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Promotion of the Concept of the Rule of Law Through the Implementation of the Central America Free Trade Agreement

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Promotion of the Concept of the Rule of Law Through Implementation of the Central America Free Trade Agreement

By Phillip A. Buhler, Esq., Moseley, Prichard, Parrish, Knight & Jones

I. Prologue – The Rule of Law and the Liberal Tradition

The concept of "The Rule of Law" is the foundation for stable, impartial and tenured systems of jurisprudence in developed and developing modern industrial democracies. It is a concept which allowed the advance of administrative and judicial systems from the absolute rule of individuals and elite groups to governments based upon the will of the broad population. Indeed, this principle has allowed the development of advanced legal

systems which in turn have permitted the introduction of complex transnational commercial relationships and the rapid integration of global commerce and society.

William Pitt acknowledged that "where law ends tyranny begins." Friedrich Hayek, decrying the decline of the rule of law in the mid-Twentieth Century, wrote that "the Rule of Law means that people do not have to answer to the arbitrary decisions of governmental officials, instead they guide their actions by what is prohibited by a clearly

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Message from the Chair:

Section Celebrates Its 25th Anniversary With a Look at Its History and a Focus on Its Future



The Membership of the ILS

I am excited and honored to have been asked to lead the over 1,100 lawyers who make up the current membership of the International Law Section and the thousands of other international practitioners

within the Florida Bar who are not yet members of the ILS. The ILS is unique among all the sections of the Florida Bar because its members practice in virtually every discipline known to the law. Within our membership are lawyers who practice international transactional law, litigation, international arbitration, travel law, tax and estate planning law, immigration law, crimi-

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defined law.” Very recently, a Chinese lawyer who has challenged the lack of a fair and impartial legal system in his own country, and has been persecuted for this challenge, wrote his summary of the principle:

“The opposite of rule of law is rule of person. In contrast, a key aspect of rule of law is ‘limitation’. Rule of law puts limits on the discretionary power of government... The rule of law ensures that individuals have a secure area of autonomy and have settled expectations by having their rights and duties pre-established and enforced by law.”

Quoting the Eighteenth Century philosopher Charles de Secondat Montesquieu, “We are free because we live under civil laws.”¹

In the summer of 2006 lawyers and businessmen in the Dominican Republic, the United States and most of Central America experienced full implementation of the Dominican Republic – Central America Free Trade Agreement (hereinafter CAFTA). This regional trade agreement, following on the general model of the North American Free Trade Agreement (NAFTA) and the parameters of the General Agreement on Tariffs and Trade (GATT), is intended to establish a comprehensive legal regime to reduce and eventually eliminate most national barriers to the trade of goods and services between the United States and the countries of Central America and the Dominican Republic.

There is a substantial history in much of Central America of efforts to create free and open markets and promulgate a stable legal regimen to encourage development through foreign commerce. The nations of Central America, initially established as the United Provinces of Central America, obtained independence from Spain scarcely a generation after the United States, and were governed in the formative years (the 1820s) by a classic liberal regime. The government sought to break with the statist and mercantilist Spanish imperial system by opening the region to foreign commerce and reducing or eliminating

the influence of the landed holdings of the Church and Iberian/Creole aristocracy. The Liberal policies of this government included elimination of many barriers to foreign investment and trade, promotion of capitalist enterprises and settlement of foreign nationals (principally British and later German and North American).²

Unfortunately, these policies did not lead to uniformly positive results. The influx of foreign investment and commerce into the nascent United Provinces caused economic and social dislocations in certain areas and led to resentment of outside influence and a certain insularity that endures. The struggle between rival interests and their reaction to the opening of Central America to free trade also led to a series of civil wars and polarization between Liberal and Conservative parties that existed well into the Twentieth Century. The failure of Central America’s first liberal regime was reflected most starkly in the break-up of the nascent Central American republic by 1840 into the respective states which exist today. Not only did this reaction create difficulties for foreign trade and relations, but also established internal barriers within the former United Provinces which in part still exist.

II. The CAFTA – A Summary and Overview³

CAFTA is a broad free trade agree-

ment governing tariff and regulatory matters for the trade of goods and services between the United States, on the one hand, and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic on the other. As set forth more fully in Section III below, CAFTA follows a succession of free trade agreements between the United States and other countries in Latin America and other parts of the world.

On October 1, 2002, President George Bush notified Congress of the Administration’s intention to enter into negotiations for a free trade agreement with the five Central American countries. Those negotiations took place between January and December 2003. Negotiations were completed with all of these countries except Costa Rica, which withdrew and later renewed negotiations which were ultimately completed in January 2004. Separate negotiations between the United States and the Dominican Republic also began in January 2004 and with the decision to incorporate the Dominican Republic into CAFTA, those negotiations were completed by March 15, 2004. CAFTA was ultimately signed by all seven party nations on August 4, 2004.⁴

Ratification of CAFTA by the signatory countries has been a longer, and in some cases, much more difficult process. In the United States,

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after a contentious debate in Congress and nationally, the U.S. Senate passed implementing legislation on June 30, 2005 with the House of Representatives following with a very close vote on July 28, 2005. President Bush signed the legislation into law on August 2, 2005.⁵

In Central America, several party nations saw their national legislatures ratify CAFTA by large margins, and relatively soon after formal signing in 2004. The Salvadoran legislature was the first to ratify CAFTA on December 17, 2004, followed by the Honduran legislative ratification on March 3, 2005 and Guatemalan ratification on March 10, 2005. The Dominican Republic ratified CAFTA on September 6, 2005 with an almost unanimous vote in the Chamber of Deputies and the Senate.⁶

Ratification has been most difficult in Nicaragua and Costa Rica. The Nicaraguan ratification process involved strident opposition in some quarters, and CAFTA was finally ratified by a narrower margin on October 9, 2005.⁷ The ratification process in Costa Rica has been held up based upon objections by unions and others to several aspects of CAFTA, including in particular opening up of trade in insurance and telecommunications services and the possibility of privatization of certain State industries.⁸ President Oscar Arias, who favors CAFTA, won election in 2006 by a narrow margin on his support for the agreement and in July 2007 he prevailed in the Costa Rican court system in his effort to hold a national referendum on CAFTA. That referendum is scheduled to be held on October 7.⁹

CAFTA contains a provision, at Chapter 22, Article 22.5, that the Agreement shall enter into force on January 1, 2005 provided that the United States and one or more other signatories notify the depository that they have completed their applicable legal procedures, but if the Agreement did not enter into force on January 1, 2005, the Agreement shall enter into force after the United States and one or more other signatories make such a notification, on such later date as

they may agree. Due to both ratification and implementation issues, the 2005 date was not met. Respective official government websites indicate that CAFTA entered into force in El Salvador on March 1, 2006 and in Honduras and Nicaragua on April 1, 2006. After several delays CAFTA went into force in Guatemala on July 1, 2006 and in the Dominican Republic on March 1, 2007. The CAFTA provisions now apply in the United States as to the countries which have implemented the Treaty.¹⁰

It should also be noted that CAFTA does not change the customs and trade relationships between the nations party to the Treaty in Central America and the Dominican Republic. Trade between these countries is governed by existing bilateral agreements which to a great extent have reduced or eliminated many of the prior trade barriers.¹¹ One of the arguments in the Costa Rican debate is that CAFTA will encourage the Central American countries to come together themselves. Some progress is being made between Honduras, Guatemala and El Salvador on this score, but on the other hand opposition to CAFTA in some quarters has stalled negotiations with the European Union on a similar agreement.¹²

III. Precursors and Successors

The reduction of tariffs and other trade barriers and the effort to open up free trade in Central America substantially predates the beginning of the CAFTA negotiations. In fact, the opponents of CAFTA usually fail to acknowledge that all of the signatories to the Convention have enjoyed substantially the same privileges *vis à vis* their trade with the United States for over twenty years. In many respects, CAFTA only serves to equalize these trade advantages by reducing or eliminating most of the barriers to U.S. products and businesses entering Central America and the Dominican Republic as those countries' products and businesses have enjoyed moving in the other direction.

In the early 1980s, the United States recognized the necessity of encouraging economic advancement in the Caribbean Basin, encompassing not only the Caribbean island nations

but also countries on the Caribbean littoral, including Central America. This was due in no small part to a number of political disruptions and the threat of the spread of communism, notable with the Nicaraguan Revolution in 1979, civil wars and unrest in El Salvador, Honduras and Guatemala and the expansion of the regional narcotics drug trade, with the connivance of a number of corrupt governments, from the northern coast of South America to the United States.

The administration of President Ronald Reagan established the Caribbean Basin Initiative as an effort to rejuvenate the Caribbean Basin economies and therefore reduce the incentive for radical political changes and criminal activity. The core aspect of the Caribbean Basin Initiative was the enactment of the Caribbean Basin Economic Recovery Act of 1983 (CBERA).¹³ Under the CBERA the President was authorized to grant duty-free treatment to all eligible articles originating from any beneficiary country in accordance with provisions of the Act. "Beneficiary countries" are listed in the Act, including each of the current signatories to CAFTA. The President could designate a country as a beneficiary to the CBERA if it met certain conditions, and was prohibited from designating a country as a beneficiary under certain conditions, most notably if it was a communist country; had nationalized, expropriated or otherwise seized property owned by a U.S. citizen; or had repudiated or nullified existing contracts or violated patent or trademark conventions.¹⁴ Section 2703 of the CBERA identifies commodities produced in the beneficiary countries which would be eligible for duty free treatment.

In 1990 the United States enacted the Caribbean Basin Economic Recovery Expansion Act of 1990 (Expansion Act)¹⁵ with the goal to both reaffirm the CBERA and to amend it to improve its operation. The Expansion Act addresses certain types of products in greater detail, increases duty-free allotments, more fully addresses rules of origin for the components of products and even contains amendments to the section dealing with worker rights.

In 1994 the elected leaders of thirty-four countries in North and

South America met at the Summit of the Americas. They agreed to work towards the negotiation and conclusion of a Free Trade Area of the Americas by the year 2005. In working towards that goal, a number of countries entered into negotiations with the United States to establish localized free trade agreements, the ultimate goal to combine them into a free trade area encompassing the entire Western Hemisphere.

On January 1, 1994, the North American Free Trade Agreement (NAFTA) entered into force between the United States, Canada and Mexico.¹⁶ One of the effects of NAFTA was that it eliminated the advantages enjoyed by the beneficiary countries of the CBERA and related provisions of the Caribbean Basin Initiative against Mexico in relative trade with the United States. At the same time, NAFTA became a model for the expansion of free trade regimes in Latin America.

Political stability seemed to return to Central America with the conclusion of civil wars and success of democratic elections in Nicaragua and El Salvador and efforts to control the narcotics trade in the Caribbean. At the same time, natural disasters in the form of several catastrophic hurricanes struck the Caribbean and Central America in the late 1990s, leading to severe economic disruption.¹⁷ As a result of these trends through the 1990s, in 2000 the United States enacted the United States – Caribbean Basin Trade Partnership Act (CBTPA)¹⁸ as part of the Trade and Development Act of 2000.¹⁹ The main purpose of this Act was to provide the twenty-four beneficiary countries of the Caribbean Basin Initiative enhanced trade preferences to equalize their U.S. trading privileges with those of Mexico under NAFTA and to encourage negotiations towards the Free Trade Area of the Americas. A key effect of the CBTPA was to significantly expand preferential treatment for apparel made in the Caribbean Basin region. The CBTPA would also give NAFTA-like parity on a temporary basis, pending expansion of the FTAA negotiations.²⁰ The enactment of CAFTA now supersedes these various Caribbean Basin treaties with respect to the beneficiary countries.

Shortly after the CBTPA was en-

acted negotiations began in 2003 for CAFTA. At the same time, the United States and Chile entered into a free trade agreement²¹ and by early 2007 the United States was negotiating or had signed bilateral trade agreements with Panama, Colombia, Peru and Bolivia.²² Prospects for the Colombian agreement appear dimmest due to opposition in the Democratic-controlled Senate based upon issues with Colombia's anti-guerilla campaign and alleged human rights abuses, and other political issues may yet derail negotiations with Bolivia and Peru. While the nations of the Americas were unable to reach their goal of creating a Free Trade Area of the Americas by 2005, the extent of smaller regional free trade agreements, and the potential merger of these agreements (as was done with the Central America and Dominican Republic negotiations) gives promise that the free trade concept can be expanded through much of the region.

IV. The CAFTA as an Engine to Promote the Rule of Law

In many respects CAFTA serves as a vehicle for promoting honest and stable government. An increase in legitimate trade, critical for economic development and growth in all of the party states, can only be accomplished where the legal environment gives reassurance of security and protection to those involved in trade and investment. There are five areas addressed by CAFTA which are critical to the promotion of a stable economic environment grounded in the Rule of Law.

A. Transparency and Anti-Corruption

The Preamble to CAFTA sets forth that the member states "seek to facilitate regional trade by promoting efficient and transparent customs procedures that reduce costs and ensure predictability for their importers and exporters." The parties also resolve to "promote transparency and eliminate bribery and corruption in international trade and investment."

Chapter V provides technical and practical applications for this goal. Article 5.2 mandates simplified procedures to timely release goods, thereby reducing the opportunity for extortion

and corruption in the import process. Article 5.5 requires the parties to cooperate in achieving compliance with their respective laws, and in particular requires parties with reasonable suspicion of unlawful activity related to the laws and regulations governing imports to coordinate with other parties and share information in efforts to combat unlawful activity. Article 5.10 requires that a state party, upon written request of an importer, must provide an advanced written ruling on the application of tariffs prior to the importation into its territory of goods from another party. This provision may have the effect of reducing the opportunity for corrupt customs officials to extort money from importers by holding arrived goods under false pretenses.

Chapter VII, pertaining to the elimination of technical barriers to trade, may likewise serve indirectly to reduce the opportunities for localized corruption by requiring parties to adhere to international standards and guidelines that reduce the opportunities for local officials to set their own rules for improper purposes. This is an ideal example of the application of the Rule of Law, setting uniform and widely recognized norms and standards to eliminate opportunities for chaos or corruption. Article 7.7 deals entirely with the issue of transparency. This article mandates that each party shall allow citizens of the other parties to participate in the development of standards, technical regulations and conformity assessment procedures. All such standards are to be published and made available to the public. This requires complete openness in the promulgation and enforcement of regulations and should also make these regulations reasonably uniform. This will give importers assurance of set laws. Hopefully such uniform regulations will be approved by all party states with their joint participation. Article 7.8 sets up a committee on technical barriers to monitor the implementation and administration of this Chapter.

Chapter IX, pertaining to government procurement, sets out in Article 9.13 to "ensure integrity in procurement practices." Referencing the anti-corruption measures of Article 18.8, this article requires each party

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to adopt or maintain procedures to declare ineligible suppliers that the party has determined have engaged in fraudulent or other illegal actions in relation to government procurement.

Chapter XVIII is solely devoted to the issues of transparency and corruption. Section A addresses transparency. In addition to requiring open communication between the parties and publication of each party's laws, regulations, procedures and administrative rulings, Article 18.4 establishes administrative proceedings for persons of another party directly affected by a party's administrative decisions. Section B pertains solely to anti-corruption. Article 18.8 requires each party to adopt or maintain necessary legislative or other measures to establish as criminal offenses certain matters affecting international trade or investment, including bribery of public officials, acceptance by public officials of bribes or favors, directly or indirectly, or aiding and abetting such practices.

B. Investment and Property Guarantees

The Preamble sets forth that the parties seek to "create and expand a secure market for the goods and services produced in their territories ..." and to "ensure a predictable commercial framework for business planning and investment." One of the principal objectives set forth in Chapter I is to provide adequate and effective protection and enforcement of intellectual property rights in each party's territory. The key chapter for this concept, however, is Chapter X - Investment. In addition to guaranteeing equal treatment for investors of other party states, Article 10.7 contains a clear limitation on any governmental expropriation or nationalization of a covered investment, either directly or indirectly. This article sets a general prohibition, with exceptions made for public purpose, in a non-discriminatory manner, and only upon prompt payment of "adequate and effective compensation" in accordance with provisions contained in the article. The article also specifies that such compensation must be equivalent to

the fair market value of the expropriated investment, be paid without delay and be fully realizable and freely transferable. Finally, Article 10.10 addresses a problem that has arisen as disguised nationalization in the past. This article mandates that no party may require an enterprise to appoint to senior management positions natural persons of any particular nationality. This prevents a state from gaining control over a foreign investment by requiring the company to cede control of the management of the investment to local persons with connections to corrupt local officials.

Chapter XI likewise contains, at Article 11.9, another protection against indirect nationalization by requiring free transfer of payments out of the territory of a party to prevent control over the finances of an investment and other currency restrictions that inhibit free investment.

C. Coordination and Uniformity in Domestic Laws and Equal Treatment Under Same

A third pillar for the establishment of the Rule of Law are terms in CAFTA to promulgate uniformity in domestic laws of each party affecting trade and to encourage coordination between the parties to create uniformity in their domestic laws and equal treatment of their traders and investors.

In the Preamble the parties resolve to "ensure a predictable commercial framework for business planning and investment," particularly recognizing "the interest of the Central American parties in strengthening and deepening their regional economic integration." Economic integration can only be accomplished where there is uniformity of the legal regime governing trade and commerce so as to allow the free flow of goods and services.

The Preamble also states that the parties are committed to building on their respective rights and obligations under the Marrakesh Agreement established in the World Trade Organization and other multi-lateral and bi-lateral instruments of cooperation. Under Chapter III, Article 3.2 commits each party to accord national treatment to the goods of another party in accordance with Article III of the GATT 1994, and incorporates Article III of the GATT 1994 into CAFTA. The potential for discrimi-

natory treatment in enforcement of tariffs in each party is precluded by Article 3.3 which eliminates, either gradually or immediately, most national tariffs. Article 3.5(a) permits free transit through the territory of the party states of vehicles and containers carrying products in international trade, and Article 3.11 prohibits the imposition of export taxes on any goods. These articles under Chapter III eliminate most domestic tariff regimes and thereby create a uniform open trading system, with the same system applicable in each party.

Chapter IV approaches the concept of uniformity and equalization in a different light by mandating, at Article 4.21, common guidelines for the interpretation, application and administration of provisions under Chapters III and IV, particularly as they apply to rules of origin for products to be provided with free or favorable tariff treatment. Where regulations and tariffs are not absolutely eliminated, they are subject to mandates to create uniform common regulations and guidelines for all parties to the Convention.

Similarly, under Chapter V dealing with customs administration and trade facilitation, Article 5.5 again mandates cooperation between the parties. While under this article the parties are not required to create uniform customs and trade regulations, they are required to give advance notice to other parties of any significant modifications in their administrative policies or similar developments related to their laws and regulations governing importations where those are likely to substantially affect the operation of the Convention. They are often required to cooperate in achieving compliance with their respective national laws and regulations. Due to the detailed requirements of the latter clause, it will be necessary for the parties to closely coordinate and unify, as much as possible, their respective domestic regulations in order to adequately enforce those of the other parties for the efficient continuation of trade.

There are a number of articles in various chapters of CAFTA mandating equal treatment by each party of the citizens of other parties in all aspects of trade and investment. For instance, in Chapter X on investment,

Article 10.3 requires each party to accord to investors of another party treatment no less favorable than that it accords to its own investors. In Chapter XI concerning trade and services, Article 11.9 requires the parties to provide mutual recognition of all licenses and certifications, including recognition of the education or experience obtained by citizens of another party on the same basis as that recognized for the residents of that party. In Chapter XII relating to financial services, Article 12.2 again mandates that each party shall accord to investors of another party treatment no less favorable than that accorded to domestic investors in the establishment of various types of financial services.

D. Dispute Resolution Mechanisms

One of the most important aspects of establishing the Rule of Law for the governance of any state or grouping of states is the creation of adequate and impartial dispute resolution mechanisms. CAFTA contains extensive provisions for the inter-party and private (individual) resolution of disputes arising out of the free trade regime that has been created.

Under Chapter I, Article 1.2(f) provides as a basic objective that the parties are to “create effective procedures for the implementation and application of this agreement, for its joint administration, and for the resolution of disputes.” Thereafter, Chapter XX in its entirety governs “dispute settlement.” Section A, Articles 20.1 through 20.19 contains extremely detailed provisions and procedures to follow for any disputes regarding the interpretation or application of CAFTA, where a party state considers that an actual or proposed measure of another party state is inconsistent with CAFTA, where a party state has failed to carry out its obligations under CAFTA, or where the action of another party state would cause nullification or impairment of CAFTA. Section A of Chapter XX requires consultation and mediation. Failing this, there are detailed rules for the implementation of an arbitration procedure and limited exceptions to the requirement for arbitration.

Section B of Chapter XX pertains to domestic proceedings and private commercial dispute settlement. Ar-

ticles 20.20 through 20.22 provide for referral of matters to judicial or administrative proceedings and alternative dispute resolution.

Other chapters of CAFTA set out dispute resolution mechanisms pertaining to specific aspects of the Convention. Chapter V (Customs Administration and Trade Facilitation) provides for administrative and judicial review under Article 5.8. Chapter X (Investment), at Section B, contains the most detailed and specialized investor-state dispute settlement system. This provides detailed rules mandating submission of a claim to arbitration with certain conditions and limitations. Importantly, Article 10.21 contains a detailed transparency requirement for the arbitral proceedings.

Under Chapter XII governing financial services Articles 12.18 and 12.19 provide another dispute settlement mechanism governing this aspect of the new trade regime.

With the extensive dispute resolution mechanisms set up to govern interpretation of CAFTA as a whole and to govern private disputes arising under the CAFTA regime, as well as incorporation of other international trade agreements, the state parties and their citizens should find adequate tools to enforce the terms and conditions of the new regime. This is perhaps the most important aspect of CAFTA in promoting the establishment of the Rule of Law over this free trade area.

E. Labor and Environment

Two issues that garnered the largest amount of protest outside of business and government circles during the course of the CAFTA negotiations were labor and environment. These grabbed the attention of populist protesters and also appear to be the subject of much of the anti-CAFTA writings, both in the popular press and in academic circles.²³

While CAFTA is attacked for not adequately protecting the interests of labor or satisfactorily addressing environmental concerns, it should be noted that nothing in CAFTA reduces protections in these categories, and in fact the CAFTA regime as a whole would tend to encourage promotion of protective measures. Admittedly, the general purpose of a free trade agreement such as CAFTA is not

directed to such protections, but with proper mandates and oversight of party states these goals can be addressed.

The Preamble specifies that the parties are resolved to “protect, enhance, and enforce basic workers’ rights and strengthen their cooperation on labor matters...create new employment opportunities and improve working conditions and living standards in their respective territories,” and therefore the state parties will “build on their respective international commitments on labor matters.” Also, the parties resolve to “implement this agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters,” and “protect and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories.” Other sections of the Preamble resolve to “create new opportunities for economic and social development in the region” and to “safeguard the public welfare.”

While these protective goals are the most extensively addressed terms in the Preamble to CAFTA, CAFTA also contains a full chapter devoted to labor protection, and another full chapter devoted to the environment. Chapter XVI – Labor first requires, at Article 16.2, that parties must enforce their existing labor laws. This goes beyond what some writers have deemed to be the inadequate labor protections existing in the laws of many of the Central American countries. Article 16.1 reaffirms the obligations of all members of CAFTA as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up (ILO Declaration).²⁴

Prior to the conclusion of the CAFTA negotiations, surveys were performed within the various party states and it was determined generally that the party states have sufficient labor laws on the books, although in some cases there are problems with enforcement or the ability to enforce those laws.²⁵ For this, Articles 16.5

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and 16.6 and Annex 16.5 provide for cooperation among the parties and a capacity-building mechanism whereby assistance can be obtained to help with full enforcement of existing labor laws and to bring any deficiencies up to standard. With the assistance not only of the United States but of the more prosperous Central American parties, those states which are deemed to be unable to fully enforce their existing labor laws or to implement enforcement systems acceptable to the ILO will now have the opportunity to share in both technical resources and obtain financial and informational assistance.

Chapter XVII – Environment is structured in a similar manner to the labor chapter. It also sets goals and mandates enforcement of existing laws, and furthermore provides for shared information and assistance in developing adequate enforcement mechanisms and collaborative assistance. The chapter references other multi-lateral environmental agreements to which the state parties are members and requires continued efforts to enhance the mutual support of multi-lateral environmental agreements within their jurisdiction. While certain aspects of this chapter are generalized or set in aspirational terms, such as Annex 17.9 pertaining to environmental cooperation, this will allow the parties with more advanced environmental laws and technical enforcement to readily assist others to improve their environmental regulations. The strong interest shown by many non-governmental groups during the course of the CAFTA negotiations would also indicate that pressure from these groups after the enactment of CAFTA will encourage the parties to continue to develop environmental enforcement more thoroughly than before they became parties to CAFTA. Again, CAFTA has served to spread the interest in regulation of labor and environmental matters more directly to countries which would not have benefited from these concepts without joining CAFTA.

Conclusion

The approved text of CAFTA, including its Annexes, and the goals set for implementation by the countries which have ratified the Convention provides a great opportunity to establish a relatively uniform legal system governing commerce in Central America. This uniform system will produce certainty to businesses and investors in the region, promoting the growth of commerce and free enterprise. The unification of most aspects of the legal system governing trade will also help, both directly and indirectly, to reduce abuses caused by the uncertain enforcement of varying laws and *ad hoc* enforcement of regulations. In the global economy, only this certainty will encourage the development of trade.

There is legitimacy in the concerns expressed by some about the effects of opening smaller and less developed economies to competition from large industries and agriculture based in an economic superpower.²⁶ CAFTA takes account of this in multiple special provisions and exceptions contained in Annexes and reservations as to each member country. The concerns are also noted in the set of goals enumerated in the first chapter of the Convention. There is no question that some amount of dislocation and economic stress may result from the initial implementation of the open market. However, the benefits foreseen from the application of a uniform and open legal system for the benefit of trade may extend much further than even the supporters of CAFTA can now anticipate. The free trade systems which have benefited other nations and regions, if handled properly and monitored closely, may bring tremendous benefits to Central America and the Caribbean first dreamed of by statesmen in these countries some two hundred years ago.

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Endnotes:

1 Bo Li, "What is the Rule of Law?," *Perspectives*, Vol. 1, No. 5 (2000), at www.ovcf.org/Perspectives.

2 Detailed summaries of this history can be found in: Leslie Bethell, *The Cambridge History of Latin America*, Vol. III (From Independence to c.1870), Chapt. 11 (Cambridge: Cambridge Univ. Press, 1985); Ralph L. Woodward, Jr. *Central America: A Nation Divided* (3d Ed.) (Oxford: Oxford Univ. Press, 1999); James Dunkerley, *Power in the Isthmus: A Political History of Modern Central America* (London: Verso, 1988).

3 The full text of CAFTA can be found on a number of web sites, but one of the most convenient is: www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts.

4 A summary of the procedural history of CAFTA can be found at: K. Larry Storrs, et al., *Central America and the Dominican Republic in the Context of the Free Trade Agreement (DR-CAFTA) with the United States*, CRS Report for Congress RL32322 (U.S. Congressional Research Service, Library of Congress, updated October 24, 2005).

5 Promulgated as Public Law 109-53, 119 Stat. 462 (Aug. 2, 2005).

6 J.F. Hornbeck, *The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, CRS Report for Congress RL31870 (U.S. Congressional Research Service, Library of Congress, updated Jan. 4, 2006), Appendix 1.

7 Hornbeck, *supra*; Clare Ribando, *DR-CAFTA: Regional Issues*, CRS Report for Congress RS22164 (U.S. Congressional Research Service, Library of Congress, updated Feb. 10, 2006)

8 See particularly: Storrs, *supra*; Ribando, *supra*.

9 "Trading Arguments: Costa Rica's Referendum on CAFTA," *The Economist*, July 14, 2007, p.41.

10 Statement of USTR Rob Portman Regarding Entry Into Force of the U.S.-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) for El Salvador (2/24/2006). www.tas.usda.gov/itp/CAFTA/cafta.html; see the US Government export portal at: www.export.gov/fta.

11 An early brief summary of the major provisions and expected impact of CAFTA can be found in: *Adoption of Central American Free Trade Agreement*, 98 Am. J. Int'l. L. 350 (April, 2004).

12 "Trading Arguments," *supra*.

13 19 U.S.C. § 2701 et. seq.; PL 98-67, Sec. 201 et. seq.

14 19 U.S.C. § 2702 (2000).

15 19 U.S.C. § 2701; et. seq.; PL 101-382, Title II, Sec. 201. et. seq.

16 32 ILM 289, 605 (1993); available at <http://www.mac.doc.gov/nafta/implement.html>.

17 The background to these Acts and agreements is set forth as findings and policy in Section 202 of the United States-Caribbean Basin Trade Partnership Act. Good summaries of background

issues in the region and individual countries are provided in: Storrs, *supra*.

18 19 U.S.C. §2701; see also: "Trade and Development Act of 2000" PL 106-200, 2000 HR 434.

19 PL 106-200, 2000 HR 434.

20 See: Vladimir N. Pregelj, *Caribbean Basin Interim Trade Program: CBI/NAFTA Parity*, CRS Issue Brief for Congress IB95050 (Congressional Research Service, Library of Congress, updated January 12, 2005).

21 See: Chile Free Trade Agreement, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html. See also: Jay V. Sagar, *The Labor and Environment Chapters of the United States-Chile Free Trade Agreement: An Improvement Over the Weak Enforcement Provisions of the NAFTA Side Agreements on Labor and the Environment?*, 21 *Ariz. J. Int'l. & Comp. L.* 913 (2004).

22 "United States and Peru Sign Trade Promotion Agreement: Background" (April 12, 2006); available at http://www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html; William H. Cooper, *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy*, CRS Report for Congress RL31356 (Congressional Research Service, Library of Congress, updated April 19, 2006), Table 1. Explanation and status of each trade agreement is found at the website of the US Trade representative, www.ustr.gov/trade_agreements.

23 For some opinions expressing concern or

opposition based particularly upon issues of labor see: *Que es el CAFTA o el TLC?* www.economiajusta.org/tlc/recustos-enlaces-CAFTA-tlc.html; Matthew E. Johnson, *CAFTA and International Human Rights in El Salvador: Is the United States Acquiescing to Widespread Workers' Rights Violations?*, 4 *Nw. U. J. Int'l. Hum. Rts.* 162 (Dec. 2005); Jose Silvario Marcus, *El Salvador Poverty and Social Impact Analysis on CAFTA: A Partial Equilibrium Estimate of the Treaty's Welfare Impact on the Salvadoran Population* (The World Bank Group, Feb. 2005), wbln0018.worldbank.org/lac/lacinfoclient.nsf; Marley S. Weiss, *Two Steps Forward, One Step Back – or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 *U.S.F. L. Rev.* 689 (Spring, 2003).

24 http://www.ilo.org/dyn/declares/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.

25 See: *Central America and the Dominican Republic in the Context of the Free Trade Agreement (DR-CAFTA) with the United States* (CRS Report for Congress RL32322, US Congressional Research Service, Library of Congress, August 4, 2005).

26 Concern over the impact of CAFTA on small and subsistence agricultural producers in competition with larger agribusiness has been expressed by many. See e.g. Oscar Rene Vargas, *El CAFTA y la agricultura*, www.ni.elnuevodiario.com.ni (8 Sept. 2005); Vargas, *Que es el CAFTA?*

Un Tratado entre desiguales, www.rebellion.org/noticia.php?id+20161 (Sept. 2003). The same has been expressed with regard to the sensitive textile industry, which has been extensively addressed in the Convention and its Annexes. See: Carlos Felipe Jaramillo, *Que Sabemos de los Efectos del CAFTA?* *Revista Centroamerica en la Economia Mundial del Siglo XXI* (World Bank, 2004). The business community and governments, generally, seem to be supportive. *Discurso Sr. Elias Antonio Saca Presidente de la Republica Anuncio de la Entrada en Vigor del Tratado de Libre Comercio*, www.minec.gob.sv/default.asp?id=13mnv=1 (27 Feb. 2006); Miguel E. Lacayo, *Las Oportunidades del Libre Comercio y las Mipymes en El Salvador*, www.causa.sicca.org.gt; *El TLC como tema de Campana Electoral en El Salvador*, hunnaphub.blogcindano.com.

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taxes, undergo rigorous security and background checks, and pay hefty fines for entering the country illegally. This earned legalization is not an "amnesty" program when the government penalizes immigrants with hefty fines for their illegal entry.

Tougher and More Effective Enforcement

Failure to pass the comprehensive immigration reform bill means that enforcement measures will not be adequately funded until after the presidential elections. In the meantime, the country continues to fear terrorism and to desire a reduction in illegal immigration. However, the solution to the illegal immigration problem is not to build a wall along the southern border with Mexico. Illegal immigration may be curtailed along the northern and southern borders by increasing the number of border patrol and electronic surveillance. Congress must appropriate the funds to fully staff Border Patrol and border security technology. Already Congress has committed to a variety of

technology-based security measures such as lighting, sensors, and night vision devices that would enhance the capability of Border Patrol officers to detect, locate and apprehend illegal entrants.

Conclusion

Perhaps the United States is far less divided on immigration than the current debate suggests. According to another recent Gallup Poll, generally U.S. citizens have a positive view of immigration in the abstract. "Three in four have consistently said it has been good for the United States in the past, and a majority says it is good for the nation today."⁵ A comprehensive immigration reform bill would channel this general sentiment into a bill that increases employment-based visas, creates tougher and more effective enforcement, and provides a road to legalization for undocumented immigrants already in the country. In order to successfully overhaul our current immigration systems, these three elements must be addressed and implemented simultaneously.

The goal should be to replace the current illegal flow of immigration with a lawful influx since it is arguably good for the economy and necessary for our national security.

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Endnotes:

- 1 The Gallup Poll News Service, "While Majority Unsure About Immigration Bill, Those With Opinion are Strongly Opposed," June 6, 2007.
- 2 U.S. Citizenship and Immigration Services, USCIS Update, "USCIS Reaches FY 2008 H-1B Cap," April 3, 2007.
- 3 AILA InfoNet Doc. No. 07062168 (posted June 21, 2007).
- 4 AILA InfoNet Doc. No. 07062167 (posted June 21, 2007).
- 5 The Gallup Poll News Service, "Gallup's Pulse on Democracy, Immigration," July 10, 2007.