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SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY AND CONSISTENCY
MARCH 1, 2004

CHAPTER TWENTY-ONE
INSTITUTIONAL ARRANGEMENTS AND DISPUTE SETTLEMENT

Section A : Institutional Arrangements and Administration

ARTICLE 21.1 : JOINT COMMITTEE

1. The Parties hereby establish a Joint Committee to supervise the implementation of this Agreement and to review the trade relationship between the Parties.

- (a) The Joint Committee shall be composed of government officials of each Party and shall be chaired by (i) the United States Trade Representative for the United States and (ii) the Minister for Trade for Australia or their respective designees.
- (b) The Joint Committee may establish and delegate responsibilities to *ad hoc* and standing committees, working groups, or other bodies, and seek the advice of non-governmental persons or groups.

2. The Joint Committee shall:

- (a) review the general functioning of this Agreement;
- (b) review and consider specific matters related to the operation and implementation of this Agreement in the light of its objectives;
- (c) facilitate the avoidance and settlement of disputes arising under this Agreement, including through consultations pursuant to Articles 21.5 and 21.6;
- (d) consider and adopt any amendment to this Agreement or other modification to the commitments therein, subject to completion of necessary legal procedures by each Party;
- (e) as appropriate, issue interpretations of the Agreement;
- (f) consider ways to further enhance trade relations between the Parties and to further the objectives of this Agreement; and
- (g) take such other action as the Parties may agree.

3. Unless the Parties agree otherwise, the Joint Committee shall convene:

- (a) in regular session every year to review the general functioning of the Agreement and such other issues as the Parties may agree, with such sessions to be held alternately in the territory of each Party; and

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- (b) in special session within 30 days of the request of a Party, with such sessions to be held in the territory of the other Party or at such location as may be agreed by the Parties.
- 4. The Joint Committee shall adopt its own rules of procedure.
- 5. Each Party shall treat any confidential information exchanged in relation to a meeting of the Joint Committee or any body created under Article 21.1.1(b) on the same basis as the Party providing the information.
- 6. Recognizing the importance of transparency and openness, the Parties affirm their respective practices of considering the views of members of the public in order to draw upon a broad range of perspectives in the implementation of this Agreement.
- 7. At its first meeting, the Joint Committee shall consider each Party's review of the environmental effects of this Agreement and shall provide the public an opportunity to provide views on those effects.

Section B: Dispute Settlement Proceedings

ARTICLE 21.2 : SCOPE OF APPLICATION

Except as otherwise provided in this Agreement or as the Parties agree otherwise, the dispute settlement provisions of this Section shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that:

- (a) a measure of the other Party is inconsistent with its obligations under this Agreement;
- (b) the other Party has otherwise failed to carry out its obligations under this Agreement; or
- (c) a benefit the Party could reasonably have expected to accrue to it under Chapters Two (National Treatment and Market Access for Goods), Three (Agriculture), Five (Rules of Origin), Ten (Cross-Border Trade in Services), Fifteen (Government Procurement), or Seventeen (Intellectual Property Rights) is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

ARTICLE 21.3 : ADMINISTRATION OF DISPUTE SETTLEMENT PROCEEDINGS

- 1. Each Party shall:
 - (a) designate an office that shall be responsible for providing administrative assistance to panels established under Article 21.7;
 - (b) be responsible for the operation and costs of its designated office; and

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- (c) notify the other Party of the location of its designated office.
- 2. The Joint Committee shall establish the amounts of remuneration and expenses to be paid to panelists.
- 3. The remuneration of panelists, their travel and lodging expenses, and all general expenses relating to proceedings of a panel established under Article 21.7 shall be borne equally by the Parties.
- 4. Each panelist shall keep a record and render a final account of the panelist's time and expenses, and the panel shall keep a record and render a final account of all general expenses.

ARTICLE 21.4 : CHOICE OF FORUM

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

ARTICLE 21.5 : CONSULTATIONS

- 1. Without prejudice to the provisions of Articles 18.6 (Labour Consultations) and 19.8 (Environment Consultations), either Party may request consultations with the other Party with respect to any matter it considers might affect the operation of this Agreement by delivering written notification to the other Party's office designated under Article 21.3. If a Party requests consultations with respect to a matter, the other Party shall reply promptly to the request for consultations and enter into consultations in good faith.
- 2. In consultations under this Article, a Party may request the other Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.
- 3. In the consultations, each Party shall:
 - (a) provide sufficient information to enable a full examination of how the matter subject to consultations might affect the operation of this Agreement; and
 - (b) treat any confidential information exchanged in the course of consultations on the same basis as the Party providing the information.
- 4. Promptly after requesting or receiving a request for consultations pursuant to this Article, each Party shall solicit and consider the views of members of the public on the matter in order to draw upon a broad range of perspectives.

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ARTICLE 21.6 : REFERRAL OF MATTERS TO THE JOINT COMMITTEE

If the consultations fail to resolve the matter within 60 days of the delivery of a Party's request for consultations under Article 21.5, or 20 days where the matter concerns perishable goods, either Party may refer the matter to the Joint Committee by delivering written notification to the other Party's office designated under Article 21.3. The Joint Committee shall endeavour to resolve the matter.

ARTICLE 21.7 : ESTABLISHMENT OF PANEL

1. If the Joint Committee has not resolved a matter within 60 days after delivery of the notification described in Article 21.6, within 30 days where the matter concerns perishable goods, or within such other period as the Parties may agree, the complaining Party may refer the matter to a dispute settlement panel by delivering written notification to the other Party's office designated under Article 21.3.
2. A Party may not refer a proposed measure to a dispute settlement panel.
3. Unless the Parties agree otherwise:
 - (a) The panel shall have three members.
 - (b) Each Party shall appoint one panelist, in consultation with the other Party, within 30 days after the matter has been referred to a panel. If a Party fails to appoint a panelist within such period, a panelist shall be selected by lot from the contingent list established under paragraph 4 to serve as the panelist appointed by that Party.
 - (c) The Parties shall endeavour to agree on a third panelist who shall serve as chair.
 - (d) If the Parties are unable to agree on the chair within 30 days after the date on which the second panelist has been appointed, the chair shall be selected by lot from the contingent list established under paragraph 4.
 - (e) The date of establishment of the panel shall be the date on which the chair is appointed.
4. By the date of entry into force of this Agreement, the Parties shall establish a contingent list of ten individuals who are willing and able to serve as panelists. Individuals on the contingent list shall be appointed by agreement of the Parties for a minimum term of three years, and shall remain on the list until the Parties constitute a new contingent list.
5. The panelists chosen pursuant to paragraph 3 and the individuals on the contingent list established pursuant to paragraph 4 shall:

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- (a) be chosen strictly on the basis of objectivity, reliability and sound judgment and have expertise or experience in law, international trade, or the resolution of disputes arising under international trade agreements;
- (b) be independent of, and not be affiliated with or take instructions from, either Party and not have a conflict of interest or appearance thereof, as set forth in the code of conduct to be established by the Joint Committee; and
- (c) comply with such code of conduct, once appointed to a panel.

In addition, in disputes related to a Party's implementation of Chapters Eighteen (Application and Enforcement of Labour Laws) and Nineteen (Application and Enforcement of Environmental Laws), panelists other than those chosen by lot from the contingent list shall have expertise or experience relevant to the subject matter that is under dispute.

ARTICLE 21.8 : RULES OF PROCEDURE

1. The Parties shall establish by the date of entry into force of this Agreement model rules of procedure, which shall ensure:

- (a) a right to at least one hearing before the panel and that, subject to subparagraph (f), any such hearings shall be open to the public;
- (b) an opportunity for each Party to provide initial and rebuttal submissions;
- (c) that each Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel shall be made public within ten days after they are submitted, subject to subparagraph (f);
- (d) that the panel shall consider requests from nongovernmental persons or entities in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties and provide the Parties an opportunity to respond to such submissions and arguments;
- (e) a reasonable opportunity for each Party to submit comments on the initial report presented pursuant to Article 21.9.1; and
- (f) the protection of confidential information.

2. Unless the Parties agree otherwise, the panel shall follow the model rules of procedure and may, after consulting the Parties, adopt additional rules of procedure not inconsistent with the model rules.

3. On request of a Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the

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Parties so agree and subject to such terms and conditions as the Parties may agree.

ARTICLE 21.9 : PANEL REPORT

1. Unless the Parties agree otherwise, the panel shall, within 180 days after the chair is appointed, present to the Parties an initial report containing findings of fact, and its determination as to whether:

- (a) the measure at issue is inconsistent with the obligations of this Agreement;
- (b) a Party has otherwise failed to carry out its obligations under this Agreement; or
- (c) the measure at issue causes a nullification or impairment described in Article 21.2(c); and
- (d) any other determination that the Parties jointly request as well as reasons for its findings and determinations.

2. The panel shall consider the provisions of this Agreement in accordance with applicable rules of interpretation under international law as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. It shall base its report on the relevant provisions of the Agreement and the submissions and arguments of the Parties. The panel may, at the request of the Parties, make recommendations for the resolution of the dispute.

3. After considering any written comments by the Parties on the initial report, the panel may modify its report and make any further examination it considers appropriate.

4. The panel shall present a final report to the Parties within 45 days of presentation of the initial report, unless the Parties agree otherwise. The Parties shall release the final report to the public within 15 days thereafter, subject to the protection of confidential information.

ARTICLE 21.10 : IMPLEMENTATION OF THE FINAL REPORT

1. On receipt of the final report of a panel, the Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel.

2. If, in its final report, the panel determines that a Party has not conformed with its obligations under this Agreement or that a Party's measure is causing nullification or impairment in the sense of Article 21.2(c), the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment.

ARTICLE 21.11 : NON-IMPLEMENTATION

1. If a panel has made a determination of the type described in Article 21.10.2, and

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the Parties are unable to reach agreement on a resolution pursuant to Article 21.10.1 within 45 days of receiving the final report, or such other period as the Parties agree, the Party complained against shall enter into negotiations with the other Party with a view to developing mutually acceptable compensation.

2. If the Parties:

- (a) are unable to agree on compensation within 30 days after the period for developing such compensation has begun, or
- (b) have agreed on compensation or on a resolution pursuant to Article 21.10 and the complaining Party considers that the other Party has failed to observe the terms of such agreement,

the complaining Party may at any time thereafter provide written notice to the office designated by the other Party pursuant to Article 21.3 that it intends to suspend the application to the other Party of benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend. Subject to paragraph 5, the complaining Party may begin suspending benefits 30 days after the later of the date on which it provides notice to the other Party's designated office under this paragraph or the panel issues its determination under paragraph 3, as the case may be.

3. If the Party complained against considers that:

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

it may, within 30 days after the complaining Party provides notice under paragraph 2, request that the panel be reconvened to consider the matter. The Party complained against shall deliver its request in writing to the office designated by the other Party pursuant to Article 21.3. The panel shall reconvene as soon as possible after delivery of the request to the designated office and shall present its determination to the Parties within 90 days after it reconvenes to review a request under either subparagraph (a) or (b), or within 120 days for a request under both subparagraphs (a) and (b). If the panel determines that the level of benefits proposed to be suspended is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.

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

5. The complaining Party may not suspend benefits if, within 30 days after it provides written notice of intent to suspend benefits or, if the panel is reconvened under

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paragraph 3, within 20 days after the panel provides its determination, the Party complained against provides written notice to the other Party's office designated pursuant to Article 21.3 that it will pay an annual monetary assessment. The Parties shall consult, beginning no later than ten days after the Party complained against provides notice, with a view to reaching agreement on the amount of the assessment. If the Parties are unable to reach an agreement within 30 days after consultations begin, the amount of the assessment shall be set at a level, in U.S. dollars, equal to 50 percent of the level of the benefits the panel has determined under paragraph 3 to be of equivalent effect or, if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend under paragraph 2.

6. Unless the Joint Committee decides otherwise, a monetary assessment shall be paid to the complaining Party in U.S. currency, or in an equivalent amount of Australian currency, in equal, quarterly instalments beginning 60 days after the Party complained against gives notice that it intends to pay an assessment. Where the circumstances warrant, the Joint Committee may decide that an assessment shall be paid into a fund established by the Joint Committee and expended at the direction of the Joint Committee for appropriate initiatives to facilitate trade between the Parties, including by further reducing unreasonable trade barriers or by assisting a Party in carrying out its obligations under the Agreement.

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

8. This Article shall not apply with respect to a matter described in Article 21.12.1.

ARTICLE 21.12 : NON-IMPLEMENTATION IN CERTAIN DISPUTES

1. If, in its final report, a panel determines that a Party has not conformed with its obligations under Article 18.2.1(a) or Article 19.2.1(a), and the Parties:

- (a) are unable to reach agreement on a resolution pursuant to Article 21.10.1 within 45 days of receiving the final report; or
- (b) have agreed on a resolution pursuant to Article 21.10.1 and the complaining Party considers that the other Party has failed to observe the terms of the agreement,

the complaining Party may at any time thereafter request that the panel be reconvened to impose an annual monetary assessment on the other Party. The complaining Party shall deliver its request in writing to the office designated by the other Party pursuant to Article 3. The panel shall reconvene as soon as possible after delivery of the request to the designated office.

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

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- (a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;
- (b) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;
- (c) the reasons for the Party's failure to effectively enforce the relevant law;
- (d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;
- (e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel; and
- (f) any other relevant factors.

The amount of the assessment determined by the Panel shall not exceed 15 million U.S. dollars annually, adjusted for inflation as specified in Annex 21-A.

3. On the date on which the panel determines the amount of the monetary assessment under paragraph 2, or at any other time thereafter, the complaining Party may provide notice in writing to the office designated by the Party complained against pursuant to Article 21.3 demanding payment of the monetary assessment. The monetary assessment shall be payable in U.S. currency, or in an equivalent amount of Australian currency, in equal, quarterly instalments beginning 60 days after the complaining Party provides such notice. Each of the first four quarterly instalments shall be equal to one quarter of the monetary assessment determined by the panel under Article 21.12.2. The fifth quarterly instalment and subsequent quarterly instalments shall be adjusted for inflation as specified in Annex 21-A.

4. Assessments shall be paid into a fund established by the Joint Committee and shall be expended at the direction of the Joint Committee for appropriate labour or environmental initiatives, including efforts to improve or enhance labour or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law. In deciding how to expend monies paid into the fund, the Joint Committee shall consider the views of interested persons in each Party's territory.

5. If the Party complained against fails to pay a monetary assessment, and if the Party has created and funded an escrow account to ensure payment of any assessments against it, the other Party shall, before having recourse to any other measure, seek to obtain the funds from the account.

6. If the complaining Party cannot obtain the funds from the other Party's escrow account within 30 days of the date on which payment is due, or if the other Party has not created an escrow account, the complaining Party may take other appropriate steps to collect the assessment or otherwise secure compliance. These steps may include suspending tariff benefits under the Agreement as necessary to collect the assessment,

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while bearing in mind the Agreement's objective of eliminating barriers to bilateral trade and while seeking to avoid unduly affecting parties or interests not party to the dispute.

ARTICLE 21.13 : COMPLIANCE REVIEW

1. Without prejudice to the procedures set out in Article 21.11.3, if the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the office designated by the other Party pursuant to Article 21.3. The panel shall issue its report on the matter within 90 days after the Party complained against provides notice.

2. If the panel decides that the Party complained against has eliminated the non-conformity or the nullification or impairment, the complaining Party shall promptly reinstate any benefits it has suspended under Article 21.11 or 21.12 and the Party complained against shall no longer be required to pay any monetary assessment it has agreed to pay under Article 21.11.5 or that has been imposed on it under Article 21.12.

ARTICLE 21.14 : FIVE-YEAR REVIEW

The Joint Committee shall review the operation and effectiveness of Articles 21.11 and 21.12 not later than five years after the Agreement enters into force, or within six months after benefits have been suspended or monetary assessments have been imposed in five proceedings initiated under this Chapter, whichever occurs first.

ARTICLE 21.15 : PRIVATE RIGHTS

Neither Party may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

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ANNEX 21-A

INFLATION ADJUSTMENT FORMULA FOR MONETARY ASSESSMENTS

1. From the entry into force of this Agreement until December 31, 2005, the annual monetary assessment determined by a panel under Article 21.12.2 shall not exceed 15 million U.S. dollars.
2. From January 1, 2006, the annual monetary assessment determined by a panel under Article 21.12.2 shall not exceed the amount of "A" calculated according to the following formula:

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

i = accumulated U.S. inflation rate (as measured by the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics) from calendar year 2004 through the calendar year for which data are available immediately preceding the one in which the assessment is determined.

3. The fifth quarterly installment and subsequent quarterly installments referred to in Article 21.12.3 shall be the amount "C" calculated according to the following formula:

$$B \times (1 + i)/4 = C$$

B = the assessment determined by the Panel.

i = accumulated U.S. inflation rate (as measured by the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics) from the calendar year immediately preceding the one in which the assessment was determined through the calendar year for which data are available immediately preceding the one in which the quarterly installment is owed.