



DR-CAFTA MINISTERIAL MEETING

February 22-23, 2011

Observations from the AmChams of the DR-CAFTA countries on the
Administration and Application of the agreement



**Comments and observations
Implementation and Compliance of DR-CAFTA
Submission for the
DR-CAFTA Trade Ministerial
By the AmChams of Central America and the Dominican Republic
February 2011**

The AmChams of Central America and the Dominican Republic are affiliated with the US Chamber of Commerce through the Association of American Chambers of Commerce in Latin America and the Caribbean (AACCLA).

The AmChams have a long history of working with our US constituency base in Washington, D.C. and at the grass roots level to promote free trade as the key to economic growth throughout the region. During the DR-CAFTA debate, our Chambers joined together to promote the agreement's approval in the US Congress and each of our chambers worked tirelessly to ensure the agreement was ratified in our respective countries.

Our organizations understand the positive impact that DR-CAFTA has had on the United States and our countries, and will continue having in the years ahead. We work to help ensure that the benefits of duty free trade and open investment are more broadly shared and understood throughout our societies.

For DR-CAFTA to succeed, it is vitally important that the agreement be fully implemented and enforced and that there is no backsliding on existing levels of market openness.

For this reason we welcome the opportunity to share with you our comments and observations on the process of implementation and compliance in our respective countries.

We respectfully request that you take into account these observations during the Ministerial Meeting to be held in El Salvador next week and look for solutions that will benefit all the signatory countries.

Sincerely,

Juan Pablo Carrasco de Groote
President AmCham Guatemala

Yalí Molina
President AmCham Nicaragua

Armando Arias
President AmCham El Salvador

Luis Gamboa
President AmCham Costa Rica

José Eduardo Atala
President AmCham Honduras

Alejandro Peña Prieto
President AmCham Dominican Republic



I. PENDING COMMITMENTS FROM THE UNITED STATES

1. Institutional provisions

- a. The Free Trade Commission (CLC in Spanish) is the highest body integrated by Ministers or Secretaries from each of the Parties. The Coordinators of the Free Trade Agreement are the officers in charge of administering the Agreements in each of the Member countries. In the case of Guatemala the Coordinator is the Office for the Administration of Foreign Trade.
- b. Administrative Office to support Arbitration Groups who in turn support the processes for conflict resolutions.
- c. Joint integration of the Committee for the creation of Capabilities Related to Trade, in charge of coordinating the cooperation for the implementation of the Agreement.
- d. Integration of the following Committees:
 - i. Trade of Commodities: At present there is only one Committee on Trade of Commodities which has met once in the United States.
 - ii. Sanitary and Phytosanitary Standards: The group has already met and is reviewing a document which contains the terms of reference and the schedule of meetings of the Committee.
 - iii. Standardization Measures
 - iv. Council on Labor Affairs
 - v. Council on Environmental Affairs
- e. Work Groups or *Ad Hoc* Committees in charge of specific functions as directed by the Committees or by CLC. *AS NEEDED*.

2. Chapter 3 – National Treatment and Access to Markets

- a. Acceleration of the program to reduce taxes as agreed by the Member Countries. Optional Commitment. Article 3.3.4
- b. Inclusion of special products. Optional commitment. Article 3.12
- c. Section G. Textiles and Apparel. Define certification procedures for folklore products and handcrafts. Article 3.21.
- d. Implementation of customs cooperation mechanisms for the trade of textiles and apparel. Article 3.22.
- e. Exemption of customs charges, in accordance with Article 3.4, on measures applied by Costa Rica, the Dominican Republic, El Salvador and Guatemala, in



accordance with Article 27.4 of the Agreement on Subsidies and Compensatory Measures of the OMC.

- f. As a result of the text negotiated in DR-CAFTA, which contains an exemption of custom duties for the year ending 2009 for Costa Rica, El Salvador, Guatemala and the Dominican Republic, the Free Trade Commission **must approve a resolution** to extend such term in accordance with the terms authorized by the Doha Declaration.

3. Chapter 4 - Rules of Origin

- a. Define common directives. Article 4.21: CA submitted a proposal in 2008, but the United States presented another proposal and in October 2010 Central America had to provide their comments.
- b. Transposition to the IV Amendment of Specific Rules of Origin, a proposal has been submitted but the work has not been completed (it does not represent a commitment regarding the text but it is necessary for the proper administration of the Agreement)

4. Chapter 5 - Customs Administration and Trade Facilitation

- a. Agreement on Mutual Support among Customs Administrations. Article 5.5.8

Documents which refer to Chapters 4 and 5 have the consensus of Central America and were sent to the Government of the United States for analysis; such results are very important. The Free Trade Commission should propose decisions for approval to facilitate customs procedures.

- b. Establish a program to support admissibility of certain products. Parallel letter.
- c. Declaration of free-pest areas. Execution of protocols, joint management program. Optional cooperation commitment.

5. Chapter 20 - Conflict Resolution

- a. Present and consolidate the roster of arbitrators. Article 20.7.1
- b. Establish Model Operating Procedures. Article 20.10.1

Only Guatemala has completed the roster of arbitrators. During the meeting a specific date for the official exchange of candidates among the Parties should be established.

The Model Operating Procedures and Code of Conduct have been approved at the Central American level. The reaction from the United States is pending.



6. Discussion of Application of commitments on Transparency (information on regulations of the United States, Article 18.3).

Since the implementation of DR-CAFTA, the U. S. Government has made decisions which directly affect trade among the member countries; however these decisions are not sent directly by USTR but through the Commercial Attaches. During the meeting the U. S. will be requested to notify such measures through the Management Directors based on Article 18.3 of the DR-CAFTA Agreement.

7. Approval of Decisions within the Free Trade Commission:

Establishment of the following Committees:

- Committee on Agricultural Trade.
- Committee on Sanitary and Phytosanitary Measures

DR-CAFTA is not clear on the creation of these committees. For that reason, and due to their importance for an efficient administration, it is necessary for the Free Trade Commission (Ministers of Economy and Trade) to make appropriate decisions.

8. Establishing the Negotiating Group to integrate the Appeal's Body to review the Lauda.

Taking into consideration that since the implementation of DR -CAFTA some countries of the region have been affected by complaints from investors through the mechanism established for the Resolution of Controversies, the establishment of the Appeals Body is necessary, as an alternative, for the Parties that have fewer benefits in a lauda before CIADI.

9. Trade capacity building

There is absolutely no knowledge of the results, if any, of this cooperation. We request more involvement of the private sector, since we are the ones who know what issues are priorities to include in this cooperation. A mechanism has to be found so that the international cooperation agencies can subcontract private sector organizations to develop regional programs of work.



II. PENDING COMMITMENTS ON BEHALF OF CENTRAL AMERICA AND THE DOMINICAN REPUBLIC

The Central American countries and the Dominican Republic have to comply practically with all the commitments of CAFTA, given the fact that it requires legal, regulatory and administrative reforms in several issues and sectors.

In the case of Guatemala, the main commitments are on Intellectual Property and Telecommunications and in the case of Costa Rica, on Telecommunications and Insurance.

Regarding Distribution and Agency Contracts, all the countries, except Guatemala, have to comply with substantial commitments relative to reform.

III. RELEVANT ISSUES REGARDING THE ADMINISTRATION OF THE AGREEMENT AND ITS BETTER USE

1. Extended Accumulation

This is an important result within DR-CAFTA because in certain instances it allows consideration of materials from other Party, member of a Trade Agreement, as if they originated in the country that produced the final goods.

This standard applies to preferential systems and allows extending the possibility to access customs preferences granted as a result of a Trade Agreement. In essence, it allows the accumulation of materials utilized in the production in the different Parties that benefit from a preferential treatment, in order to determine if the requirements for preferential treatment have been met. The relevance of it is that most of these plans are bilateral; this means that origin can be accrued only among the Parties of the same Trade Agreement.

Presently Guatemala enjoys an Extended Accumulation in DR-CAFTA for apparel and textiles with Mexico and Canada. This mechanism has only been activated with Mexico, because Canada has not agreed to implement a Customs Cooperation Agreement with the United States.

The technical and legal process with Mexico to conclude this regulation and include it as part of the Trade Agreements that the Central American countries have executed with this partner, lasted approximately two years, and were concluded and implemented in 2008.



The apparel industry in Central America can utilize raw material from the United States as well as from Mexico and export it, taking advantage of customs preference, to Mexico or to the United States under the corresponding trade agreements. This mechanism works for certain quotas. **The way to distribute these quotas** was not adopted and therefore it remained under a “first come, first served” basis. Exporters indicate that this does not provide sufficient certainty and thus, they have not used it. However, the Dominican Republic has been the main beneficiary.

The proposal would be that this same “concept” be extended to other products within the Textile and Apparel Sector as well within other sectors, especially manufacturing because the CAFTA region is a net importer of raw material and this would represent an increase in exports to the United States.

One possible difficulty could be the objection from the industrial sectors in the United States, because products manufactured with raw materials from third countries would benefit from the customs preference. Therefore, products that are not sensitive for the US industry should be identified. **Another sector which could benefit is the Central American agricultural sector**, but some productive sectors oppose to this type of plans.

✓ **Benefits of Extended Accumulation**

- a. Increased possibility of procurement of intermediate raw materials and other materials because these may be obtained from countries members of a Trade Agreement, as well as from third countries with which Trade Agreements have been implemented, providing customs preferences under the agreement used by the country which benefits from the Extended Accumulation for exports.
- b. Reduction of production costs for industries as a result of an increased offer from the countries that produce raw materials and intermediate materials.
- c. Increased job opportunities offered by the companies involved in the industry of raw materials, intermediate materials and final products.
- d. Economic benefits for the companies involved in the manufacture of this type of goods because under these preferences they can reduce the costs of exports to other markets.
- e. Increased competitiveness of the processing industry with other countries that do not enjoy this accumulation of origin nor customs benefits included in the Trade Agreements.



- f. Increased regional integration as this promotes the purchase of raw materials and intermediate materials among regions.
- g. Is a good precedent for future negotiations with commercial partners interested in this new type of mechanism of Accumulation of Origin.

2. Commercial controversies between Central America and the Dominican Republic

The increased commercial relations between Central America (C.A.) and the Dominican Republic (DR) originate from the Trade Agreement implemented in all the member countries. This agreement excluded the possibility that products from free trade zones or those covered by special programs could enjoy customs preferences. On the other hand and as a result of the implementation of DR-CAFTA, commercial relations between Central America and the Dominican Republic take a substantial turn and generate a dual legal structure on foreign trade. This means that exporters in the countries that participate in the exchange may select one of the systems established by both trade agreements: CAFTA and TLC C.A. – DR. The main problem surfaced because DR-CAFTA regulations were utilized together with the preferences of the Dominican Republic (All are under free trade, except for 21 products).

This has raised concerns within the DR industry and government authorities have initiated investigations and imposed restrictions against Central American products, especially those originating from Guatemala, El Salvador and Costa Rica.

In previous months the Council of Ministers of Economic Integration (COMIECO) invited the Secretary for Trade and Industry of the Dominican Republic to participate in a meeting to discuss this situation. However, he did not attend. Finally a meeting was held in Costa Rica at the Ministers level, but the possibility of integrating a working group to resolve the issue was not discussed. It is expected that the Ministers Meeting on CAFTA-RD will include this issue in the agenda.

At present the Dominican Republic has presented three options for Central American exporters: to

1. Export under DR-CAFTA with customs preferences, but waiving the benefits of special programs.
2. Export, taking advantage of special programs but without the customs preferences under DR-CAFTA.



3. Export taking advantage of customs preferences under DR-CAFTA but making use of the rules of origin and of the reduction of taxes under this agreement.

The main problem is that DR is making retroactive collections to Central American companies for up to three years and in many cases this could leave them outside of the market.

In addition, DR is implementing a series of protection measures under the Agreement.

This matter has made the government of El Salvador uneasy, because they say that CAFTA “drilled” the Central American Tariff even more. Also, this country has also shown concern on the effects of trade of products originated from special programs on intra-regional trade. With this argument El Salvador may also include this matter in the agenda of the next Ministers meeting.

This matter is far from being resolved because if it is determined that products originated from special programs cannot be exported at the intra-regional level nor between Central America and the Dominican Republic, exports in the region would be seriously compromised.

At this time the United States has not defined its position, so it is important to contact the USTR on this matter.

Costa Rica has initiated consultations on the mechanism to resolve differences under CAFTA-RD.

3. Controversies between Investors and Governments of the DR-CAFTA region

Even if each country has its own priorities and operates independently, it is important to address this issue because of its relevance, international image, the US perspective, etc.

It is also relevant because DR-CAFTA not only applies to Central American countries and the Dominican Republic, but also has implications on the United States. This means that DR-CAFTA also affects our commercial partner, even if, at present, it is generating the Investors-State situations.

4. Compliance of DR-CAFTA provisions on behalf of USTR: the case of Honduras' sugar quota

On December 2009, USTR determined that Honduras could ship 6,163 metric tons of sugar under DR-CAFTA for 2010, but the use of the correct government data in the calculation would have given it an additional 2,477 metric tons. This would have amounted to 8,640



metric tons, which is the amount specified in an appendix to the agreement. According to its rules, a signatory can ship the lesser of either the amount specified in the agreement's annex or its trade surplus in sugar, syrup and sugar-containing products for the most recent year in which data is available.

Honduras has traditionally been a net surplus producer and the lowest surplus it has recorded was 32,166 metric tons in the wake of a 1998 hurricane. This fact should have signaled to USTR that a surplus of slightly more than 6,000 tons was likely inaccurate. According to a letter sent by the Honduran central bank to the U.S. embassy in Tegucigalpa, the correct figure for Honduras' 2008 sugar surplus was 73,187 metric tons.

The additional sugar access that was denied by USTR's use of incorrect data would be roughly worth more than US\$1.5 million in exports to small cane growers in Honduras at a time of economic hardship. Honduran Minister of Industry and Commerce, Oscar Armando Escalante, wrote a letter to U.S. Trade Representative Ron Kirk on July 1st 2010, which has not been responded. This letter followed several written communications and personal meetings of Honduran officials with USTR, on which David Oliver acknowledged that the U.S. Government had used incorrect data to calculate Honduras' DR-CAFTA sugar allocation, but said correcting this error would set a bad precedent. The last message from USTR was that officials had no intent of answering the letter and that the matter had been "sufficiently discussed."



Annex

Costa Rican-American Chamber of Commerce®

Comments on DR-CAFTA Implementation and Compliance Submitted by AmCham Member companies

INTELLECTUAL PROPERTY RIGHTS

DR-CAFTA Article 15.10 provides 10 years of data exclusivity for new agrochemical products registered in member parties. To comply with this obligation, Decree 35828 MAG-S-MINAET-MEIC- COMEX (published 15 March 2010) was part of DR-CAFTA implementation and introduced necessary amendments to Decree 33495 MAG-S-MINAE-MEIC. Effective data exclusivity protection for novel agrochemical products in Costa Rica should be available. Previously, Decree 34903-MAG-S-MINAET-MEIC-COMEX of 21 November 2008 did introduce data exclusivity protection, but was substituted (abolished by) with Decree 35838.

Inspired in the existence of data exclusivity protection, since May 2009 CropLife member companies have filed at least 7 applications for novel agrochemical products to the Costa Rican market and duly requested data exclusivity protection. None of them have been awarded a regulatory decision.

While Costa Rica did comply with DR-CAFTA obligations in the rulebooks by issuing of Decree 35828, data exclusivity remains unenforceable if authorities do not evaluation products. Some applications have been waiting more than 15 months for a regulatory decision. In other words, there is a de facto non-enforcement of DR-CAFTA implementing legislation.

INSURANCE

Trade/commerce related issues that affect companies' ability to effectively take advantage of DR-CAFTA



The main commitments Costa Rica acquired under DR-CAFTA in connection with the insurance market are the following:

1. Lifting of the insurance monopoly on insurance
2. Creating of an independent regulatory and supervisory body (General Insurance Superintendence or “SUGESE”)
3. Establishment of regulations necessary for the granting of licenses to do business as an insurer in Costa Rica.

On paper, all three items have been completed to date. However, there are certain areas where the lifting of the insurance monopoly could benefit from greater intervention and support by government agencies charged with enforcement of antitrust laws.

The state-owned Instituto Nacional de Seguros (“INS”), formerly the monopoly insurer, has been permitted to continue to operate in the new market as a commercial insurer. Although the monopoly has been eliminated and new insurers, such as Assa, have been licensed to operate, there remain a series of practices on the part of INS that are affecting insurers’ ability to effectively compete in the new market. These practices, both individually and especially when taken together, would appear to constitute behavior that is contrary to Costa Rican antitrust law.

- **Exclusivity in insurance agency agreements**

Prior to the enactment of the Insurance Market Act (“Ley Reguladora del Mercado de Seguros”), but subsequent to Costa Rica’s signing of DR-CAFTA in 2006, INS drafted a new “insurance agency agreement” with all of the existing insurance agencies (formerly known as “comercializadoras de seguros”). These agencies were then responsible for distribution of approximately 70% of all insurance sold in Costa Rica (the remaining 30% was either sold directly by INS to consumers, by individual agents – natural persons –, or to the Costa Rican Government). These agreements, signed with all existing insurance agencies (nearly 70 companies), all contain an exclusivity clause that requires the agencies to obtain INS’s consent prior to engaging in business with other insurers in order to promote and sell their products. However, by law and given the nature of insurance agents, agencies may sell insurance products for more than one company provided that they do so in lines of business that do not compete amongst themselves (for example, an agency may legally sell auto insurance for company ‘A’, fire insurance for company ‘B’, and life insurance for company ‘C’).



Given the state-owned company's dominant position in the market to date, such exclusivity provisions are likely illegal under article 12.a) of the Law for the Promotion of Competition and the Effective Defense of Consumers (Law 7472). These exclusivity provisions effectively thwart competition downstream because they tie all insurance producers to INS and they will make the transition to an open market slower and more cumbersome.

It is our understanding that the Commission for the Promotion of Competition (COPROCOM) has recently opened an investigation into these contracts. However, to our knowledge, no action has been taken and the market would definitely benefit from a swifter and more forceful response from the authorities.

- **Predatory pricing**

The state-owned insurer, INS, has launched a campaign to match any quote offered by a private insurer. While the opening of the insurance market certainly sought to lower average insurance premiums through competition, there have been many instances where INS has lowered its prices beyond what is technically feasible. Under the Insurance Market Act and following international standards, insurance rates in Costa Rica are not fixed by the regulator. However, the law requires such rates to be "sufficient" (i.e., premiums collected must be based on sound technical, financial and actuarial information such that those premiums will be enough to pay claims and administrative expenses). The determination whether a premium is "sufficient" must be made by SUGESE as part of a company's rate and policy form filings. Once the rates are filed, an insurer is free to move within the methodology set in the rate filing in order to determine premiums. Despite this, on many occasions the state owned INS has dropped its quotes freely, without regard to any technical standards, possibly infringing both the Insurance Market Act (premium insufficiency) and the antitrust laws (Law 7472, art. 12.f) in order to retain an account.

This is part of a systematic effort on the part of the state company that may have a dangerous outcome for the stability of the insurance sector, since no company can sustain pricing at or below cost for long without endangering its ability to pay claims.

All of the above must be noted with additional concern taking into account that

INS is a state-owned company; thus, on the one hand, the Costa Rican Government is seeking to enhance competition in the field and, on the other hand, the actions of the Government (through INS) affect the proper development of the market.



MULTILATERALITY

- **BRIDGESTONE FIRESTONE COSTA RICA**

Bridgestone de Costa Rica faces a serious issue with respect to El Salvador's interpretation of the concept of "multilaterality" in the DR- CAFTA agreement. El Salvador does not recognize the tariff negotiated by signatory countries for goods produced inside the DR-CAFTA region by US Companies, regardless of the the regime status (Free Trade Zone for BSCR) of the Company.

BSCR made a shipment under CAFTA rules which was taxed by Salvadorian Customs. The Ministry of Foreign Trade of Costa Rica is aware of the case and is taking the appropriate legal measures the treaty provides in order to resolve the problem.

In our opinion as a US Company, it is very important for the stability of the agreement if USA Commerce agencies express their concern about this matter.

- **DR Interpretation Chapter 4.1**

KRAFT FOODS COSTA RICA

Regarding chapter 4.1 of the CAFTA Protocol, we are concerned about the interpretation given by the Dirección General de Aduanas (DGI) in Dominican Republic which we consider to be abusive and extreme. This chapter establishes that there cannot be a tributary double benefit in the country of destination, with which we absolutely agree, the issue is that this has been taken to the extremes by DR in affirming that if the company enjoys this benefit in the country of origin, even if the products entering DR are excluded, the benefits given by the TLC should not be applied at their entry to DR. (e.g. Régimen de Perfeccionamiento Activo).

We strongly believe that if this is going to be the position taken by DR, they should have previously communicated and discussed it with the other member countries which are not applying it in the same way and do not share this interpretation. Furthermore, they should establish a reasonable period of time for companies to either come forward and present their arguments or make necessary adjustments before applying it in the DGI.