procedures for allocating and using scarce telecommunications resources, including frequencies, numbers, and rights of way, in an objective, timely, transparent, and non-discriminatory manner. The provision in the Chile-U.S. FTA further establishes that the Parties must also make publicly available the current state of allocated frequency bands, but shall not be required to provide detailed identification of frequencies allocated for specific uses. In DR-CAFTA, the latter provision also applies but limited to frequencies allocated for specific *government* uses. Each Party retains the right to *exercise* (Chile-U.S. FTA)/*establish and apply* (DR-CAFTA) its spectrum and frequency management policies, provided that this is done in a manner that is consistent with the provisions of the Agreement.

Enforcement: competent authorities must have the authority to enforce the Party's measures relating to the obligations set out in Articles 13.2 through 13.5 and to impose effective sanctions (Article 13.11).

Resolution of Domestic Telecommunications Disputes: the procedures for resolving domestic telecommunications disputes are set out in Article 13.12 of both Chapters. The Articles cover three main issues: Recourse to Telecommunications Regulatory Bodies, Reconsideration and Judicial Review. These supplement two Articles – Administrative Proceedings and Review and Appeal- in the Chapter on Transparency of each Agreement. Two main differences between texts can be highlighted. First, in the resolution of disputes regarding interconnection Agreements between suppliers of public telecommunications services of the other Party and a major supplier of a Party, the former are to be given recourse to a *national telecommunications regulatory body* or *other relevant body* under the Chile-U.S. FTA text. DR-CAFTA guarantees recourse to a telecommunications regulatory body more broadly, meaning, for instance, that for the U.S. this body may be a state regulatory authority. Second, under "Juridical Review" in the Chile-U.S. FTA text, any enterprise aggrieved by a determination or decision of the national telecommunications regulatory body or other relevant body may obtain judicial review of such determination or decision by an impartial and independent judicial authority. In DR-CAFTA, this provision applies both when an enterprise has been aggrieved or when its *interests are adversely affected* by a determination or decision of the Party's telecommunications regulatory body. No definition is provided for the term "adversely affected" in DR-CAFTA.

Transparency: Article 13.13 of both Agreements spells out the types of measures relating to access and use of public telecommunications services that each Party shall make publicly available. Both Articles list measures relating to (a) tariffs and other terms and conditions of service; (b) technical interfaces; (c) bodies responsible for preparing, amending and adopting standards-related measures affecting access and use; (d) conditions for attaching terminal or other equipment to the public telecommunications network; and (e) notification, permit, registration, or licensing requirements. DR-CAFTA incorporates an additional measure dealing with procedures relating to judicial and other adjudicatory proceedings. Subject to Articles 18.2 (Publication) and 18.3 (Notification and Provision of Information), DR-CAFTA also requires (a) the prompt publication (or otherwise make publicly available) of rulemakings of a Party's telecommunications regulatory body and end-user tariffs filed with its telecommunications regulatory body and that (b) interested persons be provided with adequate advance public notice of, and the opportunity to comment on, any rulemaking that its telecommunications regulatory body proposes.

Flexibility in the Choice of Technologies: using slightly different language, Article 13.14 of both telecommunications Chapters, impede their Parties from preventing suppliers of public telecommunications services from having the flexibility to choose the technologies that they use to supply their services, including commercial mobile wireless services. The language used in the Chile-U.S. FTA makes this a "best-endeavors" clause, whereas if such impediments are imposed under DR-CAFTA they must conform to legitimate public policy interests.

Forbearance: the Parties to both Agreements recognize the importance of relying on market forces to achieve wide choices in the supply of telecommunications services. To this end, each Party may forbear from applying regulation to a telecommunications service that the Party classifies as public telecommunications service if its telecommunications regulatory body determines that: enforcement of such regulation is not necessary to prevent unreasonable or discriminatory practices, as well as the protection of consumers, and forbearance is consistent with the public interest (Art.13.15). The main difference between texts is that the Chile-U.S. FTA, but not DR-CAFTA, specifies that forbearance needs are to be provided for under the domestic law.

Specific Commitments of Costa Rica on Telecommunications Services (Annex 13 to DR-CAFTA)

Costa Rica undertook specific commitments related to regulatory principles on telecommunications in place of the obligations established in Chapter 13 of DR-CAFTA. It also undertook specific commitments with respect to market access. These are summarized below.

New legal framework for the telecommunications incumbent provider: Costa Rica committed to enact a new legal framework to strengthen the Instituto Costarricense de Electricidad (ICE) no later than December 31, 2004.

Selective and Gradual Market Opening:

- **Market Access Standstill:** Costa Rica will allow service providers of other DR-CAFTA member countries to supply telecommunications services on terms and conditions that are no less favorable than those established by or granted pursuant to its legislation in force on January 27, 2003.

- **Gradual and Selective Opening of Certain Telecommunications Services:** Costa Rica committed to allow telecommunications services providers of other DR-CAFTA member countries, on a non-discriminatory basis, to compete to supply, directly to the customer, telecommunications services in its territory such as: (i) Private network services, no later than January 1, 2006; (ii) Internet services, no later than January 1, 2006; and (iii) Mobile wireless services, no later than January 1, 2007. This provision also applies to any other telecommunications service that Costa Rica may decide to allow in the future.

Regulatory Principles: Costa Rica committed to having in force a new regulatory framework on telecommunications services by January 1, 2006, that will conform, but will not be limited to, the following provisions:

- **Universal Service:** Costa Rica's commitment regarding universal service differs from Article 13.8 of DR-CAFTA in that Costa Rica explicitly acknowledges its right to define the kind of universal service obligations it wishes to maintain. Costa Rica, as well as the other DR-CAFTA members commit to administer universal service obligations in a transparent, non-discriminatory, and competitively neutral manner and cannot be more burdensome than necessary for the kind of universal service defined.

- **Independence of the Regulatory Authority:** in line with Article 13.7, Costa Rica commits to establish or maintain an independent regulatory authority for telecommunications services and to ensure that its decisions and procedures are impartial with respect to all market participants. In order to ensure the independence of the regulator, Costa Rica utilizes a very general language compared to that used in Article 13.7. In particular, Costa Rica requires that the competent domestic authority be separate from and not accountable to any supplier of telecommunications services. Meanwhile, Article 13.7 stipulates that a Party ensures that its telecommunications regulatory body does not hold a financial interest or maintain an operating role in any supplier, nor to ensure that any financial interest that it holds in a supplier of public telecommunications services does not influence the decisions and procedures of its telecommunications regulatory body. Costa Rica also does not schedule commitments to rule out discriminatory treatment in favor of government-owned suppliers of public telecommunications services or information services and to endeavor to ensure that its telecommunications regulatory body has adequate resources to carry out its functions. Consistent with Article 13.11 (Enforcement), Costa Rica commits to authorize its telecommunications regulatory authority to impose effective sanctions to enforce domestic measures relating to the obligations set out in the Annex.

- **Transparency:** Costa Rica committed to making publicly available applicable procedures for interconnection to a major supplier; either its interconnection Agreements or referenced interconnection offers; all licensing or authorization criteria and procedures, required for telecommunications services suppliers; and the terms and conditions of all licenses or authorization issued. This provision combines some, but not all, elements in Articles 13.4.5, 13.9 and 13.13.

- **Allocation and Use of Scarce Resources:** using similar language to that found in Article 13.10 of the main text of the Agreement, Costa Rica commits to administer its procedures for the allocation and use of limited resources, including frequencies, numbers, and rights of way, in an objective, timely, transparent, and non-discriminatory manner by a competent domestic authority. As opposed to the other DR-CAFTA members, Costa Rica does not bind a commitment to make publicly available the current state of allocated frequency bands. With respect to licensing, Costa Rica establishes that licenses for use of spectrum shall be issued directly to the service providers, in accordance to its law.

- **Regulated Interconnection:** Costa Rica committed to ensuring that public telecommunications services suppliers of another Party are provided interconnection with a major supplier in a timely fashion, under non-discriminatory terms, conditions, and cost-oriented rates that are transparent, reasonable, and having regard to economic feasibility. This obligation replicates part of the language in Article 13.4.5(iv) and omits the requirement that interconnection rates be provided "sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided". Costa Rica also does not commit to other general terms and conditions for interconnection between *major* suppliers and the facilities and equipment of suppliers of public telecommunications services found in item (a) of Article 13.4.5, as well as to items (b) to (e) of said Article (see subsection *Interconnection* above). Costa Rica's commitment regarding regulated interconnection also establishes that a service supplier requesting interconnection with a major supplier has recourse to an independent domestic body, which may be the regulatory authority referred to above, to resolve disputes regarding appropriate terms, conditions, and rates for interconnection within a reasonable time. This commitment replicates part of the provision "Recourse to Telecommunications Regulatory Bodies" of Article 13.12, and omits any reference to "Reconsideration", "Judicial Review" in said Article and to "Administrative Proceedings" and Review and Appeal" contained in Chapter 18 on Transparency.

- **Access to and Use of the Network:** Costa Rica's commitment on access and use of the network replicates most of the language found in Article 13.2.1 to 13.2.4. A visible difference between the texts is that the measures that Costa Rica may take – to ensure the security and confidentiality of messages; or protect the privacy of non-public personal data of subscribers to public telecommunications services - and that limit access to and use of the network, are not made subject to a non-discrimination requirement. Costa Rica also excluded text found in Article 13.2.5(b) allowing Parties to impose conditions on access to and use of public telecommunications networks or services necessary to protect the technical integrity of public telecommunications network or services. An indicative list of conditions was also excluded from Costa Rica's commitment.

- **Provision of Information Services:** the commitment of Costa Rica with respect to the provision of information services replicates the language in Article 13.6 (Conditions for the Supply of Information Services) of DR-CAFTA. A significant difference between the two texts is that although both establish that a Party may take action to remedy anti-competitive practices of a supplier of information services or to promote competition or safeguard the interests of consumers, the text in Article 13.6 limits such actions to require the supplier of information services to (a) supply such services to the public generally; (b) cost-justify its rates for such services; (c) file a tariff for such services; (d) interconnect its networks with any particular customer for the supply of such services; or (e) conform with any particular standard or technical regulation for interconnection other than for interconnection to a public telecommunications network. Costa Rica, on the other hand, reserves the right to take *any* action to remedy anti-competitive practices of a supplier of information services or to promote competition or safeguard the interests of consumers.

- **Competition:** using similar language to that found in Article 13.4.2 (Competitive Safeguards), Costa Rica commits to maintaining appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in anti-competitive practices. The commitment further provides an indicative list of anti-competitive practices, which is more limited than that found in Article 13.4.2.

- **Submarine Cable Systems:** the commitment of Costa Rica with respect to submarine cable systems replicates Article 13.5 of DR-CAFTA.

- **Flexibility in the Choice of Technologies:** Costa Rica commits to not prevent suppliers of public telecommunications services from having the flexibility to choose their technologies. The text used is identical to that in Article 13.14 of DR-CAFTA, except that Costa Rica does not explicitly state that the obligation applies to the supply of commercial mobile wireless services. Moreover, a definition of public telecommunications services is not provided and hence it is not possible to determine a priori whether or not commercial mobile wireless services are covered by the commitment.

- Costa Rica did not schedule specific commitments relating to *resale, number portability, dialing party, unbundling of network elements, co-location, access to rights-of-way* and forbearance.

Chapter Fourteen

Temporary Entry for Business Persons

Only the Chile-U.S. FTA contains a chapter that deals with Temporary Entry for Business Persons. This Chapter is not a part of DR-CAFTA and the issue is not treated in the latter Agreement. Consequently this summary discusses the Chile-U.S. FTA text only.

General principles and obligations: set out in Articles 14.1 and 14.2, these ensure that nothing in the Chapter affects the ability of either Party to carry out immigration or security measures, i.e. those measures "...necessary to regulate the entry of natural persons into, or their temporary stay in, its territory...". These include security measures. The right of both Parties to require visas for entry or for the conduct of investment activities is also unaffected by the Agreement. However, the Parties are to try and ensure that these immigration and visa measures do not unduly delay trade and investment activities. Additionally, Article 14.1 makes it clear that the Chapter does not apply to measures regarding citizenship, nationality, permanent resident, or employment on a permanent basis.

Grant of temporary entry: sets out (in Article 14.3) the obligation to grant temporary entry to business persons of the other Party (as specified in the categories set out in the Annex 14.3 described below) under applicable measures relating to public health and safety and national security and when the temporary entry might adversely affect the settlement of any labor dispute. In case of refusal, the Party is obliged to inform the business person in writing and the other Party as well of the reasons.

Provision of information: obliges each Party to provide material to familiarize the other Party with its immigration laws and visa procedures and other relevant measures, and additionally to publish and provide a consolidated document of references to applicable laws and regulations no later than six months after the entry into force of the Agreement. Each Party is also required to collect data on the granting of temporary entry to business persons, specific to each occupation, profession or activity, and to make this available to the other Party.

Committee on Temporary Entry: establishes a Committee on Temporary Entry with representatives of the two Parties, including immigration officials. Article 14.5 sets out the tasks of this Committee which include: establishing procedures to exchange information; developing measures to further facilitate temporary entry of business persons; and developing common criteria and interpretations for implementing the Chapter.

Dispute settlement: specifies (in Art.14.6) that a Party may not initiate proceedings regarding a refusal to grant temporary entry under the Chapter unless: " (a) the matter involves a pattern of practice; and (b) the business persons has exhausted the available administrative remedies regarding the particular matter". The latter is further defined as a situation in which a determination in the matter has not been issued within a one-year period of time.

Relation to other chapters: states (in Art.14.7) that no provision of the Agreement shall impose any obligation on a Party regarding its immigration measures, and that nothing in Chapter

Fourteen shall impose obligations or commitments with respect to other Chapters of the Agreement.

Transparency in development and application of regulations: sets out provisions (in Art.14.8) that complement those in Chapter Twenty (Transparency). The Article provides for each Party to do the following:

i) establish/ maintain mechanisms to respond to inquiries regarding regulations relating to temporary entry;
ii) provide a statement addressing comments received on proposed regulations relating to temporary entry;
iii) allow a reasonable period of time between the date of publication of final regulations and their entry into force;
iv) inform applicants of the status of their application without undue delay and of a decision concerning their application within a reasonable period of time.

Definitions: sets out (in Art.14.9) definitions relevant to the Chapter. These include definitions for the following terms: business person; immigration measure; national; professional; and temporary entry.

Annex 14.3: Temporary Entry for Business Persons: the Annex to Article 14.3 on Temporary Entry for Business Persons specifies the four categories that are encompassed within the provisions of Chapter 14. These include: Business Visitors; Traders and Investors; Intra-Company Transferees; and Professionals.

Under the relevant sections, namely Section A for Business Visitors, Section B for Traders and Investors, Section C for Intra-Company Transferees and Section D for Professionals, the text specifies what requirements each category of worker must satisfy in order to be granted temporary entry. The text also specifies in Sections A, B and C that neither Party may require labor certification tests or impose or maintain any numerical restriction relating to temporary entry, while Section D authorizes the Parties to establish an annual numerical limit on the temporary entry of Professionals.

Additionally, there are three Appendices under the Annex 14.3. The first is an Appendix relevant to the first category of Business Visitors. The second is an Appendix relevant to the fourth category of Professionals. The third is an Appendix setting out commitments by the United States for temporary entry quotas.

The first Appendix 14.3(A)(1) sets out the various types of activity in which Business Visitors may be engaged, namely:

i) Meetings and Consultations;
ii) Research and Design;
iii) Growth, Manufacture, and Production;
iv) Marketing;
v) Sales;

vi) Distribution;
vii) After-Sales Service; and
viii) General Service.

The second Appendix 14.3 (D)(2) lists the minimum education requirements and alternative credentials for the following professions:

i) Disaster Relief Claims Adjuster;
ii) Management Consultant;
iii) Agricultural Manager; and
iv) Physical Therapist.

A third and final Appendix 14.3 (D)(6) under the title "United States" sets out the commitment by the United States to annually approve as many as 1,400 applications for business persons of Chile seeking temporary entry under the category of Professionals (not including accompanying family members).

Chapter Fifteen

Electronic Commerce

There is a great deal of similarity as between the two Agreements with respect to the substance of the six Articles in the text. Under both Agreements, the Parties in the Article establishing the General provisions, recognize the economic growth opportunities provided by electronic commerce and the importance of avoiding unnecessary barriers to its use and development. Both Agreements also provide that nothing in the Chapter shall be construed to prevent a Party from imposing internal taxes, directly or indirectly, on digital products, provided they are imposed in a manner consistent with the respective Agreements. The General Article in both Agreements also recognizes the applicability of the Chapter on Electronic Commerce to measures adopted or maintained by a Party affecting the electronic supply of services. The Article in DR-CAFTA contains an additional provision that specifically recognizes the applicability of the WTO rules to electronic commerce.

Substantively, both Agreements contain the same provisions related to the Electronic Supply of Services, Customs Duties on Digital Products, Non-Discrimination for Digital Products and Cooperation. However, there are also a few notable differences.

Electronic Supply of Services: in the Article covering the Electronic Supply of Services, the provisions are identical to the extent that they both recognize that the supply of a service using electronic means falls within the scope of the obligations contained in the relevant provisions of their respective Chapters on Cross- Border Trade in Services and Financial Services subject to any nonconforming measures or exceptions applicable to such obligations. However, DR-CAFTA also specifically refers to the Chapter on Investment.

Customs Duties on Digital Products: both Agreements provide that neither Party may apply customs duties on digital products of the other Party. However DR-CAFTA refers to "other duties" including "fees, or charges on or in connection with the importation or exportation of digital products by electronic transmission".

Non-Discrimination for Digital Products: both Agreements contain identical provisions regarding Non-Discrimination for Digital Products, save that:

The Chile-U.S. FTA provides that a Party:

"may maintain an existing measure that does not conform with paragraph 1 or 2 for one year after the date of entry into force of this Agreement. A Party may maintain the measure thereafter, if the treatment the Party accords under the measure is no less favorable than the treatment the Party accorded under the measure on the date of entry into force of this Agreement, and the Party has set out the measure in its Schedule to Annex 15.4. A Party may amend such a measure only to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with paragraphs 1 and 2."

DR-CAFTA provides that:

"Paragraphs 3 and 4 do not apply to any non-conforming measure described in Articles 10.13 (Non-Conforming Measures), 11.6 (Non-Conforming Measures), or 12.9 (Non-Conforming Measures)."

Transparency: only DR-CAFTA contains a specific Article that addresses the issue of transparency and provides that each Party shall publish or otherwise make available to the public its laws, regulations, and measures of general application which pertain to electronic commerce.

Cooperation: both DR-CAFTA and the Chile-U.S. FTA contain identical Cooperation provisions under Articles 15.5 and 14.5 respectively. Having in mind the global nature of electronic commerce, both Parties recognize the importance of: (a) working together to overcome obstacles encountered by small and medium enterprises in the use of electronic commerce; (b) sharing information and experiences; (c) working to maintain cross-border flows of information; (d) encouraging the development by the private sector of methods of selfregulation; and (e) actively participating in international fora with the purpose of promoting the development of electronic commerce.

Definitions: nearly identical in both Agreements (Chile-U.S. FTA Art.15.6 and DR-CAFTA Art.14.6), sets out the same definitions for the following terms:

- digital products (save that the Chile-U.S. FTA provides further that the identified products shall be defined as digital products "regardless of whether a Party treats such products as a good or a service under its domestic law")
- electronic means
- electronic transmission

Additionally, there is a definition for "carrier medium" in DR-CAFTA. A definition for "carrier medium" is included in the Chile-U.S. FTA under the Chapter on National Treatment and Market Access for Goods.

Annex on Non-Discrimination for Digital Products: contained only in the Chile-U.S. FTA, sets out the Schedule of a Party which sets out the non-conforming measures maintained by that Party pursuant to Article 15.4.3.

Chapter Sixteen

Competition Policy, Designated Monopolies, and State Enterprises

Competition Policy

Due to the absence of this Chapter in DR-CAFTA, this part only describes the contents of the Competition Policy Chapter of the Chile-U.S. FTA (Chapter 16) that is divided into nine Articles (including definitions) in which the objectives, principles and scope of application of the competition policy commitments are established, as follows:

Anticompetitive Business Conduct: under the first Article of the Chapter (Art.16.1), each party must adopt or maintain competition laws to proscribe anticompetitive business conduct and also take appropriate action with respect to such conduct. The Parties must also maintain a national authority responsible for the enforcement of such measures in a way that guarantees the principles of transparency, non-discrimination, the right of the person to be heard and to present evidence on the proceeding and the existence of an independent authority to impose or to review the sanctions or remedies. Each Party's autonomy in developing its competition policies or in deciding how to enforce its competition laws is also guaranteed.

Cooperation: recognizing the importance of cooperation and coordination (Art.16.2), the Parties agree to include dispositions on these issues to deepen the effective enforcement of competition laws. This cooperation includes notifications, consultations and the exchange of information.

Designated Monopolies: a Party may designate a monopoly or establish or maintain a government enterprise, but when this designation may affect the interests of persons of the other Party, the Article (Art.16.3) demands the designating Party to introduce conditions on the operation of the monopoly to minimize or eliminate any nullification or impairment of benefits, as well as provide written notification in advance of the designation. Additionally, the Article establishes that any privately-owned monopoly designated after the date of entry into force of the Agreement shall act in accordance with commercial considerations, provides non-discriminatory treatment to covered investments in the purchase or sale of goods and services and, does not use its monopoly position to engage in anticompetitive practices that affect these investments. The Article does not apply to procurement.

State enterprises: the Chile-U.S. FTA (Art.16.4) allows a Party to establish or to maintain state enterprises, as long as these enterprises act in a manner that is not inconsistent with the Party's obligations and do not discriminate in the sale of their goods and services to covered investments.

Differences of Pricing: the discrimination of prices based on normal commercial considerations will not be inconsistent with the dispositions on designated monopolies and state enterprises (Art.16.5).

Transparency and Information Requests: recognizing the value of transparency the Chile-U.S. FTA (Art.16.6) established that, on request, each Party shall make available public

information concerning its implementation of competition law, state enterprises and designated monopolies, as well as exemptions provided under its competition laws.

Consultations: any Party can request the establishment of consultations to foster understanding or to address specific matters; the other Party must accord full and sympathetic consideration to the concerns (Art.16.7).

Disputes: the Chapter (Art.16.8) establishes that no party can use the dispute settlement mechanism within the Agreement with respect to issues arising from anti-competitive business conduct, cooperation and consultations. The disputes concerning those obligations should access mechanisms under the WTO or perhaps an arbitration treaty.

Definitions: the Chapter (Art.16.9) concludes with descriptions for the following terms: delegation, designate, government monopoly, non-discriminatory treatment, market, monopoly, and in accordance with commercial considerations.

Chapter Seventeen

Intellectual Property Rights

Chapter XVII of the Chile-U.S. FTA and Chapter XV of DR-CAFTA are the first comprehensive Agreements on intellectual property rights (IPR) negotiated in the Western Hemisphere since the WTO TRIPS Agreement in 1994 (TRIPS).

The IPR Chapters of the Chile-U.S. FTA and DR-CAFTA build on the standards and disciplines of the TRIPS Agreement and recent Treaties concluded under the auspices of the World Intellectual Property Organization (WIPO). Although there are some differences, both FTAs are very similar in terms of basic structure and content. Both cover general provisions, trademarks, domain names in the Internet, geographical indications, copyright and related rights, patents, measures related to certain regulated products and enforcement measures.

Both Chapters require accession to specific international intellectual property Agreements and, in some instances, they implement and/or further develop provisions of these IPR Agreements. Additionally, both Chapters address technological developments unforeseen during the Uruguay Round negotiations, particularly in the areas of copyright and related rights, domain names in the Internet and enforcement.

In the "Final Provisions" Parties agreed to phase-in periods for certain IPR obligations. These periods and the obligations covered under the Chile-U.S. FTA and DR-CAFTA are different and in some cases country-specific. Each transitional period is indicated with a footnote in the corresponding provision.

Some of the main features and significant differences between the two Chapters are described below.

General Provisions: both Chapters provide for accession to a number of intellectual property treaties, contain the national treatment obligation (Chile-U.S. FTA Art.17.1.6; DR-CAFTA Art.15.1.8) and allow Parties to implement more extensive protection than required under the FTA (Chile-U.S. FTA Art.17.1.1; DR-CAFTA Art.15.1.1). Other general provisions included in both Chapters cover transparency (Chile-U.S. FTA Art.17.1.12; DR-CAFTA Art.15.1.14), protection of existing subject matter (Chile-U.S. FTA Arts. 17.1.9-11; DR-CAFTA Arts. 15.1.11-13), control of anticompetitive practices (Chile-U.S. FTA Art.17.1.13; DR-CAFTA Art.15.1.15) and technical cooperation (Chile-U.S. FTA Art.17.1.14; DR-CAFTA Art.15.1.16).

Regarding accession, there are some differences between the Chile-U.S. FTA and DR-CAFTA in the number of treaties and the dates to bring them into force.

Notwithstanding that all Parties involved in both FTAs have already ratified the WIPO Copyright Treaty (WCT) (1996) and the WIPO Performances and Phonograms Treaty (WPPT) (1996), only DR-CAFTA requires each Party to ratify or accede these treaties (by the entry into force of DR-CAFTA, pursuant to Art.15.1.2).

Both FTAs require ratification or accession to the Patent Cooperation Treaty (PCT); Chile-U.S. FTA (Art.17.1.2) before January 1, 2007, whereas DR-CAFTA (Art.15.1.3(a)) establishes January 1, 2006, as the deadline. This latter date also applies to DR-CAFTA Parties (Art.15.1.3(b)) with respect to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980). The Budapest Treaty is not included in the Chile-U.S. FTA.

Both FTAs provide for ratification of the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974) and the Trademark Law Treaty (1994). The only difference is the deadline to comply with this commitment: January 1, 2009, under the Chile-U.S. FTA (Art.17.1.3(b),(c)) and by January 1, 2008 under DR-CAFTA (Art.15.1.4(a),(b)). The Chile-U.S. FTA (Art.17.1.3(a)) also requires ratification or accession to the International Convention for the Protection of New Varieties of Plants (UPOV Convention 1991) before January 1, 2009. In the case of the UPOV Convention 1991, DR-CAFTA (Art.15.1.5) establishes country-specific deadlines: June 1, 2007, for Costa Rica; January 1, 2010, for Nicaragua, and January 1, 2006 for the rest of the countries.

Under both the Chile-U.S. FTA (Art.17.1.4) and DR-CAFTA (Art.15.1.6), Parties agreed to undertake *reasonable efforts* to ratify or accede 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). No specific date is established to comply with this commitment.

The two FTAs address their relationship to the TRIPS Agreement. Under the Chile-U.S. FTA, in the Preamble, Parties "...affirm... the rights and obligations set forth in the TRIPS Agreement;" and "...*Recognize* 'the principles set out in the Declaration on the TRIPS Agreement and Public Health, adopted on November 14, 2001, by the WTO at the Fourth WTO Ministerial Conference, held in Doha, Qatar". Furthermore, the Chile-U.S. FTA (Art.17.1.5) provides that "nothing in this Chapter ...shall 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 World Intellectual Property Organization (WIPO)". In DR-CAFTA there is no "no derogation" clause. However, pursuant to Article 15.1.7, "Parties affirm their existing rights and obligations under the TRIPS Agreement and intellectual property Agreements concluded or administered under the auspices of the World Intellectual Property Organization (WIPO) and to which they are party". Additionally, DR-CAFTA Parties reached an "Understanding regarding certain Public Health Measures." Pursuant to this Understanding, Parties highlighted that Chapter 15 of DR-CAFTA does not affect a Party's ability to take necessary measures to protect public health by promoting access to medicines for all in terms similar to those agreed under the Doha Declaration on the TRIPS Agreement and Public Health in the WTO. Moreover, the Understanding points out that Chapter 15 on IPR in DR-CAFTA does not prevent the effective utilization of the solution reached to implement Paragraph 6 of the aforementioned Declaration (with respect to countries with insufficient or no manufacturing capacities in the pharmaceutical sector).

Both FTAs provide for national treatment. The Chile-U.S. FTA (Art.17.1.6) accords this treatment to "persons of the other Party" whereas DR-CAFTA (Art.15.1.8) refers to "nationals." As exceptions to National Treatment both FTAs allow for derogations in relation to their judicial

and administrative procedures requiring an address or agent for service in their territory and for procedures related to the acquisition or maintenance of rights concluded under the auspices of the WIPO (Chile-U.S. FTA Arts. 17.1.7-8; DR-CAFTA Arts. 15.1.9-10). Unlike DR-CAFTA, Chile-U.S. FTA (Art.17.1.6) contains an additional limitation to national treatment. It subjects to reciprocity protection to performers and producers of phonograms with respect to secondary uses of phonograms by means of analog communications and free over-the-air broadcasting.

Both FTAs call for technical cooperation to strengthen the use of IPR as a research and innovation tool, facilitate cooperation, exchange of information and coordination as well as the implementation of electronic systems for the management of intellectual property. DR-CAFTA (Art.15.1.16), however, goes beyond the Chile-U.S. FTA (Art.17.1.14) and establishes a Committee on Trade Capacity Building.

Trademarks: in the area of trademarks, both Chapters provide for very similar standards of protection building on the provisions of the TRIPS Agreement.[28] Both the Chile-U.S. FTA (Art.17.2.1) and DR-CAFTA (Art.15.2.1)[29] require the protection of collective, certification and sound marks and may extend trademark protection to geographical indications and scent marks. The Chile-U.S. FTA (Art.17.2.2) mandates that each Party shall have the opportunity to oppose the application for a trademark. DR-CAFTA (Art.15.2.6) includes a similar provision as part of the requirements of the system for registration of trademarks, including the possibility of opposition after registration.

Building on TRIPS Article 20, both the Chile-U.S. FTA (Art.17.2.3) and DR-CAFTA (Art.15.2.2), establish that Parties are to ensure that the use or effectiveness of trademarks shall not be encumbered through measures requiring the use of the *common name* or generic reference as the common name for goods or services. Both FTAs identify as examples of such encumbrances the following: requirements regarding size, placement or style of use of a trademark in relation to the common name.

Both FTAs include provisions dealing with rights conferred and exceptions and limitations to these rights. Under exclusive rights for trademark owners, both Chapters add coverage for goods or services *that are related* to the goods or services in respect of which the trademark is registered, *including* geographical indications, where use would result in likelihood of confusion (Chile-U.S. FTA Art.17.2.4; DR-CAFTA Art.15.2.3). DR-CAFTA also incorporates geographical indications to the presumption of likelihood of confusion in case of the use of an identical sign for identical goods or services.

Both DR-CAFTA (Art.15.2.5) and the Chile-U.S. FTA (Art.17.2.6) broaden the protection of well-known marks to goods and services which are not similar, whether registered or not, provided that there is a connection or association between the goods or services and the owner of

[28] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: two years from the entry into force of the Chile-U.S. FTA, with respect to the obligations in Article 17.2 on trademarks (Chile-U.S. Art.17.12.2).

[29] Guatemala and Honduras may delay giving effect to Article 15.2.1 for no longer than two years, and the Dominican Republic for 18 months, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

the well-known mark and that the interests of the owner of the trademark are likely to be damaged. The Chile-U.S. FTA (Art.17.2.7) goes beyond and provides for appropriate measures to prohibit or cancel the registration of a trademark, identical or similar to a well-known trademark, if the use is likely to cause confusion or constitutes unfair exploitation of the reputation of the trademark. Under the Chile-U.S. FTA (Art.17.2.8) and DR-CAFTA (Art.15.2.5 ftnt.6), a Party shall not require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services to determine whether a trademark is well-known. Additionally, the Chile-U.S. FTA (Art.17.2.9) recognizes the importance of the WIPO *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999).*

In addition to certain minimum due process and transparency requirements in the system for the registration of trademarks, both FTAs set forth the objective to provide a system for the electronic application, processing, registration and maintenance of trademarks (Chile-U.S. FTA Art.17.2.10-11; DR-CAFTA Art.15.2.6-7). DR-CAFTA (Art.15.2.7) also seeks to make available a public electronic database-including an on-line database- for trademark application and registration.

Both FTAs refer to the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1979).* Neither FTA requires ratification or accession to this Treaty. Under DR-CAFTA (Art.15.2.8), for purposes of trademark application or registration, goods and services are to be grouped according to the classes of the Nice classification. Under the Chile-U.S. FTA (Art.17.2.12) Parties are only *encouraged* to classify goods and services according to Nice.

Only DR-CAFTA (Art.15.2.9) provides for a renewable term of registration of no less than 10 years.

Unlike the Chile-U.S. FTA, DR-CAFTA (Art.15.2.10) establishes that no Party may require recordal of trademark licenses to establish the validity of the license or to assert any right in a trademark. A footnote clarifies that such recordal may be established only to provide public notice as to the existence of the license.

Domain Names on the Internet: both FTAs include provisions regarding domain names. According to these provisions each Party shall provide for an appropriate procedure for the settlement of disputes, based on the principles established in the *Uniform Domain-Name Dispute-Resolution Policy (UDRP)*, in order to address the problem of trademark cyber-piracy (Chile-U.S. FTA Art.17.3.1; DR-CAFTA Art.15.4.1). Both Chapters also require Parties to provide online public access to a reliable and accurate database of contact information for domain-name registrants with due regard to laws protecting privacy (Chile-U.S. FTA Art.17.3.2; DR-CAFTA Art.15.4.2[30]).

[30] Guatemala, Honduras and Nicaragua may delay giving effect to Article 15.4 and Costa Rica to Article 15.4.1 for no longer than two years, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

Geographical Indications (GIs): both the Chile-U.S. FTA (Art.17.4.1[31]) and DR-CAFTA (Art.15.3.1) mirror TRIPS Article 22 with respect to the definition of geographical indications. Both FTAs add to this definition by establishing that any sign or combination of signs, in any form whatsoever, shall be eligible as a geographical indication.

Both FTAs establish the obligation to provide for the "legal means" to identify and protect geographical indications (Chile-U.S. FTA Art.17.4.2-3; DR-CAFTA Art.15.3.2). Only DR-CAFTA clarifies that "legal means to identify" refers to "a system that permits applicants to provide information on the quality, reputation, or other characteristics of the asserted geographical indication (DR-CAFTA Art.15.3.2. ftnt. 8)." Pursuant to Article 17.4.11, Parties to the Chile-U.S. FTA shall communicate to the public the means to implement the commitments under the Section on Geographical Indications within six months of the entry into force of the FTA.

Regarding the relationship between trademarks and geographical indications, both FTAs provide as grounds to refuse protection or recognition of GIs cases where a geographical indication is *confusingly similar* (under the Chile-U.S. FTA) or *likely to be confusingly similar* (under DR-CAFTA) to pre-existing registration, good-faith pending application or trademark rights (Chile-U.S. FTA Art.17.4.10; DR-CAFTA Art.15.3.7[32]). In the case of pre-existing trademark rights DR-CAFTA also requires that the rights were acquired in accordance to each Party's law. DR-CAFTA (Art.15.3.7 ftnt.9) adds a footnote stating that it is understood that each Party already has established grounds for refusing protection of a trademark if it is confusingly similar to a protected geographical indication, including equivalent grounds to those provided in Article 15.3.7.

Both the Chile-U.S. FTA (Arts. 17.4.4-8) and DR-CAFTA (Arts. 15.3.3-6) establish specific requirements for the system to apply for protection or recognition of geographical indications. These requirements cover several procedural steps such as: minimum of formalities, transparency, publication, opposition procedures and public notice.

Only the Chile-U.S. FTA (Art.17.4.9) refers to the principle of exclusivity incorporated in the Paris Convention and TRIPS Agreement.

Copyright and Related Rights: both the Chile-U.S. FTA and DR-CAFTA provide very similar protection to copyright and related rights. The main difference is, however, reflected in the structure of their respective sections. DR-CAFTA combines provisions of copyright and related rights whereas the Chile-U.S. FTA has separate headings for copyright and then related rights. Thus, under DR-CAFTA in several instances provisions establish rights and obligations for both copyright and related rights in a single Article. In addition to building on the TRIPS Agreements,

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[31] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: two years from the entry into force of the Chile-U.S. FTA, with respect to the obligations Article 17.4(1) through 17.4(9) on geographical indications (Chile-U.S. Art.17.12.2).

[32] Costa Rica, Guatemala, Honduras, Nicaragua and the Dominican Republic may delay giving effect to Article 15.3.7 for no longer than two years, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

both FTAs implement and further develop provisions of the WIPO Internet Treaties, WCT and WPPT.

Both FTAs include the right of reproduction for authors, including temporary copies and storage in electronic form (Chile-U.S. FTA Art.17.5.1[33]; DR-CAFTA Art.15.5.1). DR-CAFTA includes a footnote (DR-CAFTA Art.15.5.1 ftnt. 12), similar to the Agreed Statements under the WCT and WPPT with respect to the right of reproduction, indicating the full application of the right of reproduction in the digital environment. The Chile-U.S. FTA covers this issue only regarding exceptions and limitations (see below, Chile-U.S. FTA Art.17.7.3).

Other rights provided for authors under both IPR Chapters are the rights of distribution and communication to the public, including the making available to the public through interactive access, in very similar terms as provided for in the WCT (Chile-U.S. FTA Arts. 17.5.2-3; DR-CAFTA Arts. 15.5.2, 15.6). Both the Chile-U.S. FTA (Art.17.5.4) and DR-CAFTA (Art.15.5.4) include a copyright term of protection of not less than the life of the author plus 70 years.

For related rights, both IPR Chapters establish rights and obligations for performers and producers of phonograms following the basic rights provided under the WPPT. Among the most relevant provisions, both FTAs provide for the right of reproduction, including temporary copies and storage in electronic form (Chile-U.S. FTA Art.17.6.1[34]; DR-CAFTA Art.15.5.1). Other rights include the right of distribution, right to authorize or prohibit the broadcasting or any communication to the public of their fixed performances or phonograms, including the making available to the public for interactive access (Chile-U.S. FTA Arts. 17.6.2, 17.6.5(a)[35]; DR-CAFTA Arts. 15.5.2, 15.7.3(a)).

Under both FTAs the protection for performers shall also include the right to authorize or prohibit the fixation of their unfixed performances and the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance (Chile-U.S. FTA Art.17.6.4; DR-CAFTA Art.15.7.2(a)(b)).

Both the Chile-U.S. FTA (Arts. 17.6.6-7) and DR-CAFTA (Arts. 15.7.4, 15.5.4[36]) specify that the enjoyment and exercise of related rights shall(Chile-U.S. FTA)/may(DR-CAFTA) not be subject to any formality and establish a term of protection of not less than 70 years from the end of the calendar year of the first authorized publication or fixation of the performance or

[33] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: two years from the entry into force of the Chile-U.S. FTA, with respect to the obligations Article 17.5.1 on temporary copies (Chile-U.S. Art.17.12.2).

[34] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: two years from the entry into force of the Chile-U.S. FTA, with respect to the obligations Article 17.6.1 on temporary copies (Chile-U.S. Art.17.12.2).

[35] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: four years from the entry into force of the Chile-U.S. FTA, with respect to the obligations Article 17.6.5 on the right of communication to the public for performers and producers of phonograms (Chile-U.S. Art.17.12.2).

[36] Guatemala and the Dominican Republic may delay giving effect to Article 15.5.4 for no longer than six months, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

phonogram. The criteria for eligibility for protection provided under both FTAs covers nationals of the other Parties and performances or phonograms first published or first fixed in the territory of another Party (Chile-U.S. FTA Art.17.6.3; DR-CAFTA Art.15.7.1).

Both FTAs establish that rules with respect to the broadcasting or communication to the public through traditional/analog communication and free over-the-air broadcasting and the exceptions or limitations to the rights shall be a matter of domestic law (Chile-U.S. FTA Art.17.6.5(b)[37]; DR-CAFTA Art.15.7.3(b)). Moreover, both the Chile-U.S. FTA and DR-CAFTA allow Parties to adopt exceptions and limitations in respect of other non-interactive transmissions provided that such limitations do not prejudice the right of the performer or producer of phonograms to obtain equitable remuneration. Under the Chile-U.S. FTA (Art.17.6.5(b)) there is specific mention of compulsory licenses. Unlike the Chile-U.S. FTA, according to DR-CAFTA (Art.15.5.10(b)), no Party may permit retransmission of television signals on the Internet without authorization of the right holder of the content and if any, of the signal.

Under "obligations common to copyright and related rights," both the Chile-U.S. FTA (Arts. 17.7.1, 17.7.2(b)) and DR-CAFTA (Arts. 15.5.3, 15.5.6(a) (b)) provide for no hierarchy of rights between those of authors and performers and producers of phonograms and the right to freely and separately transfer economic rights by contract and exercise and enjoy fully the benefits derived from such rights. The Chile-U.S. FTA (Art.17.7.2(b)) includes additional provisions governing contracts dealing with work for hire. As provided by TRIPS, WCT and WPPT, both FTAs include the three-step test to confine limitations or exceptions to the rights conferred to certain special cases which do not conflict with the normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder (Chile-U.S. FTA Art.17.7.3; DR-CAFTA Art.15.5.10(a)).

A footnote under the Chile-U.S. FTA (Art.17.7.3 ftnt.17), comparable to the Agreed Statements under the WCT and WPPT regarding exceptions and limitations, allows a Party to extend limitations and exceptions in its domestic laws (already considered acceptable under the Berne Convention) and to devise new ones that are appropriate in the digital network environment. Moreover, the footnote establishes that for works, other than computer software, and other subject-matter, such exceptions and limitations may include temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a lawful transmission in a network between third Parties by an intermediary; or (b) a lawful use of a work or other subject-matter to be made; and which have no independent economic significance. As previously indicated DR-CAFTA (Art.15.5.1 ftnt. 12) includes a footnote covering the right of reproduction. In the same paragraph DR-CAFTA also refers to exceptions and limitations. The scope in DR-CAFTA is however limited to exceptions permitted under the Berne Convention and Article 15.5.10(a) of DR-CAFTA. Hence, DR-CAFTA does not specifically refer to possible new exceptions or the special cases addressed under the Chile-U.S. FTA.

[37] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: four years from the entry into force of the Chile-U.S. FTA, with respect to the obligations Article 17.6.5 on non-interactive digital transmissions for performers and producers of phonograms (Chile-U.S. Art.17.12.2).

Both Chapters implement the obligations concerning technological measures pursuant to the WCT and WPPT. Therefore, the Chile-U.S. FTA (Art.17.7.5[38]) and DR-CAFTA (Art.15.5.7[39]) contain detailed provisions in order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures. Although the structure is relatively different, both Chapters include a definition of "effective technological measure," specific conducts and cases where liability exists and corresponding criminal and civil remedies.

Under DR-CAFTA (Art.15.5.7(c)) a violation of a measure implementing this protection is a separate civil cause of action or criminal offense independent of any copyright or related rights infringement. The Chile-U.S. FTA does not include an equivalent provision.

Both FTAs provide for remedies against the act of unauthorized circumvention and the trafficking of devices, products or components of limited use other than to enable, facilitate or circumvent any effective technological measure. Consequently, the two Chapters make available civil remedies for violations of effective technological measures and criminal penalties for willful violations for purposes of commercial advantage.

Regarding the act of circumvention, the Chile-U.S. FTA (Art.17.7.5(a)) requires actual knowledge, demonstrated through reasonable evidence for the conduct of unauthorized circumvention to be subject to sanctions. Only the Chile-U.S. FTA (Art.17.7.5(a)) establishes that no Party is required to impose civil or criminal liability for a person who circumvents any effective technological measures that protects any of the exclusive rights of copyright or related rights, but does not control access. Furthermore, unlike DR-CAFTA, Chile refers to the possibility of considering circumvention as an aggravating circumstance of another offense.

Both FTAs incorporate a list of very detailed exceptions to protect specific cases of fair use.

The Chile-U.S. FTA (Art.17.7.6) and DR-CAFTA (Art.15.5.8[40]) also implement WCT and WPPT provisions on obligations concerning rights management information. This protection is aimed at prohibiting the removal or alteration of rights management information which identifies the right holder, terms and conditions of use, any numbers or codes attached or connected to a copy of a work, performance or phonogram available to the public. Provisions include definition of rights management information, cases of civil and criminal liability as well as limited exceptions.

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[38] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: five years from the entry into force of the Chile-U.S. FTA, with respect to the obligations Article 17.7.5 on effective technological measures (Chile-U.S. Art.17.12.2).

[39] Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic may delay giving effect to Articles 15.5.7(a)(ii), 15.5.7(e), 15.5.7(f) for no longer than three years, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

[40] Costa Rica, Guatemala, Honduras and Nicaragua may delay giving effect to Article 15.5.8(a)(ii) for no longer than two years and El Salvador, for no longer than 30 months, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

Another obligation included in both FTAs requires governments to issue appropriate laws, regulations or decrees to mandate use of authorized software by all federal or central government agencies (Chile-U.S. FTA Art.17.7.4; DR-CAFTA Art.15.5.9[41]).

Protection of Encrypted Program-Carrying Satellite Signals: both the Chile-U.S. FTA (Art.17.8) and DR-CAFTA (Art.15.8[42]) protect right holders of encrypted satellite signals against (i) willful unauthorized reception and further distribution of that signal. Moreover, both FTAs provide for sanctions for those dealing with (ii) devices or systems knowing (or having reason to know under DR-CAFTA) that their function is primarily of assistance in decoding an encrypted signal without authorization of the lawful distributor.

DR-CAFTA subjects these conducts to criminal penalties and civil remedies (compensatory damages). Under the Chile-U.S. FTA (Art.17.8.1) each Party shall make it a civil *or* criminal offense and requires evidence of actual knowledge by the person infringing the exclusive rights in both instances (i.e., reception, distribution and decoding devices or systems).

Patents: as is the case with other issues, both patent sections under the Chile-U.S. FTA and DR-CAFTA build on TRIPS provisions.

Both FTAs include a general provision on patentable subject matter following the TRIPS Agreement (Chile-U.S. FTA Art.17.9.1[43]; DR-CAFTA Art.15.9.1). Additionally, DR-CAFTA (Art.15.9.2) indicates that nothing shall be construed to prevent a Party from excluding inventions from patentability as set out in Articles 27.2 and 27.3 of the TRIPS Agreement. The Chile-U.S. FTA does not make specific reference to the exclusions from patentability allowed under TRIPS.

Regarding patent protection for plants, under DR-CAFTA (Art.15.9.2), Parties agreed to undertake "all reasonable efforts to make patent protection available by the date [DR-CAFTA] enters into force." Under the Chile-U.S. FTA (Art.17.9.2), the commitment is to "undertake reasonable efforts, through a transparent and participatory process, to develop and propose legislation within four years from the entry into force of the Agreement that makes available patent protection for plants".

The two FTAs contain a provision allowing exceptions as long as they are limited, do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interest of the patent owner, taking account of the legitimate interest of third Parties (Chile-U.S. FTA Art.17.9.3[44]; DR-CAFTA Art.15.9.3).

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[41] Guatemala, Honduras, Nicaragua and the Dominican Republic may delay giving effect to Article 15.5.9 for no longer than one year, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

[42] Guatemala and Honduras may delay giving effect to Article 15.8, and Costa Rica, El Salvador, Nicaragua to Article 15.8.1, for no longer than 18 months, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

[43] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: two years from the entry into force of the Chile-U.S. FTA, with respect to the obligations Article 17.9.1 on patents (Chile-U.S. Art.17.12.2).

[44] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: two years from the entry

Both DR-CAFTA (Art.15.9.5) and the Chile-U.S. FTA (Art.17.9.4) cover aspects of the so-called regulatory review or Bolar exception in the patent section. These provisions link patent protection with applications by third Parties to obtain marketing approval or sanitary permits. Under both IPR Chapters use of the subject matter of a subsisting patent to support a regulatory application shall be limited to purposes of meeting the marketing or sanitary requirements. Thus, any product produced under such authority shall not be made, used, or sold in the territory of the Party or exported, if permitted, for purposes other than obtaining marketing approval or sanitary permits. Pursuant to DR-CAFTA this provision is applicable to pharmaceutical or agricultural chemical products. The Chile-U.S. FTA refers only to pharmaceuticals.

Under both FTAs, a Party may revoke or cancel a patent only when grounds exist that would have justified a refusal to grant the patent (Chile-U.S. FTA Art.17.9.5; DR-CAFTA Art.15.9.4). DR-CAFTA (Art.15.9.4) adds the caveat that this provision is without prejudice to Article 5.A(3) of the Paris Convention (dealing with forfeiture of patents to prevent abuse which might result from the exercise of exclusive rights conferred by the patent). DR-CAFTA (Art.15.9.4) also expressly indicates that fraud, misrepresentation or inequitable conduct may be the basis for revoking, canceling or holding a patent unenforceable. The Chile-U.S. FTA (17.9.5 ftnt. 24) only incorporates fraud as possible grounds to revoke or cancel a patent in a footnote to this provision.

The two IPR Chapters require the adjustment of the term to compensate for unreasonable delays in granting the patent. This obligation is triggered by a delay of more than five years from the date of filing in the territory of the Party or three years after a request for examination has been made (Chile-U.S. FTA Art.17.9.6; DR-CAFTA Art.15.9.6[45]).

Both the Chile-U.S. FTA (Art.17.9.7) and DR-CAFTA (Art.15.9.7) establish a twelve-month grace period. Thus, any public disclosures made, authorized by or derived from the patent applicant do not affect the patentability of the invention.

Unlike the Chile-U.S. FTA, under DR-CAFTA (Art.15.9.8) each Party shall provide patent applicants with at least one opportunity to submit amendments, corrections and observations in connection with their application.

DR-CAFTA (Art.15.9.9) further develops the requirement to disclose the invention established in the TRIPS Agreement. Thus, DR-CAFTA provides that such disclosure is considered "sufficiently clear and complete", if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date. Moreover, DR-CAFTA (Art.15.9.10) establishes a presumption so that an invention is sufficiently supported by its disclosure if the disclosure reasonably conveys to a person skilled in the art that the applicant was in possession of the claimed invention, as of the filing date.

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into force of the Chile-U.S. FTA, with respect to the obligations Article 17.9.3-17.9.7 on patents (Chile-U.S. Art.17.12.2).

[45] Costa Rica, Guatemala, Honduras, Nicaragua and the Dominican Republic may delay giving effect to Article 15.9.6 for no longer than one year, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

Only DR-CAFTA (Art.15.9.11) defines an invention as *industrially applicable* when it has a specific, substantial and credible utility.

Measures Related to Certain Regulated Products: the two FTAs deal with protection provided under TRIPS Article 39.3 when governments require submission of undisclosed test or other data as a condition to grant marketing approval or sanitary permit of pharmaceuticals or agricultural chemical products. Both the Chile-U.S. FTA (Art.17.10.1) and DR-CAFTA (Art.15.10.1(a)) prohibit reliance (market a product on the basis of protected test data concerning safety and efficacy) by third Parties not having the consent of the originator (person providing the information) for a period of at least five and ten years from the date of approval (in the Party, under DR-CAFTA) for pharmaceuticals and agricultural chemical products respectively.

There are some differences between the two Chapters. Under DR-CAFTA the protection covers "...undisclosed *data* concerning safety or efficacy of a *new... product* ..." whereas the Chile-U.S. FTA refers to "undisclosed *information* concerning safety or efficacy of a product which utilizes a *new chemical entity*, which product has not been previously approved...". In a subsequent paragraph of the same Article (Art.15.10.1(c)), DR-CAFTA defines that a *new product* is one that does not contain a chemical entity that has been previously approved in the territory of the Party. The Chile-U.S. FTA does not include a definition of *new chemical entity.*

Regarding the obligation of non-reliance, DR-CAFTA (Art.15.10.1(a)) establishes that Parties shall not permit third persons to market a product on the basis of (1) "the information" or (2) "the approval granted to the person who submitted the information." Under the Chile-U.S. FTA (Art.17.10.1) the corresponding provision prohibits "to market a product based on this new chemical entity on the basis of the approval granted to the party submitting such information".

DR-CAFTA (Art.15.10.1(b)) also provides equivalent protection when a Party permits third Parties to submit evidence of prior marketing approval or evidence concerning safety or efficacy of a product previously approved in the other territory. Therefore, unauthorized third Parties cannot obtain authorization to market a product on the basis of: (1) "evidence of prior marketing approval in the other territory" or (2) "information concerning safety or efficacy that was previously submitted to obtain marketing approval in another territory" for a period of at least five and ten years for pharmaceuticals and agricultural chemical products respectively from the date approval was granted in the Party's territory to the person who received approval in the other territory. In order to qualify for this protection, a Party to DR-CAFTA may require that approval be sought in the territory of the Party within five years after obtaining marketing approval in the other territory. Thus, DR-CAFTA calculates the time period of data exclusivity from the date of approval *in the Party's territory.* Under the Chile-U.S. FTA there is no similar provision regarding products previously approved in other territory.

Both the Chile-U.S. FTA (Art.17.10.1) and DR-CAFTA (Art.15.9.10(d)) follow TRIPS with respect to the protection of test or other data against *disclosure* except where necessary to protect the public. DR-CAFTA adds that information in the public domain may not be considered as undisclosed data and requires protection from unfair commercial use if the Party or an entity on behalf of the Party discloses the information.

The two FTAs include additional provisions providing for linkage of the section on measures related to certain regulated products and patents with respect to pharmaceutical products that are subject to a patent. Both FTAs provide for compensation for unreasonable curtailment of the patent term as a result of the marketing approval process. DR-CAFTA however, includes this provision under the Patent section. Under both Chapters the compensation consists of restoration or extension of the patent term. There is no specific period identified in any of the Chapters (Chile-U.S. FTA Art.17.10.2(a); DR-CAFTA Art.15.9.6(b)).

In addition to this provision, DR-CAFTA (Art.15.10.2(a)) requires Parties to prevent unauthorized third Parties from "*marketing* a product covered by a patent" (claiming the product or its approved use) during the term of that patent. Under the Chile-U.S. FTA (Art.17.10.2(c) there is a similar provision. However, the obligation for Parties under the Chile-U.S. FTA is "*not to grant marketing approval* prior to the expiration of the patent term." Both the Chile-U.S. FTA (Art.17.10.2(b)) and DR-CAFTA (Art.15.10.2(b)) require that patent owners be informed of the identity of any third party requesting marketing approval during the term of the patent. DR-CAFTA also specifies that such request itself needs to be notified when claiming the approved product or its approved use.

Enforcement: as in other sections in the IPR Chapters of the Chile-U.S. FTA and DR-CAFTA, the provisions on enforcement build on the TRIPS Agreement.

Regarding the scope of enforcement remedies and procedures, both Chapters include measures covering: general obligations, civil and administrative, provisional, border and criminal measures as well as limitations on liability of Internet Service Providers. A good number of provisions in both FTAs specifically address procedures and remedies in cases of copyright piracy and trademark counterfeiting.

The two FTAs also deal with technological developments unforeseen at the conclusion of the Uruguay Round. Thus, for example, both Chapters include a new sub-section establishing a system of incentives, cooperation and limited liability for Internet Service Providers (ISP) and make civil remedies available for effective technological measures and rights management information.

A detailed description of the main provisions and differences between the Chile-U.S. FTA and DR-CAFTA in the area of enforcement is provided below.

General obligations: both FTAs provide that procedures and remedies for enforcement shall be established in accordance with the principles of due process, which each Party recognizes as well as the foundations of their own legal systems (Chile-U.S. FTA Art.17.11.1[46]; DR-CAFTA Art.15.11.1).

[46] Amendments to domestic legislation and financial resources required for the full implementation of the obligations shall be in force or available as soon as practicable, and in no event later than: four years from the entry into force of the Chile-U.S. FTA, with respect to the obligations Article 17.9.11 on enforcement (including border measures) (Chile-U.S. Art.17.12.2).

Both FTAs establish that there is no obligation to put in place a judicial system for the enforcement of IPR (distinct from that for the enforcement of law in general) or to change the distribution of resources from enforcement of law in general to enforce IPR. However, both FTAs also specify that decisions on distribution of enforcement resources shall not excuse that Party from complying with the provisions of the FTA (Chile-U.S. FTA Art.17.11.2; DR-CAFTA Art.15.11.2).

Both FTAs establish that decisions on the merits of a case *shall be* in writing and reasoned (Chile-U.S. FTA Art.17.11.3; DR-CAFTA Art.15.11.3). Both Chapters provide for publication or to make these decisions publicly available. The only difference is that DR-CAFTA includes this provision under enforcement whereas the Chile-U.S. FTA covers the issue in Article 17.1.12 under General Provisions as part of a broader provision on transparency. Only the Chile-U.S. FTA (Art.17.1.12) adds a caveat to protect confidential information. Both FTAs also require Parties to publicize information, if available, regarding efforts to provide effective enforcement of IPR, including statistical information.

For civil, administrative and criminal proceedings involving copyright and related rights, both FTAs establish presumptions that, in the absence of proof to the contrary, the person indicated as the author, producer, performer or publisher of the work, performance or phonogram in the usual manner, shall be presumed to be the designated right holder, and that the copyright or related right subsists in such subject matter (Chile-U.S. FTA Art.17.11.6; DR-CAFTA Art.15.11.5). Unlike DR-CAFTA, to qualify for this presumption, under the Chile-U.S. FTA a Party may require that the work appear on its face to be original and that it bears a publication date not more than 70 years prior to the date of the alleged infringement.

Civil and Administrative: both FTAs provide that each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right (Chile-U.S. FTA Art.17.11.7; DR-CAFTA Art.15.11.6). In the corresponding footnote, both Chapters identify as right holders, duly authorized licensees (under the Chile-U.S. FTA) and exclusive and other authorized licensees (under DR-CAFTA) having legal standing and authority to assert such rights. Furthermore, DR-CAFTA indicates that the term licensee shall include the licensee of any one or more of the exclusive IPR encompassed in a given intellectual property.

Under both FTAs Parties shall provide that judicial authorities have the authority to compensate the right holder with actual damages suffered as a result of the infringement (Chile-U.S. FTA Art.17.11.8; DR-CAFTA Art.15.11.7). Both IPR Chapters *require* authority to order the payment of profits at least in the case of infringement of trademark, copyright or related rights.

Both FTAs include rules to determine actual damages. Under both the Chile-U.S. FTA (Art.17.11.8.) and DR-CAFTA (Art.15.11.7) judicial authorities shall consider, *inter alia*, the legitimate or suggested retail value of the infringed goods. DR-CAFTA incorporates the possibility of other legitimate measure of value that the copyright holder presents.

Both FTAs require pre-established (or statutory) damages, at least with respect to copyright and related rights and trademark counterfeiting. Under the Chile-U.S. FTA (Art.17.11.9), statutory damages *shall* be established as prescribed by each Party's domestic law, that the judicial

authorities deem reasonable. Pursuant to DR-CAFTA (Art.15.11.8[47]) statutory damages are considered an alternative to actual damages to be set out in domestic law and determined by the judicial authorities. Moreover, statutory damages should be sufficient to compensate for the harm caused and constitute deterrent to future infringements.

For proceedings concerning copyright or related rights and trademark counterfeiting under both FTAs, judicial authorities *shall*, apart from exceptional circumstances, have the authority to order court costs or payment of fees and reasonable attorney's fees (Chile-U.S. FTA Art.17.11.10; DR-CAFTA Art.15.11.9). The Chile-U.S. FTA refers to payment to the "right holder" by the "infringing party" whereas DR-CAFTA uses the broader terms "prevailing party" and "losing party". DR-CAFTA also adds the payment of attorney's fees for cases of patent infringement, at least in exceptional circumstances.

Under both IPR Chapters judicial authorities shall have the authority to order the seizure of *suspected* infringing goods, materials and implements concerning copyright and related rights infringement and trademark counterfeiting (Chile-U.S. FTA Art.17.11.11; DR-CAFTA Art.15.11.10). The provision in DR-CAFTA covers "related" materials and implements whereas the Chile-U.S. FTA covers materials and implements by means of which goods are produced where necessary to prevent further infringement. DR-CAFTA adds authority to seize documentary evidence relevant to the infringement, at least for trademark counterfeiting.

Also provided for under both the Chile-U.S. FTA (Art.17.11.12) and DR-CAFTA (Art.15.11.11) is the authority to order the destruction of goods found or determined to be infringing under the Chile-U.S. FTA or pirated or counterfeited under DR-CAFTA. Both FTAs allow for discretion by judicial authorities in applying this remedy. DR-CAFTA specifies that this provision is applicable to "pirated or counterfeited goods".

Both the Chile-U.S. FTA and DR-CAFTA include a provision on charitable donations under this section. There are some differences regarding the scope and specific rules between the two FTAs. Under the Chile-U.S. FTA (Art.17.11.12(b)), the provision covers goods that infringe copyright and related rights and require authorization of the right holder for instances other than special cases that do not conflict with the normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. Like the Chile-U.S. FTA, DR-CAFTA (Art.15.11.11(c)) also requires authorization by the right holder but does not refer to exceptions based on the three-step test under the Berne Convention. In addition to goods that infringe copyright and related rights, counterfeit trademark goods may be donated to charity *outside the channels of commerce*, when the removal of the trademark eliminates the infringing characteristic of the good under both the Chile-U.S. FTA (Art.17.11.12(d)) and DR-CAFTA (Art.15.11.11(c)). However, both FTAs establish that the simple removal of the trademark lawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce.

Both FTAs include rules with respect to materials and implements. Under the Chile-U.S. FTA (Art.17.11.12(c)) judicial authorities, *at their discretion*, shall have the authority to order that

[47] Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua may delay giving effect to Article 15.11.8 (Statutory damages) for no longer than three years, beginning on the date of entry into force of DR-CAFTA.

material and implements *actually used* in the manufacture of *infringing* goods be destroyed. DR-CAFTA (Art.15.11.11(b)) provides a similar remedy so materials and implements *used* in the manufacture or creation of *pirated and counterfeit goods* be *promptly* destroyed. DR-CAFTA also provides for an alternative, in exceptional circumstances, without compensation, to dispose of such materials and implements outside the channels of commerce. The Chile-U.S. FTA Article 17.11.12(c) indicates that authorities *shall take* into account the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third Parties. Under DR-CAFTA the provision is discretionary. Therefore authorities *may* take into account these factors. Both the Chile-U.S. FTA and DR-CAFTA limit this provision to third Parties holding an ownership, possessory, contractual or secured interests.

Both FTAs include a provision dealing with right of information (Chile-U.S. FTA Art.17.11.13; DR-CAFTA Art.15.11.12). Under the two FTAs judicial authorities *shall* have the authority to order the infringer to provide any information regarding any person involved in the infringement and the distribution channels. DR-CAFTA also requires information regarding *any aspect* of the infringement and the means of production, including the identification of third Parties involved in production and distribution of the infringing goods or services. In case of non-compliance, both FTAs require authority to impose sanctions. The Chile-U.S. FTA specifically identifies fines or imprisonment.

The Chile-U.S. FTA (Art.17.11.5) makes civil remedies available for the protection of effective technological measures and rights management information. DR-CAFTA includes similar provisions directly under "Obligations pertaining to Copyright and Related Rights, Articles 15.5.7 (effective technological measures) and 15.5.8 (rights management information) and a very specific provision (Art.15.11.14[48]) listing all civil remedies available in these cases: a) provisional measures, including seizure of devices and products suspected of being involved in the prohibited activity; b) actual damages (plus any profits not taken into account in computing actual damages) or pre-established (statutory) damages; c) court costs, fees and reasonable attorney's fees; d) destruction of devices and products found to be involved in the prohibited activity subject to judicial discretion. No damages may be available against non-profit library, archives, educational institution or public broadcasting entity that can provide sufficient evidence of lack of knowledge that their acts constituted a prohibited activity.

Only DR-CAFTA (Art.15.11.15) provides for authority to order a party to desist from an infringement of IPR in civil judicial proceedings. The objective is to prevent the entry into the channels of commerce of infringing IPR goods immediately after customs clearance or to prevent their exportation.

Under DR-CAFTA (Art.15.11.16) the costs of technical experts appointed by judicial authorities that must be paid by the Parties should take into account the nature and quantity of work to be performed and should not deter recourse to such proceedings. The Chile-U.S. FTA (Art.17.11.16(b)) includes a similar provision under "Provisional Measures" which additionally establishes that such costs should be reasonable and, if applicable, be based on standardized fees.

[48] Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua may delay giving effect to Article 15.11.14 (civil remedies for effective technological measures and rights management information) for no longer than three years, beginning on the date of entry into force of DR-CAFTA.

With respect to Administrative Procedures on the merits of the case, both IPR Chapters establish that equivalent principles shall apply to those provided for Civil Procedures and Remedies (Chile-U.S. FTA Art.17.11.14; DR-CAFTA Art.15.11.13).

Provisional Measures: both FTAs establish an obligation to act expeditiously in requests for relief *inaudita altera parte* in accordance with their rules of judicial procedure (Chile-U.S. FTA Art.17.11.16; DR-CAFTA Art.15.11.17).

Pursuant to the Chile-U.S. FTA (Art.17.11.16) and DR-CAFTA (Art.15.11.18), the applicant shall provide evidence of legal standing as right holder and of any infringement or imminent infringement as well as reasonable security in an amount sufficient to protect the defendant and prevent abuse. Both FTAs add a sentence that establishes that such security shall not be set at a level that would unreasonably deter recourse to such procedures.

Only DR-CAFTA (Art.15.11.19) requires a rebuttable presumption of validity for patents in proceedings concerning the grant of provisional measures.

Special Requirements related to Border Measures: both FTAs address the requirements necessary to initiate procedures for suspension of the release of suspected counterfeit trademark or pirated copyright goods into free circulation. Pursuant to the Chile-U.S. FTA (Art.17.11.17) and DR-CAFTA (Art.15.11.20[49]) the right holder needs to provide the competent authority with evidence of a *prima facie* infringement and supply *sufficient* information to make the suspected goods *reasonably recognizable* to the customs authorities. In the FTAs there is a caveat clarifying that the sufficient information required shall not unreasonably deter recourse to these procedures.

Both Chapters include a provision requiring the applicant initiating procedures for suspension to provide security or equivalent assurance sufficient to protect the defendant, the competent authorities and to prevent abuse. Both FTAs refer to "reasonable" security and specify that such security shall not unreasonably deter recourse to these procedures. Only DR-CAFTA refers to possible forms of security. It identifies an instrument issued by a financial services provider to cover any loss or damage in the event authorities determine that the Article is not an infringing good (Chile-U.S. FTA Art.17.11.18; DR-CAFTA Art.15.11.21[50]).

Both the Chile-U.S. FTA (Art.17.11.19) and DR-CAFTA (Art.15.11.22[51]) build on the last paragraph of Article 57 of TRIPS with respect to the right of information. In the FTAs the authority with respect to this right is no longer discretionary since under both the Chile-U.S. FTA and DR-CAFTA a Party *shall* grant the competent authorities the aforementioned authority to inform the right holder.

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[49] Guatemala, Honduras and Nicaragua may delay giving effect to Article 15.11.20 (Border measures) for no longer than two years, beginning on the date of entry into force of DR-CAFTA.

[50] Guatemala, Honduras and Nicaragua may delay giving effect to Article 15.11.21 (Border measures) for no longer than two years, beginning on the date of entry into force of DR-CAFTA.

[51] Guatemala, Honduras and Nicaragua may delay giving effect to Article 15.11.22 (Border measures) for no longer than two years, beginning on the date of entry into force of DR-CAFTA.

DR-CAFTA (Art.15.11.25[52]) establishes that application or merchandise storage fees shall not be set at an amount that unreasonably deters recourse to such measures.

The two FTAs provide that competent authorities may initiate border measures *ex-officio* without the need for a formal complaint. This authority covers goods imported, destined for export or in transit, suspected of infringing IPR (under DR-CAFTA) or counterfeit or pirated (under the Chile-U.S. FTA). Pursuant to the Chile-U.S. FTA each Party may provide that *ex officio* authority shall be exercised prior to sealing the container or other means of conveyance at customs (Chile-U.S. FTA Art.17.11.20; DR-CAFTA Art.15.11.23[53]).

Both FTAs provide for remedies under Border Measures. The Chile-U.S. FTA (Art.17.11.21) and DR-CAFTA (Art.15.11.24) require authority to destroy goods found or determined to be pirated or counterfeit by competent authorities (apart from exceptional cases under the Chile-U.S. FTA). Furthermore, the two FTAs establish that authorities shall not permit re-exportation of pirated or counterfeit goods or other customs procedures (aside from exceptional circumstances under DR-CAFTA).

Criminal Procedures and Remedies: both the Chile-U.S. FTA (Art.17.11.22) and DR-CAFTA (Art.17.11.26) provide for criminal procedures and penalties in cases of willful trademark counterfeiting or copyright and related rights piracy *on a commercial scale*. The Chile-U.S. FTA and DR-CAFTA also incorporate some specific activities within the scope of "copyright or related rights piracy on a commercial scale." Under the Chile-U.S. FTA, this concept includes the willful infringing reproduction or distribution, including by electronic means, of copies with a significant aggregate monetary value of the infringed goods. DR-CAFTA follows a different formula and includes significant willful infringements of copyright or related rights, for commercial advantage or private financial gain. Moreover, DR-CAFTA includes willful infringements that have no direct or indirect motivation of financial gain provided that there is more than *de minimis* financial harm. The Chile-U.S. FTA (Art.17.11.22 ftnt.34) also excludes *de minimis* infringements and indicates that nothing in the FTA prevents prosecutors from exercising any discretion they may have to decline to pursue cases.

Both the Chile-U.S. FTA and DR-CAFTA provide for a number of remedies. The two Chapters include imprisonment and/or monetary fines sufficient to provide a deterrent to future infringements. DR-CAFTA also requires that each Party establish penalties guidelines for judicial authorities. (Chile-U.S. FTA (Art.17.11.22(b)) and DR-CAFTA (Art.15.11.26(b)(i)).

The two FTAs require authority to order the seizure of suspected counterfeit or pirated goods, related materials and implements, assets traceable to the infringing activity as well as documentary evidence relevant to the offense. Both FTAs clarify that items need not to be

[52] Guatemala, Honduras and Nicaragua may delay giving effect to Article 15.11.25 (Border measures) for no longer than two years, beginning on the date of entry into force of DR-CAFTA.

[53] Guatemala, Honduras and Nicaragua may delay giving effect to Articles 15.11.23 (ex-officio border measures) for no longer than four years, and El Salvador for no longer than two years, beginning on the date of entry into force of DR-CAFTA.

individually identified in the search order (Chile-U.S. FTA Art.17.11.22(c); DR-CAFTA Art.15.11.26(b)(ii)).

Pursuant to the Chile-U.S. FTA and DR-CAFTA assets legally traceable to the infringing activity are subject to forfeiture. The two FTAs also require authority to order the forfeiture and destruction of all counterfeit and pirated goods. Moreover, both FTAs expand these remedies to related materials and implements at least with respect to copyright and related rights piracy (Chile-U.S. FTA Art.17.11.22(d)) and DR-CAFTA (Art.15.11.26(b)(iii)).

Both Chapters require *ex officio* enforcement without a formal complaint at least in cases of trademark counterfeit or copyright piracy (Chile-U.S. FTA Art.17.11.22(e); DR-CAFTA Art.15.11.26(b)(iv)). The Chile-U.S. FTA limits these provisions to appropriate authorities as determined by each Party. In DR-CAFTA, Parties refer to "suspected" cases of counterfeiting or piracy and indicates that this authority shall be available at least for the purpose of preserving evidence or preventing the continuation of the infringing activity.

Limitations on Liability for Internet Service Providers[54]**:** both the Chile-U.S. FTA (Art.17.11.23) and DR-CAFTA (Art.15.11.27) provide for legal incentives and limitations of liability for service providers with respect to infringement of copyright. These provisions limit the remedies available against service providers that cooperate with copyright owners for copyright infringements that they do not control, initiate, or direct and take place through systems or networks controlled or operated by them or on their behalf.

The two FTAs include a definition of service provider; identify specific functions subject to limitation of liability (i.e., transmitting, caching, storage, linking), and detailed conditions to be eligible for those limitations. Both Chapters clarify that service providers may not be required to monitor for infringing activity (Chile-U.S. FTA Arts. 17.11.23(b),(c),(d); DR-CAFTA Arts. 15.11.27(i)-(vii)).

According to both Chapters the limitations preclude monetary and court-ordered relief to compel or restraint certain actions (i.e., terminate accounts, remove or disable access to infringing material) (Chile-U.S. FTA Art.17.11.23(b); DR-CAFTA Art.15.11.27(i)). Both FTAs provide that relief shall be issued with due regard for the burden to the service provider and harm to the copyright owner and requires proper notice to the service provider and an opportunity to appear before the judicial authority.

Both FTAs include rules for procedures of the notice and take down process. Additionally, the two Chapters require the establishment of an administrative or judicial procedure to obtain expeditiously from a service provider information in its possession identifying the alleged infringer (Chile-U.S. FTA Art.17.11.23(h); DR-CAFTA Art.15.11.27(xi)).

[54] Costa Rica, Guatemala and Honduras may delay giving effect to Article 15.11.27 (Internet Service Providers) for no longer than 30 months, El Salvador for no longer than one year, the Dominican Republic for no longer than two years and Nicaragua for no longer than 3 years, beginning on the date of entry into force of DR-CAFTA (DR-CAFTA Art.15.12.2).

Chapter Eighteen

Labor

Labor issues are dealt with in Chapter 18 of the Chile-U.S. FTA and Chapter 16 of DR-CAFTA and are subject to dispute settlement mechanisms similar and equivalent to those established for the treatment of commercial issues.

However, for each Party the only obligation that can be subject to dispute settlement is the non-compliance with its own labor laws and only if the failure "to effectively enforce its labor laws... (is) in a manner affecting trade between the Parties...". Each Party retains its sovereignty with respect to its national legislation and monitoring of its labor laws.

Statement of Shared Commitment: in both Agreements (Chile-U.S. FTA and DR-CAFTA) Parties commit to promote, to the maximum extent possible, the labor principles set out in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) and to ensure that the domestic labor laws promote and protect those principles. (Chile-U.S. FTA Arts. 18.1.1 and 18.1.2 and DR-CAFTA Arts.16.1.1 and 16.1.2).

DR-CAFTA also affirms respect to each Party's Constitution as part of this section (Art.16.1.2).

Enforcement of Labor Laws: the subsections of Article 18.2 in the Chile-U.S. FTA are the same as those in Article 16.2 in DR-CAFTA. In both Agreements the Parties are required to strictly comply with their own labor legislation, with respect to the labor rights defined in the text. These are:

(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.

This is the only obligation subject to dispute settlement after the period of consultation with experts. In this section, Parties oblige each other to enforce their labor laws and recognize that it is inappropriate to promote trade and investment by weakening their labor laws. However, Parties retain the right to decide on the investigatory, prosecutorial, regulatory, and compliance matters and "to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities".

Procedural Guarantees and Public Awareness: (Chile-U.S. FTA Art.18.3 and DR-CAFTA Art.16.3)

Procedural guarantees: both Agreements recognize the right of every person with a legally recognized interest under the law to have "access to judicial tribunals of general, labor or other specific jurisdiction, quasi-judicial tribunals or administrative tribunals, as appropriate, for the enforcements of the Party's labor laws".

In this matter, DR-CAFTA is slightly more specific in terms of the proceedings including compliance with due process. While the Chile-U.S. FTA only states that the proceedings should be fair, equitable, and transparent. DR-CAFTA adds that "each Party shall ensure that:

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

It also includes the types of remedies that may be used (Art.16.3.6).

Public Awareness: both Agreements state that the Parties should promote public awareness. In addition, DR-CAFTA states how each Party will promote public awareness:

(a) ensuring the availability of public information related to its labor laws and enforcement and compliance procedures; and
(b) encouraging education of the public regarding its labor laws.

It also includes statements on impartiality of proceeding reviews and the right to review proceedings (Art 16.3.2).

DR-CAFTA also states that final decisions in the proceedings should be in writing and well based and made available without delay to the Parties to the proceedings (Art.16.3.3). It further provides for the right to review and, when appropriate, to correct the final decision.

Labor Affairs Council and Institutional Arrangements: both Agreements have a very simple institutional arrangement with Contact Points in the Ministry of Labor and the establishment of a Labor Affairs Council (Chile-U.S. FTA Art.18.4 and DR-CAFTA Art.16.4). Comprised of cabinet-level officials or their designees, the Labor Affairs Council will pursue the labor objectives of this Agreement, oversee the implementation of the Labor Chapter, review progress and supervise the activities of the Labor Cooperation Mechanism. In the case of the Chile-U.S. FTA, the Council will establish a work program and procedures.

Particulars on the duties of the contact point are omitted in the Chile-U.S. FTA. Only DR-CAFTA mentions the publication of reports written in matters related to Labor.

Labor Cooperation (Chile-U.S. FTA), Labor Cooperation and Capacity Building (DR-CAFTA): DR-CAFTA includes capacity building in this Article. This covers the strengthening of institutional capacity and the creation of a Capacity Building Mechanism, and the activities to be undertaken by the mechanism. (Chile-U.S. FTA Art.18.5 and DR-CAFTA Art.16.5)

Labor Consultations: both Agreements establish a consultation mechanism that seeks mutually satisfactory solutions of any difficulty that might arise among the Parties. The Chapter allows for the possibility to consult with experts or mediators. This mechanism is required to be used before any other dispute settlement mechanism.

There are very small differences regarding the time tables for these consultations. As stated in this section, the Council may also provide information to the Commission on consultations held on the matter.

Labor Roster: both Agreements instruct the establishment, within six months of the date of entry into force, of a labor roster comprised of experts in, among others, labor law, its enforcement and dispute resolution (Chile-U.S. FTA Art.18.7 and DR-CAFTA Art.16.7). The main difference between the Agreements is the number of individuals required in the roster and the number of members that can be nationals of the Parties. In the Chile-U.S. FTA out of the 12 roster members, there would be up to eight members who are non-Party nationals. In the case of DR-CAFTA out of the 28 roster members, there would be a minimum of seven who are non-Party nationals but there is no maximum. Also, DR-CAFTA explicitly allows for the appointment of "a replacement when a roster member is no longer available to serve".

Definitions: both Agreements provide definitions for "labor laws" and for "statutes or regulations" (Chile-U.S. FTA Art.18.8 and DR-CAFTA Art.16.8).

Annex

Labor Cooperation (Chile-U.S. FTA Annex 18.5), Labor Cooperation and Capacity Building (DR-CAFTA Annex 16.5): only the Chile-U.S. FTA includes specifications for the establishment of a labor cooperation mechanism previously mentioned in Article 18.5 (Chile-U.S. FTA).

Organizational and Principal Functions: both the Chile-U.S. FTA and DR-CAFTA are fairly similar. Differences rely on the publication of data for comparison on labor standards, labor market indicators and enforcement activity, which is only mentioned in the Chile-U.S. FTA. DR-CAFTA includes a statement on the use of support from various international organizations as well as some differences in deadlines.

The Chile-U.S. FTA also envisions periodic labor cooperation review sessions at the request of a Party which is not included in DR-CAFTA.

Cooperative Activities–Cooperation and Capacity Building Priorities: the differences between the two Agreements in this section are based on the range of activities to be undertaken by the Labor Cooperation Mechanism.

Table 18.1 Cooperative Activities

Chile-U.S. FTA	DR-CAFTA
(a) fundamental rights and their effective application (b) labor relations (c) working conditions (d) issues related to small and medium enterprises (e) social protections (f) technical issues and information exchange (g) implications of economic integration between the Parties for advancing each Party's labor objectives	(a) fundamental rights and their effective application (b) worst forms of child labor (c) labor administration (d) labor inspectorates and inspection systems (e) alternative dispute resolution (f) labor relations (g) working conditions (h) migrant workers (i) social assistance programs (j) labor statistics (k) employment opportunities (l) gender (m) technical issues

Implementation of Cooperation Activities: DR-CAFTA incorporates the possibility of technical assistance programs.

Public Participation: only DR-CAFTA mentions Public Participation.

Chapter Nineteen

Environment

Environmental issues are dealt with in a separate Chapter of the Agreement in both the Chile-U.S. FTA (Chapter 19) and DR-CAFTA (Chapter 17) and are subject to dispute settlement mechanisms similar and equivalent to those established for the treatment of commercial issues.

However, for each Party the only obligation that can be subject to dispute settlement is the non-compliance with its own Environmental laws and only if the failure "to effectively enforce its Environmental laws... (is) in a manner affecting trade between the Parties...". Each Party retains its sovereignty of legislation and monitoring of its Environmental laws.

Objectives: the objective, found only in the Chile–U.S. FTA, is to ensure that trade and environmental policies are mutually supportive and that environmental laws and policies promote and encourage high levels of environmental protection through non-discriminatory measures and the elimination of trade distortions where both trade and environment would be enhanced.

Levels of Protection: (Chile-U.S. FTA Art.19.1 and DR-CAFTA Art.17.1) Parties are required to ensure that their laws provide high levels of environmental protection and to seek the improvement of their environmental laws; retaining, however, the right to determine their own levels of environmental protection and development of laws. The only significant difference is that in the case of DR-CAFTA this Article refers to both laws and policies while in the case of Chile it only refers to laws.

Enforcement of Environmental Laws: (Chile-U.S. FTA Art.19.2 and DR-CAFTA Art.17.2) in both Agreements the Parties are required to strictly comply with their own Environmental legislation, with respect to the environmental protection and environmental development policies defined in the text. This is the only obligation subject to dispute settlement after the period of consultation with experts. Each Party retains, however, "the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities".

Environmental Affairs Council: (Chile-U.S. FTA Art.19.3 and DR-CAFTA Art.17.5) both Agreements establish an Environmental Affairs Council comprised of cabinet-level officials or their designees. The Environment Affairs Council will oversee the implementation and review progress under the Environmental Chapter and supervise the activities of the Environmental Cooperation Mechanism. In the case of DR-CAFTA there are two exceptions (Arts. 17.8 and 17.10) to the decision making process in the Council. DR-CAFTA further states that the Council "shall include a session in which members of the Council have an opportunity to meet with the public to discuss matters relating to the implementation" of the Chapter on Environment.

DR-CAFTA also requires the designation of a contact point in the respective Ministry.

Opportunities for Public Participation: (Chile-U.S. FTA Art.19.4 and DR-CAFTA Art.17.6) this Article ensures the provision, reception and consideration of public communications on matters related to the Environment.

In the case of the Chile-U.S. FTA, each Party shall make best efforts to accommodate requests for consultations by persons or organizations, however, in the case of DR-CAFTA such efforts should be restricted to requests made by persons of that Party –i.e. a national or an enterprise of that Party.

Environmental Cooperation: (Chile-U.S. FTA Art.19.5 and DR-CAFTA Art.17.9) both Agreements commit the Parties to promote cooperative activities on any environmental matter that they consider appropriate.

In the case of DR-CAFTA, the Parties identify certain priority areas of cooperation and establish an Environmental Cooperation Commission that is responsible for developing, revising and updating a work program that reflects the national priorities for cooperation.

Environmental Consultations and Collaborative Environmental Consultations: both Agreements establish a consultation mechanism that seeks mutually satisfactory solutions of any difficulty that might arise among the Parties (Chile-U.S. FTA Art.19.6 and DR-CAFTA Art.17.10). The Chapter allows for the possibility to consult with experts or mediators. This mechanism is required to be used before any other dispute settlement mechanism.

Procedural Matters: (Chile-U.S. FTA Art.19.8 and DR-CAFTA Art.17.3) this Article requires each party to ensure that judicial, quasi-judicial, or administrative proceedings are available under its law to sanction or remedy violations of its environmental laws.

They require ensuring due process and the existence of effective remedies or sanctions to violation of its own environmental laws.

The main significant difference is that in the case of DR-CAFTA decisions by each Party's judicial, quasi-judicial, or administrative tribunals shall not be called for examination under the Agreement.

Relationship to Environmental Agreements: (Chile-U.S. FTA Art.19.9 and DR-CAFTA Art.17.12) there are no significant differences in this Article.

Principles of Corporate Stewardship: (Chile-U.S. FTA Art.19.10) this Article only appears in the Chile-U.S. FTA and aims at encouraging enterprises operating within each Party's territory or jurisdiction to incorporate sound principles of corporate stewardship in their internal policies.

Definitions: both Agreements contain similar definitions on environmental law and statute or regulation. The Chile-U.S. FTA also includes a definition for the term territory while DR-CAFTA defines judicial or administrative proceeding (Chile-U.S. FTA Art.19.11 and DR-CAFTA Art.17.13).

Environmental Cooperation: (Chile-U.S. FTA Annex 19.3 and DR-CAFTA Annex 17.9) the Chile-U.S. FTA identifies all the cooperation projects that have been identified during the negotiating process while DR-CAFTA only states the need to create a framework for environmental cooperation.

Measures to Enhance Environmental Performance: (DR-CAFTA Art.17.4) this Article only appears in DR-CAFTA.

Submission on Enforcement Measures and Factual Records and Related Cooperation: (DR-CAFTA Arts. 17.7 and 17.8) these Articles only appear in DR-CAFTA and regulate who can file a submission, what can be a matter in the submission, what are the appropriate bodies such a submission should be filed with, what are the conditions for the submission to be processed and who decides on the matter.

The submissions should be aimed at promoting enforcement of national environmental laws and can be filed by any person of a Party. Due to the existence of the North American Agreement on Environmental Cooperation, there is a special proceeding for submissions filed by a person residing or established in the territory of the US asserting that the US is failing to effectively enforce its environmental laws. The end result is a factual record that may be made public if the Council, by a vote of any Party, decides so; and the Council recommendations to the Environmental Cooperation Commission related to matters addressed in the factual record.

Chapter Twenty

Transparency

The provisions on Transparency are very similar in both (Chile-U.S. FTA Chapter 20 and DR-CAFTA Chapter 18). Both Agreements set forth processes to encourage and promote transparency within the process of creating an FTA, through the provision of information, opportunities for public commentary, and subsequent review and appeals mechanisms between Parties. Of interest is the underlying precept that notes that action should be taken to communicate/publish a measure prior to adoption.

Contact points: both Agreements establish that contact points (Chile-U.S. FTA Art.20.1 and DR-CAFTA Art.18.1) be designated to facilitate communications between the Parties. They go on to note that the contact points shall assist the other Party(ies) to find the responsible office or official in specific areas as needed.

Publication: as a matter of transparency of process, the Agreements note that each party agrees to make public, or otherwise make available to interested Parties, all laws, regulations, procedures and administrative rulings that are covered by the respective Agreements. Additionally, it is encouraged, to the extent possible, that new measures are made public prior to adoption and that Parties should be allowed the opportunity to comment. (Chile-U.S. FTA Art.20.2 and DR-CAFTA Art.18.2).

Notification and Provision of Information: both Agreements (Chile-U.S. FTA Art.20.3 and DR-CAFTA Art.18.3) mandate that the member Parties notify the other when undertaking a proposed or actual measure that might materially affect the operation of the Agreement. One Party may even request more information or ask questions of the other Party on the measure.

Administrative proceedings: in both the Chile-U.S. FTA and DR-CAFTA (Chile-U.S. FTA Art.20.4 and DR-CAFTA Art.18.4), provisions are set forth to create a consistent, impartial and reasonable manner in the process by which proceedings are undertaken. Both establish that wherever possible, a Party directly affected by a proceeding, should be given reasonable notice, when a measure is initiated, a description of the nature of the proceeding, the legal authority under which the measure is initiated and a general description of the controversy under consideration.

Each goes on to state that affected persons should be afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final determination, when time, the nature of the proceeding and the public interest permit. Also, both Agreements conclude this issue by stating the procedures used be in accordance with domestic law.

Review and Appeal: additionally the Agreements (Chile-U.S. FTA Art.20.5 and DR-CAFTA Art.18.5) call for all Parties to establish judicial, quasi-judicial or administrative tribunals or mechanisms where final administrative actions covered by the Agreements could be reviewed and if warranted corrected. There are to be independent bodies with no substantial interest in the outcome of the matter under consideration. In addition to these structures, the Agreements note

that the proceedings must allow for a reasonable opportunity to support or defend respective positions and that the decisions of the bodies be based on the evidence or the submissions of record.

Definitions: both Agreements (Chile-U.S. FTA Art.20.6 and DR-CAFTA Art.18.6) set forth a "definition for an administrative ruling of general application".

Anti-Corruption: DR-CAFTA takes on the additional issue of bribery and corruption. In Section B of this Chapter, under Article 18.7, a statement of principle is included that "affirms (each Parties) resolve to eliminate bribery and corruption in international trade and investment". Article 18.8, *Anti-Corruption Measures*, sets forth three underlying activities, as they affect international trade or investment, that require necessary legislative or other measure to establish that they are a criminal offense, these are: for public officials to materially gain from an act in exchange for an act or omission in the performance of a public function; for a person to bribe, either directly or indirectly, a public official for personal gain or advantage; for a person of one country to bribe a foreign official of another in order that the official act or refrain from acting in relation to the performance of an official duty, in order to obtain or retain a business or other improper advantage in the conduct of international business. Lastly they note that to conspire to undertake any of the aforementioned activities is also considered a criminal offence.

The section also notes that appropriate penalties should be put into effect to cover these criminal measures, also that should an activity as described above not be applicable to enterprises as criminal activities, that effective, proportionate and dissuasive non-criminal sanctions be put into place.

They also note that appropriate protections be put into place to protect those that in good faith report acts of bribery or corruption.

Lastly the Parties set forth to work jointly to encourage and support appropriate initiatives in relevant international fora (Art.18.9).

Chapter Twenty-One

Administration of the Agreement

The institutionalization of both Agreements is straightforward in order to avoid making them bureaucratic and complex.

This Chapter (Chile-U.S. FTA Chapter 21 and DR-CAFTA Chapter 19) describes the Commission, Committee and/or working groups established to supervise, oversee and handle any other administrative matters of the Agreement. In addition, the Chapter describes the duties and responsibilities of all Parties involved in the administration. In the Administration Chapter, both the Chile-U.S. FTA and DR-CAFTA are very similar, differing only slightly in the details involving the interaction of the seven Parties of DR-CAFTA. However, the inclusion of the Committee on Trade Capacity Building in DR-CAFTA is a first for any U.S. FTA.

Committee on Trade Capacity Building: (Art.19.4) DR-CAFTA establishes a Committee on Trade Capacity Building to foster trade-driven economic growth, poverty reduction, and adjustment to liberalized trade. This Committee shall receive periodically from each party the updated national strategies to assist in the implementation and adjustment of the Agreement; seek to prioritize trade capacity building projects; invite donor institutions, private sector and NGO's to provide assistance; monitor and assess progress in the implementation of the projects; work with other committees and working groups of the Agreement; provide an annual report to the Commission.

The Trade Capacity Building Committee will meet at least twice a year and its decisions shall be taken by consensus. In addition, an initial working group on customs administration and trade facilitation is established to work under and report to the Committee.

The Free Trade Commission: both FTAs establish a Free Trade Commission, comprising of cabinet level representatives to supervise the implementation of the Agreement among other administrative duties. This Commission is scheduled to meet at least once a year.

Furthermore, while DR-CAFTA (Art.19.1) states that the Commission may issue interpretations of the provisions of this Agreement; seek the advice of non-governmental persons or groups and take such other action in the exercise of its functions as the Parties may agree, Chile-U.S. FTA (Art.21.1) does not mention it specifically.

Free Trade Agreement Coordinators: DR-CAFTA notes that the Commission shall establish its rules and procedures and that all decisions of the Commission be taken by consensus. In addition, DR-CAFTA (Art.19.2) points out that each Party shall appoint a free trade Agreement coordinator to develop agendas and preparations for Commission meetings as well as to follow up on its decisions.

Administration of Dispute Settlement Proceedings: finally, both DR-CAFTA (Art.19.3) and Chile-U.S. FTA (Art.21.2) state that each Party is responsible in designating an office that shall provide administrative assistance to the panels established under the Dispute Settlement Chapter.

DR-CAFTA goes further by indicating that the each Party is responsible for the remuneration and payment of expenses of panelists and experts.

Chapter Twenty-Two

Dispute Settlement

Chapter Twenty-two on dispute settlement of the Chile-U.S. FTA and Chapter Twenty on dispute settlement of DR-CAFTA are virtually the same in terms of basic structure. DR-CAFTA contains two additional section headings (A: Dispute Settlement and B: Domestic Proceedings and Private Commercial Dispute Settlement) and an additional Article on third party participation.

Both Chapters are also virtually the same in terms of substantive content, including the sequencing of the various dispute settlement stages and provision for default procedures to apply when the Parties cannot agree within specified deadlines. Most of the differences between the two Chapters are of form, taking into account that the Chile-U.S. FTA is an Agreement between two Parties, while DR-CAFTA is an Agreement among more than two Parties. In DR-CAFTA, there is provision for third party participation in the consultations between two Parties to the dispute and in panel proceedings, as well as for multiple complainants regarding the same measure. Additionally there are differences in the access by panels to outside expertise, the provision for sectoral/cross-sectoral retaliation under DR-CAFTA, and also under that Agreement, the establishment of an advisory committee on alternative dispute resolution in private commercial disputes.

Cooperation: both Chapters provide that the Parties shall cooperate to arrive at a mutually satisfactory resolution of disputes under the Agreement concerned (Chile-U.S. FTA Art.22.1 and DR-CAFTA Art.20.1).

Scope: the scope of the respective Chapters applies to settling or avoiding disputes regarding the interpretation or application of the respective Agreement, to claims of failure to carry out obligations under the Agreement as well as to certain non-violation nullification or impairment claims (Chile-U.S. FTA Art.22.2 and DR-CAFTA Art.20.2). The latter claims refer to benefits under the goods, technical barriers to trade, government procurement, services and intellectual property Chapters in the respective Agreement. However, a Party may not have recourse to dispute settlement in connection with benefits expected to accrue under the Chapters on cross-border trade in services and intellectual property Chapters, with respect to a measure covered under the Chapter on general exceptions of the respective Agreement.

Choice of Forum: a complaining Party may select the forum (the free trade Agreement concerned, another free trade Agreement to which the Parties are party, or the WTO, as appropriate) in which to settle a dispute, but once this Party requests a panel under one Agreement, the forum selected shall be used to the exclusion of the others (Chile-U.S. FTA Art.22.3 and DR-CAFTA Art.20.3).

Consultations and Conciliation by the Commission: Article 22.4 of the Chile-U.S. FTA and Article 20.4 of DR-CAFTA provide for consultations between the Parties regarding any actual or proposed measure or any other matter that might affect the operation of the Agreement. If these consultations fail to resolve the dispute within specified time periods (shorter in cases regarding

perishable products), a Party may request that the Commission be convened to help conciliate or resolve the dispute. Unlike the Chile-U.S. FTA, DR-CAFTA defines "perishable goods" in footnote 1 to paragraph 4 of Article 20.4 as meaning perishable agricultural and fish goods classified in Chapters 1 through 24 of the Harmonized System.

Being a two-party Agreement, the Chile-U.S. FTA does not have provision for third party participation in consultations. Under paragraph 3 of Article 20.4 of DR-CAFTA, a Party that considers it has a substantial trade interest may participate upon written notice, explaining its interest in the matter, to the other Parties within seven days of delivery of the initial request for consultations. This Party thus automatically becomes one of the consulting Parties, and may request a meeting of the Commission if the matter is not resolved within specified time periods. Paragraph 5 of Article 20.5 provides that, unless it decides otherwise, the Commission shall consolidate two or more proceedings before it regarding the same measure and may do so regarding other matters as appropriate. Footnotes 3 and 4 to Article 20.5 specify that for the purposes of good offices, conciliation and mediation by the Commission, as well as consolidation of proceedings, the Commission shall be composed of the designated representatives of the consulting Parties. These provisions are absent from the Chile-U.S. FTA because the Commission under this FTA will necessarily be composed of representatives of the consulting Parties and not include non-consulting Parties.

Request for Arbitral Panel: both Chapters provide that if the dispute is still not resolved within specified time periods (shorter in cases regarding perishable products), the complaining Party may request an arbitral panel to examine and make findings on the matter (Chile-U.S. FTA Art.22.6 and DR-CAFTA Art.20.6). The panel is automatically established upon this request unless the disputing Parties otherwise agree. Standard terms of reference apply unless the disputing Parties otherwise agree within 20 days of the request.

Article 20.6 of DR-CAFTA also provides that any consulting Party that requested a Commission meeting may request in writing the establishment of an arbitral panel to consider the matter. In addition to indicating the measure or other matter concerned, this request shall include an identification of the legal basis for the complaint. Moreover, any consulting Party that it is eligible to request a panel and considers it has a substantial interest in the matter may join the panel as a complaining Party upon written notice within seven days of the request by another Party for the establishment of a panel. If a Party does not join as a complainant, it normally shall refrain from pursuing dispute settlement under the respective Agreement or WTO Agreement or another free trade to which that Party and the Party complained against are party, on substantially equivalent grounds regarding the same matter in the absence of a significant change in economic or commercial circumstances. Upon written notice, a Party that is not a disputing Party shall be entitled to attend all panel hearings, make written and oral submissions to the panel and receive written submissions of the disputing Parties. Third Party submissions shall be reflected in the panel's final report.

Article 20.2 (b) of DR-CAFTA specifies that the scope of the dispute settlement Chapter applies to "an actual or proposed" measure that is or would be inconsistent with obligations of the Agreement or causes or would cause (non-violation) nullification or impairment. However, both

the Chile-U.S. FTA (Art.22.6.3) and DR-CAFTA (Art.20.6.6) specify that an arbitral panel may not be established to review a proposed measure.

Roster and Panel Selection: under both Agreements, a three-member panel is to be normally selected by the disputing Parties from a roster established by the Parties by mutual Agreement, consisting of individuals with requisite expertise and objectivity, who shall comply with a code of conduct established by the respective Commission (Chile-U.S. FTA Arts. 22.7-22.9 and DR-CAFTA Art.20.7-20.9). The number of individuals on the respective roster under the two Agreements differs: 20 under the Chile-U.S. FTA, of which six shall be non-Party nationals versus 70 individuals under DR-CAFTA, of which 14 shall not be nationals of the Parties, with provision for a replacement where a roster member is no longer available to serve. Both Chapters provide that roster members may be reappointed and that once established shall remain in effect for a minimum of three years and remain in effect thereafter until the Parties constitute a new roster. Paragraph 1 of Article 20.7 of DR-CAFTA specifies additionally that the Parties may appoint a replacement where a roster member is no longer available to serve.

The disputing Parties are to agree on the panel chair, but if they cannot agree within 15 days of the request for a panel, the chair is chosen by lot among roster members who are not nationals of the disputing Parties. Within 15 days of the selection of the chair, the complaining Party, or Parties in the case of DR-CAFTA, selects one panelist and the party complained against selects one panelist. In case either side fails to select within 15 days, a panelist of the nationality of such Party(ies) is selected from the roster by lot within three days. A disputing Party may exercise a peremptory challenge against any non-roster individual proposed.

Rules of Procedure: both Chapters provide for rules of procedure to be established by the Agreement's entry into force, ensuring a right to at least one hearing before the panel, an opportunity for each disputing Party to provide initial and rebuttal submissions, and the protection of confidential information (Chile-U.S. FTA Art.22.10 and DR-CAFTA Art.20.10). Subject to the latter protection, the rules shall ensure that one hearing before the panel shall be open to the public, and that the written submissions and responses by the disputing Parties and written versions of their oral statements respectively are public. The rules shall also ensure consideration by the panel of requests from non-governmental entities in the disputing Parties' territories to submit written views on the dispute.

Both Chapters provide for similar standard terms of reference for a panel to apply, unless the disputing Parties otherwise agree within 20 days of the delivery of the request for panel establishment. If a complaining Party wishes to argue that a matter constitutes non-violation nullification or impairment, the terms of reference shall so indicate. If a disputing Party wishes the panel to make findings as to the degree of adverse effects on a Party of the measure or matter found to be non-conforming with the respective Agreement or causing non-violation nullification or impairment, the terms of reference shall also so indicate.

Third Party Participation: DR-CAFTA being an Agreement with more than two Parties, Article 20.11 provides for third party participation on delivery of a written notice to the disputing Parties. A third Party shall be entitled to attend all hearings, make submissions and receive

submissions of the disputing Parties, in accordance with the model rules of procedure. The submissions shall be reflected in the panel's final report.

Experts: the panel's access to experts differs under the two Chapters. Under paragraph 1 of Article 22.11 of the Chile-U.S. FTA, a panel may seek information and technical advice on its own initiative unless the Parties disapprove, whereas under Article 20.12 of DR-CAFTA, the panel may only do so if the disputing Parties so agree, and subject broadly to such terms and conditions as they may agree. Paragraph 1 of the Chile-U.S. FTA further specifies that information and technical advice may encompass environmental, labor, health, safety, or other technical matters raised by a Party in a proceeding. Paragraph 2 provides that before seeking information or technical advice, a panel shall establish procedures in consultation with the Parties and provide them with advance notice and opportunity to provide comments, such comments to be taken into account if the panel takes into account the information and technical advice in preparing its report. No corresponding provisions exist under DR-CAFTA, however as noted above, the panel may seek information and advice subject to Agreement by the disputing Parties and under such terms and conditions as they may agree.

Initial Report: both Chapters provide for the panel to present an initial report containing findings of fact, its determination on conformity or non-violation nullification or impairment, and its recommendations, to the disputing Parties for their written comments within specified time periods (Chile-U.S. FTA Art.22.12 and DR-CAFTA Art.20.13). The panel may reconsider its report and undertake further examination as appropriate, in the light of these comments.

Paragraph 4 of Article 20.13 of DR-CAFTA requires the Panel to inform the disputing Parties why it cannot provide its report within 120 days, and provides that in no case can the period exceed 180 days. This provision is absent from the Chile-U.S. FTA Chapter.

Final Report: both Chapters provide for the panel to present a final report to the disputing Parties within 30 days of presentation of the initial report, unless the disputing Parties otherwise agree (Chile-U.S. FTA Art.22.13 and DR-CAFTA Art.20.14). The Parties shall release the final report to the public within 15 days of receipt, subject to the protection of confidential information. No panel may disclose which panelists are associated with any majority or minority opinions.

Implementation of Final Report: both Chapters provide that on receiving the final report, the disputing Parties shall agree on resolving the dispute, including a mutually satisfactory action plan, normally in conformity with the panel's recommendations (Chile-U.S. FTA Art.22.14 and DR-CAFTA Art.20.15). If the panel finds that a disputing Party has not abided by its obligations or its measure is causing (non-violation) nullification or impairment, the resolution whenever possible is to eliminate the non-conformity or nullification or impairment. Compensation, the payment of monetary assessment, and the suspension of benefits, discussed below, are intended as temporary measures pending elimination of any non-conformity or nullification or impairment found by the panel. Footnote 6 to paragraph 3 of Article 20.15 of DR-CAFTA specifies that the disputing Parties may undertake cooperation activities as part of an action plan.

Non-Implementation – Compensation: both Chapters provide that if the disputing Parties are unable to reach Agreement on a resolution within 45 days of receiving the final report, they shall negotiate mutually acceptable compensation (Chile-U.S. FTA Art.22.15.1 and DR-CAFTA Art.20.16.1).

Non-Implementation - Suspension of Benefits or Monetary Assessment: both Chapters provide that if the disputing Parties are unable to agree on compensation within 30 days, or if a complaining Party considers that the Party complained against has not observed their compensation Agreement or action plan, the complainant may give written notice that it intends to suspend benefits of equivalent effect to the other Party (Chile-U.S. FTA Art.22.15.2 and DR-CAFTA Art.20.16.2).

Paragraph 5 of Article 20.16 of DR-CAFTA provides that the complaining Party should first seek to suspend benefits in the same sector(s) affected by the measure the panel found to be inconsistent or causing non-violation nullification or impairment, but if the complaining Party considers that it is not practicable to suspend these benefits, it may suspend benefits in other sectors. No such specific provision for sectoral or cross-sectoral retaliation is found in the Chile-U.S. FTA.

Under the Chile-U.S. FTA and DR-CAFTA, the complaining Party may proceed to suspend benefits as proposed within 30 days of its notice, unless the Party complained against:

- requests the panel to be reconvened to rule on (within 120 days of request or 90 days after reconvening) whether:
  a) the proposed level of suspension is manifestly excessive, and if so, the panel shall determine the suspension level it considers to be of equivalent effect, and then the complainant may suspend up to the level determined by the panel, or
  b) the party complained against has eliminated the non-conformity or nullification or impairment found by the panel, and if the panel determines this to be the case, then the complainant may not suspend benefits; or
- provides written notice to the complaining Party that it will pay an annual monetary assessment, which amount will be fixed:
  a) by Agreement of the disputing Parties, or
  b) if no Agreement within 30 days, in U.S. dollars at 50 % of the level of benefits of equivalent effect as determined by the panel, or
  c) if no panel determination, at 50% of the level of suspension proposed by the complaining party;

  to the complaining Party (or to a fund directed by the Commission if it so decides, for trade facilitation initiatives) in U.S. dollars or in an equivalent amount of the currency of Chile (Chile-U.S. FTA Art.22.15.6) or the Party complained against (DR-CAFTA Art.20.16.7) in equal quarterly installments
  - but if the Party complained against fails to pay the assessment within 60 days of its notice, then the complainant may suspend benefits:
    a) up to the level determined by the panel,
    b) or if no panel determination, up to the level proposed in the party's notice of suspension,

unless the panel has determined that the party complained against has eliminated the non-conformity or nullification or impairment.

Footnote 7 to paragraph 7 of Article 20.16 of DR-CAFTA specifies that for purposes of deciding that an assessment shall be paid into a fund established by, and expended at the direction of, the Commission for appropriate initiatives to facilitate trade between the disputing Parties, the Commission shall consist of the cabinet-level representatives of the disputing Parties, or their designees.

Non-Implementation in Labor or Environmental Disputes: both Chapters provide for a monetary assessment in the case of a Party's non-conformity with its obligations to enforce its labor laws (Chile-U.S. FTA Art.18.2.1(a) or DR-CAFTA Art.16.2.1(a)) or its environmental laws (Chile-U.S. FTA Art.19.2.1(a) or DR-CAFTA Art.17.2.1(a)) in the respective Agreements. Monetary assessment in these cases operates somewhat differently than the monetary assessment scheme outlined above for the enforcement of commercial obligations. In labor or environmental disputes, if the disputing Parties are unable to reach Agreement on a resolution within 45 days of receiving the final report, or if the Party complained against fails to observe the terms of such a resolution, a complainant may request the panel to be reconvened to impose an annual monetary assessment. The panel shall determine the amount of the monetary assessment within 90 days, taking into account certain enumerated factors relating to the bilateral trade effects of, pervasiveness and duration of, and reasons for, the Party's failure to effectively enforce the relevant law, the level of enforcement that could reasonably be expected, efforts made to begin remedying the non-enforcement, and any other relevant factors. Paragraph 2(c) of Article 20.17 of DR-CAFTA specifies additionally the failure by the Party complained against to observe the terms of an action plan as a factor to be taken into account by the panel determining the amount of monetary assessment in labor or environmental disputes.

The amount of the assessment shall not exceed 15 million U.S. dollars annually, adjusted for inflation. Upon determination by the panel of the monetary assessment, a complaining Party may provide written notice to the Party complained against, demanding payment. Assessments shall be paid into a fund directed by the Commission for labor or environmental initiatives. If the Party complained against fails to pay the monetary assessment, the complainant may take other appropriate steps to collect the assessment or secure compliance, including suspending tariff benefits under the respective free trade Agreement.

Thus the payment of a monetary assessment for not conforming to general trade obligations under the respective free trade Agreements, is at the election of the Party complained against, when facing a proposed suspension of benefits by the complainant. Whereas in the case of non-implementation or non-compliance in disputes relating to the enforcement of labor and environmental laws, the payment of a monetary assessment by the Party complained against may be sought by a complaining Party. The amount of the assessment may be fixed by the disputing Parties themselves in trade disputes, or by the reconvened panel. In labor or environmental disputes, the reconvened panel determines the amount, based on specific criteria provided in the Agreement. The amount of the assessment in labor or environmental cases is capped in absolute dollar terms annually under the Agreement, unlike in trade cases where it is 50% of the level of equivalent effect to the nullification or impairment for any year. The assessment in trade cases

may be paid to the complainant directly or into a fund directed by the Commission, whereas for labor or environmental cases, it is provided that the assessment is to be paid into a fund directed by the Commission.

Both Chapters provide for the Party complained against to refer to a compliance panel whether that party has eliminated the non-conformity or nullification or impairment originally found, and if the panel so determines, the suspension or payment of assessment must cease. There is also provision for reviewing the suspension or monetary assessment provisions five years after the respective free trade Agreement enters into force or within six months after suspension or imposition of monetary assessments, whichever earlier.

Referral of Matters from Domestic Judicial or Administrative Proceedings: both Chapters provide for a Party to refer any issue of interpretation or application of the respective Agreement that arises in any domestic judicial or administrative proceeding of a Party, to the Commission for response (Chile-U.S. FTA Art.22.19 and DR-CAFTA Art.20.20).

Private Rights: both Chapters bar private rights of action under the domestic law of a Party to pursue another Party for a measure deemed inconsistent with the respective Agreement (Chile-U.S. FTA Art.22.20 and DR-CAFTA Art.20.21).

Private Alternative Dispute Resolution: both Chapters encourage alternative dispute resolution for the settlement of international commercial disputes between private Parties in the respective free trade area, including ensuring the observance of Agreements to arbitrate and the recognition and enforcement of arbitral awards (Chile-U.S. FTA Art.22.21 and DR-CAFTA Art.20.22). Unlike the Chile-U.S. FTA, DR-CAFTA provides in its Article 20.22 that the Commission may establish an Advisory Committee on Private Commercial Disputes comprised of experts in resolving such private, international disputes, to provide recommendations on arbitration and other alternative dispute resolution procedures and to promote technical cooperation projects between the Parties.

Chapter Twenty-Three

Exceptions

Chapter Twenty-Three on exceptions of the Chile-U.S. FTA and Chapter Twenty-One on exceptions of DR-CAFTA are the same in terms of basic structure.

The respective provisions on exceptions of the Chile-U.S. FTA and DR-CAFTA are also virtually the same in terms of substantive content.

General Exceptions: paragraph 1 of Article 23.1 of the Chile-U.S. FTA and paragraph 1 of Article 21.1 of DR-CAFTA incorporate and make part of the respective FTA, *mutatis mutandis* Article XX (General Exceptions) of the GATT 1994 and its interpretive notes, for purposes of Chapters three through seven related to goods in the respective Agreements. This means that subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the above-mentioned Chapters related to goods shall be construed to prevent a Party to the respective FTA from adopting or enforcing the kinds of measures enumerated in Article XX of the GATT. Both Chapters specify the respective Parties' understanding that measures referred to in GATT Article XX(b), thus incorporated, include environmental measures necessary to protect human, animal or plant life or health, and that Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

Paragraph 2 of Article 23.1 of the Chile-U.S. FTA and paragraph 2 of Article 21.1 of DR-CAFTA incorporate and make part of the respective FTA, *mutatis mutandi* Article XIV of GATS including its footnotes for purposes of the respective Chapters eleven, thirteen and fifteen (Chile-U.S. FTA) or fourteen (DR-CAFTA) related to trade in services, telecommunications and electronic commerce. This means that subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in the above-mentioned Chapters related to services shall be construed to prevent a Party to the respective FTA from adopting or enforcing the kinds of measures enumerated in GATS Article XIV (which are similar to but not the same as GATT Article XX).

Incorporating these WTO provisions makes them a part of the respective FTA, as well as enforceable and subject to dispute settlement under the FTA.

Essential Security: Article 23.2 of the Chile-U.S. FTA and Article 21.2 of DR-CAFTA both specify that nothing in the respective Agreement shall require a Party to disclose information contrary to its essential security interests or shall preclude a Party from applying measures it considers necessary to protect those interests. The Chile-U.S. FTA cabins the essential interest exception by specifying that nothing in the Agreement shall preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to maintaining or restoring international peace or security. The reference to the U.N. Charter is absent in DR-CAFTA.

Taxation: both Chapters set forth the extent to which the rules and disciplines of the respective Agreement apply to or govern taxation measures (Chile-U.S. FTA Art.23.3 and DR-CAFTA Art.21.3). Both Articles provide for exceptions on taxation measures with certain carve-outs and/or conditions. Therefore, in some cases, other disciplines of the FTA do apply to taxation measures, for instance:

- national treatment in the case of market access in goods;
- national treatment and most-favored-nation (MFN) treatment (Investment, Cross-border Trade in Services and Financial Services Chapters);
- performance requirements (Investment Chapter);
- expropriation (Investment Chapter).

Paragraph 1 of Article 23.3 of the Chile-U.S. FTA and paragraph 1 of Article 21.3 of DR-CAFTA both provide that nothing in the respective FTA shall apply to taxation measures except as specified in the respective Article.

Paragraph 2 of both Articles provides that nothing in the respective Agreement shall affect the rights and obligations of a Party under any tax convention. The competent tax authorities have the sole responsibility for determining whether any inconsistency exists between the respective Agreement and the tax convention concerned, the latter prevailing over the trade Agreement in the event of conflict.

Notwithstanding this basic exception in paragraph 2 relating to rights and obligations under a tax convention, certain national treatment and market access provisions for goods in the respective FTA do apply to taxation measures (an exception to the exception). Paragraph 3(a) provides that the national treatment obligation set out in the FTA with respect to goods (Article 3.2, which incorporates GATT Article III and successor Agreements by reference) applies to taxation measures to the same extent as GATT Article III. Paragraph (3b) provides that the prohibitions of export taxes in the FTA (Chile-U.S. FTA Art.3.13 and DR-CAFTA Art.3.10) apply to taxation measures.

Subject to the basic exception for tax conventions, national treatment and most-favored-nation provisions in the respective services and investment Chapters apply to certain specified kinds of taxation measures, again with additional conditions/exceptions attached thereto.

Paragraph 4(a) provides that the national treatment provision in Article 11.2 of the Chapter on cross-border trade in services and Article 12.2 of the Chapter on financial services apply to taxation measures on income, capital gains, or on the taxable capital of corporations that relate to the purchase or consumption of particular services, except that nothing in paragraph 4(a) shall prevent a Party from conditioning the receipt or continued receipt of an advantage relating to the purchase or consumption of particular services on requirements to provide the service in its territory. So, a capital tax on banks or a tax on the premium income of insurance companies would be covered by the national treatment provision. Moreover, a Party could impose a performance requirement to provide a service as a condition to receive an investment incentive.

Paragraph 4(b) provides that the national treatment and the MFN treatment provisions in the investment, cross-border trade in services, and financial services Chapters apply to all taxation measures, other than those on income, capital gains, or on the taxable capital of corporations, taxes on estates, inheritances, gifts, and generation-skipping transfers.

Both 4(a) and 4(b) are subject to paragraph 2, which means that if there is an inconsistency between the FTA and the provisions of a tax convention, the tax convention prevails.

Paragraph 4(a) and Paragraph 4(b) do not apply to:

- MFN obligations in tax conventions;
- non-conforming measures (i.e. reservations) listed in the Party's Annexes, new taxation measures aimed at the equitable and effective imposition of taxes that do not arbitrarily discriminate or nullify and impair the FTA benefits;
- the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes (as permitted by Article XIV(d) of GATS);
- a provision that conditions the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, pension trusts or pension plans on a requirement that the Party maintain continuous jurisdiction over the pension trust or pension plan.

Additionally, paragraph 4(i) of Article 23.3 of the Chile-U.S. FTA provides that the national treatment and most-favored-nation treatment provisions in the services and investment Chapters of that Agreement, do not apply to any excise tax on insurance premiums adopted by Chile to the extent that such tax would, if levied by the United States, be covered by certain provisions regarding non-conforming measures.

Also subject to the basic exception for tax conventions, provisions in the respective investment Chapters relating to performance requirements and to expropriation and compensation as well as arbitration (with certain additional conditions), apply to taxation measures.

Paragraph 5 provides that the respective investment Chapter's prohibition of performance requirements as a condition to receive an advantage (i.e. incentive) applies to taxation measures, without prejudice to the rights and obligations of the Parties under paragraph 3 (which covers national treatment and market access for goods). This means that advantages (incentives) offered as tax concessions for goods are subject to the Article on performance requirements. Therefore, this applies to taxes on capital gains, income, sales, and value-added taxes. Paragraph 5 is subject to paragraph 2, which means that if there is an inconsistency between the FTA and the provisions of a tax convention, the tax convention prevails.

Paragraph 6 provides that the expropriation and compensation provision of the investment Chapter applies to taxation measures. However, an investor may not invoke the provision on expropriation in the investment Chapter as a basis for a claim under the investor-State dispute settlement procedures if it is determined that the taxation measure is not an expropriation. This determination is made by the taxation authorities in the country imposing the measure. If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the

investor may submit its claim to arbitration under the investor-State dispute settlement mechanism.

Balance of Payments Measures on Trade in Goods: both Chapters provide that a Party which decides to impose measures on trade in goods for balance of payments purposes shall do so only in accordance with its WTO obligations (under the GATT 1994, the 1979 Declaration and BOP Understanding). In adopting such measures, the Party shall immediately consult with the other Part(y)(ies) under the respective Agreement (Chile-U.S. FTA Art.23.4 and DR-CAFTA Art.21.4).

Disclosure of Information: both Chapters specify that nothing in the respective Agreement shall require a Party to furnish or allow access to information, the disclosure of which would impede law enforcement (Chile-U.S. FTA Art.23.5 and DR-CAFTA Art.21.5).

Article 23.5 of the Chile-U.S. FTA provides an exception to disclosing information where disclosure would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions. Article 21.5 of DR-CAFTA refers more broadly to where disclosure of confidential information would be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular public or private enterprises.

Definitions: both Chapters provide the same definition of a tax convention, which means a convention for the avoidance of double taxation or other international taxation Agreement or arrangement (Chile-U.S. FTA Art.23.6 and DR-CAFTA Art.21.6). Both Chapters specify that taxes and taxation measures do not include a customs duty or measures listed as exceptions to the definition of customs duty.

Competent Authorities: the competent authorities listed for Chile in Annex 23.3 and for the Dominican Republic and the Central American countries in Annex 21.3 obviously differ.

Chapter Twenty-Four

Final Provisions

Chapter Twenty-Four on final provisions of the Chile-U.S. FTA and Chapter Twenty-Two on final provisions of DR-CAFTA are similar in terms of basic structure except that DR-CAFTA contains additional Articles on reservations, accession, withdrawal, and a depositary.

The respective final provisions of the Chile-U.S. FTA and DR-CAFTA are also similar in terms of substantive content. Both Chapters specify that annexes, appendices and footnotes to the respective Agreement constitute an integral part thereof, make provision for amending the respective Agreement, and specify that the English and Spanish texts of the respective Agreement are equally authentic. Being an Agreement among more than two Parties, DR-CAFTA provides additionally for accession, withdrawal and a depositary.

Annexes, Appendices and Footnotes: both Chapters specify that annexes, appendices, and footnotes to the Agreement are an integral part of the respective Agreement (Chile-U.S. FTA Art.24.1 and DR-CAFTA Art.22.1).

Amendment of the FTA: both Chapters provide for the Parties to agree on any amendment of the respective Agreement (Chile-U.S. FTA Art.24.2 and DR-CAFTA Art.22.2). The Chile-U.S. FTA uses the term "modification or addition." Paragraph 1 of Article 22.2 of DR-CAFTA provides that the English and Spanish texts of the amendment shall be deposited with the Depositary, which will provide a certified copy to each Party. When so agreed and approved in accordance with the applicable legal procedures of each Party, the amendment shall constitute an integral part of the respective Agreement. Additionally in paragraph 2 of Article 22.2, DR-CAFTA provides that the amendment shall take effect on the date on which all Parties have notified the Depositary in writing that they have approved the amendment or on such other date as the Parties may agree.

Amendment of the WTO Agreement: both Chapters provide that if any WTO provision that is incorporated into the respective Agreement is amended, the Parties shall consult on whether to amend the Agreement (Chile-U.S. FTA Art.24.3 and DR-CAFTA Art.22.3). Thus, notwithstanding that the original WTO provision is amended for purposes of the WTO Agreement, the provision in the FTA is not automatically amended in the respective FTA. The Parties to the FTA must go through the above-mentioned amendment procedures of the respective FTA to effect the amendment for purposes of the FTA.

Reservations: Article 22.4 of DR-CAFTA specifically bars a Party from entering a reservation on any provision of the Agreement without the written consent of the other Parties. This provision does not exist in the Chile-U.S FTA. A reservation is any statement purporting to exclude or modify the legal effect of a provision with regard to the declarant (UN Treaty Handbook).

Entry into Force: Article 24.4 of the Chile-U.S. FTA provides for entry into force 60 days after the Parties have exchanged written notification that they had completed the necessary domestic

legal procedures, respectively. Under its Article 22.5, DR-CAFTA shall enter into force on January 1, 2005 provided that the United States and at least one other signatory notify the depositary in writing by that date that they have completed their applicable legal procedures. If the Agreement does not enter into force on January 1, 2005, DR-CAFTA shall enter into force after the U.S. and at least one other signatory make such a notification, on such later date as those signatories may agree. Thereafter DR-CAFTA shall enter into force for any other signatory within 90 days of its written notification to the depositary of completion of its applicable legal procedures, but such notification must be provided within two years of the date of entry into force, unless the Parties otherwise agree. The depositary shall promptly inform the signatories, Parties and non-Parties, of any notification made under this Article.

An important difference between the two Agreements of course is that the Chile-U.S. FTA has entered into force, which is not the case with DR-CAFTA.

Accession: unlike the Chile-U.S. FTA, DR-CAFTA contains a provision for accession. Article 22.6 provides that any country or group of countries may accede to DR-CAFTA subject to such terms and conditions as may be agreed between such country(ies) and the Commission and following approval in accordance with the applicable legal procedures of each Party and acceding country. The instrument of accession shall be deposited with the depositary, which shall promptly inform each Party of the accession.

Withdrawal: under paragraph 3 of Article 24.4 of the Chile-U.S. FTA, either Party may terminate the Agreement by written notification to the other. The Agreement then expires within 180 days of this notification.

Under Article 22.7 of DR-CAFTA, any Party may withdraw from the Agreement upon written notice to the depositary, such withdrawal taking effect for that Party six months after such notice, unless the Parties agree on a different period. If a Party withdraws, DR-CAFTA remains in force for the remaining Parties.

Depositary: unlike the Chile-U.S. FTA, DR-CAFTA provides for a depositary. Article 22.8 of DR-CAFTA states that the original English and Spanish texts of the Agreement shall be deposited with the General Secretariat of the Organization of American States, which shall serve as depositary. The Depositary shall promptly provide a certified copy of the original texts to each signatory.

Authentic Texts: both Chapters provide that the English and Spanish texts of the respective Agreement are equally authentic (Chile-U.S. FTA Art.24.5 and DR-CAFTA Art.22.9).

Annexes on Non-Conforming Measures: Services and Investment

Introduction

The Chile-U.S. FTA and DR-CAFTA contain three annexes on non-conforming measures: Annex I encompassing Existing Measures with respect to Cross-Border Trade in Services (all services other than financial services) and Investment; Annex II encompassing Future Measures with respect to Cross-Border Trade in Services (all services other than financial services) and Investment; and Annex III on Non-Conforming Measures with respect to Financial Services. The information contained in each of these three Annexes is summarized below for the Parties to the two Agreements. However, as it is impossible to compare the coverage of the non-conforming measures or their impact, no attempt is made in this study to evaluate or compare the incidence or relative restrictiveness of these measures. Likewise, because the Parties to the two Agreements do not necessarily follow the same classification scheme when setting out their measures in the Annexes, no attempt has been made to put either the horizontal or the sectoral measures into comparative tables. Rather, the information is set out in summary form for each individual Party to the relevant Agreement.

Annex I: Existing Measures: Cross-Border Trade in Services and Investment

In Annex I, the Schedule of a Party sets out that country's existing non-conforming measures for cross-border trade in services (for all sectors other than financial services) and for investment. These measures are set out according to a negative listing. These non-conforming measures include those that are not subject to some or all of the obligations imposed by:

(a) National Treatment (NT) (Investment and Cross-Border Trade in Services);
(b) Most-Favored-Nation (MFN) Treatment (Investment and Cross-Border Trade in Services);
(c) Local Presence (Cross-Border Trade in Services);
(d) Performance Requirements (PR) (Investment);
(e) Senior Management and Boards of Directors (SM) (Investment); or
(f) Market Access (MA) (Investment in Services and Cross-Border Trade in Services).

Each annex entry sets out the following elements:

(a) **Sector** refers to the sector for which the entry is made;

(b) **Obligations Concerned** specifies the obligation(s) that do not apply to the listed measure(s);

(c) **Level of Government** indicates the level of government maintaining the listed measure(s);

(d) **Measures** identifies the laws, regulations, or other measures for which the entry is made.

(e) **Description** provides a general, non-binding, description of the **Measures** (Chile-U.S. FTA). In DR-CAFTA, this section sets out commitments, if any, for the progressive, future liberalization of the measures.

The non-conforming measures in Annex I are listed at their level of actual application and are supported by references to laws, regulations or other measures. Each Party is bound to apply such measures on a basis not more restrictive than what is indicated in the description of the measure. If a non-conforming measure set out in Annex I is made less restrictive or eliminated after the entry into force of the Agreement, it cannot subsequently be amended by or replaced with a new measure that is more restrictive ("ratcheting"). Thus the new measure is considered to be legally bound and must be applied to all Parties at the more liberalized level.

A. CHILE – U.S. FTA

A.1 CROSS-BORDER TRADE IN SERVICES

The total number of non-conforming measures listed in Annex I by each Party is the following:

Chile	**17 Sectoral Measures**	**+ 1 Horizontal Measure**
United States	**5 Sectoral Measures**	**+ 1 Horizontal Measure**

The discipline that both Parties invoke most often in their non-conforming measures is that of National Treatment.

Chile applies a greater number of non-conforming measures to mode 1, or cross-border services supply than does the United States, but tends to do this on a sectoral basis. The U.S. applies relatively few non-conforming measures at the sectoral level (other than transport), but does set out measures at the horizontal level that may have a significant impact on services trade of all sectors.

A.1.a Horizontal Measures

At the horizontal level both countries list one measure with respect to cross-border trade in services that affects various obligations of the Agreement.

- **Chile : National Treatment / Local Presence**

Chile requires that a minimum of 85 percent of employees who work for the same Chilean employer (in a firm of more than 25 employees) must be Chilean natural persons.

- **United States : National Treatment / MFN / Local Presence**

The United States reserves National Treatment, MFN and Local Presence for all existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico. This measure affects three obligations: National Treatment, MFN and Local Presence. It is the only measure taken at the regional level of government.

A.1.b Sectoral Measures

The non-conforming measures on cross-border trade in services in Annex I are set out by each Party to the Agreement according to the various sectors or sub-sectors, and with reference to the core discipline(s) invoked in the measure. The measures for Chile are found in *Table 1* and those for the United States in *Table 2*.

Table 1
Chile
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Communications		X	X	X
Fisheries		X	X	X
Sports, Industrial Fishing and Hunting, and Recreational Services			X	
Customs Agents and Brokers		X	X	
Private Armed Security Guards		X		
Research Services		X		
Research Services		X		
Research in Social Services		X		
Printing, Publishing, and Other Related Industries		X	X	X
Professional Services		X	X	
Auxiliary Services in the Administration of Justice		X	X	
Legal Services		X		X
Air Transportation		X	X	X
Shipping		X	X	X
Shipping		X	X	
Land Transportation		X	X	X
Land Transportation		X		X

Table 2
United States
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Business Services (Export Conduct)		X	X	
Business Services (License from BIS)		X	X	
Specialty Air Services		X	X	X
Customs Brokers		X	X	
Patents Attorneys, Patent Agents, and Other Practice Before the Patent and Trademark Office		X	X	X

A.2 INVESTMENT

The total number of non-conforming measures listed in Annex I by each Party is the following:

Chile	**9 Sectoral Measures + 1 Horizontal Measure**
United States	**6 Sectoral Measures + 3 Horizontal Measures**

The non-conforming measures that affect investment in services with respect to Market Access are included in the tables under Section A.1 on Cross-Border Trade in Services.

The majority of Chile's existing non-conforming measures pertain to the National Treatment obligation (9 measures). Chile also lists a number of existing non-conforming measures against Senior Management and Boards of Directors (6 measures), and MFN Treatment (5 measures). Chile has 3 existing non-conforming measures that violate the performance requirements obligation.

Most sectoral non-conforming measures listed by the United States are with respect to National Treatment (6 measures), followed by MFN Treatment (3 measures) and Senior Management and Boards of Directors (2 measures). The United States has no sectoral non-conforming measure with regard to the Performance Requirements obligation.

A.2.a Horizontal Measures

At the horizontal level both countries list one measure with respect to investment that affects various obligations of the Agreement.

- **Chile: National Treatment**

Chile may only dispose of the ownership or other rights over "State land" to Chilean natural or juridical persons, unless the applicable legal exceptions apply.

- **United States: National Treatment / MFN Treatment**

The Overseas Private Investment Corporation insurance and loan guarantees are not available to certain aliens, foreign enterprises, or foreign-controlled domestic enterprises.

- **United States: National Treatment / MFN Treatment**

Foreign firms, except for certain Canadian issuers, may not use the small business registration forms under the Securities Act of 1933 to register public offerings of securities or the small business registration forms under the Securities Exchange Act of 1934 to register a class of securities or file annual reports.

- **United States: National Treatment / MFN Treatment / Performance Requirements / Senior Management and Boards of Directors**

The United States reserves National Treatment, MFN Treatment, Performance Requirements, and Senior Management and Boards of Directors for all existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico. It is the only measure taken at the regional level of government.

- A.2.b Sectoral Measures

The non-conforming measures on investment in Annex I are set out by each Party to the Agreement according to the various sectors or sub-sectors, and with reference to the core discipline(s) invoked in the measure. The measures for Chile are found in *Table 3* and those for the United States in *Table 4*.

Table 3
Chile
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Communications	X	X	X	X
Energy	X		X	
Mining	X		X	
Fisheries	X	X		X
Fisheries Aquaculture	X			
Printing, Publishing, and Other Related Industries	X	X		X
Air Transportation	X	X		X
Shipping I-CH-25	X	X		X
Shipping I-CH-28	X			X

Table 4
United States
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Atomic Energy	X			
Mining	X	X		
Air Transportation I-US-6	X	X		X
Air Transportation I-US-8	X	X		X
Customs Brokers	X			
Radio Communications	X			

B. DR-CAFTA

B.1 CROSS-BORDER TRADE IN SERVICES

The total number of non-conforming measures listed in Annex I by each Party is the following:

Costa Rica	**28 Sectoral Measures**	**No Horizontal Measures**
Dominican Republic	**18 Sectoral Measures**	**No Horizontal Measures**
El Salvador	**16 Sectoral Measures**	**No Horizontal Measures**
Guatemala	**5 Sectoral Measures**	**No Horizontal Measures**
Honduras	**30 Sectoral Measures**	**No Horizontal Measures**
Nicaragua	**27 Sectoral Measures**	**No Horizontal Measures**
United States	**5 Sectoral Measures**	**+ 1 Horizontal Measure**

The obligation that both Parties invoke most often in their non-conforming measures is that of National Treatment.

Honduras lists the greatest number of non-conforming measures to cross-border services supply, with Guatemala listing the fewest measures. The US applies relatively few non-conforming measures at the sectoral level, but sets out a measure at the horizontal level that may have a significant impact on the trade of all service sectors.

B.1.a Horizontal Measures

At the horizontal level the United States lists one measure with respect to cross-border trade in services that affects various obligations of the Agreement. There are no measures listed at the horizontal level by the Central American Parties and the Dominican Republic to the Agreement.

- **United States: National Treatment / MFN / Local Presence**

The United States reserves all existing non-conforming measures for all states of the United States, the District of Columbia, and Puerto Rico with respect to three obligations: National Treatment, MFN and Local Presence. It is the only measure taken at the regional level of government.

B.1.b Sectoral Measures

The non-conforming measures on cross-border trade in services in Annex I are set out by each Party to the Agreement according to the various sectors or sub-sectors, and with reference to the core discipline(s) invoked in the measure. The measures for the Central American Parties and the Dominican Republic to the Agreement are found in *Tables 5* through *10* and those for the United States in *Table 11*.

Table 5
Costa Rica
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Irrigation Services	X			
Solid Waste Treatment Services	X			
Maritime and Specialty Air Services	X			
Professional Services		X	X	X
Maritime-Land Zone	X	X	X	
Land Transportation Services- Transportation of Passengers	X	X		X
Land Transportation Services - Freight Transportation	X	X		X
Water Transportation Services		X	X	X
Specialty Air Services		X	X	X
Tourist Guides		X		
Travel Agencies and Tourism	X			
Transportation Services - Customs Brokers – Assistant Custom Brokers – Custom Transportation Agents		X	X	
Telecommunications Related Services - Radio and Television	X	X		X
Wholesale and Retail Distribution – Crude Oil and its Derivatives	X			
Services Incidental to Mining – Hydrocarbon Exploration			X	
Mining and Services Incidental to Mining – Ores Other than Hydrocarbons	X	X	X	
Scientific and Research Services			X	
Services Incidental to Agriculture and Forestry		X		
Electric Energy	X	X	X	
Higher Education Services		X		
Human Health Service Professionals – Physicians and Surgeons, Dental Surgeons, Microbiologists, Pharmacists, Nurses, and Nutritionists		X		
Audiovisuals – Advertising – Services of Cinema, Radio, Television, and Other Shows	X	X	X	X
News Agencies Services		X	X	
Sport Services and Other Entertainment Services	X	X	X	
Railroads, Ports, and Airports	X		X	
Wireless Services	X	X		X
On Premise Supply of Liquors for Consumption	X			
Lottery Sale Services	X			

Table 6
Dominican Republic
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Professional Services – Legal Services	X	X		
Professional Services – Architectural and Engineering Services		X	X	X
Professional Services – Accounting, Auditing and Bookkeeping Services	X	X	X	
Professional Services – Health Services and Related Professions		X	X	X
Energy Related Services	X			
Communications – Audio-Visual Services		X		X
Communications – Advertising Services		X		
Communications - Broadcasting	X	X	X	
Communications	X		X	
Distribution, Trade, and Commission Agent Services	X		X	
Tourism and Services Related to Travel		X	X	
Recreational and Cultural Services		X		
Transportation – Maritime Services		X	X	
Air Transportation – Specialty Air Services and Maintenance and Repair of Aircraft		X		X
Educational Services	X		X	
Lotteries	X			
Retail Distribution of Pharmaceutical Products	X			
Services Incidental to Mining, Hydro-Electric Plant Construction and Management; Electricity Transmission, Marketing and Distribution Services; Public Irrigation Services; Management and Operation of Water Distribution and Waste Management Services; Airport and Port Construction, Operation and Management Services; and Operation of Lotteries	X			

Table 7
El Salvador
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Air Services: Specialty Air Services		X		X
Air Services: Aircraft Repair and Maintenance Services During which an Aircraft is Withdrawn from Service and Pilots of Specialty Air Services		X		X
Communication Services – Advertising and Promotional Services for Radio and Television		X		X
Performing Arts		X		
Circuses		X		
Performing Arts		X		
Construction and Related Engineering Services		X	X	X
Public Accounting and Public Auditing		X		X
Professional Services: Architectural Services, Engineering Services Integrated Engineering Services, Urban Planning and Landscaping Services		X	X	
Professional Services: Health Services (Including but not limited to: General and Specialist Medical Services, Dental Services, Veterinary Services, Paramedical Services, Services rendered by Psychologists, Midwives, Nurses, Physiotherapists, Chemists and Qualified Clinical Laboratory Technicians, and Technical Auxiliary Staff)		X	X	X
Professional Services: Legal Services (Notary Public)		X	X	X
Professional Services: Teachers		X		
Professional Services: Customs Agents		X		X
Transport Services - Road Transport Services		X		
Energy	X			
Land Transport	X			

Table 8
Guatemala
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Professional Services: Notaries		X	X	
Performing Arts		X	X	
Tour Guides		X	X	
Specialty Air Services				X
Specialty Air Services		X		

Table 9
Honduras
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Customs Agents and Customs Agencies		X		
Communication Services: Mail	X			
Telecommunications		X		
Telecommunications	X			
Construction or Consulting Services and Related Engineering Services – Civil Engineering	X	X	X	X
Distribution Services – Petroleum Products (Liquid Fuel, Automotive Oil, Diesel, Kerosene, and LPG)			X	
Electricity	X			
Lotteries	X			
Education Services – Private Preschool, Primary, and Secondary Education Services		X	X	X
Entertainment Services – Music Entertainment		X		
Championships and Soccer Games Services		X	X	X
Amusement, Cultural, and Sports Services – Casinos and Gambling (Encompasses Roulette, Cards, Punter, Baccarat, Slot Machines, and the Like)		X	X	
Environmental Services	X			
Distribution, Wholesale and Retail – Weapons, Munitions, and Other Related Items	X			
Professional Services		X	X	X
Air Transportation		X	X	X
Maritime Transportation – Coastal Navigation		X	X	X
Land Transportation	X	X	X	X
Other Building Services - Warehousing	X			
Economic Consulting Services			X	
Business Consulting Services	X	X		X
Agricultural Engineering and Agronomy		X		X
Forestry Engineers		X	X	
Veterinarians		X	X	X
Microbiologist and Clinicians		X		
Notaries		X		
Electrical Energy Services	X			
Telecommunications	X			
Public Accountants			X	
Architects			X	

Table 10
Nicaragua
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Musicians and Artists		X		X
Tourism – Hotels, Restaurants, Tour Guides, Car Rental, and Other Tourism Related Activities		X	X	
Services Related to Construction		X	X	
Distribution of Fireworks, Firearms, and Munitions		X	X	
Private Security Services		X	X	
Radio Broadcast, Free Television Reception		X		
Communications – Professional Radio and Television Broadcast Services		X		X
Electricity Distribution			X	
Services Incidental to Mining - Hydrocarbons			X	
Services Incidental to Mining – Metallic and Non-Metallic Minerals			X	
Fisheries and Services Incidental to Fishing		X	X	
Land Transportation		X	X	X
Maritime Transportation		X		
Ports	X			
Air Transportation - Repair and Maintenance Services, Specialty Air Services		X	X	X
Professional Services		X	X	X
Public Accounting and Auditing		X	X	
Professional Services - Notary Publics		X		X
Customs Brokers		X	X	X
Scientific Research Services			X	
Telecommunications	X	X		
Development of Maps	X			
Potable Water, Sanitary Sewer Systems, and Sewage Collection and Disposal	X			
Airports	X			
Energy Services	X			
Administration of Lotteries	X			
Public Communication Services	X			

Table 11
United States
Existing Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Business Services		X	X	
Business Services		X	X	
Air Transportation		X	X	X
Transportation Services-Customs Brokers		X	X	
Professional Services --Patent Attorneys, Patent Agents, and Other Practice before the Patent and Trademark Office		X	X	X

B.2 INVESTMENT

The table below shows the total number of existing non-conforming measures listed by each Party in Annex I.

Costa Rica	**14 Sectoral Measures**	**No Horizontal Measures**
Dominican Republic	**12 Sectoral Measures**	**1 Horizontal Measure**
El Salvador	**7 Sectoral Measures**	**+ 2 Horizontal Measures**
Guatemala	**3 Sectoral Measures**	**+ 5 Horizontal Measures**
Honduras	**14 Sectoral Measures**	**+ 3 Horizontal Measures**
Nicaragua	**4 Sectoral Measures**	**No Horizontal Measures**
USA	**3 Sectoral Measures**	**+ 3 Horizontal Measures**

The non-conforming measures that affect investment in services with respect to Market Access are included in the tables under Section B.1 on Cross-Border Trade in Services.

The obligation that both Parties invoke most often in their non-conforming measures is that of National Treatment.

Costa Rica has 13 non-conforming measures which do not apply to the National Treatment obligation, 6 to MFN Treatment, 3 to Performance Requirements, and 4 to Senior Management and Boards of Directors.

The Dominican Republic has 8 non-conforming measures which do not apply to National Treatment, 3 to Performance Requirements, and 3 to Senior Management and Board of Directors.

El Salvador has 7 non-conforming measures that do not apply to the National Treatment obligation, and 3 to the MFN Treatment obligation.

Guatemala lists 3 measures that do not conform to National Treatment and 1 to Senior Management and Boards of Directors.

Honduras has 12 non-conforming measures which do not apply to National Treatment, 1 to the MFN Treatment, and 5 to Senior Management and Boards of Directors.

Nicaragua has 3 non-conforming measures that do not apply to National Treatment, 2 to Performance Requirements, and 1 to Senior Management and Boards of Directors.

The United States has 6 non-conforming measures with respect to National Treatment, 3 for MFN Treatment, and 2 for Senior Management and Boards of Directors.

B.2.a Horizontal Measures

At the horizontal level both countries list one measure with respect to investment that affects various obligations of the Agreement.

- **Dominican Republic: National Treatment**

Only Dominican nationals may perform activities related to the disposal of toxic, hazardous, or dangerous or radioactive waste produced outside the Dominican Republic.

- **El Salvador: National Treatment / MFN Treatment**

Rural land may not be owned by a foreign person, including a branch of a foreign person, if the person is a national of a country or is organized under the law of a country that does not permit Salvadoran persons to own rural land, except in the case of land to be used for industrial plants. An enterprise organized under Salvadoran law, a majority of whose capital is owned by foreign persons, or a majority of whose partners are foreign persons, is subject to the preceding paragraph.

- **El Salvador: National Treatment / MFN Treatment**

Only the following persons may engage in small scale commerce, industry, and the supply of services in El Salvador: (a) Salvadoran nationals born in El Salvador; and (b) nationals of Central American Parties. An enterprise organized under Salvadoran law, a majority of whose capital is owned by foreign persons, or a majority of whose partners are foreign persons, may not establish a small scale enterprise to engage in small scale commerce, industry, and the supply of services ("small scale enterprise"). For purposes of this entry, a small scale enterprise is an enterprise with a capitalization not greater than 200,000 U.S. dollars.

- **Guatemala: National Treatment**

Only the following persons may be granted title to, rent, or use state-owned lands in the Department of El Petén: (1) Guatemalan nationals who do not own rural real estate anywhere in the country that exceeds 45 hectares; and (2) Guatemalan nationals who do not own industrial,

mining or commercial enterprises. Enterprises owned 100 percent by Guatemalan nationals that meet the requirements set out in the preceding paragraph may be granted title to, rent, or use state-owned lands in the Department of El Petén.

- **Guatemala: National Treatment**

Only Guatemalan nationals and enterprises that are majority owned by Guatemalan nationals may take adverse possession of real estate.

- **Guatemala: National Treatment**

Foreign nationals require an authorization from the *Oficina de Control de Areas de Reserva del Estado* to acquire ownership of the following state-owned land:

(a) real estate located in urban zones; and
(b) real estate for which rights were registered in the General Property Registry before March 1, 1956 in the following locations:

(i) a 3-kilometer-long strip of land along the ocean;
(ii) 200 meters around the lakeshores;
(iii) 100 meters on either side of the navigable rivers; and
(iv) 50 meters around any spring that serves as a source of water for the population.

Only the Government may rent state-owned land described above to enterprises organized under Guatemalan law.

- **Guatemala: National Treatment**

Only Guatemalan nationals by birth and enterprises 100 percent owned by Guatemalan nationals may own or possess real property located within 15 kilometers of the borders. Foreign nationals may, however, own or possess urban real estate and real estate for which rights were registered in the General Property Registry before March 1, 1956 within the 15 kilometer area.

- **Guatemala: National Treatment**

For an enterprise organized under foreign law to be established in Guatemala, in any form, it must allocate an assigned amount of capital for its operations in Guatemala, and execute a guarantee in favor of third Parties in an amount not less than the equivalent in quetzales of US$ 50,000, which must remain in effect for the duration of the enterprise's operations in Guatemala. The exact amount of the guarantee shall be determined by the *Registro Mercantil,* based on, among other factors, the amount of the investment. For greater certainty, the requirement of a bond is not to be construed to prevent an enterprise organized under the laws of a foreign country from establishing in Guatemala.

- **Honduras: National Treatment**

State land, common land, and private land within 40 kilometers of the borders and coastlines, and such land on islands, keys, coral reefs, breakwaters, rocks, and sand shoals in Honduras, can only be acquired, possessed, or held under any title by Honduran nationals by birth, by enterprises fully owned by Honduran nationals, and by state institutions. Notwithstanding the preceding paragraph, any person may acquire, possess, hold, or lease for up to 40 years (which may be renewed) urban lands in such areas provided that it is certified and approved for tourist purposes, economic or social development, or for the public interest by the *Secretaría de Estado en los Despachos de Turismo.* Any person that acquires, possesses, or holds such urban land may transfer that land only after prior authorization by the *Secretaría de Estado en los Despachos de Turismo.*

- **Honduras: National Treatment / MFN Treatment**

Small-scale industry and trade are reserved to Honduran persons. Foreign investors cannot engage in small-scale industry or trade unless they are naturalized citizens and their country of origin grants reciprocity. "Small-scale industry and trade" means an enterprise with capital, excluding land, buildings, and vehicles, of less than 150,000 Lempiras.

- **Honduras: National Treatment / MFN Treatment**

Non-Honduran cooperatives may establish in Honduras if they receive authorization from the *Instituto Hondureño de Cooperativas*. Authorization will be granted if: (a) reciprocity exists in the country of origin; and (b) the non-Honduran cooperative has at least one permanent legal representative in Honduras.

- **United States: National Treatment / MFN Treatment**

The Overseas Private Investment Corporation insurance and loan guarantees are not available to certain aliens, foreign enterprises, or foreign-controlled domestic enterprises.

- **United States: National Treatment / MFN Treatment**

Foreign firms, except for certain Canadian issuers, may not use the small business registration forms under the Securities Act of 1933 to register public offerings of securities or the small business registration forms under the Securities Exchange Act of 1934 to register a class of securities or file annual reports.

- **United States: National Treatment / MFN Treatment / Performance Requirements / Senior Management and Boards of Directors**

The United States reserves National Treatment, MFN Treatment, Performance Requirements, and Senior Management and Boards of Directors for all existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico. It is the only measure taken at the regional level of government.

B.2.b Sectoral Measures

The non-conforming measures on investment in Annex I are set out by each Party to the Agreement according to the various sectors or sub-sectors, and with reference to the core discipline(s) invoked in the measure. The measures for the Central American Parties and the Dominican Republic to the Agreement are found in *Tables 12* through*17* and those for the United States in *Table 18*.

Table 12
Costa Rica
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Maritime-Land Zone	X			
Land Transportation Services - Transportation of Passengers	X	X		
Land Transportation Services – Transportation of Freight	X	X		X
Water Transportation Services	X			
Air Transportation Services	X	X		X
Telecommunications Related Services - Radio and Television	X	X		X
Mining and Services Incidental to Mining -- Ores Other than Hydrocarbons	X			
Free Zones			X	
Fisheries and Services Incidental to Fishing	X		X	
Electric Energy	X			
Higher Education Services	X			X
Audiovisuals - Advertising - Services of Cinema, Radio, Television, and Other Shows	X	X	X	
Sports Services and Other Entertainment Services	X			
Wireless Services	X	X		

Table 13
Dominican Republic
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Energy Related Services	X			
Mining	X			
Communications: Audio-Visual Services			X	
Communications: News Agency Services				X
Communications: Broadcasting	X			
Distribution, Trade and Commission Agent Services			X	
Transportation – Maritime Transportation	X			X
Air Transportation	X			X
Free Zones			X	
Oil Exploitation and Exploration Services	X			
Fishing	X			
Cooperative Associations	X			

Table 14
El Salvador
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Cooperative Production Societies	X			
Duty-Free Commercial Centers and Establishments	X			
Communications Services: Television and Radio Broadcasting Services	X			
Construction and Related Engineering Services	X	X		
Public Accounting and Public Auditing	X	X		
Professional Services: Customs Agents	X	X		
Transport Services - Road Transport Services	X			

Table 15
Guatemala
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Forestry	X			
Professional Services	X			
Air Transportation	X			X

Table 16
Honduras
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Customs Agents and Customs Agencies	X			
Agricultural	X			
Radio, Television, and Newspaper Services				X
Construction or Consulting Services and Related Engineering Services - Civil Engineering	X			
Distribution Services - Petroleum Products (liquid Fuel, Automotive Oil, Diesel, Kerosene, and LPG)	X			
Education Services - Private Preschool, Primary, and Secondary Educational Services				X
Entertainment Services - Music Entertainers	X			
Amusement, Cultural, and Sports Services - Casinos and Gambling (Encompasses Roulette, Cards, Punter, Baccarat, Slot Machines, and the Like)	X			
Investigation and Security Services	X			X
Fisheries	X			
Air Transportation	X			X
Maritime Transportation - Coastal Navigation	X	X		
Land Transportation	X			
Transportation - Railways	X			X

Table 17
Nicaragua
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Radio Broadcast, Free Television Reception	**X**			
Fisheries and Services Incidental to Fishing	**X**		**X**	
Air Transportation	**X**			**X**
Regime on Free Zones and Regime on Active Improvement			**X**	

Table 18
United States
Existing Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Atomic Energy	X			
Mining	X	X		
Air Transportation	X	X		X
Air Transportation	X	X		X
Transportation Services-Customs Brokers	X			
Communications - Radiocommunications	X			

Annex II: Future Measures: Cross-Border Trade in Services and Investment

In Annex II, the Schedule of a Party sets out the specific sectors, sub-sectors, or activities for which that Party **may maintain existing, or adopt new or more restrictive, measures** for cross-border trade in services (for all sectors other than financial services) and for investment. For the sector and sub-sectors included in this Annex, the respective Governments thus remain free to regulate in a discriminatory manner in any way felt desirable, without constraint. Measures are set out according to a negative listing. These non-conforming measures include those that are not subject to some or all of the obligations imposed by:

(a) National Treatment (NT) (Investment and Cross-Border Trade in Services);
(b) Most-Favored-Nation (MFN) Treatment (Investment and Cross-Border Trade in Services);
(c) Local Presence (Cross-Border Trade in Services);
(d) Performance Requirements (PR) (Investment);
(e) Senior Management and Boards of Directors (SM) (Investment); or
(f) Market Access (MA) (Investment in Services and Cross-Border Trade in Services).

Each annex entry sets out the following elements:

(a) **Sector** refers to the sector for which the entry is made;

(b) **Obligations Concerned** specifies the obligation(s) that do not apply to the sectors, sub-sectors, or activities listed in the entry;

(c) **Description** sets out the scope of the sectors, sub-sectors, or activities covered by the entry;

(d) **Existing Measures** identifies, for transparency purposes, existing measures that apply to the sectors, sub-sectors, or activities covered by the entry.

C. CHILE–U.S. FTA

C.1 CROSS-BORDER TRADE IN SERVICES

The total number of non-conforming measures listed in Annex II by each Party is the following:

Chile	**9 Sectoral Measures**	**+ 2 Horizontal Measures**
United States	**4 Sectoral Measures**	**+ 2 Horizontal Measures**

The obligation that both Parties invoke most often in their non-conforming measures is that of National Treatment.

Chile lists a greater number of measures with respect to cross-border services supply than does the United States. At the horizontal level both Parties list one identical measure on MFN and one measure each on Market Access. The measures affecting Market Access are comprehensive and may have a significant impact on services trade of all sectors.

C.1.a Horizontal Measures

- **United States / Chile / MFN**

At the horizontal level both Parties to the Agreement list an identical measure affecting MFN treatment. The measure has two components that should be read separately.

The first part of the measure preserves any pre-existing bilateral or multilateral international Agreement from falling under the purview of the Chile-U.S. FTA. Each of the Parties is given the right to adopt or maintain any measures that accord differential treatment to countries under any bilateral or multilateral international Agreement in force or signed *prior to the date of entry into force of the Agreement.*

The second part of the measure allows each of the Parties to adopt or maintain any measure involving differential treatment to countries under any bilateral or multilateral international

Agreement *in force or signed after the date of entry into force of the Agreement* with respect to three specific activities, namely:

(a) aviation;
(b) fisheries; or
(c) maritime matters, including salvage.

- **United States: Market Access**

The US reserves the right to adopt or maintain any measure that is not inconsistent with the United States' obligations under Article XVI of the WTO General Agreement on Trade in Services. (Note: This Article contains six measures affecting Market Access, of which four of these are non-discriminatory quantitative restrictions.)

- **Chile: Market Access**

Chile reserves the right to adopt or maintain any measure affecting Market Access except those which it sets out explicitly in Annex II with respect to various sub-sectors and four modes of service supply, as defined in the text of the non-conforming measure. These sub-sectors include: legal services; accounting, auditing and bookkeeping services; taxation services; architectural services; engineering services; veterinary services; services provided by midwives, nurses, physiotherapists and paramedical personnel; computer and related services; real estate services; rental/leasing services related to vessels, aircraft, and any other transport equipment; advertising services, market research and public opinion polling services, management consulting services; services related to agriculture, hunting and forestry; services related to mining, placement and supply services of personnel, investigation, and security services; maintenance and repair of equipment, cleaning services, photographic services, packing services and convention services; printing and publishing services; national or international long-distance telecommunications services; local basic telecommunication services and networks; commission agents services, wholesale trade services, retailing services, franchising and other distribution; hotels and restaurants, travel agencies and tour operators services, entertainment services, news agencies services, libraries, archives, and other cultural services; sporting and other recreational services; road transport, services auxiliary to all transport, pipeline transport and transportation of fuels and other goods; and aircraft repair and maintenance services.

Chile also agrees to set out any existing non-conforming measures on energy-related services and adult education within one year of the date of entry into force of the Agreement.

C.1.b Sectoral Measures

The non-conforming measures on cross-border trade in services in Annex II are set out by each Party to the Agreement according to the various sectors or sub-sectors, and with reference to the core discipline(s) invoked in the measure. The measures for Chile are found in *Table* 19 and those for the United States in *Table 20.*

Table 19
Chile
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Communications Services		x	X	x
Issues Involving Minorities		x	X	x
Issues Involving Indigenous People		x	X	x
Education Services		x	X	x
Fishing-related Activities		x		x
Cultural Industries				x
Social Services		x	X	x
Environmental Services		x	X	x
Construction Services		x	X	

Table 20
United States
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Communications Services				x
Social Services		x	X	x
Minority Affairs		x	X	
Maritime Transport		x	X	x

C.2 INVESTMENT

The total number of non-conforming measures listed in Annex II by each Party is the following:

Chile **7 Sectoral Measures + 3 Horizontal Measures**
United States **4 Sectoral Measures + 1 Horizontal Measure**

The non-conforming measures that affect investment in services with respect to Market Access are included in the tables under Section C.1 on Cross-Border Trade in Services.

The obligation that both Parties invoke most often in their non-conforming measures is that of National Treatment.

Chile lists a greater number of measures with respect to investment than does the United States. With respect to specific sectors, Chile has a list of 7 non-conforming measures, while the United States has 4 measures. National Treatment is invoked with respect to six non-conforming measures. The same number applies to MFN Treatment. Four non-conforming measures violate

the Performance Requirements obligation and 4 the obligation for Senior Management and Boards of Directors. The US has the same number of non-conforming measures for all obligations (3 measures for each).

Both Parties include the greatest number of future non-conforming measures in sectors relating to social issues, including social services, minority affairs, and in the case of Chile, issues involving indigenous people. Chile includes a non-conforming measure for communications, which does not apply to National Treatment, MFN Treatment, Performance Requirements, and Senior and Management and Boards of Directors. The United States, on the other hand, does the same in the transportation sector.

C.2.a Horizontal Measures

- **US / Chile: MFN**

At the horizontal level both Parties to the Agreement list an identical measure affecting MFN treatment. The measure has two components that should be read separately.

The first part of the measure preserves any pre-existing bilateral or multilateral international Agreement from falling under the purview of the Chile-U.S. FTA. Each of the Parties is given the right to adopt or maintain any measures that accords differential treatment to countries under any bilateral or multilateral international Agreement in force or signed *prior to the date of entry into force of the Agreement.*

The second part of the measure allows each of the Parties to adopt or maintain any measure involving differential treatment to countries under any bilateral or multilateral international Agreement *in force or signed after the date of entry into force of the Agreement* with respect to three specific activities, namely:

(a) aviation;
(b) fisheries; or
(c) maritime matters, including salvage.

- **Chile: National Treatment / MFN**

Chile reserves the right to adopt or maintain any measure relating to the ownership or control of land within five kilometers of the coastline that is used for agricultural activities. Such measures could include a requirement that the majority of each class of stock of a Chilean juridical person that seeks to own or control such land be held by Chilean persons or by persons residing in Chile for 183 days or more per year.

- **Chile: National Treatment / Senior Management and Boards of Directors**

In the transfer or disposal of any interest in stock or asset held in an existing state enterprise or governmental entity, Chile reserves the right to prohibit or impose limitations on the ownership of said interest or asset and on the right of foreign investors or their investments to control any

State company created thereby or investments made by the same. In connection with any such transfer or disposal, Chile may adopt or maintain any measure related to the nationality of senior management and members of the Board of Directors. A "State company" shall mean any company owned or controlled by Chile by means of an interest share in the ownership thereof, and it shall include any company created after the effective date of this Agreement for the sole purpose of selling or disposing of its interest share in the capital or assets of an existing state enterprise or governmental entity.

C.2.b Sectoral Measures

The non-conforming measures on investment in Annex II are set out by each Party to the Agreement according to the various sectors or sub-sectors, and with reference to the core discipline(s) invoked in the measure. The measures for Chile are found in *Table 21* and those for the United States in *Table 22.*

Table 21
Chile
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Communications	X	X	X	X
Issues Involving Minorities	X	X	X	X
Issues Involving Indigenous People	X	X	X	X
Government Finances	X			
Fishing-Related Activities	X	X		
Cultural Industries		X		
Social Services	X	X	X	X

Table 22
United States
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Communications		X		
Social Services	X	X	X	X
Minority Affairs	X		X	X
Transportation	X	X	X	X

D. DR-CAFTA

D.1. CROSS-BORDER TRADE IN SERVICES

The total number of non-conforming measures listed in Annex II by each Party is the following:

Costa Rica	**2 Sectoral Measures**		**1 Horizontal Measure**
Dominican Republic	**4 Sectoral Measures**		**1 Horizontal Measure**
El Salvador	**3 Sectoral Measures**		**1 Horizontal Measure**
Guatemala	**2 Sectoral Measures**		**1 Horizontal Measure**
Honduras	**6 Sectoral Measures**		**1 Horizontal Measure**
Nicaragua	**3 Sectoral Measures**		**1 Horizontal Measure**
United States	**4 Sectoral Measures**	+	**2 Horizontal Measures**

The sector with the largest number of listed non-conforming measures is Health and Related Social Services.
The sector with the fewest non-conforming measures is that of Recreational, Cultural and Sporting Services.

Honduras lists the greatest number of non-conforming measures with respect to cross-border services supply, with Guatemala and Costa Rica applying the fewest non-conforming measures. All Parties to the Agreement have an identical horizontal measure affecting MFN, and the US has an additional horizontal measure affecting Market Access.

D.1.a Horizontal Measures

- **US / Costa Rica/ Dominican Republic/El Salvador/ Guatemala/ Honduras/ Nicaragua: MFN**

At the horizontal level all Parties to the Agreement list an identical measure affecting MFN treatment. The measure has two components that should be read separately.

The first part of the measure preserves any pre-existing bilateral or multilateral international Agreement from falling under the purview of DR-CAFTA. Each of the Parties is given the right to adopt or maintain any measures that accords differential treatment to countries under any bilateral or multilateral international Agreement in force or signed *prior to the date of entry into force of the Agreement.*

The second part of the measure allows each of the Parties to adopt or maintain any measure involving differential treatment to countries under any bilateral or multilateral international Agreement *in force or signed after the date of entry into force of the Agreement* with respect to three specific activities, namely:

(a) aviation;
(b) fisheries; or

(c) maritime matters, including salvage.

- **US / Market Access**

The United States reserves the right to adopt or maintain any measure that is not inconsistent with the United States' obligations under Article XVI of the WTO General Agreement on Trade in Services. (Note: This Article contains six measures affecting Market Access, of which four of these are non-discriminatory quantitative restrictions.)

D.1.b Sectoral Measures

The non-conforming measures on cross-border trade in services in Annex II are set out by each Party to the Agreement according to the various sectors or sub-sectors, and with reference to the core discipline(s) invoked in the measure. The measures for the Central American Parties and the Dominican Republic to DR-CAFTA are found in *Table 23* through *28* and those for the United States in *Table 29.*

Table 23
Costa Rica
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Cultural Industries				X
Social Services	X	X	X	X

Table 24
Dominican Republic
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Communications				X
Services Related to Craft Industry	X	X		
Social Services		X	X	X
Socially and Economically Disadvantaged Groups		X	X	

Table 25
El Salvador
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Social Services	X	X	X	X
Minority Affairs		X	X	
Transport Services: Road Transport Services		X	X	X

Table 26
Guatemala
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Maritime Transportation		X	X	X
Matters Related to Disadvantaged Minorities and Indigenous People		X	X	

Table 27
Honduras
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Communication Services - Telecommunications	X			
Agronomists		X	X	X
Social Workers		X		
Chemists and Pharmacists		X	X	X
Social Services	X	X	X	X
Minority Affairs		X	X	

Table 28
Nicaragua
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Minority Affairs and Indigenous Peoples		X	X	X
Communications				X
Social Services		X	X	X

Table 29
United States
Future Non-Conforming Measures for Cross-Border Trade in Services

	Type of Obligation			
Sector / Sub-Sector	**MA**	**NT**	**Local Presence**	**MFN**
Communications				X
Social Services		X	X	X
Minority Affairs		X	X	
Transportation		X	X	X

D.2 INVESTMENT

The total number of non-conforming measures listed in Annex II by each Party is the following:

Costa Rica	**2 Sectoral Measures**	**1 Horizontal Measure**
Dominican Republic	**4 Sectoral Measures**	**3 Horizontal Measures**
El Salvador	**2 Sectoral Measures**	**1 Horizontal Measure**
Guatemala	**2 Sectoral Measures**	**1 Horizontal Measure**
Honduras	**3 Sectoral Measures**	**1 Horizontal Measure**
Nicaragua	**4 Sectoral Measures**	**2 Horizontal Measures**
USA	**5 Sectoral Measures**	**1 Horizontal Measure**

The non-conforming measures that affect investment in services with respect to Market Access are included in the tables under Section D.1 on Cross-Border Trade in Services.

The sector with the largest number of listed non-conforming measures is Social Services, followed by Minority Affairs.

The Dominican Republic lists the greatest number of non-conforming measures with respect to investment, with Costa Rica, El Salvador and Guatemala having the fewest. All Parties to the Agreement have an identical horizontal measure affecting MFN. Nicaragua and the Dominican Republic have an additional horizontal measure pertaining only to investment that affects National Treatment and Senior Management and Board of Directors. The Dominican Republic lists a third horizontal measure pertaining only to investment that affects National Treatment.

D.2.a Horizontal Measures

- **US / Dominican Republic/ Costa Rica/ El Salvador/ Guatemala/ Honduras/Nicaragua:MFN**

At the horizontal level all the Parties to the Agreement list an identical measure affecting MFN treatment. The measure has two components that should be read separately.

The first part of the measure preserves any pre-existing bilateral or multilateral international Agreement from falling under the purview of DR-CAFTA. Each of the Parties is given the right to adopt or maintain any measures that accords differential treatment to countries under any bilateral or multilateral international Agreement in force or signed *prior to the date of entry into force of the Agreement.*

The second part of the measure allows each of the Parties to adopt or maintain any measure involving differential treatment to countries under any bilateral or multilateral international Agreement *in force or signed after the date of entry into force of the Agreement* with respect to three specific activities, namely:

(a) aviation;
(b) fisheries; or
(c) maritime matters, including salvage.

- **Dominican Republic/Nicaragua: National Treatment / Senior Management and Boards of Directors**

At the Horizontal level the Dominican Republic and Nicaragua list a measure with respect to investment that affects National Treatment and Senior Management and Board of Directors. The measure includes two components.

The first part of the measure preserves the right to limit the transfer or disposal of any interest held in an existing state enterprise, such that only a national can receive such interest. This pertains only to the initial transfer or disposal of the interest and not to subsequent transfers or disposals.

Under the second part of the measure, the Dominican Republic and Nicaragua preserve the right to limit control of any new enterprise created by the transfer or disposal of any interest through means other than limitations on the ownership of the interest. The Parties also reserves the right

to adopt or maintain any measure related to the nationality of senior management and members of the board of directors in that enterprise.

- **Dominican Republic: National Treatment**

The Dominican Republic reserves the right to adopt or maintain any measure relating to the ownership or control of land within 20 kilometers of the Dominican border.

D.2.b Sectoral Measures

The non-conforming measures on investment in Annex II are set out by each Party to the Agreement according to the various sectors or sub-sectors, and with reference to the core discipline(s) invoked in the measure. The measures for the Central American Parties and the Dominican Republic to DR-CAFTA are found in *Tables 30* through *35* and those for the United States in *Table 36.*

Table 30
Costa Rica
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Cultural Industries		X		
Social Services	X	X	X	X

Table 31
Dominican Republic
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Communications		X		
Government Finances	X			
Social Services	X	X	X	X
Socially and Economically Disadvantaged Groups	X		X	X

Table 32
El Salvador
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Social Services	X	X	X	X
Minority Affairs	X		X	X

Table 33
Guatemala
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Maritime Transportation	X	X	X	X
Matters Related to Disadvantaged Minorities and Indigenous Peoples	X		X	X

Table 34
Honduras
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Communication Services - Telecommunications	X			
Social Services				X
Minority Affairs	X		X	X

Table 35
Nicaragua
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Minority Affairs and Indigenous Peoples	X	X	X	X
Communications		X		
Coastal Lands, Islands and River Banks	X			
Social Services	X	X	X	X

Table 36
United States
Future Non-Conforming Measures for Investment

	Type of Obligation			
Sector / Sub-Sector	**NT**	**MFN**	**PR**	**SM**
Communications		X		
Communications - Cable Television	X	X		X
Social Services	X	X	X	X
Minority Affairs	X		X	X
Transportation	X	X	X	X

Annex III: Financial Services

In Annex III, the Schedule of a Party sets out the headnotes that limit or clarify a Party's commitments with respect to the obligations listed below and that Party's non-conforming measures for cross-border trade and investment in financial services. These measures are set out according to a negative listing.[55]

A. U.S. under the Chile-U.S. FTA:

In the annex to the Chile-U.S. FTA, the United States distinguishes between *existing* non-conforming measures relating to banking and other non-insurance financial services and those relating to insurance. The United States does not reserve the right to adopt new or more restrictive non-conforming measures relating to financial services. The non-conforming measures scheduled by the U.S. include those that are not subject to some or all of the obligations imposed by:

Relating to Banking and Other Non-Insurance Financial Services

(a) National Treatment;
(b) Most-Favored-Nation Treatment;
(c) Senior Management and Boards of Directors; or
(d) Right of Establishment with Respect to Certain Financial Services

Relating to Insurance

(a) National Treatment;
(b) Most-Favored-Nation Treatment;
(c) Market Access for Financial Institutions;
(d) Cross-Border Trade; or
(e) Senior Management and Boards of Directors.

Each non-conforming measure entry in the annex sets out the following elements:

Relating to Banking and Other Non-Insurance Financial Services and to Insurance

(a) **Description**

(i) for entries related to banking and other non-insurance financial services, sets out the non-conforming aspects of the entry and the subsector, financial institution, or activities covered by the entry; and
(ii) for entries related to insurance, provides general, nonbinding description of the **Measures**

(b) **Measures** identifies the laws, regulations, or other measures for which the entry is made.

[55] Note that the non-conforming measures are set out according to a negative listing, even though a positive listing was followed with respect to some specific commitments (see section Market Access above).

(c) **Obligations Concerned** specifies the obligation(s) that do not apply to the listed measure(s);

Relating to Insurance Only

(d) **Level of Government** indicates the level of government maintaining the listed measure(s).

B. DR-CAFTA and Chile under the Chile-U.S. FTA:

In the annex to DR-CAFTA, the Parties distinguish between existing non-conforming measures (section A) and specific sectors, subsectors or activities for which the Parties **may maintain existing, or adopt new or more restrictive non-conforming measures** (section B). Chile, in Annex III to the Chile-U.S. FTA, uses a slightly different text to distinguish between existing measures (section I) and **existing and future measures** (section II). For the sectors and sub-sectors included in sections B or II in the respective annexes, Governments remain free to regulate in a discriminatory manner in any way they feel desirable, without constraint. Measures are set out according to a negative listing. For the countries member to both Agreements, existing and future non-conforming measures include those that are not subject to some or all of the obligations imposed by:

(a) National treatment;
(b) Most-Favored-Nation Treatment (except Chile for existing measures);
(c) Market Access for Financial Institutions;
(d) Cross-Border Trade;
(e) Senior Management and Board of Directors; or
(f) Right of Establishment with Respect to Certain Financial Services (Chile only);

Each non-conforming measure entry in the annex sets out the following elements:

(a) **Sector** refers to the general sector for which the entry is made;

(b) **Subsector** refers to the specific sector for which the entry is made;

(b) **Obligations Concerned** as above;

(c) **Level of Government** as above;

(d) **Measures** as above (except DR-CAFTA Members, other than the U.S., for future measures);

(e) **Description**

(i) (i) and (ii) above (the U.S. in DR-CAFTA for existing measures);
(ii) provides general, nonbinding description of the **Measures** (DR-CAFTA Members, except the U.S., for existing measures and Chile for existing and future measures);

(iii) sets out the scope of the sectors, subsectors, or activities covered by the entry (DR-CAFTA Members for future measures).

The non-conforming measures in Annex III to both Agreements are listed at their level of actual application and are supported by references to laws, regulations or other measures. Each Party is bound to apply such measures on a basis not more restrictive than what is indicated in the description of the measure. If a non-conforming measure set out in Annex III is made less restrictive or eliminated after the entry into force of the Agreement, it cannot subsequently be amended by or replaced with a new measure that is more restrictive ("ratcheting"). Thus the new measure is considered to be legally bound and must be applied to all Parties at the more liberalized level. Both texts establish exceptions to this rule (see headnotes to a Party's schedule of non-conforming measures in Annex III). In the Chile-U.S. FTA, these relate to the right of establishment in Chile and the U.S. with respect to banking and other financial services (excluding insurance) (Annex 12.9), as well as market access (Article 12.4) for financial institutions in Chile and insurance providers in the U.S. For the U.S. in DR-CAFTA, the rule does not apply to market access (Article 12.4) for insurance providers and restrictions on the specific type of legal entity or joint venture (Article 12.4.b) for banking institutions or providers of "other financial services (excluding insurance)".

A. Existing Measures

A.1. Chile-U.S. FTA

The total number of reservations or non-conforming measures listed in Annex III by each Party is the following:[56]

Chile	**26 Measures on Banking and Non-Insurance Services**	**+**	**6 Measures on Insurance and Insurance-Related Services**
U.S.	**17 Measures on Banking and Non-Insurance Services**	**+**	**4 Measures on Insurance and Insurance-Related Services**

The disciplines that both Parties invoke most often in their non-conforming measures are those of National Treatment (11 the U.S. and 6 Chile) and the Right of Establishment with respect to Certain Financial Services (12 the U.S. and 23 Chile). It must be noted that the large number of non-conforming measures that affect the Right of Establishment with respect to Certain Financial Services does not necessarily imply that Chile and the U.S. excessively limit this right. An accurate assessment of this issue would require establishing the extent to which the discipline deepened the right in question and confronting this to each relevant non-conforming measure scheduled by Chile and the U.S.

Chile also lists a number of existing non-conforming measures against Senior Management and Board of Directors (3 measures), Market Access (1 measure) and Cross-Border Trade (1 measure). The non-conforming measures of the U.S. also affect MFN (4 measures), Senior Management and Boards of Directors (2 measures), Market Access (1 measure) and Cross-

[56] The number of reservations or non-conforming measures includes relevant limitations inscribed in Annexes 12.5 and 12.9.

Border Trade (3 measures). The table below lists the non-conformation measures scheduled by Chile and the U.S. with respect to each obligation:

Table 37: U.S. and Chile: Non-Conforming Measures for Financial Services

	NT		MFN		Senior Management and Boards of Directors		MA		Right of Establishment with respect to Certain Financial Services		Cross-Border Trade	
	B	*I*	*B*	*I*	*B*	*I*	*B*	*I*	*B*	*I*	*B*	*I*
Chile	3	3	0	0	1	2	0	1	23	0	1	0
U.S.	8	3	3	1	1	1	0	1	12	0	0	3

B: Banking and Other Financial Services (excluding Insurance)
I: Insurance and Insurance-Related Services

Headnotes:

Chile and the U.S. list the following headnotes that limit or clarify their commitments:

Chile:

- Juridical persons supplying financial services and constituted under the laws of Chile are subject to non-discriminatory limitations on juridical form.

U.S.:

- National treatment with respect to banking will be provided based upon the foreign bank's "home state," as that term is defined under the International Banking Act. A domestic bank subsidiary of a foreign firm will have its own "home state," and national treatment will be provided based upon the subsidiary's home state, as determined under applicable law.
- The U.S. undertakes no commitment with respect to any existing non-conforming measures maintained at the regional level with respect to Banking and Non-Insurance Services.
- Juridical persons supplying banking or other financial services (excluding insurance) and constituted under the laws of the United States are subject to non-discriminatory limitations on juridical form.
- National treatment commitments of the U.S. with respect to insurance financial institutions are provided according to a non-U.S. insurance financial institution's state of domicile, and is generally the state which an insurer either is incorporated, is organized or maintains its principal office in the U.S.

Horizontal Measures

Chile and the U.S. do not schedule measures that apply horizontally to financial services.

A.2. DR-CAFTA

The total number of reservations or non-conforming measures listed in Annex III by each Party is the following:

Costa Rica	**6 Measures on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
Dominican Republic	**4 Measures on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
El Salvador	**7 Measures on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services + 1 Horizontal**
Guatemala	**5 Measures on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
Honduras	**7 Measures on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
Nicaragua	**6 Measures on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
U.S.	**14 Measures on Banking and Non-Insurance Services + 3 Measures on Insurance Insurance-Related Services**

The U.S. is the country that listed the highest number of non-conforming measures with respect to National Treatment (9 measures) and Market Access (9 measures), El Salvador with respect to MFN (6 measures) and Nicaragua with respect to Cross-Border Trade (5 measures). The table below lists the non-conformating measures scheduled by DR-CAFTA member countries with respect to each obligation:

Table 38: DR-CAFTA Countries: Non-Conforming Measures for Financial Services

	NT		**MFN**		**Senior Management and Boards of Directors**		**MA**		**Cross-Border Trade**	
	B	*I*	*B*	*I*	*B*	*I*	*B*	*I*	*B*	*I*
Costa Rica	4	0	0	0	0	0	2	3	1	0
Dominican Republic	0	1	0	1	0	0	4	1	0	0
El Salvador	5	1	5	1	2	0	5	1	2	0
Guatemala	2	1	0	0	0	0	2	1	1	1
Honduras	2	1	1	0	0	0	6	0	1	0
Nicaragua	2	0	0	0	1	1	3	1	4	1
U.S.	7	2	3	0	1	0	8	1	1	2

B: Banking and Other Financial Services (excluding Insurance)
I: Insurance and Insurance-Related Services

Headnotes:

DR-CAFTA members list the following headnotes that limit or clarify their commitments:

All DR-CAFTA Members:

- Juridical persons supplying financial services[57] and constituted under the laws of a Party are subject to non-discriminatory limitations on juridical form. This headnote is not itself intended to affect, or otherwise limit, a choice by a financial institution of another Party between branches or subsidiaries.

U.S.:

- National treatment commitments in the subsectors specified in the Annex are subject to the following limitations:

  (a) National treatment with respect to banking will be provided based upon the foreign bank's "home state" in the United States, as that term is defined under the International Banking Act, where that Act is applicable. A domestic bank subsidiary of a foreign firm will have its own "home state," and national treatment will be provided based upon the subsidiary's home state, as determined under applicable law.
  (b) National treatment with respect to insurance financial institutions will be provided according to a non-U.S. insurance financial institution's state of domicile, where applicable, in the United States. State of domicile is defined by individual states, and is generally the state in which an insurer either is incorporated, is organized or maintains its principal office in the United States.

Horizontal Measures:

Only El Salvador scheduled non-conforming measures that apply to all types of financial services:

- The *Banco de Fomento Agropecuario* will not be member of the *Instituto de Garantía de Depósitos*.
- Panama and the Dominican Republic may be treated as Central American Parties for the purposes of the Financial Services Chapter.

[57] The U.S. excludes insurance services.

B. Future Measures

B.1. Chile-U.S. FTA

The total number of reservations or non-conforming measures listed with respect to future measures by each Party is the following:

Chile	**1 Measure on Banking and Non-Insurance Services + 2 Measures on Insurance and Insurance-Related Services + 3 Horizontal Measures + 1 Measure on Social Services**
U.S.	**No future measures**

Chile's non-conforming measure with respect to Banking and Other Financial Services invokes the National Treatment obligation, and its two non-conforming measures with respect to Insurance and Insurance-Related Services invoke one of the Market Access or Cross-Border Trade obligations.

For insurance services, Chile modifies the listing approach followed for Banking and Other Financial Services (excluding Insurance). It binds a market access reservation following a positive list approach. In particular, Chile reserves the right to adopt or maintain any measure with respect to Article 12.4 (Market Access), except for a limited number of insurance subsectors -direct life insurance and direct general insurance, insurance brokerage and reinsurance and retrocession (including reinsurance brokers)- and under the terms, limitations and conditions specified in the schedule.

Horizontal Measures:

At the horizontal level, Chile lists non-conforming measures with respect to:

- *Right of Establishment and Market Access*: Chile reserves the right to adopt measures that restrict or require specific types of juridical form or establishment, such as subsidiaries, with respect to financial conglomerates, including the entities forming part of it.
- *Cross-Border Trade*: Chile requires that the purchase of financial services, by persons located in the territory of Chile and its nationals wherever located, from financial services suppliers of the U.S. be subject to the exchange rate regulations adopted or maintained by the *Banco Central de Chile*.
- *National Treatment and Senior Management and Board of Directors*: In the transfer or disposal of any interest in stock or asset held in an existing state enterprise or governmental entity, Chile reserves the right to prohibit or impose limitations on the ownership of said interest or asset, and on the right of foreign investors or their investment to control any State company created thereby or investments made by such company. In connection with any such transfer or disposal, Chile may adopt or maintain any measure related to the nationality of senior management and member of the Board of Directors.

Chile also lists one measure with respect to social services:

- Chile reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for reasons of public interest: income security or insurance, social security or insurance, social welfare, public education, public training, health care and child care.

B.2. DR-CAFTA

The total number of reservations or non-conforming measures listed with respect to future measures by each Party is the following:

Costa Rica	**1 Measure on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
Dominican Republic	**1 Measure on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
El Salvador	**1 Measure on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
Guatemala	**1 Measure on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
Honduras	**2 Measures on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services**
Nicaragua	**1 Measure on Banking and Non-Insurance Services + 1 Measure on Insurance and Insurance-Related Services + 1 Horizontal**
U.S.	**1 Measure on Insurance and Insurance-Related Services**

All Parties to DR-CAFTA, except the U.S., list a non-conforming measure with respect to market access that applies to "All Subsectors Other than Banking and Insurance", i.e. it covers "Other Financial Services (excluding insurance)" and "Insurance-Related Services". The measure states that a Party reserves the right to adopt or maintain measures requiring the incorporation in the Party's territory of foreign financial institutions, other than those seeking to operate as banks or insurance companies within the country.

One additional subsector-specific measure is scheduled by each of Honduras and the U.S.:

Honduras: reserves the right to adopt or maintain non-conforming measures with respect to the supply of services by Savings and Loan Cooperatives. This measure affects four obligations: National Treatment, MFN, Market Access and Senior Management and Boards of Directors.

U.S.: The United States reserves the right to adopt or maintain any measure that is not inconsistent with the United States' obligations under Article XVI of the GATS. This measure affects the Market Access obligation with respect to insurance services.

Horizontal Measures:

The only country that scheduled a future non-conforming measure affecting all financial services is Nicaragua. The measure states that:

Nicaragua: reserves the right to accord benefits to financial institutions or public entities wholly or majority owned by the State that supply financial services and are established with a public interest purpose, including but not limited to agriculture production finance, housing credits for low income families, and credits for small and midsize enterprises. Such benefits shall not disadvantage the core operations of commercial competitors and include, but are not limited to: extension of State guarantees, tax exemptions, exceptions to the usual juridical form requirements, and the legal requirements to begin operations.