

**Chapter Twenty**

**Dispute Settlement**

**Section A: Dispute Settlement**

**Article 20.1: Cooperation**

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

**Article 20.2: Scope of Application**

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

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

**Article 20.3: Choice of Forum**

1. Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which the Parties are party or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.

**Article 20.4: Consultations**

1. Either Party may request in writing consultations with the other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

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

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3. Consultations on matters regarding perishable goods<sup>1</sup> shall commence within 15 days of the date of delivery of the request.
4. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the Parties shall:
  - (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation and application of this Agreement; and
  - (b) treat any confidential information exchanged in the course of consultations on the same basis as the Party providing the information.
5. 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.<sup>2</sup>

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

1. If the Parties fail to resolve a matter pursuant to Article 20.4 within:
  - (a) 60 days of delivery of a request for consultations;
  - (b) 15 days of delivery of a request for consultations in matters regarding perishable goods; or
  - (c) such other period as they may agree,either Party may request in writing a meeting of the Commission.<sup>3</sup>
2. A Party may also request in writing a meeting of the Commission where consultations have been held pursuant to Article [ ] (Cooperative Labor Consultations), Article [ ] (Collaborative Environmental Consultations), or Article [ ] Committee on Technical Barriers to Trade).
3. The requesting Party shall deliver the request to the other Party, and shall set out the reasons for the request, including identification of the actual or proposed measure or other matter at issue and an indication of the legal basis for the complaint.

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

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

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

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

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

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

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

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

- (a) 30 days after the Commission has convened pursuant to Article 20.5;
- (b) 30 days after a Party has delivered a request for consultations under Article 20.4 in a matter regarding perishable goods, if the Commission has not convened pursuant to Article 20.5.4;
- (c) 75 days after a Party has delivered a request for consultations under Article 20.4, if the Commission has not convened pursuant to Article 20.5.4; or
- (d) such other period as the Parties may agree,

the Party that requested a meeting of the Commission with regard to the measure or other matter in accordance with Article 20.5 may request in writing the establishment of an arbitral panel to consider the matter. The requesting Party shall deliver the request to the other Party, and shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint.

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

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

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

**Article 20.7: Roster**

1. The Parties shall establish within six months of the date of entry into force of this Agreement and maintain a roster of at least 20 individuals who are willing and able to serve as panelists. Unless the Parties otherwise agree, at least seven members of the roster shall be nationals of each Party, and at least six members of the roster shall be selected from among individuals who are not nationals of either Party. The roster members shall be appointed by

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consensus, and may be reappointed. Once established, a roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new roster. The Parties may appoint a replacement where a roster member is no longer available to serve.

2. Roster members shall:

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

**Article 20.8: Qualifications of Panelists**

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

**Article 20.9: Panel Selection**

1. The Parties shall apply the following procedures in selecting a panel:

- (a) the panel shall comprise three members;
- (b) the Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the Parties are unable to agree on the chair within this period, the chair shall be selected by lot within three days from among the roster members who are not nationals of a Party;
- (c) within 15 days of selection of the chair, each Party shall select one panelist;
- (d) if a Party fails to select a panelist within this period, the panelist shall be selected by lot within three days from among the roster members who are nationals of such Party; and
- (e) each Party shall endeavor to select panelists who have expertise or experience relevant to the subject matter of the dispute, as appropriate.

2. Panelists shall normally be selected from the roster. A Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by the other Party within 15 days after the individual has been proposed.

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3. If a Party believes that a panelist is in violation of the code of conduct, the Parties shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with this Article.

**Article 20.10: Rules of Procedure**

1. The Commission shall establish by the date of entry into force of this Agreement Model Rules of Procedure, which shall ensure:

- (a) a right to at least one hearing before the panel, which, subject to subparagraph (e), shall be open to the public;
- (b) an opportunity for each Party to provide initial and rebuttal written 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 public, subject to subparagraph (e);
- (d) that the panel will consider requests from non-governmental 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
- (e) the protection of confidential information.

2. Unless the Parties otherwise agree, the panel shall conduct its proceedings in accordance with the Model Rules of Procedure.

3. The Commission may modify the Model Rules of Procedure.

4. Unless the Parties otherwise agree within 20 days from the date of the delivery of the request for the establishment of the panel, the terms of reference shall be:

“To examine, in the light of the relevant provisions of this Agreement, the matter referenced in the panel request and to make findings, determinations, and recommendations as provided in Articles 20.10.6 and 20.13.3 and to deliver the written reports referred to in Articles 20.13 and 20.14.”

5. If the complaining Party in its panel request has identified that a measure has nullified or impaired benefits, in the sense of Annex 20.2, the terms of reference shall so indicate.

6. If a Party wishes the panel to make findings as to the degree of adverse trade effects on a Party of the other Party's failure to conform with the obligations of this Agreement or of a Party's measure found to have caused nullification or impairment in the sense of Annex 20.2, the terms of reference shall so indicate.

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**Article 20.11: Role of Experts**

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

**Article 20.12: Initial Report**

1. Unless the Parties otherwise agree, the panel shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the Parties, and on any information before it pursuant to Article 20.11.
2. If the Parties request, the panel may make recommendations for resolution of the dispute.
3. Unless the Parties otherwise agree, the panel shall, within 120 days after the last panelist is selected or such other period as the Model Rules of Procedure established pursuant to Article 20.10 may provide, present to the Parties an initial report containing:
  - (a) findings of fact, including any findings pursuant to a request under Article 20.10.6;
  - (b) its determination as to whether a Party has not conformed with its obligations under this Agreement or that a Party's measure is causing nullification or impairment in the sense of Annex 20.2, or any other determination requested in the terms of reference; and
  - (c) its recommendations, if the Parties have requested them, for resolution of the dispute.
4. When the panel considers that it cannot provide its report within 120 days, it shall inform the Parties in writing of the reasons for the delay together with an estimate of the period within which it will provide its report. In no case should the period to provide the report exceed 180 days. The panel shall inform the Parties of any determination under this paragraph no later than seven days after the initial written submission of the complaining Party and shall adjust the remainder of the schedule accordingly.
5. Panelists may furnish separate opinions on matters not unanimously agreed.
6. A Party may submit written comments to the panel on its initial report within 14 days of presentation of the report or within such other period as the Parties may agree.
7. After considering any written comments on the initial report, the panel may reconsider its report and make any further examination it considers appropriate.

**Article 20.13: Final Report**

1. The panel shall present a final report to the Parties, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the

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Parties otherwise agree. The Parties shall release the final report to the public within 15 days thereafter, subject to the protection of confidential information.

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

**Article 20.14: Implementation of 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 Annex 20.2, the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment.<sup>4</sup>

3. Where appropriate, the Parties may agree on a mutually satisfactory action plan to resolve the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel. If the Parties agree on such an action plan, a complaining Party may have recourse to Article 20.15.2 or Article 20.16.1, as the case may be, only if it considers that the Party complained against has failed to carry out the action plan.<sup>5</sup>

**Article 20.15: Non-Implementation – Suspension of Benefits**

1. If a panel has made a determination of the type described in Article 20.14.2, and the Parties are unable to reach agreement on a resolution pursuant to Article 20.14 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 complaining 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 20.14 and a complaining Party considers that the Party complained against has failed to observe the terms of the agreement,

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<sup>4</sup> Compensation, the payment of monetary assessments, and the suspension of benefits are intended as temporary measures pending the elimination of any non-conformity or nullification or impairment that the panel has found.

<sup>5</sup> For greater certainty, as part of an action plan the Parties may undertake, modify, or enhance cooperation activities.

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the complaining Party may at any time thereafter provide written notice to the other Party 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 6, the complaining Party may begin suspending benefits 30 days after the later of the date on which it provides notice under this paragraph or the panel issues its determination under paragraph 3, as the case may be.

3. If the Party complained against considers that:
  - (a) the level of benefits proposed to be suspended is manifestly excessive; or
  - (b) it has eliminated the non-conformity or the nullification or impairment that the panel has found,

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

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

5. In considering what benefits to suspend pursuant to paragraph 2:
  - (a) the complaining Party should first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of Annex 20.2; and
  - (b) if the complaining Party considers that it is not practicable or effective to suspend benefits in the same sector or sectors, it may suspend benefits in other sectors.

6. The complaining Party may not suspend benefits if, within 30 days after it provides written notice of intent to suspend benefits or, if the panel is reconvened under paragraph 3, within 20 days after the panel provides its determination, the Party complained against provides written notice to the other Party 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

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under paragraph 3 to be of equivalent effect or, if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend under paragraph 2.

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

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

9. This Article shall not apply with respect to a matter described in Article 20.16.1.

**Article 20.16: Non-Implementation In Certain Disputes**

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

- (a) are unable to reach agreement on a resolution pursuant to Article 20.14 within 45 days of receiving the final report; or
- (b) have agreed on a resolution pursuant to Article 20.14 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 Party complained against. The complaining Party shall deliver its request in writing to the other Party. The panel shall reconvene as soon as possible after delivery of the request.

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

- (a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;
- (b) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;

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<sup>6</sup> For purposes of this paragraph, the Commission shall consist of the cabinet-level representatives of the disputing Parties, as set out in Annex 19.1 (The Free Trade Commission), or their designees.

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- (c) the reasons for the Party's failure to effectively enforce the relevant law, including, where relevant, its failure to observe the terms of an action plan;
- (d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;
- (e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel, including through the implementation of any mutually agreed action plan; and
- (f) any other relevant factors.

The amount of the assessment shall not exceed 15 million U.S. dollars annually, adjusted for inflation as specified in Annex 20.16.

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

4. Assessments shall be paid into a fund established by the Commission and shall be expended at the direction of the Commission for appropriate labor or environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law. In deciding how to expend monies paid into the fund, the Commission shall consider the views of interested persons in the Parties' territories.<sup>7</sup>

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

**Article 20.17: Compliance Review**

1. Without prejudice to the procedures set out in Article 20.15.3, if the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the complaining Party. The panel shall issue its report on the matter within 90 days after the Party complained against provides notice.

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

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2. If the panel decides that the Party complained against has eliminated the non-conformity or the nullification or impairment, the other Party shall promptly reinstate any benefits that Party has or those Parties have suspended under Article 20.15 or Article 20.16 and the Party complained against shall no longer be required to pay any monetary assessment it has agreed to pay under Article 20.15.6 or that has been imposed on it under Article 20.16.1.

**Article 20.18: Five-Year Review**

The Commission shall review the operation and effectiveness of Articles 20.15 and 20.16 not later than five years after the Agreement enters into force, or within six months after benefits have been suspended or monetary assessments have been imposed in five proceedings initiated under this Chapter, whichever occurs first.

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

**Article 20.19: Referral of Matters from Judicial or Administrative Proceedings**

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

**Article 20.20: Private Rights**

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

**Article 20.21: Alternative Dispute Resolution**

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

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*Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.*

4. The Commission may establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes.
5. This committee shall:
  - (a) report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use, and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area; and
  - (b) when the committee considers appropriate, promote technical cooperation between the Parties, in furtherance of the objectives identified in paragraph 1.

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**Annex 20.2**

**Nullification or Impairment**

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

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

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

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

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**Annex 20.16**

**Inflation Adjustment Formula for Monetary Assessments**

1. An annual monetary assessment imposed before [December 31, 2006] shall not exceed 15 million dollars (U.S.).
2. Beginning [January 1, 2007], the 15 million dollar (U.S.) annual cap shall be adjusted for inflation in accordance with paragraphs 3 through 5.
3. The period used for the accumulated inflation adjustment shall be calendar year [2005] through the most recent calendar year preceding the one in which the assessment is owed.
4. The relevant inflation rate shall be the U.S. inflation rate as measured by the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics.
5. The inflation adjustment shall be estimated according to the following formula:

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

$\pi_i$  = accumulated U.S. inflation rate from calendar year [2005] through the most recent calendar year preceding the one in which the assessment is owed.

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