

# **Final Environmental Review of the Dominican Republic – Central America – United States Free Trade Agreement**

*February 2005*

## **Executive Summary**

Pursuant to authority delegated by the President in Executive Order 13277 (67 *Fed. Reg.* 70305) and consistent with Executive Order 13141 (64 *Fed. Reg.* 63169) and its Guidelines (65 *Fed. Reg.* 79442), the Office of the United States Trade Representative (USTR) submits this Final Environmental Review of the Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR), as provided for under section 2102(c)(4) of the Trade Act of 2002 (Trade Act).

On October 1, 2002, in accordance with section 2104(a) of the Trade Act, U.S. Trade Representative Robert B. Zoellick notified the Congress of the President's intent to enter into negotiations for a free trade agreement with Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua (collectively, "CAFTA countries"). The formal launch of negotiations took place on January 8, 2003. On August 4, 2003, in accordance with section 2104(a) of the Trade Act, U.S. Trade Representative Robert B. Zoellick notified the Congress of the President's intent to enter into negotiations for a free trade agreement with the Dominican Republic. The negotiations with the CAFTA countries were successfully concluded on May 28, 2004. Negotiations with the Dominican Republic were successfully concluded on August 5, 2004.

The environmental review process examines possible environmental effects that may be associated with the FTA. This Final Environmental Review summarizes the Administration's conclusions regarding the environmental effects of the CAFTA-DR. In identifying and examining these possible effects, the Administration drew on public comments submitted in response to an Interim Review (announced in 68 *Fed. Reg.* 51822), the advice of relevant advisory committees, including the Trade and Environment Policy Advisory Committee (TEPAC), and relevant published economic analysis. The review also draws upon environmental and economic expertise of federal agencies. Consistent with Executive Order 13141 and its Guidelines, the focus of the review is on potential impacts in the United States. Additionally, this review includes consideration of global and transboundary effects.

### Findings

1. In this Final Environmental Review, the Administration has concluded that changes in the pattern and magnitude of trade flows attributable to the FTA will not have any significant environmental impacts in the United States. Based on existing patterns of trade and changes likely to result from provisions of the CAFTA-DR, the impact of the CAFTA-DR on total U.S. production through changes in U.S. exports appears likely to be small. As a result, the CAFTA-DR is not expected to have significant direct effects on the U.S. environment. While it is conceivable that there may be instances in which the economic and associated environmental impacts are concentrated regionally or sectorally in the United States, we could not identify any such instances.

2. In considering whether provisions of the CAFTA-DR could affect, positively or negatively, the ability of U.S. federal, state, local or tribal governments to enact, enforce or maintain environmental laws and regulations, the Administration focused in particular on the provisions of the CAFTA-DR's Environment Chapter and related dispute settlement provisions. We concluded that the CAFTA-DR will not adversely affect the ability of U.S. federal, state, local or tribal governments to regulate to protect the U.S. environment, and that these and related CAFTA-DR provisions should have positive implications for the enforcement of environmental laws and the furtherance of environmental protection in both the United States and the FTA partner countries.

3. This review also carefully examined the provisions of the Investment Chapter and their environmental implications. We were unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the Agreement's substantive investment obligations. Given that U.S. environmental measures can already be challenged in U.S. courts, we do not expect the CAFTA-DR's investor-state mechanism to significantly increase the potential for a successful challenge to U.S. environmental measures. The CAFTA-DR's innovations in the substantive obligations and investor-state mechanism should provide coherence to the interpretation of the FTA's investment provisions.

4. As compared to the expected effects in the United States, the CAFTA-DR may have relatively greater effects on the economies of Central America and the Dominican Republic. In the near term, however, net changes in production and trade are expected to be relatively small because exports to the United States from these countries already face low or zero tariffs. Longer term effects, through investment and economic development, are expected to be greater but cannot currently be predicted in terms of timing, type and environmental implications.

5. Through increased economic activity in Central America and the Dominican Republic, the CAFTA-DR may have indirect effects on the U.S. environment through transboundary transmission of pollutants (air and water), and through effects on habitat for wildlife, including migratory species. This review examined a range of these possible impacts, but did not identify any specific, significant consequences for the U.S. environment. Nevertheless, the possibility of such effects requires ongoing monitoring. Monitoring of conditions in the U.S. environment will continue as an element of existing domestic environment programs. Monitoring of environmental conditions in Central America and the Dominican Republic will be enhanced as a component of an Environmental Cooperation Agreement among the Parties.

6. The CAFTA-DR can have positive environmental consequences in Central America and the Dominican Republic by reinforcing efforts to effectively enforce environmental laws, accelerating economic growth and development through trade and investment and disseminating environmentally beneficial technologies. The public submissions process established by the Environment Chapter has significant potential to improve environmental decision-making and transparency in Central America and the Dominican Republic and to inform capacity-building activities in the region.

7. The CAFTA-DR provides a context for enhancing cooperation activities to address both

trade-related and other environmental issues. As a complement to the CAFTA-DR, the United States and the FTA partner countries signed an Environmental Cooperation Agreement (ECA) that will enhance the positive environmental consequences of the Agreement. The ECA establishes a comprehensive framework for developing cooperative activities. An Environmental Cooperation Commission, consisting of high-level officials with environmental responsibilities from each Party, will oversee implementation of the ECA. The Agreement makes specific provision for benchmarking and monitoring of the progress of cooperative activities. The Parties are currently developing a Plan of Work that will identify specific areas of cooperation and provide more detail on how the benchmarking and monitoring provisions will be implemented.

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<b>Executive Summary .....</b>	<b>1</b>
<b>I. Legal and Policy Framework.....</b>	<b>5</b>
A. The Trade Act of 2002.....	5
B. The Environmental Review Process .....	6
<b>II. Background .....</b>	<b>7</b>
A. Economy and Environment in Central America and the Dominican Republic .....	7
B. United States – CAFTA-DR Trade.....	11
<b>III. The United States–Central America–Dominican Republic Free Trade Agreement</b>	
A. Overview of the CAFTA-DR.....	12
B. The CAFTA-DR Environment Chapter and Related Environment Provisions....	15
<b>IV. Public and Advisory Committee Comments .....</b>	<b>17</b>
A. Public Comments .....	18
B. Advisory Committee Report.....	19
<b>V. Potential Economically-driven Environmental Effects .....</b>	<b>20</b>
A. Potential Impacts in the United States .....	20
B. Transboundary and Global Issues.....	21
<b>VI. Potential Regulatory Impacts .....</b>	<b>28</b>
A. Regulatory Review.....	28
B. Investment.....	29
<b>VII. Environmental Cooperation .....</b>	<b>33</b>
<b>Annex I—Organizations Providing Comments .....</b>	<b>35</b>
<b>Annex II—Data Tables.....</b>	<b>36</b>

## **I. Legal and Policy Framework**

### **A. The Trade Act of 2002**

The Trade Act of 2002 (Trade Act) establishes a number of negotiating objectives and other priorities relating to the environment. The Trade Act contains three sets of objectives and priorities: (i) overall trade negotiating objectives; (ii) principal trade negotiating objectives; and (iii) promotion of certain priorities, including associated requirements to report to Congress.

Overall environment-related trade negotiating objectives include:

- (1) ensuring that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources (section 2102(a)(5)); and
- (2) seeking provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade (section 2102(a)(7)).

In addition, the Trade Act establishes the following environment-related principal trade negotiating objectives:

- (1) ensuring that a party to a trade agreement with the United States does not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, while recognizing a party's right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to prioritize allocation of resources for environmental law enforcement (sections 2102(b)(11)(A) (B));
- (2) strengthening the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development (section 2102(b)(11)(D));
- (3) reducing or eliminating government practices or policies that unduly threaten sustainable development (section 2102(b)(11)(E));
- (4) seeking market access, through the elimination of tariffs and non-tariff barriers, for U.S. environmental technologies, goods and services (section 2102(b)(11)(F)); and
- (5) ensuring that environmental, health or safety policies and practices of parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as disguised barriers to trade (section 2102(b)(11)(G)).

The Trade Act also provides for the promotion of certain environment-related priorities and associated reporting requirements, including:

- (1) seeking to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science and reporting to the Committee on Ways and Means and the Committee on Finance (“Committees”) on the control and operation of such mechanisms (section 2102(c)(3));
- (2) conducting environmental reviews of future trade and investment agreements consistent with Executive Order 13141 and its relevant Guidelines, and reporting to the Committees on the results of such reviews (section 2102(c)(4)); and
- (3) continuing to promote consideration of multilateral environmental agreements and consultation with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing exceptions under Article XX of the GATT 1994 (section 2102(c)(10)).

## **B. The Environmental Review Process**

The framework for conducting environmental reviews of trade agreements under the Trade Act is provided by Executive Order 13141 – *Environmental Review of Trade Agreements* (64 Fed. Reg. 63169) and the associated Guidelines (65 Fed. Reg. 79442). The Order and Guidelines are available on USTR’s website at <http://www.ustr.gov/environment/environmental.shtml>.

The purpose of environmental reviews is to ensure that policymakers and the public are informed about reasonably foreseeable environmental impacts of trade agreements (both positive and negative), identify complementarities between trade and environmental objectives and help shape appropriate responses if environmental impacts are identified. Section 5(b) of Executive Order 13141 provides that “as a general matter, the focus of environmental reviews will be impacts in the United States,” but “[a]s appropriate and prudent, reviews may also examine global and transboundary impacts.” Reviews are intended to be one tool, among others, for integrating environmental information and analysis into the fluid, dynamic process of trade negotiations. USTR and the Council on Environmental Quality (CEQ) jointly oversee implementation of the Order and Guidelines. USTR, through the Trade Policy Staff Committee (TPSC), is responsible for conducting the individual reviews.

The environmental review process provides opportunities for public involvement, including an early and open process for determining the scope of the environmental review (“scoping”). Through the scoping process, potentially significant issues are identified for in-depth analysis, while issues that are less significant – or that have been adequately addressed in earlier reviews – are eliminated from detailed study.

The Guidelines recognize that the approach adopted in individual reviews will vary from case to case, given the wide variety of trade agreements and negotiating timetables. Generally, however, reviews address two types of questions: (i) the extent to which positive and negative environmental impacts may flow from economic changes estimated to result from the prospective agreement; and (ii) the extent to which proposed agreement provisions may affect U.S. environmental laws and regulations (including, as appropriate, the ability of state, local and

tribal authorities to regulate with respect to environmental matters).

## **II. Background**

As described in the Guidelines, the focus of this review is on the possible effects in the United States, although transboundary and global effects may be considered as appropriate and prudent. Public comments on scope for the review as well as the Interim Review emphasized the need to examine possible indirect effects on the U.S. environment through transboundary air and water pollution and effects on shared migratory species, such as neo-tropical migratory birds. Recognition of existing environmental challenges in Central America and the Dominican Republic, the geographic proximity of the CAFTA-DR countries to the United States and the importance of Central America as habitat for neo-tropical migratory birds suggest careful consideration of these possible effects of the FTA. This review does not, however, provide a comprehensive assessment of environmental concerns in Central America and the Dominican Republic, or broad-scale consideration of the manner in which economic growth may affect their environment.

### **A. Economy and Environment**

In addition to the United States, parties to the CAFTA-DR are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic. The Central American Parties are located in the tropical region south of Mexico and comprise most of the land mass connecting North and South America. The region is flanked by the Pacific Ocean to the west and the Caribbean Sea to the east, with over 2,300 miles of coastline and a combined area of 159,000 square miles. The climate is tropical and subtropical. The Dominican Republic occupies the eastern two-thirds of the island of Hispaniola in the Caribbean Sea, with nearly 19,000 square miles and more than 800 miles of coastline. Haiti occupies the remainder of the island. The climate is maritime tropical.

#### ***Economy***

Table 1 (annex II) provides basic economic data on the CAFTA-DR countries, including the United States. Although small in comparison to the U.S. economy, the countries of Central America and the Dominican Republic are important and growing trading partners for the United States. The United States is the main supplier of goods and services to these economies and is the largest single market for their exports. The CAFTA-DR is expected to strengthen political and economic reforms already underway in the region and reinforce basic building blocks for long-term development, such as the rule of law, transparent governance, protection of intellectual property rights and investment and market-based competition.

Table 1 illustrates the scale of the Central American and Dominican Republic economies in relation to the United States, as well as diversity within the region in terms of economic development. Although per capita incomes differ widely within Central America, economic growth in all of the countries of the region is highly dependent on trade. The United States is an important market due to its size and proximity and the existence of relatively few market barriers for goods originating in Central America and the Dominican Republic. Under the Caribbean

Basin Initiative (CBI) and other U.S. preference programs, U.S. tariffs on Central American and Dominican Republic goods are already low, and more than three-quarters of regional imports currently enter the United States duty-free.

Table 2 (annex II) provides further information to assess the CAFTA-DR economies in relation to the United States. Table 2 also illustrates the diversity within the region in terms of economic and social development.

Costa Rica has achieved considerable success in establishing a developed and stable democracy and an increasingly diversified economy. Costa Rica's economy, once largely dependent on agriculture, now includes strong technology and tourism sectors. Ecological conservation is a widely accepted value in Costa Rica, and the country has been a regional leader in the development of the eco-tourism industry.

El Salvador ranks second in the region in per capita GDP, but its average annual income is slightly more than half that of Costa Rica (see table 1). El Salvador has made remarkable economic, social and political progress since it emerged from a 12-year civil war in 1991. During the 1990s, growth and stable prices replaced economic decline and inflation. Trade liberalization, financial sector and pension reforms and privatization of state-owned enterprises have all contributed to a strengthened economy. El Salvador is less dependent now on agriculture than in the past and is developing strong service and manufacturing sectors.

Guatemala is the largest of the CAFTA-DR countries in terms of both population and total GDP. Guatemala's economy experienced significant growth during the 1990s, with GDP more than doubling from 1991 to 2001. The 1996 signing of peace accords, which ended 36 years of civil war, removed a major obstacle to foreign investment and also set a social agenda to address development needs through a substantial increase in investment in basic infrastructure. Nevertheless, and like other countries in the region, Guatemala continues to face problems of poverty and income distribution. More than half of the population lives below the poverty line.

With a population of 7.0 million and per capita GDP (in nominal terms) of \$1,000, Honduras is among the poorest countries in the Western Hemisphere. Throughout the 1990s, Honduran economic growth was less consistent than that of other CAFTA-DR countries, but has recently improved, led by growth in exports.

Measured in terms of per capita GDP, Nicaragua is the poorest of the CAFTA-DR countries, but is in the process of a transformation. The peaceful transition to a democratic system of government in the early 1990s was accompanied by adoption of market-based reforms, generating a strong economic recovery. Growth has not been steady, however, and structural economic reforms are ongoing.

The Dominican Republic has achieved considerable success in establishing a stable democracy and increasingly diversified economy. Although agriculture remains an important sector (roughly 10 percent of GDP), services account for nearly 60 percent of GDP and tourism and Free Trade Zone earnings are the fastest growing export sectors. U.S. firms account for a significant share of foreign private investment in the Dominican Republic, and remittances from



Dominicans living in the United States are estimated to total nearly \$2 billion per year.

### *Environment*

As a consequence of national, regional and international concern, attention to environmental issues in Central America and the Dominican Republic has increased markedly, especially over the past decade. Environment is now addressed in the broader context of development, environmental policies have been formulated and environmental institutions have been created.<sup>1</sup> Nevertheless, countries in the region face considerable challenges as they seek to achieve development goals while protecting their environment.

Although the region accounts for less than one percent of the earth's land area, Central America and the Dominican Republic contain considerable biological diversity. The marine and coastal systems of the region include complex and distinct ecosystems and are among the most productive in the world. However, ongoing habitat loss threatens many species and a variety of activities, such as resource extraction, land conversion for agriculture, coastal development and tourism are causing degradation of terrestrial and marine ecosystems, including estuaries, mangroves and coral reefs.<sup>2</sup> Tables 3 and 4 (Annex II) summarize selected land use data and biodiversity indicators for Central America, the Dominican Republic and the United States. These data display both environmental challenges (such as rates of deforestation and threats to species) as well as progress in addressing environmental concerns (such as the share of land in protected status, and the area of biosphere reserves). Data in tables 3 and 4 should be considered in conjunction with data in tables 1 and 2 in order to gain insights into the environment/development nexus.

For Central America, the most pressing environmental issues include: loss of biodiversity, notably through deforestation and forest degradation; air and water pollution, including in coastal and marine systems; waste disposal; sustainable energy production; and degradation of land through erosion, nutrient depletion and mismanagement. The Dominican Republic faces many of the same problems as well as environmental challenges associated with water quality and protection of water sources; land use planning; and forest management.

Deforestation: Deforestation has been a concern for many years and is inextricably linked to a variety of environmental issues in the CAFTA-DR countries. Deforestation has been driven by many factors, including development policies that encouraged conversion of forested land (for example, for cattle grazing or coffee growing); illegal logging; and a combination of population growth, extreme poverty and lack of widespread access to electricity, leading to reliance on wood and other traditional fuels for cooking. As a result, all of the CAFTA-DR countries have lost significant portions of their forest land and continue to struggle to check current rates of deforestation (see table 3).

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<sup>1</sup> See: *Latin America and the Caribbean, Environment Outlook 2000* (GEO-LAC 2000), United Nations Environment Program (UNEP), Regional Office for Latin America and the Caribbean (available at: <http://www.unep.org/geo/index.htm>).

<sup>2</sup> See: "Nature, People and Well Being: Mesoamerica Fact Book." Partners and Donors Conference, Mesoamerican Biological Corridor. Paris, France, December 12-13, 2002. University of Costa Rica Development Observatory and the Central American Commission for Environment and Development.

The CAFTA-DR countries, however, have made some important strides in addressing deforestation, including by promoting electrification and establishing policies and innovative programs to encourage sustainable forest management. Costa Rica, for example, has established a program that pays owners of forest land to retain forest cover. Guatemala and Honduras have been active members of the International Tropical Timber Organization (ITTO), an international organization that promotes trade in tropical timber from sustainably managed sources. Despite such efforts and progress, these countries continue to suffer from problems that are due to or exacerbated by deforestation, including soil erosion and landslides and intensified effects of floods and hurricanes, as demonstrated by the devastation caused by Hurricane Mitch in 1998. The loss of forest cover has decreased habitat for the unique biodiversity of the region and adds considerable pressure on the viability of many species. Deforestation also contributes to levels of runoff, leading to water pollution through sediments that may contain contaminants, with adverse effects on freshwater and marine species and drinking water supplies.

Environmental Laws: The countries of Central America and the Dominican Republic are progressively moving towards an integrated treatment of the environment in their national laws, and they have made a concerted effort over the last 10 years to develop laws and enforcement mechanisms. See Annex I to the Interim Environmental Review. At this time, most have gone through at least two phases in the development of environmental laws: an initial, somewhat fragmented approach concentrated on particular sectors, followed by more systematic (although still incomplete) identification of objectives and standards. Each of the CAFTA-DR countries has passed a general framework law on the environment addressing air, water, land and biodiversity, establishing and/or strengthening institutional mechanisms and drawing on many advanced principles. They also have begun to develop specific laws and regulations addressing, for example, pesticide use, environmental impact assessment and other matters. In addition, their constitutions have been reformed to include the obligation of each government to provide a healthy and ecologically sound environment.<sup>3</sup> Since 1994, the Central American-United States Joint Accord (CONCAUSA) has been contributing to this process through U.S. federal agency assistance in the reform and enactment of national environmental laws.

Although there appears to be good progress in establishing national and regional frameworks for addressing environmental problems, the ability to effectively implement and enforce environmental laws has been limited by the lack of fiscal and human resources. The challenges faced in enforcement at the national level include the need to strengthen enforcement and compliance mechanisms and national institutions. Some steps in this direction are in process. For example, environmental divisions have been created within the offices of the attorneys general to enforce natural resource regulations oriented towards public ownership. Through the CONCAUSA project, officials from the Central American CAFTA-DR countries have participated in capacity building training programs on impact assessment, inspection, enforcement and other matters, and judges have been trained in environmental law. Legislative bodies are proposing new environmental laws and overcoming the traditional practice of only receiving and approving proposals from executive authorities. There also has been an increase in

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<sup>3</sup> Central American Commission on Environment and Development (CCAD), 1998. "State of Environment and Natural Resources in Central America." San Jose, Costa Rica. Available at: <http://ccad.sgsica.org/documents/doc2000.php>.

policies oriented towards decentralization and greater regional autonomy, which provides local governments with greater decision making powers.<sup>4</sup> However, local and regional levels of government face even greater institutional and fiscal constraints in terms of their ability to implement and enforce mandates and programs. In addition, administrative regulations and procedures for the enforcement of general laws on the environment of most of the countries are in early stages of development, as are efforts to provide transparent processes for public participation.

Central American treaties relating to biodiversity, hazardous substances, forests and climate change have been signed and ratified by all countries in the region and complement the large number of multilateral, regional and bilateral treaties on the environment to which each of the countries is a party (see Annex I to the Interim Review). Regional commissions of technical teams have been created as a result of these treaties and meet periodically to examine and promote compliance with commitments. Additional information on the countries of Central America and the Dominican Republic and their environment is available from a variety of sources, including the Central American Commission on Environment and Development (CCAD) and the United Nations Environment Program (UNEP).<sup>5</sup> The CCAD is a regional organization created by the countries of Central American in 1989 to enhance the development of regional initiatives.

In 1997, the U.S. Department of State established an Environmental Hub for Central America and the Caribbean, one of 12 such regional environmental offices worldwide. The hub is located at the U.S. Embassy in Costa Rica, and its goal is to promote U.S. environmental diplomacy with a focus on transboundary issues. The United States has been involved in environmental cooperation with the CAFTA-DR countries via this and other mechanisms on such issues as harmonization of environmental legislation, development of the Mesoamerican Biological Corridor, increasing awareness of illegal wildlife trade (including species covered in the Convention on International Trade in Endangered Species of Wild Fauna and Flora—CITES) and organizing the first meeting of the parties for the Inter-American Sea Turtle Convention, held in August 2002. See Annex II to the Interim Review for a summary of U.S. environmental cooperation activities in Central America.

## **B. U.S. – CAFTA-DR Trade**

In 2003, two-way trade between the United States and the CAFTA-DR countries was nearly \$32 billion, accounting for slightly more than 1 percent of U.S. imports and about 2 percent of U.S. exports (see Table 5, annex II). U.S. goods exports to the CAFTA-DR countries were \$15.0 billion in 2003. The United States is the main supplier of goods and services to Central America and the Dominican Republic, accounting for about 40 percent of the region's imports. Key U.S. exports to the region include machinery and equipment, chemicals and plastics, agricultural products, textiles and apparel and paper. The majority (more than three-quarters) of U.S. exporters to the region are small and medium-sized businesses, and these firms account for nearly half of the value of U.S. exports to Central America and the Dominican Republic.

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<sup>4</sup> Ibid.

<sup>5</sup> Information on CCAD is available at <http://ccad.sgsica.org>; information on UNEP is available at <http://www.unep.org>.

CAFTA-DR country goods exports to the United States totaled \$16.9 billion in 2003. The largest categories of U.S. imports from the CAFTA-DR countries were textiles and apparel and agricultural commodities. Textiles and apparel account for more than half of the value of U.S. imports from Central America and the Dominican Republic. The United States had a trade deficit with the region in 2003 of \$1.9 billion, a slight decrease from the deficit in 2002. U.S. Foreign Direct Investment (FDI) in the CAFTA member states was valued at \$3.4 billion in 2003, a 7 percent increase from 2002. The United States has signed bilateral investment treaties (BITs) with El Salvador, Honduras and Nicaragua. As of the date of this review, only the BIT with Honduras is in force.

### **III. The United States-Central America Free Trade Agreement**

#### **A. Overview of the Agreement**

The CAFTA-DR is designed to eliminate tariffs and trade barriers and expand regional opportunities for the workers, manufacturers, consumers, farmers, ranchers and service providers of all the participating countries. The CAFTA-DR countries will immediately eliminate tariffs on more than 80 percent of U.S. exports of consumer and industrial products, phasing out the rest over 10 years. Eighty percent of Central American and Dominican Republic goods already enter the United States duty free under the Caribbean Basin Initiative and Generalized System of Preferences programs, as well as under U.S. normal trade relations tariffs. The CAFTA-DR will provide reciprocal access for U.S. products and services.

The CAFTA-DR consists of a preamble and the following 22 chapters and associated annexes: initial provisions; general definitions; national treatment and market access for goods; rules of origin; customs administration and trade facilitation; sanitary and phyto-sanitary measures; technical barriers to trade; trade remedies; government procurement; investment; cross-border trade in services; financial services; telecommunications; electronic commerce; intellectual property rights; labor; environment; transparency; administration and trade capacity building; dispute settlement; exceptions; and final provisions. The complete text of the CAFTA-DR, related annexes and side letters, and summary fact sheets are available on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/DR-CAFTA/DR-CAFTA\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/DR-CAFTA/DR-CAFTA_Final_Texts/Section_Index.html)

Based on the scoping process (see section IV), public comments and developments since the Interim Review, the following is a summary of the CAFTA-DR provisions most relevant to this Final Environmental Review. The provisions of the environment chapter are described in Section III.B.

#### *Market Access for Goods*

Tariff commitments by the United States, the Central American countries and the Dominican Republic provide immediate benefits for all Parties. More than 80 percent of U.S. exports of consumer and industrial products to Central America and the Dominican Republic will become duty free immediately upon entry into force of the CAFTA-DR and 85 percent will be duty free

within five years. All remaining tariffs will be eliminated within ten years of entry into force. As previously noted, under the Caribbean Basin Initiative program, many products from Central America and the Dominican Republic already enter the United States duty-free. The CAFTA-DR will consolidate those benefits and make them permanent, so that nearly all consumer and industrial products made in Central America and the Dominican Republic will enter the U.S. duty free immediately on entry into force of the agreement.

#### *Customs Matters and Rules of Origin*

The CAFTA-DR sets out methods for valuing products used to qualify for preferential treatment and, product-specific rules of origin. The CAFTA-DR includes specific obligations on customs procedures to ensure compliance with laws governing importation. The CAFTA-DR requires the Parties to provide transparency and efficiency in customs administration, with commitments to publishing laws and regulations and ensuring procedural certainty and fairness. The CAFTA-DR also includes a commitment to share information to combat illegal trans-shipment of goods.

#### *Sanitary and Phytosanitary Measures*

The CAFTA-DR Parties reaffirm their commitments under the WTO Agreement on the Application of Sanitary and Phytosanitary measures. The Agreement also creates a process for enhanced cooperation and coordination among the Parties on sanitary and phytosanitary issues.

#### *Technical Barriers to Trade (TBT)*

The CAFTA-DR Parties reaffirm their commitments to the WTO Agreement on Technical Barriers to Trade (TBT) and creates a process for enhanced cooperation and coordination on technical regulations and standards.

#### *Intellectual Property Rights (IPR)*

The IPR Chapter provides for strong protection of copyrights, patents, trademarks and trade secrets, including enhanced enforcement and non-discrimination obligations for all types of intellectual property. Through the copyright provisions, Parties will address the challenge of providing protection in the digital environment of the internet and provide important protection for performers and producers of phonograms. Under the CAFTA-DR, the Parties will provide strong protections for trademarks and will apply the principle of “first-in-time, first-in-right” to trademarks and geographic indicators applied to products. The Chapter provided for streamlined trademark filing processes and improved protection of trademark owners’ rights.

#### *Services*

The CAFTA-DR permits substantial market access across the entire services regimes (based on a “negative list” approach), subject to limited exceptions. The Agreement requires the Parties to provide national treatment and MFN treatment to the other Parties’ services suppliers. Commitments apply across a wide range of sectors and provide for nondiscriminatory treatment through strong disciplines on both cross-border supply of services and the right to invest and

establish a local services presence. Regulatory authorities must use open and transparent administrative procedures, consult with interested parties before issuing regulations, provide advance notice and comment periods for proposed rules and to publish all regulations.

### *Investment*

The CAFTA-DR provides for a more predictable framework for U.S. investors operating in Central America. The CAFTA-DR imposes major obligations pertaining to non-discrimination (national treatment and MFN), expropriation, free transfers related to covered investments, prohibition on the use of performance requirements, minimum standard of treatment, and limitations on requirements on senior managers. The CAFTA-DR also provides a mechanism for investor-State dispute resolution, including a commitment to establish an appellate or similar mechanism to review awards made by tribunals under the Agreement.

### *Government Procurement*

The CAFTA-DR will provide a more predictable procurement environment for U.S. suppliers. Parties have committed to using open, transparent and non-discriminatory procurement procedures. The Chapter includes requirements for advance public notice of procurement opportunities, provision of tender documentation to all interested suppliers in a timely fashion, as well as timely and effective bid review procedures.

### *Transparency*

The Transparency Chapter ensures that laws, regulations, procedures and administrative rulings on matters covered by the CAFTA-DR are published and made available to the public, requiring notification of proposed measures and providing for a reasonable opportunity for interested parties to comment, whenever possible. Procedures for review and appeal of administrative actions covered by the CAFTA-DR also are provided.

### *Trade Remedies*

The CAFTA-DR includes provisions for implementing several bilateral safeguards and the Parties' maintain their respective rights under the WTO Safeguards Agreement. A Party may exclude imports from another Party from a WTO safeguard measure, if imports from that Party are not a substantial cause of serious injury or threat of serious injury. The Agreement also establishes procedures for safeguard measures on agricultural, textile and other goods.

### *Labor*

The CAFTA-DR's Labor Chapter reaffirms the Parties' obligations as members of the International Labor Organization (ILO), and commits them to strive to ensure that their domestic laws provide for labor standards consistent with internationally recognized labor principles. Labor obligations are part of the core text of the Agreement. The United States, Central America and the Dominican Republic agree that it is inappropriate to weaken or reduce domestic labor protections to encourage trade or investment. Further, each Party's obligation to effectively

enforce its domestic labor laws is enforceable through the Agreement's dispute settlement procedures. Procedural guarantees ensure that workers and employers will continue to have fair, equitable, and transparent access to labor tribunals/courts. The Parties also establish a process for further cooperation on labor matters.

### *Dispute Settlement*

The CAFTA-DR's dispute procedures set high standards of openness and transparency, calling for open public hearings and the public release of legal submissions by Parties. It provides opportunities for interested third parties, such as non-governmental organizations, to submit views. The Agreement promotes compliance through consultation, joint action plans and trade-enhancing remedies. Core obligations of the CAFTA-DR, including labor and environment provisions, are subject to the dispute settlement provisions with the use of labor or environment expertise for disputes in these areas. The Chapter includes an enforcement mechanism providing for monetary assessments as a way to enforce commercial, labor and environmental obligations of the Agreement.

### *Exceptions*

For certain chapters, the Parties agreed to incorporate into the CAFTA-DR Article XX of the GATT 1994 and Article XIV of the GATS, including their footnotes. The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources. The Parties also understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health. Nothing in the CAFTA-DR shall be construed to compel a Party to reveal information contrary to its essential security interests or prevent it from applying measures that it considers necessary to its essential security interests.

### *Trade Capacity Building*

Building on the Parties' experience with the Trade Capacity Building (TCB) process during the CAFTA-DR negotiations, the Agreement creates a Committee for Trade Capacity Building for the purpose of defining and identifying priority needs so that governments can effectively implement commitments and maximize the long-term benefits of free trade. In addition to the State Department's negotiation of the separate Environmental Cooperation Agreement (see Section VIII), regional TCB budget and activities related to environmental issues during the CAFTA-DR negotiating process in 2003 were: (1) \$2.5 million for cleaner production; (2) \$6 million for certified timber product development; (3) \$2.5 million for environmentally sound products and services; and (4) \$1.4 million for modernization of the energy sector in Central America.

## **B. The CAFTA-DR Environment Chapter and Related Environmental Provisions**

Following guidance in the Trade Act, the CAFTA-DR includes core environmental obligations

within the body of the Agreement. These obligations require a Party: (1) to maintain high levels of environmental protection and to strive to improve those levels; (2) not to fail to effectively enforce environmental laws through a sustained and recurring course of action or inaction in a manner affecting trade between the Parties, subject to the right to exercise enforcement discretion and to make decisions regarding allocation of resources to other environmental matters considered to be a higher priority; and (3) not to waive or otherwise derogate from environmental laws in order to attract trade or investment. The effective enforcement obligation is subject to the CAFTA-DR's dispute settlement procedures.

To assist in the administration and implementation of the CAFTA-DR, the Parties have established an Environmental Affairs Council to oversee the implementation of the Environment Chapter. This Council will be composed of high-level government officials from each Party. It will meet within the first year of the CAFTA-DR's entry into force, and annually thereafter unless the Parties agree otherwise.

The CAFTA-DR encourages a comprehensive approach to environmental protection. Provisions on procedural guarantees promote good environmental governance by obliging each Party to provide certain basic remedies for violations of its environmental laws and appropriate due process and public access to environmental enforcement proceedings. These procedural guarantees are accompanied by provisions that promote incentives and other voluntary mechanisms to protect the environment, including market-based incentives. Provisions on the relationship between the CAFTA-DR and multilateral environmental agreements (MEAs) acknowledge the importance of effective domestic implementation of MEAs to which the CAFTA-DR Parties are all party and the contributions that the CAFTA-DR Environment Chapter and ECA can make to achieving the goals of those MEAs. The Parties also may consult, as appropriate, with respect to ongoing negotiations in the WTO regarding MEAs.

### **Public Submissions Process**

The CAFTA-DR contains an innovative public submissions process that will allow members of the public to raise concerns with the Parties' enforcement of their respective environmental laws. The CAFTA-DR's public submission provisions are modeled on Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), but contain a number of improvements to the NAAEC. Combined with other elements in the environment package (*e.g.* robust environmental cooperation and capacity building under the ECA, see Section VII *infra*), the public submissions process should significantly contribute to improved environmental governance and transparency in Central America and the Dominican Republic.

Under the CAFTA-DR, any person of a Party may file a submission alleging that a Party is failing to enforce its environmental laws with a designated "secretariat or other appropriate body," and the secretariat will review the submission in light of specified criteria.<sup>6</sup> In comparison with the NAAEC, the CAFTA-DR makes it easier for a meritorious concern to be

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<sup>6</sup> The CAFTA-DR's public submissions procedure is not available to U.S. persons wishing to raise concerns with U.S. enforcement of its environmental laws, because such persons already have available to them other remedies including the procedures under Articles 14 and 15 of the NAAEC. However, persons of CAFTA-DR Parties other than the United States may raise concerns with U.S. enforcement under the CAFTA-DR provisions.



addressed by providing that the secretariat will prepare a factual record if any member of the Council requests that it do so. (Under the NAAEC, a 2/3 vote of the Parties is required.) The CAFTA-DR also provides that the Council will review the factual record in light of the objectives of the Environment Chapter and the ECA and may make recommendations to the Environmental Cooperation Commission established under the ECA concerning matters addressed in the factual record that are relevant to potential environmental cooperation. This provision represents an important innovation to the NAAEC, which contains no such provision for follow-through.

After the CAFTA-DR negotiations were completed, the Administration and the CAFTA-DR partners took great care in selecting an appropriate institution to serve as the “secretariat or other appropriate body” for implementing the public submissions mechanism. The Parties agreed that the institution selected must have the capabilities for objective review of submissions, appropriate environmental and regional expertise and adequate infrastructure. An institution with an established presence in the region was strongly favored. In close consultation with TEPAC and the Congress, the United States and the CAFTA-DR partners considered a number of possible institutions. In September 2004, U.S. representatives participated with Central American governments in conducting public outreach in Central America on the new public submissions process and the identification of a secretariat.

Informed by these consultations, the CAFTA-DR Parties agreed to establish a new unit under the Secretariat for Central American Economic Integration (La Secretaria de Integracion Economica Centroamerica or SIECA). SIECA has been assisting Central America with other aspects of the CAFTA-DR and is widely perceived as the strongest of the Central American regional institutions. The five Central American CAFTA Parties are members; however, SIECA has sufficient organizational flexibility to allow non-members (such as the United States) to participate in particular units set up for particular purposes.<sup>7</sup> Its selection will also help support the policy goal of fostering improved coordination between trade and environment ministries in the region.

While the public submissions unit would be organized under SIECA for purposes of infrastructure support, it would report solely to the Environmental Affairs Council established under the CAFTA-DR. Environmental expertise would be provided through a General Coordinator and small permanent professional staff appointed by the Council. The Council would also establish a roster of environmental experts that would assist the unit, as appropriate, in preparing factual records. Further details of the process, including measures to ensure effective public participation that advances the goals of the CAFTA-DR environment package, will be established through working arrangements to be developed by the Parties in consultation with the public.

#### **IV. Public and Advisory Committee Comments**

To determine the scope of the review, the Administration considered information provided by the public and solicited comments through notices in the *Federal Register* and at a public hearing.

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<sup>7</sup> SIECA's website is [www.sieca.org.gt](http://www.sieca.org.gt).

Section IV.A summarizes public comments. In addition to providing guidance on the scope of the environmental review, any information, analysis and insights available from these sources were taken into account throughout the negotiating process and were considered in developing U.S. negotiating positions.

Pursuant to Trade Act requirements (section 2104(e)), advisory committees, including the TEPAC, submitted reports on the FTA with Central America and the Dominican Republic to the President, USTR and Congress within 30 days after the President notified Congress of his intent to enter into the agreement. The TEPAC report is summarized in section IV.B.

#### **A. Public Comments**

The review of the FTA with Central America was formally initiated by publication of a notice in the *Federal Register*, which requested public comment on the scope of the review (see 67 *Fed. Reg.* 70475, November 22, 2002). The Administration also requested public comments on all aspects of the negotiations and held a public hearing to discuss issues raised in connection with the FTA, including environmental issues (see 67 *Fed. Reg.* 63954, October 16, 2002).

Comments and testimony addressing environmental issues received in response to those notices were taken into account in the preparation of the Interim Review. The availability of an Interim Review of the FTA with Central America was announced in the *Federal Register* (see 68 *Fed. Reg.* 51822, August 28, 2003) and provided a further opportunity for public comments.

The review of the FTA with the Dominican Republic was formally initiated by publication of a notice in the *Federal Register* (see 68 *Fed. Reg.* 74693, December 24, 2003). This notice drew attention to the timetable for the negotiations and to the relevance of information and analysis in the Interim Environmental Review of the FTA with Central America. The public was requested to focus particular attention on environmental concerns other than those already addressed in the Interim Review of the FTA with Central America.

We received five sets of comments on scope for the review of the FTA with Central America, one set of comments on scope for the review of the FTA with the Dominican Republic and ten sets of comments on the Interim Review of the FTA with Central America (see annex I). Comments on scope for the FTA with Central America are summarized in the Interim Review.<sup>8</sup>

Commenters on the Interim Review identified several environmental issues to be examined in connection with the proposed FTA. All of the comments focused on the possible global and transboundary effects: that is, direct effects in Central America and effects on the U.S. environment through shared ecosystems (air and water pollution, for example) and migratory species (see section V.B for a discussion of these topics). A few comments agreed with the preliminary conclusion of the Interim Review regarding possible effects on the U.S. environment (that any effects are likely to be small) (see section V.A). A few comments also advocated expanded consideration of environmental effects in the FTA partner countries, including effects not directly related to trade.

Several commenters requested additional analysis of possible sectoral impacts in the region (*e.g.*,

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<sup>8</sup> Available at [http://www.ustr.gov/Trade\\_Sectors/Environment/Environmental\\_Reviews/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html)

possible deforestation impacts associated with shifts in agricultural production, impacts of shifts in energy production). Other commenters noted that transshipment of species among countries could increase the risk of invasive species and suggested more analysis of this issue. A number of commenters raised concerns with wildlife trade and endangered species protection in the region (see section V.B).

Several commenters requested additional assessment of environmental governance and the institutional capacity of governments in the region to handle environmental challenges (see section II.A). A number of commenters raised concerns with the FTA's investment provisions, including the investor-State dispute settlement provisions (see section VI.B). Several commenters stressed the role the FTA could play in promoting greater transparency and improved opportunities for public involvement in environmental issues in Central America. In particular, they recommended inclusion of a public submissions process similar to that in the NAAEC (see section III.B). Others emphasized opportunities to work constructively to improve environmental regulatory capacity in the region and called for a coordinated, long-term framework for environmental cooperation with adequate funding (see section VII).

## **B. Advisory Committee Report**

Under Section 135(e) of the Trade Act of 1974, as amended, advisory committee reports must include advisory opinions as to whether and to what extent an agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Trade Act of 2002. The reports must also include advisory opinions as to whether an agreement provides for equity and reciprocity within the sectoral or functional area of the particular committee. The advisory committee reports are available at [http://www.ustr.gov/Trade\\_Agreements/bilateral/DR-CAFTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/bilateral/DR-CAFTA/Section_Index.html).

A majority of TEPAC members supported the conclusion that the CAFTA-DR provides adequate safeguards to ensure that Congress's environmental negotiating objectives will be met and expressed satisfaction at the manner in which environmental issues were integrated into the drafting of the Agreement. A majority of the Committee expressed the view that trade agreements can create opportunities to enhance environmental protection, noting that trade opens markets, creates business and employment opportunities, and can increase economic growth, leading to increased wealth and providing opportunities to enhance environmental protection, including the creation of a political will in favor of such protection. However, they also noted that trade can create and amplify adverse externalities that require enhanced regulatory oversight.

A majority of the Committee members noted with satisfaction that environmental issues in the CAFTA-DR appeared to have obtained a higher profile than in previous FTAs with Singapore and Chile. In particular, the majority viewed favorably the new CAFTA-DR provisions on public submissions, which were not included in the Singapore and Chile FTAs. The majority found that, if successfully implemented, these provisions would enhance the ability of citizens with reasonable environmental concerns to be heard and responded to, while limiting the possibility for frivolous comments to bog down the process. However, the majority stressed that the secretariat selected to administer the process must have adequate capabilities and funding in order for the provisions to live up to their promise. The majority further noted that establishment

of a secretariat with a presence in the region would be a beneficial means of building the capacity of local nongovernmental organizations.<sup>9</sup>

The majority concluded that the dispute resolution provisions are acceptable, although the majority also expressed the view that additional elements and obligations could have been added to these provisions. The majority agreed that monetary assessments of up to \$15 million per year for instances of non-compliance with enforcement obligations is adequate.

With respect to investment, the majority found that the CAFTA-DR's investment protection and dispute resolution provisions represented an improvement over corresponding provisions in the NAFTA. They believe that these CAFTA-DR provisions reduce the possibility of successful challenges to a U.S. environmental measure. In addition, a majority of TEPAC were pleased to see specific language clarifying the relationship between investment and environmental obligations.

Finally, the majority viewed favorably the ECA negotiated by the State Department and found that the ECA represents an impressive framework for fulfilling Congressional objectives regarding environmental capacity building and sustainable development. However, the majority stressed that without adequate funding, the ECA framework would not achieve Congress' objectives.

Several differing viewpoints exist among committee members, especially with regard to investment protection and dispute resolution issues. The TEPAC report describes multiple minority views that include: (1) there is a lack of clarity in the interaction between CAFTA-DR and GATT; (2) there is ambiguity in certain terms used in the FTA; (3) the definition of investment is too broad (potentially giving rise to a wide array of investor-state claims); (4) there is ambiguity regarding committee jurisdiction over issues that have environmental implications; (5) the Agreement does not adequately protect sanitary and phyto-sanitary standards; (6) the provisions on customs administration and trade facilitation should be interpreted to include efforts to prevent introduction of invasive alien species; (7) the Agreement excessively relies on trade as a means of advancing environmental objectives; (8) the investment provisions are too broad; (9) the investment provisions weaken traditional protections for U.S. investors; (10) the Agreement's intellectual property provisions are inadequate and may create new delays in bringing generic pharmaceutical products to market; and (11) the Agreement's environmental provisions will not ensure that environmental protection in Central America and the Dominican Republic is improved in a meaningful way.

## **V. Potential Economically-Driven Environmental Effects**

### **A. Potential Impacts in the United States**

Although the economies of Central America and the Dominican Republic represent important markets for some U.S. producers and exporters, the impact of the CAFTA-DR on total U.S.

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<sup>9</sup> TEPAC submitted its report before the selection of the "secretariat or other appropriate body" called for in the environment chapter's public submissions process. The Administration consulted closely with TEPAC in selecting such an institution. See Section III.B.

production through changes in U.S. exports appears likely to be very small. Exports to Central America and the Dominican Republic currently account for about 2 percent of total U.S. exports and a very small portion of total U.S. production. Increases in U.S. exports of agricultural and industrial goods to Central America and the Dominican Republic are expected as a result of the Agreement's reductions in market access barriers. However, any associated increases in U.S. production will represent a very small change in the aggregate U.S. economy.

In its analysis of the potential economic effects of the market access provisions of CAFTA-DR, the U.S. International Trade Commission (USITC) estimated the likely change in the value of U.S. exports to Central America and the Dominican Republic as 15 percent; the estimated change in total U.S. exports (to all destinations) is less than 0.2 percent.<sup>10</sup> The USITC analysis estimated that the CAFTA-DR, when fully implemented would increase U.S. welfare by about 0.02 percent.<sup>11</sup> The USITC also conducted a detailed examination of CAFTA-DR's economic effect on sectors of the U.S. economy likely to experience increased import competition or increased export opportunities (*e.g.*, textiles, apparel and footwear, sugar and sugar-containing products, grains and services) and concluded that any such increases would be from a small initial level and, as a result, likely to have only a minimal impact on production in these sectors. Comparable findings are reported by academic studies of the possible effects of the agreement.<sup>12</sup>

Although small changes in production and exports in environmentally-sensitive sectors could provide a basis for concern regarding the CAFTA-DR's direct environmental effects in the United States, no instances warranting such concerns were identified and none were raised in public comments on the Interim Review (See section IV.B). Based on this information and analysis, the Administration has concluded that changes in the pattern and magnitude of trade flows and production attributable to the FTA will not have any significant environmental impacts in the United States.

## **B. Transboundary and Global Issues**

As compared to its effects in the United States, the CAFTA may have relatively greater impacts on the economies of Central America and the Dominican Republic and, through those impacts, on their environment. As described above (see section II.A), trade, especially with the United States, is an important factor in economies of all of the countries in the region. However, a substantial portion (more than three-fourths) of the region's exports to the United States already enter duty-free as a consequence of the Caribbean Basin Initiative and other programs providing for preferential treatment.

The environmental effects of the CAFTA-DR may be both positive and negative in the CAFTA-

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<sup>10</sup> See: "U.S.-Central America-Dominican Republic Free Trade Agreement: Potential Economywide and Selected Sectoral Effects" USITC Publication 3717, August 2004; available at: <http://www.usitc.gov>.

<sup>11</sup> This is a comprehensive measure of the impact that the quantifiable components (tariff liberalization) of CAFTA-Dr will have on the U.S. economy. It summarizes benefits to consumers as well as the economic effects on households in their roles as providers of labor, owners of capital and taxpayers. For further information see USITC Publication 3717 (*loc. cit.*).

<sup>12</sup> See, for example, Drusilla K. Brown, Kozo Kiyota, and Robert M. Stern, "Computational analysis of the U.S. Bilateral Free Trade Agreements with Central America, Australia, and Morocco," May 6, 2004; paper available at <http://www.fordschool.umich.edu/rsie/workingpapers/wp.html>.

DR countries. The CAFTA-DR may increase investment, trade and production in the region, which may be associated with further pressure on the environment. On the other hand, it is important to note that by reducing risks to investors the CAFTA-DR may contribute to investment in Central America and the Dominican Republic by companies that bring high environmental standards, thus providing a model for others in the region. In addition, commitments in the CAFTA-DR, such as those to effectively enforce environmental laws, should have a positive effect on the environment, especially when coupled with capacity-building and environmental cooperation activities. The CAFTA-DR also is likely to contribute to increases in per capita income and, through this, to greater demand for environmental regulation within the region over time.

While the environmental impacts of expected economic changes in the United States attributable to the CAFTA-DR are expected to be minimal (see section V.A), the Administration examined a large number and wide variety of environmental issues with potential global and transboundary impacts in this review. Some of these issues were raised through public comments (see section III.A); others were identified through an open-ended analytical process among agencies with environment, trade and economic expertise. The following issues were examined for potential environmental consequences (positive or negative) related to the FTA.<sup>13</sup>

## 1. Migratory Birds

Because they are a shared as well as a globally important resource, the Interim Review examined the possible impacts of the CAFTA-DR on migratory and resident species of birds. In the United States, migratory bird species are protected under the Migratory Bird Treaty Act (MBTA), and at least 350 of these neo-tropical migratory species (mainly songbirds) migrate through or are winter residents in Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic. Many of these species face both direct and indirect threats to survival, most of which are human-caused, and some of which may intensify with implementation of the CAFTA-DR.

Deforestation (including clearing for agricultural production and development) and forest degradation (including unsustainable timber production) are among the greatest threats to birds and their habitats in Central America and the Dominican Republic. Although forests cover more than half of the land area of Central America, all of the countries in the region face high rates of deforestation. Factors affecting habitat for migratory birds (primarily forests) have been identified as a critical area of concern.

The tariff provisions of the CAFTA-DR are not expected to have an impact on migratory bird habitat in the CAFTA-DR countries because applied tariffs on most products linked to deforestation and forest degradation are low or at zero. It is more difficult to predict the effects of potential increased investment attributable to the CAFTA-DR (for example, possible increased investment in sectors such as agriculture whose activities may contribute to loss of migratory bird habitat). The Parties to the CAFTA-DR have a history of cooperating to address concerns related to migratory species, and we identified additional opportunities for cooperation in the context of the Environmental Cooperation Agreement (see section VII).

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<sup>13</sup> Further information is available in the Interim Review for the FTA with Central America (see [http://www.ustr.gov/Trade\\_Sectors/Environment/Environmental\\_Reviews/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html)).

## 2. Wildlife Conservation and Trade

The Interim Review examined the possible effects of the FTA on wildlife, including endangered species in Central America. We considered the possibility of direct effects on wildlife (an increase in harvesting of wildlife for export) as well as the possible loss or degradation of habitat due to economic activities stimulated by trade.

Trade between the United States and the CAFTA-DR countries in wild plants and animals is relatively small and the majority of this trade is regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>14</sup> U.S. imports of queen conch (*Strombus gigas*) from Honduras and the Dominican Republic have accounted for most of the value of U.S.-Central American-Dominican Republic trade in wild plants and animals (this species is listed on Appendix II of CITES). CITES Appendix II includes species for which trade must be regulated to avoid utilization incompatible with their survival in the wild.

The United States and all of the CAFTA-DR countries are Parties to CITES. Implementation of CITES is generally considered to be good in Central America and the Dominican Republic, despite limited resources. The Interim Review described an ongoing assessment of the adequacy of national legislation for effective implementation of CITES in Honduras and El Salvador.<sup>15</sup> Both countries were initially placed in Category 2, the designation for countries with national legislation that may not meet all requirements for effective implementation of CITES. The Dominican Republic was placed in category 3 (national legislation is inadequate). Although there was an initial deadline of 31 December 2003, at its 50<sup>th</sup> session (March 2004) the CITES Standing Committee took note of the challenges (faced by countries as well as the Secretariat) and provided additional time for Honduras, El Salvador, the Dominican Republic and more than 50 other countries in these categories. Legislative progress was reviewed at the 51<sup>st</sup> session of the Standing Committee (October 2004) and will likely be reviewed again at the 53<sup>rd</sup> session (scheduled for June 2005). In the absence of progress, further measures (which could include restrictions on commercial trade) could be required.

Generally, U.S. tariffs on wild plants and animals imported from Central America and the Dominican Republic are already low; as a consequence, we do not expect the CAFTA-DR to cause a significant increase in wildlife trade. Given the legal protections in place in each country, it also appears unlikely that the CAFTA-DR will cause an increase in illegal trade of wildlife or endangered species.

The Interim Review identified trade in queen conch as a subject of some concern based on allegations that illegally fished conch from the waters of surrounding countries are being exported from Honduras.<sup>16</sup> Similar concerns exist for the Dominican Republic. Queen conch is

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<sup>14</sup> Wildlife trade accounts for less than 0.1 percent of the value total goods trade between the United States and the CAFTA-DR countries.

<sup>15</sup> This assessment is carried out by the CITES Secretariat and evaluated by the Standing Committee (composed of Parties to CITES) in the context of the National Legislation Project. Further information is available at <http://www.cites.org>.

<sup>16</sup> See <http://www.cites.org/eng/ctee/animals/19/E19-08-3.pdf>

a large marine gastropod (snail) that is a significant commercial fisheries resource. Most of the region's queen conch exports originate in Honduras and the Dominican Republic; the United States is the world's largest consumer of queen conch and receives the majority of its conch meat from Honduras and the Dominican Republic. As noted in the Interim Review, concerns related to CITES-regulated species are appropriately addressed within the framework of CITES and through cooperation between the U.S. CITES Management Authority (the U.S. Fish and Wildlife Service) and the Management Authorities in Honduras and the Dominican Republic.<sup>17</sup> Along with the Caribbean Fisheries Management Council, the NOAA Fisheries (of the U.S. Department of Commerce) promotes regional management efforts for this species, for example by convening meetings in support of the CITES Significant Trade Review process. Through commitments to effectively enforce environmental laws, as well as through the ECA, the CAFTA-DR may provide additional opportunities to reinforce these efforts.

Although clearing for agriculture has been a primary cause of deforestation in all of the CAFTA-DR countries, and agricultural products currently account for a significant share of exports to the United States from Central America and the Dominican Republic, U.S. tariffs on the agricultural products of these countries (with the exceptions of sugar) are already low. Therefore, tariff reductions resulting from the CAFTA-DR are not expected to lead to a significant expansion of agricultural production in Central America and the Dominican Republic. Shifts may occur within the agricultural sector, but these do not appear likely to contribute additional pressure to the forests of the region.

U.S. tariffs on other products that are likely to affect wildlife habitat (such as fisheries, forest products and mining) also are low. Therefore, the CAFTA-DR is not expected to significantly alter existing patterns or levels of Central American and Dominican Republic production and exports to the United States. Given the legal protections for wildlife and endangered species in place in the United States, Central America and the Dominican Republic, it appears unlikely that the CAFTA-DR will contribute to an increase in illegal trade of wildlife or endangered species. However, increased volumes of trade could lead to the need for additional enforcement resources. Provisions related to customs cooperation are expected to contribute to reductions in illegal wildlife trade through, for example, information sharing for the purpose of promoting compliance and preventing violations of trade regulations.

### **3. Shrimp/Turtle**

In response to public comments, the Interim Review examined the possible effects of the CAFTA-DR on sea turtles. That examination included a summary of threats to sea turtles posed by human activities (exploitation for meat, eggs and shells, as well as marine pollution) and focused on incidental mortality in nets used by shrimp trawlers. Recognizing that shrimp trawl fishing poses threats to sea turtles, Section 609 of Public Law 101-162 requires the Department of State to make annual certifications to the Congress for countries that meet the requirements of

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<sup>17</sup> In September 2003, based on a recommendation of the CITES Animals Committee, Honduras voluntarily suspended issuing CITES export certificates for queen conch pending improved population assessments and development of management plans. For further information see: <http://www.cites.org/eng/ctee/animals/19/E19-08-3.pdf>



Section 609 in terms of sea turtle protection for commercial shrimp trawl fisheries.<sup>18</sup> Any country that is not certified may not export commercially-harvested shrimp and shrimp products to the United States (this import restriction does not affect shrimp and shrimp products from aquaculture or artisanal fisheries). The standard for certification is that the sea turtle protection program in that country must be comparable in effectiveness to the program in effect in the United States. In Central America, this trade restriction has been in place for countries with shrimp fisheries in the Caribbean since the early 1990s, and for countries with Pacific fisheries since 1996.

Certification decisions are based in part on bi-annual verification visits to observe compliance and enforcement, conducted by Department of State and NOAA Fisheries personnel. Meeting the standard for certification means adopting a regulatory program for the mandatory use of turtle excluder devices (TEDs) and the development of a credible enforcement program to ensure the use of the devices, or adopting a program governing the incidental taking of sea turtles that is of comparable effectiveness to the TEDs-based program in effect in the United States. On April 30, 2004, the Department of State certified 38 countries, including all six CAFTA-DR countries, as meeting the requirements set by Section 609 of P.L. 101-162 for continued export of shrimp to the United States. Shrimp from other nations that have been harvested in a manner harmful to sea turtles will be embargoed.<sup>19</sup>

The provisions of the CAFTA-DR will not affect implementation of Section 609, including the manner in which the Department of State assesses and makes decisions on the effectiveness of foreign governments in their implementation and enforcement of their domestic laws related to protection of sea turtles. The CAFTA-DR provides an opportunity to reinforce efforts to protect turtles through environmental cooperation activities and through its obligations to effectively enforce environmental laws.

#### **4. Transboundary Air Pollution**

The Interim Review describes our examination of the possibility that air pollution could be transported from Central America to the United States. A comparable examination was conducted for the Dominican Republic. With no physical barriers (*e.g.*, mountain ranges) to modify or impede them, air masses from Central America and the Dominican Republic have an unobstructed path northward as far as the Great Lakes. In the past, smoke from fires in Central America and Mexico has reduced visibility and presented threats to public health in parts of the United States. Although some of the most dramatic episodes (such as smoke transported to the Great Lakes) were abnormal, agricultural burning and clearing of land using fires is common practice in Central America. However, some countries in the region are developing policies designed to reduce the frequency and extent of burning.

On balance, the CAFTA-DR does not appear likely to cause a net expansion of agricultural production in Central America and the Dominican Republic. Even so, the potential transport of pollution from fires in Central America could continue or even increase given the following

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<sup>18</sup> The Dominican Republic is one of a number of countries whose fishing environments are certified as not posing a danger to sea turtles because they harvest shrimp using manual rather than mechanical means to retrieve nets, or use other fishing methods not harmful to sea turtles.

<sup>19</sup> Additional information is available at: <http://www.state.gov/r/pa/prs/ps/2004/32529.htm>

conditions: no change in the widespread practice of burning agricultural wastes; and no change in the use of fire to clear trees and other vegetation from land.

The Interim Review also examined air pollution concerns associated with nitrogen oxide (NO<sub>x</sub>) and sulfur oxide (SO<sub>x</sub>) emissions. Although NO<sub>x</sub> emissions from Central America and the Dominican Republic are not likely to reach the United States (due to their relatively short residence time in the atmosphere), SO<sub>x</sub> emissions, which result primarily from burning coal, have the potential for longer range transport to the United States. The extent to which SO<sub>x</sub> emissions from Central American and Dominican Republic coal-fired power plants or other fossil fuel combustion sources reach the United States is not currently known. This is, however, a possibility. Because economic growth in the region has been associated with increases in air pollution, CAFTA-DR's contribution to economic growth may increase emissions of NO<sub>x</sub>, SO<sub>x</sub> and other air pollutants in Central America and the Dominican Republic, some of which may be transported to the United States. However, through increased trade in environmental goods and services, the CAFTA-DR also may contribute to increasing use of less-polluting technologies in the region's energy sector.

The Interim Review also examined production and possible transboundary transport of Persistent Bioaccumulative Toxics (PBTs). PBTs (such as DDT, PCBs, chlordane, mercury, dioxins) have particular significance because they are stable in the environment for long periods, transfer readily between air, water and soil, accumulate as they move up the aquatic and terrestrial food chains and are toxic to humans and wildlife. Although the United States has a well-established basis for concern regarding PBTs in the domestic environment, accurate quantification of the possible sources and magnitudes of emissions from Central America and the Dominican Republic is not possible. Although preliminary information indicates high past and present use of pesticides in Central America, including restricted compounds such as DDT, data on use rates, environmental concentrations and emissions are not currently available.

We did not identify specific links between the CAFTA-DR and possible changes in production and transfer of PBTs. However, the CAFTA-DR may contribute to mitigation of pollution through increased trade in and use of improved technologies. In addition, there are a number of ongoing efforts to address air pollution in the region and these can be bolstered and extended through cooperative activities.

## **5. Marine Pollution**

The Interim Review described the possibility that contaminants and pollution from Central America could be transported to the Gulf Coast of the United States and the Florida Keys. A similar examination was conducted for the Dominican Republic. Significant volumes of marine pollution resulting from both maritime vessels as well as terrestrial activities are deposited along the Mexican and Texas coasts as a result of oceanographic currents in the Wider Caribbean Region. The Interim Review also noted that increases in land clearing and/or agricultural production in the less-developed eastern watersheds of Central America could accelerate soil erosion, increase polluted run-off and increase pollution stress on coastal ecosystems. This could be expected to have adverse effects on regional ecosystems, including coral reef ecosystems (mangroves, sea grasses, back reef areas and coral reefs).

Parties to the CAFTA-DR have opportunities to address the impacts of land-based sources of marine pollution that affect human health, coastal or marine resources. One opportunity for cooperation is through domestic implementation of provisions of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (the Cartagena Convention) and its protocols. Other opportunities are provided through the United Nations Environment Program's Global Plan of Action and Regional Seas Program. Through cooperative efforts aimed at implementing best management practices for land-based sources of marine pollution, the Parties can effectively address areas of mutual concern.

As discussed above (see section V.B.1 and V.B.2), we were not able to identify specific, direct links between the CAFTA-DR and changes in land clearing or agricultural production in Central America. Nevertheless, we expect to address a variety of land-based sources of marine pollution concerns through cooperative activities.

## **6. Tourism**

The Interim Review describes the increasing importance of tourism to all of the countries of Central America, along with the mixed environmental implications of this trend. Although expansion of tourism-based development adds pressure and may contribute to degradation of the environment of Central America, if properly managed it also can contribute to sustainable development. The Interim Review identified a number of tourism-related threats to the environment, including land development (affecting terrestrial and especially coastal ecosystems such as mangroves and sea turtle nesting sites), pressure on marine resources and habitats, air pollution, water pollution and solid waste disposal.

At the same time, the environment, particularly the biodiversity of the region, is an important factor in attracting tourists to Central America and the Dominican Republic. While eco-tourism activities can cause degradation of marine ecosystems through physical damage, pollution and commercial harvesting for sale to tourists, eco-tourism has also contributed to environmental conservation and preservation as well as economic development. In addition to increasing interest in eco-tourism, the concept of sustainable tourism is attracting the attention of both the private sector and governments.

We did not identify any significant restrictions on tourism services in the CAFTA-DR countries and, as a consequence, did not identify any direct impacts of the CAFTA-DR on the tourism sector in Central America and the Dominican Republic. Investment provisions may lead to increased investments in the tourism sector in these countries, but we are not able to accurately predict or analyze these possible effects given the complex mix of considerations that shape such business decisions. The CAFTA-DR provides opportunities, however, to build on existing cooperative activities to encourage tourism development that is consistent with protection of cultural and natural resources.

## **7. Invasive Species<sup>20</sup>**

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<sup>20</sup> An "invasive species" is defined as a species that is 1) non-native (or alien) to the ecosystem under consideration and 2) whose introduction causes or is likely to cause economic or environmental harm or

Public comments and interagency analysis identified invasive species and the possible effects of the CAFTA-DR on risks associated with invasive species as a possible transboundary impact to be considered. Without appropriate mitigation measures, commodity trade may provide pathways for invasive species, and the introduction of such species may result in harmful effects on the environment and economy of the importing country. Because the United States, Central America and the Dominican Republic contain areas with similar ecological conditions in which species from one country can thrive in and have impacts on the other, all of the Parties face and recognize risks associated with invasive species.<sup>21</sup> The level of risk is difficult to ascertain in light of limited information, including the variable and sometimes long delay between the entry of a species and the time at which it is identified as invasive.

Pathways for invasive species include commodity trade as well as the movement of people (migration and tourism) and present varying degrees of risk of environmental impact. Trade-related pathways that involve a risk of invasive introductions include the movement of vessels used in transporting commodities (e.g., ballast water in ships), or the transport of products and packaging that contain potentially invasive organisms (e.g., grains that contains weed seeds). Some invasive species also may be introduced on ornamental plants, fruits, aquarium fish and through other commonly traded products. Known or potential invasive species may also be imported deliberately as ornamental plants, pets or for other purposes, and as hitch-hikers on living organisms or biological materials such as fruit and fiber.

The United States and the CAFTA-DR countries maintain import regulations designed to minimize the risk of entry of invasive species. As examples, Animal and Plant Health Inspection Service (APHIS) regulations protect U.S. agricultural commodities from invasive species, Coast Guard regulations provide standards for management of ballast water from ships to reduce risks associated with aquatic invasive species and the Lacey Act, which is administered by the Fish and Wildlife Service, provides for prohibitions on the import of species of animals identified as injurious to domestic wildlife. The CAFTA-DR does not alter these laws and standards or the ability to enforce U.S. regulations addressing the introduction of invasive species. The CAFTA-DR provides opportunities for further cooperation and consultation to address concerns related to invasive species. In addition, the CAFTA-DR is expected to result in relatively small changes in the volume of trade (see section V.A). While acknowledging uncertainties about baseline conditions, we concluded that the CAFTA-DR is not likely to significantly increase the risk of invasive species for the United States. Nevertheless, and in keeping with their shared desire to minimize the risk of environmental and economic damage, the Parties are discussing including invasive species as an area for focus in cooperative activities (see section VII).

## **VI. Potential Regulatory Impacts**

### **A. Regulatory Review**

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harm to human health (for further information, see: <http://www.invasivespecies.gov>).

<sup>21</sup> For the United States, Executive Order 13112 (February 3, 1999) established the Invasive Species Council and commits federal agencies to conduct research on invasive species issues, take reasonable actions to discourage the introduction of these species into the United States and elsewhere and to undertake international cooperation aimed at addressing this issue.

Consistent with Executive Order 13141 and its Guidelines, this review included consideration of the extent to which the CAFTA might affect U.S. environmental laws, regulations, policies and/or international commitments. Within the range of CAFTA-DR obligations, those related to investment, services and TBT can have particular significance for domestic regulatory practices concerning the environment, health and safety. Previous environmental reviews, including the preliminary and final reviews for the Jordan, Chile and Singapore FTAs, have considered potential impacts on the U.S. regulatory regime with respect to all of these obligations and have found that the respective trade agreements were not anticipated to have a negative impact on U.S. legal or regulatory authority or practices. Further, the reviews noted the potentially positive impact that the FTAs could have on the U.S. environmental regulatory regime as a result of FTA commitments to effectively enforce U.S. environmental laws, not weaken U.S. environmental laws to attract trade or investment, and ensure that U.S. environmental laws and policies provide for high levels of environmental protection.

Based on this previous analysis, and given that the core obligations in these areas are similar to those undertaken in the previous FTAs<sup>22</sup>, the Administration concluded that the CAFTA-DR will not have a negative impact on the ability of U.S. government authorities to enforce or maintain U.S. environmental laws or regulations.

For a more in-depth analysis of general FTA commitments and their potential regulatory impacts in the United States, see the preliminary and final reviews for Jordan, Chile and Singapore FTAs at <http://www.ustr.gov/environment/environmental.shtml>.

## **B. Investment**

Investment provisions in FTAs were a matter of intense debate during Congress' consideration of the Trade Act. The central question was the appropriate balance that should be struck between protecting the rights of U.S. investors abroad and preserving the ability of the federal government and state and local governments to regulate with respect to health, safety and the environment.

In the Trade Act, Congress recognized that securing a stable investment climate and a level playing field for U.S. investment abroad is an important objective of U.S. trade policy. By fostering economic growth and job creation, investment can bring important benefits, including potential benefits to the environment: as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries, particularly as they develop constituencies in favor of increased environmental protection. Congress, however, also gave weight to concerns that arbitral claims brought by investors against governments (through "investor-State" arbitration) could be used inappropriately to challenge U.S. domestic laws and regulations, including those concerning the environment. As the Conference Report accompanying the Trade Act states, "[I]t is a priority for negotiators to seek agreements protecting the rights of U.S. investors abroad and ensuring the existence of a neutral investor-State dispute settlement mechanism. At the same time, these protections must

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<sup>22</sup> For information on FTAs, see the USTR website at <http://www.ustr.gov/new/fta/>.

be balanced so that they do not come at the expense of making U.S. Federal, State, and local laws and regulations more vulnerable to successful challenges by foreign investors than by similarly situated U.S. investors.”<sup>23</sup>

The Trade Act strikes a balance between these two goals by recommending U.S. trade negotiating objectives that clarify several substantive investment obligations of particular concern (notably, provisions on expropriation and “fair and equitable treatment”). The objectives seek to ensure that foreign investors in the United States are not accorded greater substantive rights than U.S. investors in the United States, while also securing for U.S. investors abroad core protections that are comparable to those that would be available to them under U.S. law. The Trade Act also includes objectives that provide for a number of innovations in the investor-State procedures to help ensure that arbitral tribunals interpret substantive obligations in a consistent and coherent manner. After enactment of the Trade Act, the Administration consulted extensively with Congress and with the business and environmental NGO communities to clarify provisions and develop new procedures and to ensure that those provisions fully satisfied the Act’s objectives. These provisions were ultimately incorporated into the Chile and Singapore FTAs that Congress approved in 2003, and have been included in the FTAs we have negotiated since then, including this FTA with Central America and the Dominican Republic.

The environmental reviews of the Singapore and Chile FTAs examined the investment provisions in detail, particularly those clarifications and improvements as compared with previous provisions, such as those of NAFTA Chapter 11. We concluded that the investment provisions should not significantly affect the United States’ ability to regulate in the environmental area.<sup>24</sup> In this review, we have re-examined that conclusion in light of public and advisory committee comments and our most recent experience.

### ***Relevant FTA Investment Provisions***

As relevant here, the CAFTA-DR Investment Chapter includes the following substantive clarifications and procedural innovations, as developed based on careful consideration of Trade Act guidance and consultations with interested constituencies:

- *Expropriation.* The expropriation provisions have been clarified in an annex to ensure that they are consistent with U.S. legal principles and practice, including a clarification that nondiscriminatory regulatory actions designed and applied to protect the public welfare (including environmental protection) do not constitute indirect expropriation “except in rare circumstances.” To determine whether an indirect expropriation has occurred, the annex directs tribunals to examine several factors, which derive from the analysis of the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the seminal case on regulatory expropriation. The annex also clarifies that only tangible or intangible property rights or interests in an investment are subject to the Agreement’s obligations with respect to expropriation.

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<sup>23</sup> See: H.Rpt. No. 624, 107<sup>th</sup> Cong., 2d Sess., at 155 (2002).

<sup>24</sup> The Interim and Final Environmental Reviews for the U.S.-Chile FTA and the U.S.-Singapore FTA are available at: <http://www.ustr.gov/environment/environmental.shtml>

- *Minimum standard of treatment/“fair and equitable treatment.”* The minimum standard of treatment obligation, including the obligation to provide “fair and equitable treatment” and “full protection and security,” is clarified to provide that these concepts do not require treatment in addition to or beyond that contained in customary international law, and do not create additional rights. Specifically, “fair and equitable treatment” is defined to include the obligation not to “deny justice” in criminal, civil or administrative adjudicatory proceedings, in accordance with “due process” protections provided in the principal legal systems of the world, including that of the United States. An annex gives further guidance concerning the Parties’ understanding of the term “customary international law.”
- *Increased transparency in the investor-State mechanism.* The CAFTA-DR provides that all documents submitted to or issued by an arbitral tribunal shall promptly be made public and that hearings are open to the public, subject to provisions ensuring the protection of classified and business confidential information. It also expressly authorizes *amicus curiae* submissions, allowing the public to present views on issues in dispute.
- *Elimination and deterrence of frivolous claims.* The CAFTA-DR includes an expedited procedure to allow for the dismissal of frivolous claims (based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, i.e., the claimant has failed to state a claim upon which relief may be granted) and for the dismissal of claims based on jurisdictional objections. It also expressly authorizes awards of attorneys’ fees and costs after a tribunal decides, as a preliminary question, whether to dismiss a claim for lack of jurisdiction or for failure to state a claim on which relief may be granted.
- *Promoting consistency and coherence of arbitral decisions.* The CAFTA-DR allows interim review of draft tribunal decisions by litigants and by the non-litigating CAFTA-DR partners. The litigants may comment on the draft decision. In addition, the Investment Chapter goes beyond previous FTAs by committing the Parties, within fifteen months of the CAFTA-DR’s entry into force, to develop an appellate or similar mechanism to review awards rendered by tribunals under the Investment Chapter. Since the CAFTA-DR was concluded, the Administration has been working diligently to develop a draft of such a mechanism in close consultation with Congress, interested advisory committees and stakeholders.

In addition to these improvements developed specifically in response to the Trade Act, the CAFTA-DR includes several provisions, similar to those in previous agreements, that recognize the flexibility that environmental regulators need to do their job and demonstrate the Parties’ intent that the investment obligations should be interpreted in a manner consistent with each Party’s right to regulate in the environmental area:

- *National treatment and most-favored-nation treatment for investors and their investments “in like circumstances.”* The provisions for national treatment and most-favored-nation treatment, similar to provisions in earlier U.S. bilateral investment treaties (BITs) and NAFTA Chapter 11, make clear that these obligations apply to investors “in like

circumstances.” This means that domestic regulation (including environmental regulation) may, in furtherance of nondiscriminatory policy objectives, distinguish between domestic and foreign investors and their investments, as well as among investors of different countries and their investments, without necessarily violating the national treatment and most-favored-nation obligations. For example, regulators in appropriate circumstances may apply more stringent operating conditions to an investment located in a wetland, or in a more heavily polluted area, than to an investment located in a less environmentally sensitive area.

- *Relationship to other provisions.* The CAFTA-DR incorporates provisions making clear that in the event of any inconsistency between the Investment Chapter and any other Chapter (such as the Environment Chapter), the other Chapter will prevail to the extent of the inconsistency. While the United States does not believe there to be any inconsistencies between the Investment Chapter and any other Chapter, the latter provision reinforces the Parties’ understanding about the relationship between different chapters. The CAFTA-DR also provides, similar to NAFTA, that nothing in it shall be construed to prevent a Party from taking measures otherwise consistent with the Investment Chapter to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. Further, as discussed above (*see* section III.B), the Environment Chapter commits each Party to strive to ensure that it does not weaken its environmental laws as a means of attracting investment.

### ***Potential Environmental Regulatory Impacts***

We have been unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the CAFTA-DR’s substantive investment obligations, and none have been called to our attention by commenters. No claims have ever been brought against the United States under the almost 40 BITs that are currently in effect or under any of our FTAs other than NAFTA. In the ten years since NAFTA has been in effect, only ten cases have been brought against the United States by Canadian or Mexican investors. The United States has prevailed in all of the cases that have been decided to date.

We also considered the views of TEPAC and other commenters on investment issues (see section IV). The TEPAC majority concluded that the clarifications to the CAFTA-DR’s investment provisions were an improvement over those in NAFTA Chapter 11 (particularly the clarification of the meaning of “indirect expropriation”), although the majority noted that some concepts could be further clarified. The majority also found that these clarifications reduced the possibility of a successful claim relating to a U.S. environmental measure. In addition, the majority noted other provisions that provide important protections for environmental regulation: *i.e.*, the provision that another Chapter (such as the Environment Chapter) would prevail over the Investment Chapter in the event of an inconsistency; the provision that nothing in the Investment Chapter should be construed to prevent a Party from taking measures otherwise consistent with the Chapter to regulate investment in an environmentally sensitive manner; clarifications of the minimum standard of treatment obligation; and the national treatment and most-favored-nation treatment obligations. Some members in a minority found that the CAFTA-DR provisions did not provide sufficient protection for U.S. environmental regulation, while other members in a



minority expressed concerns that investment protections had been inappropriately weakened.

Based on the above considerations, and given that U.S. environmental measures can be challenged in U.S. courts under current law, we do not expect the CAFTA-DR to result in a significantly increased potential for a successful claim relating to such measures under the CAFTA-DR's investor-State mechanism. The CAFTA's innovations as compared with NAFTA Chapter 11 should further reduce the risk that arbitral tribunals will misapply the investment provisions of the CAFTA-DR. We will, however, continue to review the potential impact of investment provisions on environmental measures as we implement this FTA and FTAs with similar provisions (such as the Chile, Singapore and Morocco FTAs).

## **VII. Environmental Cooperation**

As discussed in Section I.A, the Trade Act establishes that a principal U.S. negotiating objective is to strengthen the capacity of our trading partners to protect the environment through the promotion of sustainable development. In addition, the Trade Act instructs negotiators to seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science.

The United States and the CAFTA-DR countries share common concerns and similar responsibilities for protecting and conserving the environment in their respective territories and have a long history of cooperation to address environmental challenges. They also have a common interest in promoting global environmental improvement and protection and in using science and technology to address environmental challenges.

The negotiation of the CAFTA-DR presented opportunities to encourage and foster development of private sector initiatives to promote the goals of the Agreement, including innovative partnerships among governments, NGOs, international financial institutions and commercial interests. All of these activities support implementation of the provisions of the CAFTA-DR by building capacity within governments, at all levels, to protect the environment in concert with the strengthening of trade and investment. These activities also contribute to the Parties' broad objective of sustainable development by promoting civil-society participation in developing and implementing policies.

In conjunction with the negotiation of the FTA, the United States and the CAFTA-DR countries negotiated the ECA (available at <http://www.state.gov/g/oes/rls/or/2004/28577.htm> ). The ECA builds on USAID's regional environmental planning and reflects a specific link to USAID activities under the Central America-U.S. Joint Accord (CONCAUSA). As previously noted, the ECA establishes a Commission to oversee the implementation of cooperative activities under the Agreement. The Commission will consist of high-level officials with environmental responsibilities from each Party (the Commission member for the United States will be a high-level official from the U.S. Department of State). Through the development of a Plan of Work, the Commission will guide and identify goals and strategic objectives, as well as specific areas for cooperation that are consistent with the national priorities. The Commission will meet annually.

The ECA makes specific provision for the development of benchmarks to assist the Commission in examining and evaluating the progress of specific cooperative programs, projects and activities in meeting their intended goals. The ECA also provides for the Commission to seek and consider input from relevant local, regional and international organizations to assist it in monitoring the progress of cooperative activities. The Plan of Work will provide further detail regarding how the benchmarking and monitoring provisions will be implemented.

Areas specifically identified in the ECA for near-term cooperation include: strengthening environmental management systems; strengthening conservation and management of shared, migratory and endangered species; facilitating technology development and transfer of clean production technologies; and developing and promoting environmentally beneficial goods and services. It is anticipated that the Plan of Work will have a particular focus on areas with a nexus to provisions of the Environment Chapter and to international trade, such as: improving environmental enforcement capacity; encouraging domestic implementation of multilateral environmental agreements; promoting conservation of migratory, shared and endangered species in international trade; and promotion of environmentally beneficial goods and services.<sup>25</sup> Examples of specific projects under consideration include, *e.g.*, training in the implementation of CITES and the Montreal Protocol; initial steps toward creating national pollutant release and transfer registries (PRTR) of hazardous chemicals; and promoting mechanisms for the public to receive information on the value received for the use, extraction or exploitation of natural resources.

This cooperative mechanism provides an important pathway for the CAFTA-DR countries to comply with the environmental obligations undertaken in the Environment Chapter of the FTA and to develop both economically and environmentally in a sustainable manner. The Administration is working closely with Congress to identify adequate and stable funding sources for potential cooperative activities under the ECA.

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<sup>25</sup> The Administration has already participated in a number of CAFTA-DR-related outreach activities on environmental cooperation in Central America: for example, USG officials participated in an August 2004 workshop in El Salvador sponsored by The Humane Society of the United States, in which the CITES Secretariat provided training to Central American officials. As mentioned *supra*, in September 2004 USG officials also participated with Central American officials in highlighting enhanced opportunities for environmental cooperation under the CAFTA-DR, including through the new public submissions unit.

**Annex I—Organizations Providing Comments**

**Comments on scope for the environmental review**

**In response to 67 Fed. Reg. 70745**

American Sugar Alliance  
Center for International Environmental Law  
Carnegie Endowment for International Peace  
Ohio Conference on Fair Trade  
World Wildlife Fund

**In response to 68 Fed. Reg. 74693**

Caterpillar, Inc.

**Comments on the Interim Environmental Review**

**In response to 68 Fed. Reg. 51822**

Ometepe Biological Field Station, Nicaragua  
University of Vermont School of Natural Resources  
Carthage College (Kenosha, WI)  
Sea Turtle Restoration Project  
Florida Sugar Industry Labor Management Committee  
Natural Resources Defense Council  
National Wildlife Federation  
Defenders of Wildlife  
Carnegie Endowment for International Peace  
Humane Society of the United States

Annex II—Data tables

Table 1—Population, economic and trade data for CAFTA-DR countries and the United States in 2003<sup>a</sup>

	Population <i>Millions</i>	Gross Domestic Product			Exports of goods and services	
		Total, Nominal <i>Billion US\$</i>	Per capita <i>US\$/capita</i>		Total <i>Billion US\$</i>	As a share of GDP <i>Percent</i>
			Nominal	PPP <sup>b</sup>		
Costa Rica	4.0	17.5	4,375	9,100	8.1	46.3
El Salvador	6.5	14.4	2,215	4,800	4.0	27.6
Guatemala	12.3	24.7	2,008	4,100	4.0	16.3
Honduras	7.0	7.0	1,000	2,600	2.6	37.1
Nicaragua	5.5	4.1	745	2,300	0.9	22.8
Dominican Republic	8.7	15.9	1,828	6,000	5.8	36.5
Subtotal	44.0	83.6			25.4	30.4
United States	291.0	11,004.0	37,394	37,800	1,020.5	9.3

<sup>a</sup> The most recent year for which comparable data are available for all countries.

<sup>b</sup> Purchasing Power Parity. Data are estimated.

Sources: World Bank, U.S. Department of Commerce, U.S. Central Intelligence Agency.  
Data available at: <http://www.worldbank.org/data>, <http://www.ita.doc.gov/td/industry/otea/>, <http://www.bea.gov/>. and <http://www.cia.gov/cia/publications/factbook/geos/cs.html>.

**Table 2—Selected development indicators for CAFTA-DR countries and the United States in 2001**

	Population density <i>People per square km</i>	Urban Population <i>Percent</i>	Access to		Under-5 mortality <i>No. per 1,000 births</i>	Life expectancy at birth <i>Years</i>
			Improved water source <i>Percent</i>	Improved sanitation facilities <i>Percent</i>		
Costa Rica	74.6	59.5	95	93	11	78
El Salvador	302.9	61.3	77	82	39	70
Guatemala	105.0	40.0	92	81	58	65
Honduras	57.4	53.6	88	75	38	66
Nicaragua	41.8	56.5	77	85	43	69
Dominican Rep.	176	67.0	86	67	47	67
United States	30.8	77.4	100	100	8	77

Source: World Bank, World Development Indicators, 2003.

Data available at: <http://www.worldbank.org/data>

*Access to an improved water source*-refers to the percentage of the population with reasonable access to an adequate amount of water from an improved source, such as a household connection, public standpipe, borehole, protected well or spring, and rainwater collection. Unimproved sources include vendors, tanker trucks, and unprotected wells and springs. Reasonable access is defined as the availability of at least 20 liters a person a day from a source within one kilometer of the dwelling. (World Health Organization and United Nations Children's Fund, Global Water Supply and Sanitation Assessment 2000 Report).

*Access to improved sanitation facilities*-refers to the percentage of the population with at least adequate excreta disposal facilities (private or shared, but not public) that can effectively prevent human, animal, and insect contact with excreta. Improved facilities range from simple but protected pit latrines to flush toilets with a sewerage connection. To be effective, facilities must be correctly constructed and properly maintained. (World Health Organization and United Nations Children's Fund, Global Water Supply and Sanitation Assessment 2000 Report).

**Table 3—Land area, land use, and forest cover change for CAFTA-DR countries and the United States**

	Land area <i>Million Hectares</i>	Land use <i>Percent total land</i>		Annual change in forest cover, 1990-2000 <i>Percent</i>	Share of land in protected status <i>Percent</i>
		Forest	Agriculture		
Costa Rica	5.1	39	56	-0.8	23
El Salvador	2.1	6	77	-4.6	a
Guatemala	10.8	26	42	-1.7	20
Honduras	11.2	48	30	-1.0	6
Nicaragua	12.1	27	62	-3.0	18
Dominican Rep.	4.8	28	23	0.0	32
United States	915.9	25	46	0.2	26

<sup>a</sup> Less than 1 percent.

Sources: United Nations Food and Agriculture Organization; World Bank  
Data available at: <http://www.fao.org> and <http://www.worldbank.org/data>

**Table 4—Biodiversity indicators for the CAFTA-DR countries and the United States**

	Number of protected areas  <i>Number</i>	Area of biosphere reserves <i>Thousand hectares</i>	Species threatened <i>Number (Percent known species)</i>		
			Mammals	Birds	Plants
Costa Rica	130	729	14 (6.8)	13 (4.7)	109 (0.8)
El Salvador	3	-	2 (1.5)	0 (0.0)	23 (0.8)
Guatemala	42	2,350	6 (2.4)	6 (2.7)	77 (0.9)
Honduras	72	800	10 (5.8)	5 (2.2)	108 (1.9)
Nicaragua	73	2,182	6 (3.0)	5 (2.3)	39 (0.5)
Dominican Rep.	34	0	5 (25.0)	15 (11.0)	136 (2.4)
United States	3,481	31,570	37 (8.6)	55 (8.5)	Na

Na = Data not available

Sources: United Nations Environment Program; World Bank

Data available at: <http://www.unep.org> and <http://www.worldbank.org/data>

*Protected areas:* Refers to management categories I through V of the International Union for the Conservation of Nature and Natural resources (IUCN). (See <http://www.iucn.org> for additional information.)

*Biosphere reserves:* Refers to areas representative of terrestrial and coastal/marine environments that have been internationally recognized under the United Nations Educational, Scientific and Cultural Organization (UNESCO) Man and the Biosphere Programme. (See <http://www.unesco.org>)

**Table 5—United States goods trade with the CAFTA-DR countries, 2001-2003**  
*Billion \$*

Trading partner	United States exports			<i>United States imports</i>		
	2001	2002	2003	2001	2002	2003
Costa Rica	2.5	3.1	3.4	2.9	3.1	3.4
El Salvador	1.8	1.7	1.8	1.9	2.0	2.0
Guatemala	1.9	2.0	2.3	2.6	2.8	2.9
Honduras	2.4	2.6	2.8	3.1	3.3	3.3
Nicaragua	0.4	0.4	0.5	0.6	0.7	0.8
Dominican Rep.	4.4	4.3	4.2	4.2	4.2	4.5
CAFTA-DR Subtotal	13.4	14.1	15.0	15.3	16.1	16.9
All U.S. partners	731.0	693.3	723.7	1,142.0	1,163.5	1259.4
<i>CAFTA-DR share (percent)</i>	1.8	2.0	2.1	1.3	1.4	1.3

Source: U.S. Department of Commerce  
 Data available at: <http://www.ita.doc.gov/td/industry/otea/>