



Examination of Asymmetrical Treatment Provided to Smaller Economies under the WTO Agreements and the DR-CAFTA

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Introduction

This document contains two tables covering the provisions of the WTO Agreements and the Dominican Republic – Central America Free Trade Agreement with the United States (henceforth the DR-CAFTA) in the following five areas:

- 1) Non-agricultural Market Access (including Tariffs, Non-tariff Measures, Rules of Origin, and Technical Barriers to Trade)
- 2) Agriculture
- 3) Intellectual Property Rights
- 4) Services
- 5) Investment

Table 1 summarizes the key provisions of the WTO Agreements in the above mentioned areas and those of the corresponding chapters in the DR-CAFTA. Table 1 also highlights the treatment provided to smaller and relatively less developed economies in the WTO Agreements. Additionally, even though there is no explicit reference to asymmetrical treatment in DR-CAFTA, Table 2 includes five categories relevant to:¹

- Differentiated schedules for compliance with commitments, especially longer periods for implementing obligations;
- More favorable quantitative thresholds for undertaking certain commitments;
- Provisions allowing for more flexibility in obligations and procedures;
- “Best endeavor clauses” and other provisions, such as the pooling of resources to implement commitments at a regional level;
- Technical assistance and cooperation measures to support national development efforts to implement the commitments contained in trade agreements.

The first category covers *time-limited derogations from obligations and longer periods for implementing obligations*. The provisions included in this category differ from those from categories 2 and 3 in that they provide for the same obligations that bind *all* signatories while allowing some countries longer periods of time to implement their commitments on account of the difference in their level of development. They do not provide, however, for adjustments or variations in the disciplines themselves. Typically, longer timeframes for phasing out tariffs in the context of a free trade agreement would fall within this category. This would also include provisions for delays for compliance

¹ The classification of the five categories follows those adopted by a seminal paper prepared by the OAS entitled *Mechanisms and Measures to Facilitate the Participation of Smaller Economies in the Free Trade Area of the Americas*, OAS Trade Unit Studies, Washington DC, 1997.

with certain commitments as those allowed to least developed countries in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. Finally, time-limited derogations would also be covered including, for example, the provision in the WTO Agreement on Trade-Related Investment Measures that allows developing countries to deviate temporarily from the general disciplines applicable to trade-related investment measures.

The second and third categories include provisions that provide for differences in obligations that take into account the level of development or size of the economies. The second category, *differentiated thresholds for undertaking certain commitments*, has been limited, however, to those provisions that refer to obligations linked with specific thresholds. For example, the WTO Agreements on Subsidies and Countervailing Measures, on Antidumping and on Safeguards provide for a *de minimis* threshold more favorable to developing countries.

Under the third category, *flexibility in obligations and procedures*, two types of provisions have been included: those allowing for flexibility in certain obligations not directly linked to thresholds and those related to procedures. For example, under the WTO Agreement on Agriculture, government measures of assistance to encourage agricultural and rural development, whether direct or indirect, are considered an integral part of the development programs of developing countries and are exempt from reduction commitments. Some procedures in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes have also been designed in consideration of the needs of developing countries such as those allowing the parties to agree to extend the periods set for establishment of panels in the context of consultations involving a measure taken by a developing country.

The fourth category includes *other commitments and “best endeavor clauses,”* which provide for binding commitments that do not fall under the other categories and diligent attempts to carry out an obligation. The WTO Agreement on Antidumping establishes, for example, that developed countries should give due regard to the situation of developing countries when considering the application of antidumping measures. The WTO General Agreement on Trade in Services contains a provision that is set out on a “best endeavor” basis whereby developed members are to provide a) the strengthening of domestic services capacity and its efficiency and competitiveness in developing WTO members, *inter alia* through access to technology on a commercial basis; b) the improvement of access to distribution channels and information networks; and c) the liberalization of market access in sector and modes of supply of export interest to developing WTO members.

Finally, all *technical assistance* commitments have been placed under the fifth category. For example, the WTO Agreement on Trade in Services requires developed countries to establish contact points to facilitate the access of developing countries’ service suppliers to information related to their respective markets concerning commercial and technical aspects of the supply of services; registration, recognition and obtaining of professional qualifications; and, the availability of services technology. Likewise, technical assistance

for developing countries is envisaged in the following WTO agreements and understandings: Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade; Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation); Agreement on Trade-Related Aspects of Intellectual Property Rights; and the Understanding on Rules and Procedures Governing the Settlement of Disputes.

It should be emphasized that the distinction between measures falling in the five categories described above is not always an easy one to make. There may often exist implicit differences in treatment among members to a given trade agreement, and this may be open to various interpretations.

While WTO Agreements provide for differentiated treatment for developing and least-developed countries in some instances, in FTAs, such as DR-CAFTA, there is no explicit reference to asymmetrical or differential treatment. Variations in the commitments and obligations between FTA parties do not necessarily reflect differences in the level of development or size of the economies but overall negotiating interests and priorities that may have influenced the outcome of the negotiation.

Moreover, it is important to keep in mind the different objectives of the WTO Agreements *vis-à-vis* regional trade agreements. The goal of the WTO is to move towards increasingly freer trade through successive rounds of multilateral trade negotiations (currently ongoing under the Doha Development Agenda). On the other hand, the objective of regional trade agreements is to progressively eliminate all barriers to trade in goods, services and investment, to the greatest extent possible, between a more limited numbers of parties within a certain timeframe. Given that regional trade agreements must comply with WTO requirements for goods (Article XXIV of the GATT 1994) and for services (Article V of the GATS), these agreements must result in liberalization of substantially all trade between the FTA parties.

Part I:

Market Access in Goods

Table 1
BASIC COMPARISON of the WTO and DR-CAFTA in SELECTED ISSUE AREAS: Non-Agricultural Market Access

I. National Treatment and Market Access for Goods

II. Rules of Origin

III. Technical Barriers to Trade

Chapter 3 National Treatment and Market Access for Goods	
World Trade Organization Multilateral Agreement on Trade in Goods²	Dominican Republic – Central America – United States Free Trade Agreement (DR-CAFTA)
Scope and Coverage	
- applies to non-agricultural goods	- Chapter 3 applies to trade in goods
Section A: National Treatment	
<ul style="list-style-type: none"> -national treatment to goods of all other WTO Members - most favoured nation treatment for all WTO Members - provisions for developing and least-developed Members - Article XIV sets out certain exceptions to the rule of non-discrimination. 	<p>Each Party shall accord national treatment to the goods of the other Parties in accordance with Article III of GATT 1994</p> <ul style="list-style-type: none"> - MFN treatment <p>Exceptions to national treatment and MFN are contained in Annex 3.2, which exempts the following from national and MFN treatment:</p> <p><i>Costa Rica</i>: controls on import of oil and derivatives; controls on export of wood in logs and boards, hydrocarbons, coffee; controls on import and export of ethanol and crude rums; controls for minimum price of bananas.</p> <p><i>Dominican Republic</i>: import of motor vehicles older than 5 years; used household appliances; used clothes; motor vehicles not suitable for operation.</p> <p><i>El Salvador</i>: controls on imports of arms and ammunition; motor vehicles older than 8 years and buses and trucks older than 15 years; of sacks and bags made out of jute and similar fibres (these controls to be eliminated ten years after entry into force).</p> <p><i>Guatemala</i>: controls on export of timber in round logs or worked logs and sawn timber more than 11cm thick; of coffee; controls on the import of weapons</p> <p><i>Honduras</i>: controls of export of wood from broadleaved forest; controls of import of arms and ammunitions; of motor vehicles older than 7 years and buses older than 19 years.</p> <p><i>Nicaragua</i>: controls on export of basic foodstuffs (beans,</p>

² Includes the provisions in the General Agreement on Tariffs and Trade, (1994 and 1947), protocols and certifications relating to tariff concessions; protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol); decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;(1) other decisions of the CONTRACTING PARTIES to GATT 1947; Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994; Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994; Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994; Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994; Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994; Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and the Marrakesh Protocol to GATT 1994.)

	brown sugar, chicken meat, coffee, corn, corn flour, corn tortillas, powdered milk, rice, salt, vegetable oil) in case of a critical shortage of that food item; controls on import of motor vehicles older than 7 years. Nicaragua may also, for the first ten years after entry into force of the agreement, maintain its existing prohibitions or restrictions on the importation of used retreaded tires (4012.10), used pneumatic tires (4012.20), used clothing (63.09) and Rags, scrap twine, cordage rope, etc (63.10) <i>United States</i> : controls on exports of logs; measures under existing provisions of the <i>Merchant Marine Act</i> of 1920, the <i>Passenger Vessel Act</i> ; actions authorized by the Agreement on Textiles and Clothing.
Section B: Tariff Elimination	
Commitment to bind (commit to not raise above a certain rate) customs duty rates.	<ul style="list-style-type: none"> - Parties may not increase existing customs duty or adopt new customs duty on originating good; - Parties will progressively eliminate customs duties (starting from MFN applied rate) on originating goods, according to staging categories that range from the immediate elimination of tariffs (upon entry into force) to elimination of duties by year 5, 10, and 15 of implementation of the Agreement.
Section C: Special Regimes	
<i>Export subsidies</i> Article 3 of the Agreement on Subsidies and Countervailing Measures (SCM) prohibits export subsidies, except as provided in the Agreement on Agriculture.	<p><i>Waivers of customs duties and exceptions thereto</i></p> <p>Parties are prohibited from adopting new waivers of customs duties or continuing existing such waivers if these are conditioned, explicitly or implicitly, on the fulfillment of a performance requirement.</p> <p>Costa Rica, the Dominican Republic, El Salvador, and Guatemala will be allowed to maintain existing measures through 2009, provided they do so in accordance with Article 27.4 of the SCM Agreement.</p> <p>Nicaragua and Honduras may each maintain such measures indefinitely for as long as they qualify as an Annex VII country (less than \$1000 GNP per capita) under the SCM Agreement.</p>
	<i>Temporary Admission of Goods</i>
	<ul style="list-style-type: none"> - professional equipment, goods for display or demonstration, commercial samples and goods admitted for sports purposes shall be granted temporary admission, regardless of origin. - duty free entry shall be granted to commercial samples of negligible value and printed advertising materials
	<i>Goods Re-entered after Repair or Alteration</i>
	No duties shall be applied to goods that reenter after being temporarily exported for repair or alteration. Repair or alteration means processes that do not destroy the good's essential characteristics or create new or commercially

	different good or transforms an unfinished into a finished good.
Section D: Non-Tariff Measures	
<i>Import and Export Restrictions</i>	
-Parties are not allowed to prohibit or restrict (except through duty charges) the import or export of goods from or to the other Parties, for example by quotas or import or export licenses. (Article XI)	<ul style="list-style-type: none"> - Parties may not adopt or maintain import or export prohibitions or restrictions on trade between them except in accordance with Article XI of GATT 1994 and its interpretative notes (Art. 3.8.1) CAFTA incorporates GATT Article XI. Clarifies that prohibited restrictions include export and import price requirements (except under antidumping and countervailing duty orders) and import licensing conditioned on the fulfilment of a performance requirement.
-Exceptions include food shortages; restrictions necessary for the application of standards or regulations for the classification, grading, marketing of commodities; import restrictions on agricultural or fisheries necessary to enforce governmental measures that operate to restrict marketing of a like domestic product; to remove a temporary surplus; to restrict production of a domestic good dependent on the imported good.	<ul style="list-style-type: none"> -CAFTA allows that a Party that has a prohibition or restriction on importation from or export to a non-Party (such as a trade embargo) may limit the importation of goods of that non-Party from the territory of another Party. As such, a Party may require, as a condition of export of a good to the other Party that good not be re-exported to a non-Party without being consumed in the territory of the other Party. (Art. 3.8.3) - Central American countries and the Dominican Republic are prohibited from requiring a person of another Party to establish or maintain a contractual or other relationship with a dealer in the importing country, and to restrict or ban imports from another Party as a remedy for a violation (real or alleged) of any law or regulation regarding importer/dealer relationships. (Art. 3.8.6 and 3.8.7)
<i>Import Licensing</i>	
Agreement on Import Licensing Procedures – objective: increased transparency - requires parties to publish sufficient information for traders to know the basis on which licenses are granted - notification requirements	<ul style="list-style-type: none"> -Consistency with the Import Licensing Agreement - Each Party is required to notify other Parties of any existing import licensing procedures (Article 3.9).
	<i>Administrative fees and formalities</i>
	<ul style="list-style-type: none"> - Parties shall ensure that fees and charges (other than customs duties, internal tax-equivalent charges applied consistent with GATT Art. III and ADCVD duties) imposed or in connection with import or export are limited to the approximate cost of services rendered and does not represent an indirect protection to domestic products or taxation on trade goods for fiscal purposes. - Parties may not require consular transactions
	<i>Export Taxes</i>
	Export taxes are not allowed. Costa Rica received exemptions for existing taxes on bananas, coffee and meat.
Section E: Other Measures	
	<i>Distinctive Products</i>
	Bourbon whiskey and Tennessee whiskey are to be recognized as distinctive products.
Section G: Textiles and Apparel	
The Agreement on Textiles and Clothing (ATC) and all restrictions thereunder terminated on January 1, 2005.	<ul style="list-style-type: none"> <i>Refund of Customs Duties</i> Excess duties paid on the importation of an originating

Trade in textile and clothing products is no longer subject to quotas under a special regime outside normal WTO/GATT rules but is now governed by the general rules and disciplines embodied in the multilateral trading system.	textile or apparel good between January 1, 2004 and the date of entry into force of the Agreement will be refunded. This can be avoided if so notified within 90 days.
	<i>Duty-Free Treatment for Certain Goods</i> Duty-free treatment shall be granted to hand-loomed fabrics of a cottage industry, hand-made cottage industry goods made of hand-loomed fabrics or traditional folklore handicraft goods.
	<i>Elimination of Existing Quantitative Restrictions</i> the United States shall eliminate the existing quantitative restrictions
	<i>Textile Safeguard Measures</i> If the reduction or elimination of duties results in such increased quantities of imports as to cause damage to a domestic industry a Party may apply a safeguard measure consisting of an increase in the duty to the lesser of MFN at the time the measure is applied or the MFN rate in force on the date of entry into force of the Agreement.
	<ul style="list-style-type: none"> - Parties may not apply a textile safeguard measure and a measure under the Trade Remedies Chapter or a measure under GATT Article XIX.
	<i>Customs Cooperation</i> Customs authorities shall cooperate to assist in enforcing their laws and regulations affecting trade in textile goods - verification measures are elaborated
	<i>Rules of Origin</i> Under the Agreement, a textile or apparel good will qualify as originating only if all processing after fiber formation takes place in the territory of a DR-CAFTA Party or if there is an applicable change in tariff classification under the specific rules of origin (annex 4.1). There is a provision that fabrics, yarns and fibers that are not available in commercial quantities in a timely manner from any DR-CAFTA Party will be considered originating. (annex 3.25)
	There is a <i>de minimis</i> exception for goods that would not be regarded as originating because certain fibers or yarns used in the production of the component that determines the tariff classification do not undergo an applicable tariff classification. These goods shall be considered originating if the total weight of all such fibers or yarns in that component is not more than 10 percent of the weight of that component. A provision on treatment of sets stipulates that textiles or apparel goods put for retail sale in sets will not qualify as originating unless each of the products in the set is originating or the total value of nonoriginating goods in the set does not exceed ten percent of the value.
	For the purposes of determining origin of woven apparel, materials originating in Canada or Mexico will be treated as

	originating (subject to a quantitative limit).
	<i>Preferential Tariff Treatment</i>
	<ul style="list-style-type: none"> - Wool Apparel Goods Assembled in Costa Rica receive a 50% preference of the duty rate of column 1 of the US Harmonized Tariff Schedule to tailored wool apparel both cut and sewn or otherwise assembled in Costa Rica from fabric produced outside the DR-CAFTA territory (Article and Annex 3.27). Preferential treatments on non-originating goods are quantitatively restricted to 500,000 square meter equivalents (SME) during each of the first 2 years after the date of entry into force of the Agreement. (Article and annex 3.27). - Non-Originating Apparel Goods of Nicaragua: some non-originating goods from Nicaragua receive the same treatment provided to the same originating goods (limited to cotton and man-made fiber apparel in HS Chapters 61 and 62). The preferential treatments on non-originating goods are quantitatively restricted to 100,000,000 square meter equivalents (SME) during each of the first 5 years; and then subject to progressive and linear reductions until the ninth year, at which time the quota amounts to 20,000,000 SME. (Article and Annex 3.28).

Comment: Market Access: WTO

In the area of tariffs, the WTO obligates countries to “bind” their tariff commitments, setting rates above which they commit to not raise their rates of duty. These commitments are set out in schedules that are annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994. Currently, 99% of developed countries’ and 73% of developing countries’ tariff rates are “bound.” Bound rates may be set above the actual applied rate – for example, Latin America countries have generally bound their tariffs at a rate of about 35%; while their applied rates are closer to 10%.

Tariff liberalization in the WTO is effected through negotiated reductions in countries’ bound tariff rates. There is no legally binding agreement with tariff reduction targets. Tariff reductions are done through unilateral concessions and by negotiations for tariff reductions. Negotiated tariff reductions are done through a variety of methods, the most common of which is a tariff reduction formula.

As a result of the Uruguay Round negotiations, developed countries’ tariff cuts were for the most part phased in over five years from 1 January 1995. The result is a 40% cut in their tariffs on industrial products, from an average of 6.3% to 3.8%. Additional tariff reductions were made in information technology (IT) products, through the Ministerial Declaration on Trade in Information Technology Products (ITA), which was concluded by 29 participants at the Singapore Ministerial Conference in December 1996. The ITA provided for participants to completely eliminate duties on IT products covered by the Agreement by 1 January 2000 (2005, in some cases). Developing country participants have been granted extended periods for some products.

Tariffs continue to be negotiated at the WTO: at the Doha Ministerial, Ministers agreed to “to reduce, or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export

interest to developing countries.” These negotiations are to “take fully into account the special needs and interests of developing and least-developed countries, and recognize that these countries do not need to match or reciprocate in full tariff-reduction commitments by other participants.” (Doha Declaration, para 16)

In August 2004 a decision called “the July package” held that “tariff reductions will be made through a tiered formula that takes into account their different tariff structures.” The package also established the following principles:

- Tariff reductions will be made from bound rates, or, for unbound tariff lines, twice the MFN applied rate on 14 November 2001. Negotiations are on the basis of HS96 or HS2002, with the results to be finalized in HS 2002 nomenclature.
- Comprehensive tariff coverage.
- Established that a formula approach will be used for tariff reduction and elimination of tariff peaks, high tariffs and tariff escalation. The formula will be a non-linear one, applied on a line-by-line basis that will be constructed in a manner such as to take fully into account the special needs and interests of the developing and least-developed country participants, including less than full reciprocity in tariff commitments.³
- Each Member (other than LDCs) will make a contribution. Operationally effective special and differential provisions for developing country Members will be an integral part of all elements.
- Progressivity in tariff reductions will be achieved through deeper cuts in higher tariffs with flexibilities for sensitive products. Substantial improvements in market access will be achieved for all products.
- Credit will be given for autonomous liberalization by developing countries for liberalization of tariff lines that were bound on an MFN basis post-Uruguay Round.

Market Access: DR-CAFTA

The objective of the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) is to establish a free trade area, eliminating tariffs among the Parties.

Tariff elimination is done on the basis of applied MFN tariffs, as set out in countries’ schedules to Annex 3.3 of the Agreement. Parties will progressively eliminate customs duties (starting from MFN applied rate) on originating goods, in accordance with the schedule set out in Annex 3.3. that includes the following staging categories:

staging category A: tariffs shall be eliminated entirely as of January 1, 2004 for textile or apparel goods and for any other goods as of the date of entry into force of the agreement;

staging category B: duties removed in five equal annual stages beginning on date of entry into force. – to be duty free January 1 of year five

staging category C: duties removed in ten equal annual stages beginning on entry into force – to be duty free January 1 of year ten

staging category D: duties removed in fifteen equal annual stages beginning on entry into force – to be duty free January 1 of year fifteen

staging category E: duties remain at base rates for years one through six; duties reduced by 8.25 percent on January 1 of year 7 and by an additional 8.25 percent on the base each year thereafter through year ten. Beginning on January 1 of year 11, duties reduced by an additional 13.4 percent of base rate annually through year 15 and shall be duty free as of January 1, year 15.

³ The development of the formula is described further in TN/MA/W/35/Rev.1 of 19 August 2003

- staging category F: duties remain at base rates years one through ten; beginning January 1 year 11, duties reduced in ten equal annual stages and will be duty free effective January 1 of year 20.
- staging category G: goods continue to receive duty-free treatment
- staging category H: goods continue to receive MFN treatment

The distribution of goods in each of these categories for each of the countries, according to the percentage of the value of imports represented, based on 2002 import data, is as follows:

	CRI	DOM	SLV	GTM	HON	NIC	USA
Staging category	Percent of the value of imports (2002) entering in each category						
Immediate	40.4%	58.3%	20.9%	16.3%	11.9%	10.4%	76.3%
5-year	2.3%	3.7%	4.6%	1.5%	3.3%	3.6%	0.0%
10-year	6.8%	7.6%	6.7%	5.4%	9.2%	8.1%	0.0%
15-year	0.6%	0.8%	0.4%	0.4%	1.4%	1.2%	0.0%
Continued duty-free	39.7%	15.5%	55.0%	61.9%	50.0%	57.0%	22.2%
J(Immediate, in accordance with existing WTO preferences)							1.3%
10-year non-linear	3.6%	2.6%	0.7%	7.4%	7.3%	2.5%	0.0%
12-year linear	0.4%	0.1%	0.4%	0.0%	0.4%	0.3%	0.0%
5-year linear; 1-year grace period		9.9%					

Source: Derived from Annex 3.5 of A Comparative Guide to the Chile-United States Free Trade Agreement and the Dominican Republic-Central America-United States Free Trade Agreement – A Study by the Tripartite Committee.

As such, upon entry into force of the agreement, the United States will eliminate duties on 76.3% of CAFTA-originating goods; the Dominican Republic will eliminate duties on 58.3% of CAFTA-originating goods; Costa Rica will eliminate duties on 40.4 % of CAFTA-originating goods; El Salvador will eliminate duties on 20.9% of CAFTA-originating goods; Guatemala will eliminate duties on 16.3% of CAFTA-originating goods; Nicaragua will eliminate duties on 11.9% of CAFTA-originating goods; and Honduras will eliminate duties on 10.4% of CAFTA-originating goods. Adding this to the percentage of goods that already enter duty free, the following percentage of goods will enter CAFTA duty-free upon the implementation of the Agreement:

United States: 99.8%
 Dominican Republic: 73.8%
 Costa Rica: 80.1%
 El Salvador: 75.9%
 Guatemala: 78.2%
 Nicaragua: 67.4%
 Honduras: 61.9%

Textiles: Duties on nearly all textile or apparel goods will be eliminated upon entry into force of the Agreement. Goods that qualify as handmade, hand-loomed or traditional folklore goods will be treated as duty-free. There are two principal exceptions to this: for the textile industries in Costa Rica and Nicaragua. For the first two years of entry into force of the agreement, the United States will charge half the MFN rate for a specified quantity of tailored wool apparel goods assembled in Costa Rica regardless of origin of the fabric. For the first ten years of the agreement, the United States shall also provide preferential tariff treatment to cotton and man-made fiber apparel goods assembled in Nicaragua, even if they do not qualify as originating.

Goods assembled in DR-CAFTA countries from US components with US thread that do not qualify as originating will be subject to MFN tariffs only on the value of the assembled good minus the value of the US component used in the good.

Chapter 4 Rules of Origin and Origin Procedures	
World Trade Organization Agreement on Rules of Origin	Dominican Republic – Central America – United States Free Trade Agreement
<p><i>Non-preferential rules of origin</i> In the WTO, rules of origin are utilized to determine the origin of goods.</p> <p><u>WTO Rules of Origin Agreement</u></p> <ul style="list-style-type: none"> - requires WTO members to ensure that their rules of origin are transparent; -that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner; -that they are based on a positive standard (in other words, they should state what does confer origin rather than what does not). - aims for common (“harmonized”) rules of origin among all WTO members, except in some kinds of preferential trade — for example, countries setting up a free trade area are allowed to use different rules of origin for products traded under their free trade agreement. -an annex to the agreement sets out a “common declaration with regard to preferential rules of origin.” - 	<p>Contains a regime on rules of origin and an annex of specific rules of origin that specify the requirements that each good must fulfill in order to be considered originating (Annex 4.1).</p> <p>This chapter provides the criteria under which a good may qualify as “originating”:</p> <ul style="list-style-type: none"> - when the good is wholly obtained or produced in the territory of a Party - when the good is manufactured or assembled from non-originating materials that undergo a specified change in tariff classification in one or more of the Parties or meets any applicable regional value content requirement - when the good is produced in one or more Parties from originating materials <p><i>Textiles regime</i> There are separate rules of origin for textiles and apparel. In textiles there is an allowance for some accumulation of products in Chapter 62 from Mexico and Canada for importation in the United States (Appendix 4.1-B)</p> <p><i>De minimis</i> The regime includes the principle of de minimis – that a good will be considered originating even if it does not comply with the change in tariff classification standard if the amount of non-originating material does not exceed ten percent of the adjusted value of the good.</p>

Comment: Rules of Origin

There is a fundamental difference between the rules of origin at the WTO and those established in DR-CAFTA. The WTO rules on rules of origin aim at harmonization of the laws, regulations and administrative determinations of general application used to determine the country or origin of goods and to ensure that such rules do not create unnecessary obstacles to trade.

Rules of origin in preferential trade agreements such as the DR-CAFTA are utilized to assess which goods will enjoy preferential access to the free trade area.

Chapter 7 Technical Barriers to Trade	
World Trade Organization Agreement on Technical Barriers to Trade	Dominican Republic – Central America – United States Free Trade Agreement
<i>Objectives</i>	<p>The WTO TBT Agreement seeks to ensure that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade.</p> <p>The Agreement recognizes countries' right to establish protection, at levels they consider appropriate, for human, animal or plant life or health or the environment, (<i>entre alia</i>) and should not be prevented from taking measures necessary to ensure those levels of protection are met.</p>
<i>International Standards</i>	<p>Parties are instructed to apply the principles set out in G/TBT/1/Rev. 8 of the WTO TBT Committee and to consult on pertinent matters under consideration by international or regional bodies.</p>
<i>Trade Facilitation</i>	<p>Parties agree to intensify joint work in the field of standards, technical regulations, conformity assessment procedures, including identifying trade facilitating initiatives for particular sectors. Includes cooperation on regulatory issues such as convergence, alignment with international standards, reliance on suppliers' declaration of conformity, use of accreditation.</p>
<i>Conformity Assessment</i>	<p>Sets out provisions for the conduct of conformity assessment procedures</p> <ul style="list-style-type: none"> -Provides for dialogue on ways to facilitate acceptance of conformity assessment results, recognizing the range of existing mechanisms for this. -Provides that Parties shall recognize conformity assessment bodies in the territories of the other Parties on no less favourable terms than accorded to conformity assessment bodies in own territory. - If a party does not accept the other Party's CAP results it shall explain its reasons. Must explain reasons for not accrediting, approving, licensing or otherwise recognizing body in the territory of the other Party.
<i>Technical Regulations</i>	<p>Must explain reasons for not accepting as equivalent technical regulations</p>
<i>Transparency</i>	<p>Requirements for notifications; establishment of inquiry point</p> <p>Obligations to allow persons of the other Party to participate in development of standards, technical regulations, and conformity assessment procedures; transmit regulatory proposals notified under the TBT agreement directly to the other Parties; describe in writing the reasons for these; respond in writing to comments on regulatory proposals.</p>

TABLE 2a
Asymmetrical Treatment
in Selected Issue Areas in the WTO

TARIFFS
<i>Time-limited derogations and longer periods for implementing obligations</i>
LDCs were given one additional year from 15 April 1994 to submit their schedules as required in Article XI of the Agreement Establishing the World Trade Organization. (<i>para 1, Decision on Measures in Favour of Least-Developed Countries</i>)
<i>Differentiated thresholds for undertaking commitments</i>
“The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.” (<i>Para 5, Decision of 28 November 1979 “Enabling Clause”</i>)
Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems. (<i>Para 6, Decision of 28 November 1979 “Enabling Clause”</i>)
<i>Flexibility in obligations and procedures</i>
“The least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities. (<i>para 1, Decision on Measures in Favour of Least-Developed Countries</i>)
<i>Specific Provisions for Smaller and Less-Developed Economies</i>
Developed parties shall, to the fullest extent possible, reduce and eliminate barriers to products currently or potentially of particular export interest to less-developed contracting parties and shall refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties. (<i>GATT Article XXXVII</i>)
(Developed parties shall refrain from imposing new fiscal measures, and accord high priority to the reduction and elimination of fiscal measures, which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products. (<i>GATT Article XXXVII</i>)
3. Negotiations shall be conducted on a basis which affords adequate opportunity to take into account: (a)the needs of individual contracting parties and individual industries; (b) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and (c) all other relevant circumstances, including the fiscal,* developmental, strategic and other needs of the contracting parties concerned. (<i>Article XXVIII bis</i>)
To the extent possible, MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging. Consideration shall be given to further improve GSP and other schemes for products of particular export interest to least-developed countries (<i>para 2(ii) Decision on Measures in Favour of Least-Developed Countries</i>)

Technical assistance
Least-developed countries shall be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services, as well as in trade promotion, to enable them to maximize the benefits from liberalized access to markets. (<i>para 2(v) Decision on Measures in Favour of Least-Developed Countries</i>)

IMPORT LICENSING
Time-limited derogations and longer periods for implementing obligations
5. A developing country Member, other than a developing country Member which was a Party to the Agreement on Import Licensing Procedures done on 12 April 1979, which has specific difficulties with the requirements of subparagraphs (a)(ii) and (a)(iii) may, upon notification to the Committee, delay the application of these subparagraphs by not more than two years from the date of entry into force of the WTO Agreement for such Member. (<i>footnote 5 of Article 2.2 on Automatic Import Licensing of the Agreement on Import Licensing Procedures</i>)
Flexibility in obligations and procedures
5. (a) Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning: <ul style="list-style-type: none"> (i) the administration of the restrictions; (ii) the import licences granted over a recent period; (iii) the distribution of such licences among supplying countries; (iv) where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account (<i>Article 3.5, Agreement on Import Licensing Procedures</i>)
Other commitments and "best endeavor clauses"
2. Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members. (<i>Article 2, of the Agreement on Import Licensing Procedures</i>) <p>"In allocating licences, the Member should consider the import performance of the applicant. In this regard, consideration should be given as to whether licences issued to applicants in the past have been fully utilized during a recent representative period. In cases where licences have not been fully utilized, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licences. Consideration shall also be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing country Members and, in particular, the least-developed country Members; (<i>Article 3.5.j, (Article 2, of the Agreement on Import Licensing Procedures)</i>)</p>

EXPORT SUBSIDIES
Time-limited derogations and longer periods for implementing obligations
Non-LDC and non-Annex VII developing country Members have an eight-year period to phase out their export subsidies (they cannot increase the level of their export subsidies during this period). With respect to import-substitution subsidies, LDCs have eight years and other developing country Members five years, to phase out such subsidies.
Differentiated thresholds for undertaking commitments
LDCs and Members with a GNP per capita of less than \$1000 per year listed in Annex VII are exempted from the prohibition on export subsidies.

Certain subsidies related to developing country Members' privatization programmes are not actionable multilaterally.

Developing country Members' exporters are entitled to more favourable treatment with respect to the termination of investigations where the level of subsidization or volume of imports is small.

SAFEGUARDS
<i>Time-limited derogations and longer periods for implementing obligations</i>
<p>2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years. (<i>Article 9.2, Agreement on Safeguards</i>)</p>
<i>Differentiated thresholds for undertaking commitments</i>
<p>1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.(2) (<i>Article 9.1, Agreement on Safeguards</i>)</p> <p>2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years. (<i>Article 9.2, Agreement on Safeguards</i>)</p>

TBT Agreement
<i>Time-limited derogations and longer periods for implementing obligations</i>
<p>12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members. (<i>Article 12.8, TBT Agreement</i>)</p>
<i>Flexibility in obligations and procedures</i>
<p>12.4 Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous</p>

technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

Other commitments and "best endeavor clauses"

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreements institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development. (*Article 12, TBT Agreement*)

Technical assistance

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members. (*Article 12, TBT Agreement*)

11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:

11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and

11.3.2 the methods by which their technical regulations can best be met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment

operated by governmental or non-governmental bodies within the territory of the Member receiving the request.

11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members.
(Article 11, TBT Agreement)

TABLE 2b
Asymmetrical Treatment
in Selected Issue Areas in DR-CAFTA

TARIFFS
<i>Time-limited derogations and longer periods for implementing obligations</i>
In the DR- CAFTA, there was comprehensive coverage of the tariff universe and all Parties are to eliminate duties on all goods, with the exception of a small number of negotiated exceptions. While there is no stated asymmetrical treatment of any particular category of countries, the results of the negotiations exhibit some differences in the pace of liberalization. According to the commitments set out in the schedules to Annex 3.3, some countries will liberalize their tariffs more quickly than others, as shown in the following result:
<p>Percentage of goods included in the tariff liberalization schedules that will enter duty-free upon entry into force of the agreement:</p> <p>United States: 99.8%</p> <p>Dominican Republic: 73.8%</p> <p>Costa Rica: 80.1%</p> <p>El Salvador: 75.9%</p> <p>Guatemala: 78.2%</p> <p>Nicaragua: 67.4%</p> <p>Honduras: 61.9%</p> <p>Percentage of goods with the longest timetables (10 years or more) for liberalization:</p> <p>United States: 0.0%</p> <p>Dominican Republic: 11.1%</p> <p>Costa Rica: 11.4%</p> <p>El Salvador: 8.2%</p> <p>Guatemala: 13.2%</p> <p>Nicaragua: 12.1%</p> <p>Honduras: 18.3%</p>
<i>Differentiated thresholds for undertaking commitments</i>
<p><i>Market Access</i></p> <p>In the article on waivers of customs duties, Costa Rica, the Dominican Republic, El Salvador, and Guatemala are allowed to maintain existing measures, provided such measures are maintained in accordance with Article 27.4 of the SCM Agreement. This ends on December 31, 2009. Nicaragua and Honduras may each maintain such measures as long as they qualify as an Annex VII country under the SCM Agreement. Thereafter, Nicaragua and Honduras shall maintain any such measures in accordance with Article 27.4 of the SCM Agreement.</p> <p>While the agreement provides for the elimination of export taxes, one country, Costa Rica, received exemptions for existing export taxes on bananas, coffee and meat.</p> <p><i>Textiles and Apparel</i></p> <p>The DR-CAFTA includes some preferential treatment in the area of textiles and apparel for Costa Rica and Nicaragua. For the first two years of the agreement, the United States will charge half the MFN rate for a specified quantity (500,000 square meter equivalents) of tailored wool apparel goods assembled in Costa Rica regardless of origin of the fabric. (Article and annex 3.27). For the first ten years of the agreement, the United States shall also provide preferential tariff treatment to cotton and man-made fiber apparel goods assembled in Nicaragua, even if they do not qualify as originating. The preferential treatments on non-originating goods are quantitatively restricted to 100,000,000 square meter equivalents (SME) during each of the first 5 years; and then subject to progressive and linear reductions until the ninth year, at which time</p>

the quota amounts to 20,000,000 SME. (Article and Annex 3.28).

Flexibility in obligations and procedures

In several cases, particularly in the area of textiles and apparels, asymmetric treatment is for goods with particular characteristics rather than for particular countries or for countries with particular characteristics. For example, goods that qualify as handmade, hand-loomed or traditional folklore goods will be treated as duty-free.

Some special provisions exist in the treatment of the rules of origin of the DR-CAFTA. There is a *de minimis* exception to the rule of origin for goods that would not be regarded as originating because certain fibers or yarns used in the production of the component that determines the tariff classification do not undergo an applicable tariff classification. These goods shall be considered originating if the total weight of all such fibers or yarns in that component is not more than 10 percent of the weight of that component. In addition, for the purposes of determining origin of woven apparel, materials originating in Canada or Mexico will be treated as originating (subject to a quantitative limit). Goods assembled in DR-CAFTA countries from US components with US thread that do not qualify as originating will be subject to MFN tariffs only on the value of the assembled good minus the value of the US component used in the good.

Specific Provisions for Smaller and Less-Developed Economies

Technical assistance

The Agreement includes a Committee on Trade Capacity Building that coordinates activities according to the needs expressed in the countries' National Trade Capacity Building Strategies.

Part II:

Market Access in Agriculture

TABLE 1
BASIC COMPARISON OF WTO AND DR-CAFTA
IN SELECTED ISSUE AREAS

AGRICULTURE	
WTO Agreement Annex 1A: Multilateral Agreements on Trade in Goods Agreement on Agriculture (AoA)⁴	DR-CAFTA (FTA) Chapter Three National Treatment and Market Access for Goods Section F: Agriculture
Definition of Terms (Art. 1) “Export subsidies” refer to subsidies contingent upon export performance, including the export subsidies listed in Art. 9 of AoA (Art. 1(e)) Product Coverage (Art. 2) Agricultural products are defined in Annex 1 as HS Chapters 1 -24 less fish and fish products plus various organic chemicals, essential oils, skins and fibers (silk, wool, cotton, flax, hemp)	Section I: Definitions (Art. 3.31) Same meanings as those under WTO AoA for “agricultural goods” (Art. 2) and “export subsidies” (Art. 1(e) including any amendment thereto)
Incorporation of Concessions & Commitments (Art. 3) Domestic support and export subsidy commitments in each Member’s Schedule are an integral part of the GATT 1994	
Market Access (Art. 4) Members provided market access concessions in their Schedules thru bound tariffs and tariff rate quotas. During the implementation period, tariff rates were reduced an average of 36% with 15% minimum cut per product for developed countries and an average of 24% with minimum 10% cut for developing countries. For “tariffified” (NTMs converted into ordinary customs duties) products, Members were required to offer (current and minimum) import access opportunities of up to 5% of their domestic consumption level ('86-'88 base period) by '00 (developed countries) or by '04 (developing countries). Members may not maintain/resort/revert to non-tariff border measures such as quotas or variable levies that have been required to be “tariffified” Special Treatment With Respect to Art. 4:2 (Annex 5)⁵ Exemption from NTM ban for “designated products” subject to “special treatment” provided: <ul style="list-style-type: none">• imports < 3% of domestic consumption;• effective production-restrictions & no export subsidies• designated “ST-Annex5” in Schedule• minimum access opportunities (MAO) of 4% dom consmptn, up to 5% by '00 (developed country) Exemption for primary ag product that is predominant staple in a developing country’s traditional diet provided: <ul style="list-style-type: none">• MAO = 1% of dom consmptn rising to 5% by '04	Administration and Implementation of Tariff-Rate Quotas (Art. 3.13)⁶ Each Party shall: <ul style="list-style-type: none">• administer TRQs in accordance with GATT Art. XIII and WTO Import Licensing Agreement• ensure that: its procedures are “transparent, made available to the public, timely, nondiscriminatory, responsive to market conditions, minimally burdensome to trade, and reflect end user preferences;” any person fulfilling requirements is eligible for import license or TRQ allocation; no quota allocation to industry ass’n or NGO; only govt authorities administer TRQ; TRQs in commercially viable shipping quantities and to maximum extent possible in amounts importers request.• strive to administer TRQs so importers fully utilize quotas• not condition TRQ use on re-export• not count food aid in determining whether TRQs have been filled consult on request
Special Safeguard Provisions (Art. 5) A Member may impose an additional duty (as set in AoA) on imports of a “tariffified” agricultural product and	Agricultural Safeguard Measures (Art. 3.15) Each Party may apply an additional import

⁴ Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries also referenced

⁵ Rice in Japan, Korea, and Philippines; cheese and sheepmeat in Israel. Japan ceased applying ST

⁶ For products subject to TRQs in DR-CAFTA, see Figures 3.3, 3.6-3.10 in *A comparative Guide to the Chile-United States Free Trade Agreement and the Dominican Republic-Central America-United States Free Trade Agreement: A Study by the Tripartite Committee*, January 2005, pp.26-32

<p>designated with the symbol “SSG” in the Member’s Schedule⁷, when the volume of imports of the product exceeds a trigger level (existing MAO) or the c.i.f. price of imports of the product in domestic currency falls below a trigger price (average ‘86-‘88 reference price)</p> <ul style="list-style-type: none"> • Exemption for imports under current and minimum access commitments and for supplies <i>en route</i> • Shorter periods and different reference prices for perishable and seasonal products • The greater the MAO, the lower the trigger volume level • Member taking special safeguard (SSG) action must do so in a transparent manner, including giving written notice within 10 days to the Committee on Agriculture, and affording interested Members the opportunity to consult • Member taking SSG may not have recourse to ordinary safeguard measures under Art. XIX of GATT 1994 or Agreement on Safeguards 	<p>duty (such duty and any other duty not to exceed lower of prevailing MFN applied rate or MFN applied rate in effect day before entry into force of FTA) on an agricultural good listed in the Party’s Schedule provided:</p> <ul style="list-style-type: none"> • quantity of imports of the good during any CY > trigger level in Party’s Schedule; • duty set in Party’s Schedule; • no safeguard measure under FTA Chapter 8 or under GATT Art. XIX or WTO Safeguards Agreement; • duty is not applied to a good subject to duty-free treatment under the Party’s Schedule or does not increase the in-quota duty under a TRQ; • safeguard implemented transparently, inc giving written notice within 60 days to any Party whose good is subject to the measure, and consulting on request; • maintained only until end of CY <p>FTA Commission and Committee on Agricultural Trade may review implementation and operation of Article <u>Agricultural Safeguard Measures & Schedules (Annex 3.15)</u>⁸</p>
	<p><u>Sugar Compensation Mechanism (Art. 3.16)</u></p> <p>In any year on 90 day notice, US has option to compensate a Party’s exporters of sugar goods in lieu of according duty-free treatment to some or all of the duty-free quantity of sugar goods listed under the US Schedule, such compensation “equivalent to the estimated economic rents that the Party’s exporters would have obtained on exports to the US of any such amounts of sugar goods”</p>
	<p><u>Consultations on Trade in Chicken (Art. 3.17)</u></p> <p>Parties to review FTA implementation and operation on trade in chicken in 9th year Costa Rica and El Salvador exchanged side letters with the U.S. agreeing to urge their agencies to work towards achieving market access for the mutual benefit of the Parties</p>
<p><u>Domestic Support Commitments (Art. 6)</u></p> <p>Unless excepted under Art. 6 or Annex 2, all domestic support for ag producers is subject to reduction commitments expressed as Total Aggregate Measurement</p>	

⁷ 38 Members reserved the right to use SSG for a limited number of products

⁸ The US Schedule subjects Central American and DR cheese, butter, ice cream, fluid fresh and sour cream, other dairy goods, peanuts and peanut butter to an agricultural safeguard measure and indicates a trigger level of 130% of TRQ. Individual Central American and DR Schedules subject US chicken leg quarters, liquid dairy, milk powder, butter, cheese, other dairy products, rough rice, milled rice, and high fructose corn syrup to an agricultural safeguard measure. Each of these Schedules includes additional but different US goods; e.g., CR also includes US beef, pork, tomatoes, carrots, sweet peppers, potatoes, beans, white corn, and vegetable oil. CR and Nicaragua are to conclude their respective negotiations with the DR on agricultural safeguard trigger levels within one year of the entry into force of DR-CAFTA.

of Support (AMS) in a Member's Schedule ("Amber Box"- i.e., other than exempted Green Box, Blue Box, developmental measures and *de minimis* support) Developed country Members agreed to reduce their AMS by 20% by the end of '00, and developing countries by 13.3% by '04.

Exemption for direct or indirect government assistance by developing country Members ("developmental measures"):

- to encourage agricultural and rural development,
- investment subsidies generally available to agriculture,
- agricultural input subsidies generally available to low-income or resource-poor producers
- to encourage diversification from growing illicit narcotic crops

Exemption for "*de minimis*" domestic support if:

- product-specific and $\leq 5\%$ (10% for developing countries) of Member's total production value of a basic ag product during the year
- non-product specific and $\leq 5\%$ of total ag production value

Exemption for direct payments under production-limiting programs ("Blue Box") if:

- based on fixed area and yields, or
- made on $\leq 85\%$ of base production level, or
- made on fixed number of livestock

General Disciplines on Domestic Support (Art. 7)

Each Member shall ensure domestic support not subject to reduction commitments under Annex 2 conform therewith and non-exempt support is included in Member's calculation of its current total AMS

Domestic Support: The Basis For Exemption From the Reduction Commitments (Annex 2)

Generally, exempted support ("Green Box") must:

- have no or minimal trade-distorting effects on production ("decoupled"),
- be provided thru a publicly-funded government program (inc govt revenue foregone),
- not involve transfers from consumer, and
- not have the effect of price support to producers

Covers general (research, pest and disease control, training, extension, inspection, marketing, infrastructural) services provided by governments, public stockholding programs for food security purposes*, domestic food aid for population sections in need*, decoupled direct payments to producers, decoupled income support, income insurance and safety-net programs, natural disaster relief, structural adjustment assistance, and certain payments under environmental and under regional assistance programs, provided measure-specific criteria are met.

*Provision of foodstuffs at subsidized prices to meet food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices qualifies

Domestic Support: Calculation of Aggregate Measurement of Support (AMS) (Annex 3)

<p>AMS is calculated on product-specific basis for each basic ag product receiving market price support, non-exempt direct payments or other subsidy not exempted from reduction commitments (“<u>Amber Box</u>”). Price support is generally measured by multiplying the gap between the administered price and a specific fixed external reference price (“world market price” ’86-’88) by the quantity of production eligible to receive the administered price. This is then evaluated against the <i>de minimis</i> threshold. Non-product specific support is calculated separately in total monetary terms and included in current total AMS calculations if exceeds <i>de minimis</i> threshold.</p> <p>Domestic Support: Calculation of Equivalent Measurement of Support (Annex 4)</p> <p>Applies to support for all basic agricultural products where market price support exists but AMS calculation not practicable and generally based on budgetary outlays</p>	
<p>Export Competition Commitments (Art. 8)</p> <p>Each Member shall not provide export subsidies other than in conformity with AoA and the Member’s Schedule⁹</p> <p>Export Subsidy Commitments Art. 9)</p> <p>Export subsidies subject to reduction commitments in terms of budgetary outlay and export quantity:</p> <ul style="list-style-type: none"> • direct subsidies, inc payments in kind, to producers or marketing board contingent on export performance • sales of non-commercial stock by governments at prices lower than on the domestic market • producer-financed payments used to subsidize exports • cost reduction measures on marketing exports, inc handling and international transportation* • internal transport subsidies more favorable on export than domestic shipments* • subsidies on ag products contingent on their incorporation in exported products (outlays only) <p>*Exemption for developing country Members provided these subsidies not applied in a manner that would circumvent reduction commitments</p> <p>Developed country Members committed to reduce export subsidies by an average 36% by value and 21% by volume by ‘00, developing country Members an average 24% by value and 14% by volume by ‘04</p> <p>Limited annual “overshooting” was permitted (“downstream flexibility”)</p> <p>Prevention of Circumvention of Export Subsidy Commitments (Art. 10)</p> <p>Export subsidies not listed in Art. 9:1 shall not be applied in a way which results in circumvention of export subsidy commitment, nor shall non-commercial transactions (food aid) be used to circumvent such commitments</p> <p>Members to work toward internationally agreed disciplines on export credits, credit guarantees or insurance</p> <p>Member claiming that quantity exported beyond reduction commitment level is not subsidized must establish that no</p>	<p>Agricultural Export Subsidies (Art. 3.14)</p> <ul style="list-style-type: none"> • Parties to work toward WTO agreement to eliminate ag export subsidies and prevent their reintroduction • No Party may introduce or maintain any export subsidy on any ag good destined for another Party’s territory, except to extent necessary to counter trade-distorting effect of subsidized exports of good from a non-Party to the importing Party’s territory, when the importing Party has not adopted agreed-on countermeasures as requested by the exporting Party

⁹ 25 WTO Members may subsidize exports for products on which they made (total 428 individual) reduction commitments, including Brazil, Canada, Colombia, EU, Mexico, Panama, US, Uruguay, and Venezuela.

<p>export subsidy has been granted on the quantity International food aid donors shall ensure aid is:</p> <ul style="list-style-type: none"> • not tied to commercial exports to recipient countries • monetized in accordance with FAO principles (“UMRs”) • to extent possible in fully grant form or terms no less concessional than Art. IV Food Aid Convention ’86 <p><u>Incorporated Products (Art. 11)</u></p> <p>Per-unit subsidy paid on incorporated ag primary product ⇒ per-unit export subsidy payable on primary product</p> <p><u>Disciplines on Export Prohibitions and Restrictions (Art. 12)</u></p> <p>Member instituting new export prohibition/restriction on foodstuffs, consistently with GATT Art. XI:2(a), shall: give due consideration to its effects on importing Member’s food security, give advance written notice to CoA and consult on request with importing Member with substantial interest</p> <p>Exemption for developing countries that are not net-food exporters of the foodstuff concerned</p> <p><u>Due Restraint (Art. 13)</u></p> <p>“Peace Clause” –now expired–whereby actions available under GATT Arts. VI and VI and SCM Agreement will not be applied on green box subsidies and domestic support and export subsidies covered by reduction commitments, and limiting non-violation nullification or impairment actions</p>	
<p><u>Sanitary and Phytosanitary Measures (Art. 14)</u></p> <p>Members agree to give effect to the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)</p>	<p><u>Sanitary and Phytosanitary Measures (Chapter Six)</u></p> <ul style="list-style-type: none"> • Parties affirm their existing rights and obligations under WTO SPS Agreement • No recourse to FTA dispute settlement for any matter under SPS chapter • Within 30 days of entry into force of FTA, Parties shall establish a Committee on Sanitary and Phytosanitary Matters thru exchange of letters providing Party reps and Committee’s terms of reference • Committee’s objectives are to help each Party implement WTO SPS Agreement, assist each Party to protect human, animal, or plant life or health, enhance consultation and cooperation and facilitate trade between Parties • Committee shall seek to promote communication between agencies responsible for SPS matters
<p><u>Special and Differential Treatment (SDT) (Art. 15)</u></p> <ul style="list-style-type: none"> • SDT shall be provided as set out in AoA and embodied in Schedules • Flexibility for developing country Members to implement reduction commitments up to 10 yrs • No requirement on least-developed country Members to undertake reduction commitments 	

<p><u>Least-Developed and Net Food-Importing Developing Countries (Art. 16)</u></p> <ul style="list-style-type: none"> • Developed country Members to take action provided under relevant Ministerial Decision • CoA to monitor follow-up <p>Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries</p> <p>Ministers <i>inter alia</i> agreed to establish appropriate mechanisms to ensure implementation of UR results “does not adversely affect the availability of food aid at a level which is sufficient to continue to provide assistance in meeting the food needs of developing countries, especially least-developed and net food-importing developing countries” (LDC&NFMDC¹⁰) and to that end to:</p> <ul style="list-style-type: none"> • review food aid levels and negotiate in the appropriate forum “a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme” • adopt guidelines to ensure that an increasing portion of basic foodstuffs is provided to LDC&NFMDC in fully grant form and/or concessional terms in line with Art. IV Food Aid Convention ’86 • fully consider requests for technical and financial assistance to LDC&NFMDC to improve their agricultural productivity and infrastructure <p>Ministers further agreed to ensure that any agreement on agricultural export credits makes appropriate provision for differential treatment in favor of LDC&NFMDC</p>	
<p><u>Committee on Agriculture (Art. 17)</u></p> <p>CoA established on entry into force of WTO Agreement</p>	<p><u>Committee on Agricultural Trade (Art. 3.19)</u></p> <p>CoAT to be established within 90 days of FTA entry into force as forum for monitoring and promoting cooperation on implementation, consultation, + additional work. It will meet at least annually and be chaired by host Party. Decisions by consensus unless CoAT otherwise decides</p>
<p><u>Review of Implementation of Commitments (Art. 18)</u></p> <ul style="list-style-type: none"> • CoA to review progress in implementation of commitments under UR reform programme based on notifications submitted by Members • Prompt notification of any new domestic support measure or modification of an existing measure, for which exemption from reduction is claimed • Members to consult annually in CoA on their participation in the normal growth of world agricultural trade within framework of AoA export subsidy commitments <p><u>Continuation of the Reform Process (Art. 20)</u></p> <p>Per long-term objective of substantial progressive</p>	<p><u>Agriculture Review Commission (Art. 3.18)</u></p> <p>ARC:</p> <ul style="list-style-type: none"> • to be established in the 14th year to review FTA implementation and operation as relates to trade in agricultural goods • to evaluate effects of trade liberalization under the FTA, operation of agricultural safeguard measures and their possible extension, progress in WTO agricultural trade reform, and developments in world agricultural markets.

¹⁰ Net Food-Importing Developing Countries include Barbados, DR, Honduras, Jamaica, Peru, St. Lucia, Trinidad & Tobago, and Venezuela. The United Nations recognizes Haiti as a least-developed country.

reductions in support and protection, Members to negotiate continuing reform process in 5 th year ('99), taking into account <i>inter alia</i> non-trade concerns, SDT, and objective to establish a fair and market-oriented ag trading system	<ul style="list-style-type: none"> • To report to FTA Commission
Consultation and Dispute Settlement (Art. 19) GATT Arts. XXII and XXIII as applied by DSU apply to disputes under AoA	Dispute Settlement (Ch Twenty Art. 20.2) FTA dispute settlement provisions apply except as otherwise may be provided
Final Provisions (Art. 21) GATT 1994 and other Multilateral Trade Agreements on goods apply subject to the AoA Annexes to the AoA are an integral part of AoA	

In the Doha Declaration (para. 13), Ministers reconfirmed their commitment to fundamental reform “encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets” Building on work under Art. 20 of AoA, they committed to negotiations aimed at:

- substantial improvements in market access;
- reductions of, with a view to phasing out, all forms of export subsidies, and
- substantial reductions in trade-distorting domestic support

They also agreed that special and differential treatment was an integral part of the negotiations to be embodied in schedules of commitments as well as in rules and disciplines “so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development” and that non-trade concerns will be taken into account.

In the July 2004 framework the General Council recognized that “[a]griculture is of critical importance to the economic development of developing countries and they must be able to pursue agricultural policies that are supportive of their development goals, poverty reduction strategies, food security and livelihood concerns.” The Council decided *inter alia*:

Cotton

- Members to work on development-related issues with international financial institutions
- Addressed ambitiously, expeditiously and specifically within ag negotiations

Domestic Support

- SDT thru longer implementation periods and lower reduction coefficients
- Harmonization in reduction by developed Members (deeper cuts on higher levels of permitted trade-distorting support)
- Substantial reduction by each developed Member in overall level of trade-distorting support
- Amber Box + *de minimis* + Blue Box support to be reduced according to tiered formula with at least 20% cut in first year
- Product-specific AMS to be capped at their average levels
- Members may make greater than formula reduction to achieve required cut level in overall trade-distorting support
- Reductions in *de minimis* to be negotiated taking into account SDT. Exemption for developing countries that allocate almost all *de minimis* support for subsistence and resource-poor farmers
- Blue Box support to be capped at 5% of (actual or potential user) Member’s average total value of ag production during historical period to be negotiated – flexibility for Member with exceptionally large % of support in Blue Box so as not called upon to make wholly disproportionate cut
- New criteria for Blue Box to be negotiated, possibly expanding to include direct payments that do not require production
- Green Box criteria to be reviewed

Export Competition

- Parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect (inc export credits, credit guarantees or insurance with repayment > 180 days; trade-distorting practices by exporting STEs, certain food aid) to be implemented in annual installments by a credible end date

- Longer implementation periods for phasing out of all forms of export subsidies by developing country Members; continued exemption for reasonable period for marketing and internal transport subsidies
- Disciplines on export credits, credit guarantees or insurance to be agreed will make appropriate provision for differential treatment in favor of LDC&NFMD
- STEs in developing country Members which enjoy special privileges to preserve domestic consumer price stability and ensure food security will receive special consideration for maintaining monopoly status
- Ad hoc temporary financing arrangements for exports to developing countries may be agreed in exceptional circumstances

Market Access

- Tariff reductions through a tiered formula will take into account different tariff structures
- Tariff reductions will be made from bound rates
- Each member except least developed countries will make a contribution
- Deeper cuts in higher tariffs with flexibilities for sensitive products
- Number of bands, thresholds and type of tariff reduction to be negotiated
- Members may designate an appropriate number, to be negotiated, of tariff lines as sensitive
- Substantial improvement in market access for each product through combinations of TRQ commitments and tariff reductions; some MFN-based TRQ expansion required for “sensitive products”
- Tariff escalation to be addressed
- Tariff simplification and SSG remain under negotiation
- SDT through lesser tariff reduction commitments or TRQ expansion, flexibility to designate an appropriate number of products as “special products,” special safeguard mechanism by developing country Members as well as full implementation of fullest liberalization of trade in tropical ag products and products of particular importance to diversification from growing illicit narcotic crops; preference erosion to be addressed

Least developed countries

- Not required to undertake reduction commitments
- Developed and developing country Members in a position to do so should provide duty-free and quota-free market access

Recently acceded Members

- Particular concerns to be addressed thru specific flexibility provisions

Explicit Asymmetrical Elements in WTO AoA:

- Time-limited derogations from obligations and longer periods for implementing obligations (Art. 15.2 Annex 5, Section B)
 - e.g., 10 years for developing countries versus 6 years for developed countries for reducing tariffs, domestic support and export subsidies
- Differentiated thresholds for undertaking certain commitments (Arts. 6.4(b), and 9.2(b)(iv))
 - e.g., lower rates of export subsidy reduction and higher *de minimis* threshold (10% vs 5%) on exempted domestic support for developing countries
- Flexibility in obligations and procedures (Arts. 6.2, 9.4, 12.2, 15.4, Annex 2 paras. 3 and 4)
 - e.g., exemption from reduction commitments for domestic subsidies by developing countries to encourage agricultural and rural development as well as diversification from growing illicit narcotic crops; exemption from reduction commitments by developing countries for marketing and internal transport subsidies in favor of exports; least-developed countries not required to undertake reduction commitments
- Other commitments and “best endeavor clauses” (Arts. 15.1, 16.1, and 20(c)) (LDC&NFMD Decision paras. 3 and 4)
 - e.g., special and differential treatment to developing countries will be taken into account in negotiations of continued reform process
- Technical assistance (LDC&NFMD Decision para. 3)
 - e.g., full consideration to requests for technical and financial assistance to LDC&NFMC

Asymmetrical Elements in DR-CAFTA

There appear to be no explicit asymmetrical elements written into the agricultural provisions of the DR-CAFTA. Like other US FTAs, DR-CAFTA covers fewer “pillars” than the WTO, and in this sense provides less scope for differentiated obligations. DR-CAFTA is essentially about market access bargained reciprocally. There are no commitments on domestic support but subsidized agricultural exports to one another are banned. Provision to re-introduce an export subsidy to counter subsidized exports from a non-Party (e.g., EU) is facially neutral, but would more likely be invoked by the United States.

An examination of the annexes and schedules attached to the DR-CAFTA reveals that it is in the agricultural sector where one finds longer transition periods for tariff elimination (15 years or longer versus 10 years for industrial goods), grace periods for or “backloading” of tariff cuts, a predominance of tariff rate quotas (e.g., 855 TRQs of the CA to the US, and 1717 US TRQs to DR-CA), and a limited number of exclusions. Under the Caribbean Basin Initiative, the U.S. already allows in over 99% of Central American agricultural exports duty-free on a trade weighted basis, with tariff protection provided for out-of-quota imports of products under U.S. tariff rate quota programs. The current average WTO-bound tariff on agricultural products is 42% in Costa Rica, 40% in Dominican Republic, 41% in El Salvador, 49% in Guatemala, 35% in Honduras, and 60% in Nicaragua. Applied tariffs may be lower on specific products.

Agricultural tariffs will be phased-out under DR-CAFTA according to specific schedules negotiated on a product and country-specific basis. Phase-outs will be immediate, 5 years, 10 years, 12 years or 15 years (17-20 years for chicken leg quarters, rice and certain dairy products). The U.S. will provide the same tariff treatment to each of the six countries, but will make country-specific commitments on TRQs. Tariffs will be eliminated for all products, except (out-of-quota) sugar for the U.S., fresh potatoes and fresh onions for Costa Rica, and white corn for the other Central American countries. The US did offer increased quotas for the DR-Central American parties on sugar but limiting access to net surplus exporting countries and also allowing US to give alternative forms of compensation.

The Dominican Republic and Central American parties have listed more US goods as eligible for protection via agricultural safeguard measures than the US has listed goods from these countries.

It should be noted that elsewhere in the DR-CAFTA, provision is made for establishing a Committee on Trade Capacity-Building Committee to foster trade-driven economic growth, poverty reduction, and adjustment to liberalized trade. The Committee will *inter alia* invite appropriate international donor institutions, private sector entities and non-governmental organizations to assist in the development and implementation of trade capacity building projects pursuant to the developing country Parties’ trade capacity building strategies, and monitor and assess progress in the implementation of these projects.

Part III:

Intellectual Property

TABLE 1
BASIC COMPARISON OF WTO AND DR-CAFTA AGREEMENTS
IN SELECTED ISSUE AREAS

INTELLECTUAL PROPERTY RIGHTS	
WTO Agreement Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	DR-CAFTA CHAPTER 15
<u>General Provisions</u> <ul style="list-style-type: none"> • Minimum Standards Agreement • Basic principles: National Treatment, Most Favored Nation Treatment (Arts. 3, 4) • Members are free to determine the appropriate method of implementation within their own legal system and practice (Art. 1) • Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)(Art.2(1)) and Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto (Art. 9(1)) 	<u>General Provisions</u> <ul style="list-style-type: none"> • Contains the national treatment obligation (Art. 15.1.8) • Allows Parties to implement more extensive protection than required under the FTA (Art. 15.1.1). • Provides for accession to a number of intellectual property treaties (Arts. 15.1.2-6) • Other general provisions: cover transparency (Art. 15.1.14), protection of existing subject matter (Art. 15.1.11-13), control of anticompetitive practices (Art. 15.1.15) and technical cooperation (Art.1.16).

Copyright and Related Rights	Copyright and Related Rights
<ul style="list-style-type: none"> • Members must comply with articles 1 to 21 of the Berne Convention (1971) and its Appendix. The one exception is article 6bis (moral rights) (Art. 9(1)). • Protection under copyright extends only to expressions and excludes ideas, methods of operation, and mathematical concepts (Art. 9(2)). • Computer programs must be protected as “literary works” (Art. 10(1)). • Member countries must provide exclusive rental rights for computer software and cinematographic works in certain circumstances (Art.11). • Member countries must provide means for performers and broadcasting organizations to prevent unauthorized fixation, broadcast or reproduction of live performances (Art. 14(1)). • Sound recordings must be protected for a term of at least of 50 years (Art. 14(1)). 	<ul style="list-style-type: none"> • Includes the right of reproduction, including temporary copies and storage in electronic form (Art.15.5.1). Other rights provided are the rights of distribution and communication to the public, including the making available to the public through interactive access, in very similar terms as provided for by the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (Arts.15.5.2, 15.6) • Includes a term of protection of not less than the life of the author plus 70 years (Art. 15.5.4) • According to DR-CAFTA, no Party may permit retransmission of television signals on the Internet without authorization of the right holder of the content and if any, of the signal (Art.15.5.10(b)). • Implements <u>the obligations concerning technological measures</u> pursuant to the WCT and WPPT. DR-CAFTA contains detailed provisions in order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures (Art. 15.5.7). • DR-CAFTA also implement WCT and WPPT provisions on <u>obligations concerning rights management information</u>. This protection is aimed at prohibiting the removal or alteration of rights management information which identifies the right holder, terms and conditions of use, any numbers or codes attached or connected to a copy of a work, performance or phonogram available to the public. Provisions include definition of rights management information, cases of civil and criminal liability as well as limited exceptions (Art.15.5.8). • Another obligation requires governments to issue appropriate laws, regulations or decrees to mandate use of authorized software by all federal or central government agencies (Art.15.5.9)

<p>Trademarks</p> <ul style="list-style-type: none"> • Member countries must grant trademark and service mark owners certain basic rights (Art. 15). • Definition of trademark (Art. 15(1)) • Actual use not a condition for registration. Minimum of three years to be a ground for refusing the application (Art. 15(3)) • Protection for service marks (Art.16) • Increased protection for well known marks (Art.16(2)) • Certain periods of trademark non-use must establish <i>prima facie</i> evidence of abandonment, with specific exceptions (Art. 19(1)). • Member countries may not impose special requirements, such as use with another trademark, that could impair a trademark's role as a source indication of a product or service (Art. 20). • Initial trademark registration must be for a term not less than seven years, and registration must be renewable indefinitely (Art. 18). 	<p>Trademarks</p> <ul style="list-style-type: none"> • DR-CAFTA requires the protection of collective, certification and sound marks and may extend trademark protection to geographical indications and scent marks (Art. 15.2.1). • Building on TRIPS Article 20, DR-CAFTA, establishes that Parties are to ensure that the use or effectiveness of trademarks shall not be encumbered through measures requiring the use of the common name or generic reference as the common name for goods or services (Art. 15.2.2). • Includes provisions dealing with rights conferred and exceptions and limitations to these rights similar to Articles 16.1 and 17 of the TRIPS Agreement. However, under exclusive rights for trademark owners, DR-CAFTA adds coverage for goods or services that are related to the goods or services in respect of which the trademark is registered, including geographical indications, where use would result in likelihood of confusion (DR-CAFTA Art. 15.2.3). • DR-CAFTA broadens the protection of well-known marks to goods and services which are not similar, whether registered or not, provided that there is a connection or association between the goods or services and the owner of the well-known mark and that the interests of the owner of the trademark are likely to be damaged (Art. 15.2.5). • Under DR-CAFTA, a Party shall not require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services to determine whether a trademark is well-known (Art.15.2.5 fnt.6). • Sets forth the objective to provide a system for the electronic application, processing, registration and maintenance of trademarks, including an on-line database for trademark application and registration (Art.15.2.6-7). • Provides for a renewable term of registration of no less than 10 years (Art. 15.2.9). • Establishes that no Party may require recordal of trademark licenses to establish the validity of the license or to assert any right in a trademark (Art.15.2.10).
<p>Domain Names on the Internet</p> <p>Not included in TRIPS</p>	<p>Domain Names on the Internet</p> <ul style="list-style-type: none"> • Provides for an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain-Name Dispute-Resolution Policy (UDRP), in order to address the problem of trademark cyber-piracy (Art.15.4.1). Also requires Parties to provide online public access to a reliable and accurate database of contact information for domain-name registrants with due regard to laws protecting privacy. (Art. 15.4.2)

<p>Geographical Indications</p> <ul style="list-style-type: none"> Member countries must provide the legal means to prevent use of product descriptions that mislead the public about geographic origins of goods, and must invalidate trademark registrations that contain a false indication of geographic origin (Art.22). With limited exceptions, additional protection for wines and spirits (Art.23(1)). Further negotiations will address a multilateral system of notification and registration of geographical indications for wines and spirits (Art. 23(4)). 	<p>Geographical Indications (GI)</p> <ul style="list-style-type: none"> DR-CAFTA adds to the definition of GI by establishing that any sign or combination of signs, in any form whatsoever, shall be eligible as a geographical indication (Art. 15.3.1). DR-CAFTA clarifies that “legal means to identify” refers to “a system that permits applicants to provide information on the quality, reputation, or other characteristics of the asserted geographical indication” (DR-CAFTA Art. 15.3.2. fnt.8). Regarding the relationship between trademarks and geographical indications, DR-CAFTA provides as grounds to refuse protection or recognition of GIs cases where a geographical indication is likely to be confusingly similar to pre-existing registration, good-faith pending application or trademark rights (Art.15.3.7) and that the rights were acquired in accordance to each Party’s law. DR-CAFTA establishes specific requirements for the system to apply for protection or recognition of geographical indications. These requirements cover several procedural steps such as: minimum of formalities, transparency, publication, opposition procedures and public notice (Arts. 15.3.3-6).
<p>Industrial Designs</p> <ul style="list-style-type: none"> Protection for independently created industrial designs that are new and original (Art. 25). Not designs dictated essentially by technical or functional considerations (Art. 25). Significant for textile sector 10 year term (Art. 26). Through industrial design law or copyright (Art. 26). 	<p>Industrial Designs</p> <p>Not included in DR-CAFTA</p>
<p>Protection of Encrypted Program-Carrying Satellite Signals</p> <p>Not included in TRIPS</p>	<p>Protection of Encrypted Program-Carrying Satellite Signals</p> <ul style="list-style-type: none"> DR-CAFTA protects right holders of encrypted satellite signals with civil and criminal sanctions against (i) willful unauthorized reception and further distribution of that signal, and provides for sanctions for those dealing with (ii) devices or systems knowing or having reason to know that their function is primarily of assistance in decoding an encrypted signal without authorization of the lawful distributor (Art. 15.8).

<p>Patents</p> <ul style="list-style-type: none"> Member countries must make patent protection available for any inventions, in all fields of technology, if they are new, involve an inventive step, and are capable of industrial application (Art.27(1)). Member countries may exclude particular inventions from patentability only in a few narrowly defined cases (Art. 27(2), (3)). Patents must include the right to exclude others from making, using, offering for sale, selling, or importing infringing products (Art. 28(1)). Use without authorization of the right holder is allowed in certain limited circumstances (Art. 31) The patent term must be at least 20 years from the filing of the application (Art. 33). 	<p>Patents</p> <ul style="list-style-type: none"> On patentable subject matter DR-CAFTA indicates that nothing shall be construed to prevent a Party from excluding inventions from patentability as set out in Articles 27.2 and 27.3 of the TRIPS Agreement (15.9.2). Regarding patent protection for plants, under DR-CAFTA, Parties agreed to undertake “all reasonable efforts to make patent protection available by the date [DR-CAFTA] enters into force.” (Art. 15.9.2) DR-CAFTA covers aspects of the so-called regulatory review or Bolar exception in the patent section. These provisions link patent protection with applications by third parties to obtain marketing approval or sanitary permits. Under DR-CAFTA use of the subject matter of a subsisting patent to support a regulatory application shall be limited to purposes of meeting the marketing or sanitary requirements. Thus, any product produced under such authority shall not be made, used, or sold in the territory of the Party or exported, if permitted, for purposes other than obtaining marketing approval or sanitary permits. Pursuant to DR-CAFTA this provision is applicable to pharmaceutical or agricultural chemical products (Art.15.9.5). A Party may revoke or cancel a patent only when grounds exist that would have justified a refusal to grant the patent and indicates that fraud, misrepresentation or inequitable conduct may be the basis for revoking, canceling or holding a patent unenforceable (Art.15.9.4). Requires the adjustment of the term to compensate for unreasonable delays in granting the patent triggered by a delay of more than five years from the date of filing in the territory of the Party or three years after a request for examination has been made (Art.15.9.6). Establishes a twelve-month grace period so any public disclosures made, authorized by or derived from the patent applicant do not affect the patentability of the invention (Art.15.9.7). Each Party shall provide patent applicants with at least one opportunity to submit amendments, corrections and observations in connection with their application (Art.15.9.8).
<p>Layout-Designs of Integrated Circuits</p> <ul style="list-style-type: none"> Incorporates provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty) (Art. 35). Protection for original layout designs (Art. 35). Exclusive rights of reproduction and the right of importation, sale and other distribution for commercial purposes (Art. 36). Reverse engineering allowed (Art. 37). 10 year protection (Art. 38). Protection to articles containing infringing integrated circuits and treatment of innocent infringers (Art. 37). 	<p>Not included in DR-CAFTA</p>

<p>Protection of Undisclosed Information</p> <ul style="list-style-type: none"> • Protection of undisclosed information (trade secrets) if the information is secret, has commercial value, and has been subject to reasonable steps to keep it secret (Art. 39) • Protection for undisclosed test data submitted to the government for approval (Art. 39.3) 	<p>Measures Related to Certain Regulated Products</p> <ul style="list-style-type: none"> • DR-DR-CAFTA (Art.15.10.1(a)) prohibits reliance (market a product on the basis of protected test data concerning safety and efficacy) by third Parties not having the consent of the originator (person providing the information) for a period of at least five and ten years from the date of approval in the Party for pharmaceuticals and agricultural chemical products respectively. • DR-CAFTA also provides equivalent protection when a Party permits third parties to submit evidence of prior marketing approval or evidence concerning safety or efficacy of a <u>product previously approved in the other territory</u>. (Art. 15.10.1(b)). • Includes additional provisions providing for linkage of the section on measures related to certain regulated products and patents with respect to pharmaceutical products that are subject to a patent, including restoration of the patent term as compensation for unreasonable curtailment of the patent term as a result of the marketing approval process (Art.15.9.6(b)). • DR-CAFTA (Art.15.10.2(a)) requires Parties to prevent unauthorized third parties from “marketing a product covered by a patent” (claiming the product or its approved use) during the term of that patent. Also (Art.15.10.2(b)) requires that patent owners be informed of the identity of any third party requesting marketing approval during the term of the patent.
<p>Control of Anti-competitive Practices in Contractual Licenses</p> <ul style="list-style-type: none"> • To prevent adverse effects on trade of some licensing conditions (Art. 40) • Measures to prevent or control practices which are abusive and anti-competitive (Art. 40) 	<p>Control of Anti-competitive Practices in Contractual Licenses</p> <p>Covered under General Provisions in DR-CAFTA</p>
<p>Enforcement</p> <ul style="list-style-type: none"> • Domestic procedures and remedies for the enforcement of IP rights. Includes general principles; provisions on civil and administrative procedures and remedies; provisional measures; requirements related to border measures; and criminal procedures. • Provisions on enforcement do not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. In addition, nothing in TRIPS creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general. 	<p>Enforcement</p> <ul style="list-style-type: none"> • Several enforcement provisions under DR-CAFTA implement and/or further develop TRIPS standards. Moreover, DR-CAFTA incorporates provisions based on experiences arising from the application of TRIPS rules and recent case law. Hence, they clarify ambiguous language, make mandatory and broaden the previously discretionary remedies or incorporate measures to prevent delays or activities that could unreasonably deter recourse to available procedures. • Regarding the scope of enforcement remedies and procedures, DR-CAFTA includes measures covering: general obligations, civil and administrative, provisional, border and criminal measures as well as limitations on liability of Internet Service Providers. A good number of provisions in DR-CAFTA specifically address procedures and remedies in cases of copyright piracy and trademark counterfeiting. Under TRIPS the section on enforcement covers all IPR in general and only the subsections on border measures and criminal remedies singled out the issues of trademark counterfeiting and copyright piracy.

	<ul style="list-style-type: none"> DR-CAFTA also includes a new sub-section establishing a system of incentives, cooperation and limited liability for Internet Service Providers (ISP) and make civil remedies available for effective technological measures and rights management information.
Transitional Arrangements <ul style="list-style-type: none"> Depend on the level of development of the country concerned (Arts. 65, 66 TRIPS) Developed countries, 1 year, 1 January 1996 Developing countries, 5 years, 1 January 2000 Least developed countries, 11 years, 1 January 2006 (Least developed countries: countries of the UN list of least developed countries. The Agreement provides the possibility to extend the transitional period upon duly motivated request). <p><u>Special transition rules</u> apply where a developing country does not provide product patent protection in a given area of technology, especially to <u>pharmaceutical or agricultural chemical inventions</u> (for an additional five years)</p>	Transitional Arrangements <p>In the “Final Provisions” Parties agreed to <u>phase-in periods</u> for certain IPR obligations. These periods and the obligations covered under DR-CAFTA are different and in some cases <u>country-specific</u>.</p>
“Non-backsliding” clause (Article 65.5- which concerns changes made during the transitional period). Forbids countries from using the transition period to reduce the level of protection of intellectual property in a way which would result in a lesser degree of consistency with the requirements of the Agreement	

WTO MINISTERIAL DECLARATION ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The Ministerial Declaration and political decisions taken in Doha (November 2001) addressed issues and concerns raised by developing countries at the TRIPS Council during the years following the entry into force of the WTO Agreement. In general, the Declaration sought to highlight the need for balance between protection of IP and flexibility for developing countries while applying and implementing TRIPS.

Regarding the agenda of multilateral trade negotiations under Doha all the IPR topics included as part of the negotiation (i.e., geographical indications) were already part of the commitments built into the TRIPS Agreement.

Perhaps the most difficult and divisive negotiation during the Ministerial Meeting in Doha was the agreement on the separate political Declaration on TRIPS and public health. The end result was a very carefully drafted document that balances the interest and concerns of developed and developing countries.

In the main declaration WTO Ministers stressed that it is important to implement and interpret the TRIPS Agreement in a way that supports public health — by promoting both access to existing medicines and the creation of new medicines.

In the separate declaration, WTO members agreed that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. The Declaration on TRIPS

and Public Health highlights provisions in the TRIPS Agreement that provide Members with the flexibility to address public health emergencies such as HIV/AIDS, tuberculosis, malaria and other epidemics through different mechanisms, i.e., compulsory licenses or parallel imports. On the other hand, through the Declaration, Members expressed their support for the TRIPS agreement and the importance of Intellectual Property Protection for the research and development of new medicines.

The only remaining question after Doha was to sort out how to provide extra flexibility for countries unable to produce pharmaceuticals domestically and allow them to import patented drugs made under compulsory licensing. This is the case of WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector that could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement (This issue is referred to as the now famous “Paragraph 6” of the separate Doha declaration on TRIPS and health.)

WTO members finally agreed on a solution on August 30, 2003. The decision took the form of a waiver. It would allow countries that can make drugs to export drugs made under compulsory license to countries that cannot manufacture them. All WTO member countries are eligible to import under this decision, but 23 developed countries are listed in the decision as announcing voluntarily that they will not use the system to import.

The waiver would last until the TRIPS Agreement is amended. It includes provisions on transparency (which would give a patent owner some opportunity to react by offering a lower price), and special packaging and other methods to avoid the medicines being diverted to rich-country markets. An annex describes what a country needs to do in order to declare itself unable to make the pharmaceuticals domestically.

A separate statement by General Council chairperson Carlos Pérez del Castillo, Uruguay’s ambassador, was designed to provide comfort to those who feared that the decision might be abused and undermine patent protection. The statement describes members’ “shared understanding” on how the decision is interpreted and implemented. It says the decision will be used in good faith in order to deal with public health problems and not for industrial or commercial policy objectives, and that issues such as preventing the medicines getting into the wrong hands are important.

On August 5, 2004, DR-DR-CAFTA Parties reached an “Understanding regarding certain Public Health Measures.” Pursuant to this Understanding, Parties highlighted that Chapter 15 of DR-DR-CAFTA does not affect a Party’s ability to take necessary measures to protect public health by promoting access to medicines for all in terms similar to those agreed under the Doha Declaration on the TRIPS Agreement and Public Health in the WTO. Moreover, the Understanding points out that Chapter 15 on IPR in DR-DR-CAFTA does not prevent the effective utilization of the solution reached to implement Paragraph 6 of the aforementioned Declaration (with respect to countries with insufficient or no manufacturing capacities in the pharmaceutical sector).

TABLE 2a
Asymmetrical Treatment in the WTO

INTELLECTUAL PROPERTY RIGHTS	
Asymmetrical Elements in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	
<p>The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains provisions allowing for time-limited derogations and longer periods for implementing obligations and providing for technical assistance.</p>	
<p><i>Time-limited derogations and longer periods for implementing obligations</i></p> <p>Under Part VI <i>Transitional Arrangements</i>, <u>developing country</u> Members are entitled to delay for a further period of <u>four years</u> the date of application of the provisions of TRIPS other than those on <i>National Treatment, Most-Favored-Nation Treatment</i> and <i>Multilateral Agreements on Acquisition or Maintenance of Protection</i>, in addition to the general period of one year granted to all Members. (<i>Art. 65(2) of TRIPS</i>).</p> <p>To the extent that a developing country is obliged to extend product patent protection to areas of technology not so protectable in its territory (i.e., pharmaceuticals) on the general date of application of this Agreement for that Member, it may delay the application of the provisions on product patents to such areas of technology for an additional period of five years. (<i>Art. 65(4) of TRIPS</i>).</p> <p>In view of their special needs and requirements, <u>Least-Developed Countries</u> shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application of the Agreement. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period. (<i>Art. 66 of TRIPS</i>).</p> <p>In the main Doha Ministerial Declaration of 14 November 2001, ministers agreed to extend exemptions on pharmaceutical patent protection for least-developed countries until 2016.</p>	
<p><i>Technical assistance</i></p> <p>Pursuant to the article on “<i>Technical Cooperation</i>,” developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel. (<i>Art. 67 of TRIPS</i>).</p>	

TABLE 2b
Asymmetrical Treatment in DR-DR-CAFTA

INTELLECTUAL PROPERTY RIGHTS
Asymmetrical Elements in DR-CAFTA
Even though there is no explicit reference to asymmetrical treatment in DR-CAFTA, the following cases dealing with phase-in periods, technical cooperation and “best efforts” clauses can be found in Chapter 15.
<i>Time-limited derogations and longer period for implementing obligations</i>
In the “Final Provisions” Parties agreed to <u>phase-in periods</u> for certain IPR obligations. These periods and the obligations covered under DR-CAFTA are different and in some cases country-specific.
<i>Technical Assistance</i>
DR-CAFTA calls for <u>technical cooperation</u> to strengthen the use of IPR as a research and innovation tool, facilitate implementation, exchange of information and coordination as well as the implementation of electronic systems for the management of intellectual property. DR-CAFTA (Art.15.1.16), however, goes beyond TRIPS and establishes a Committee on Trade Capacity Building.
<i>Other commitments and “best endeavor clauses”</i>
Under DR-CAFTA (Art. 15.1.6), Parties agreed to undertake <u>reasonable efforts</u> to ratify or accede the Patent Law Treaty (2000), the Hague Agreement Concerning the International Registration of Industrial Designs (1999) and the Protocol relating to the Madrid Agreement Concerning the International Registration of Marks (1989). No specific date is established to comply with this commitment.
Regarding patent protection for plants, under DR-CAFTA (Art. 15.9.2), Parties agreed to undertake “ <u>all reasonable efforts</u> to make patent protection available by the date [DR-CAFTA] enters into force.”
A very useful exercise is to compare the substantive provisions of DR-CAFTA with other Bilateral FTAs recently negotiated by the US with other countries. Even though the differences between FTAs cannot be regarded as part of any asymmetrical treatment <i>per se</i> , commitments <u>not included</u> in DR-CAFTA may reflect some the main negotiating objectives of countries from Central America in the IPR area. These variations do not necessarily reflect differences in the level of development or size of the economies but overall negotiating interests and priorities that may have influenced the outcome of the negotiation.
These are some examples of provisions included in other FTAs but not in DR-CAFTA:
<ul style="list-style-type: none"> • Accession to certain International Treaties. Differences in the number of treaties and corresponding deadlines. • Obligations to provide patents for new uses of known products (US-Morocco, US-Australia) • Explicit obligation to provide patent protection for plants and animals (US-Morocco, US-Bahrain) • Limitations on grounds for compulsory licenses to national emergencies, anticompetitive practices and for public non-commercial use (US-Singapore, US-Jordan). • Additional three year data exclusivity triggered by “new clinical information” (US-Bahrain) • Limitation on parallel imports of pharmaceutical products by patent holders through licensing contracts (US-Morocco, US-Australia)

Part IV:

Services

TABLE 1
Basic Comparison of WTO and DR-CAFTA Agreements
in Selected Issue Areas

SERVICES :

I. CROSS-BORDER TRADE IN SERVICES
II. TELECOMMUNICATIONS
III. FINANCIAL SERVICES

I. CROSS-BORDER TRADE IN SERVICES

WTO Agreement Annex IB: General Agreement on Services	Trade in	DR-CAFTA Agreement Chapter 11: Cross-Border Trade in Services
<p><i>Scope and Coverage</i></p> <ul style="list-style-type: none"> • All service sectors are included within scope of agreement except air transport (routing) and government services (Art. I) • All measures affecting trade in services are included within scope of agreement (Art I) 		<p><i>Scope and Coverage</i></p> <ul style="list-style-type: none"> • All service sectors are included within the scope of agreement except air transport (routing) and government services (Art 11.1 and Art. 11.4 and Art. 11.6). Financial services are covered by disciplines in the chapter on Financial Services (Art. 11.4). • All measures affecting trade in services are included within scope of agreement (Art. 11.1). However, subsidies or grants are excluded from the coverage of the agreement (Art. 11.4), as well as all matters relating to employment in the territory of the Parties (Art. 11.5).
<p><i>General Provisions</i></p> <ul style="list-style-type: none"> • Some, but not all, disciplines are of general application. These include: Most-favored Nation Treatment (Art II); Transparency (Art III); Domestic Regulation (Art VI - part of the article); Recognition (Art VII); Monopolies and Exclusive Service Suppliers (Art VIII); Business Practices (Art IX); Payments and Transfers (Art XI); Restrictions to Safeguard the Balance of Payments (Art XII); General Exceptions (Art XIV); Security Exceptions (Art XIV bis); and Subsidies (Art XV). 		<p><i>General Provisions</i></p> <ul style="list-style-type: none"> • All disciplines are of general application and obligatory in nature. These include: National Treatment (Art. 11.2); Most-favored Nation Treatment (Art. 11.3); Local Presence (Art. 11.5); Market Access (Art. 11.4); Non-conforming Measures (Art. 11.6); Domestic Regulation (Art. 11.8); Mutual Recognition (Art. 11.9); and Transfers and Payments (Art. 11.10).
<p><i>Provisions of Specific Application</i></p> <ul style="list-style-type: none"> • Some disciplines are of specific application, only applying to those sectors included in the Schedules of service sectors committed by WTO Members. These are: Market Access (Art XVI); National Treatment (Art XVII); and Additional Commitments (Art XVIII) 		<p><i>Provisions of Specific Application</i></p> <ul style="list-style-type: none"> • There are no disciplines of specific application in the DR-CAFTA Agreement.
<p><i>Definitions</i></p> <ul style="list-style-type: none"> • The GATS contains Definitions applicable to trade in services and the provisions in the Agreement (Article XXVIII) 		<p><i>Definitions</i></p> <ul style="list-style-type: none"> • DR-CAFTA contains an article on Definitions applicable to the provisions in Chapter 11, Cross-Border Trade in Services

	(Art. 11.14).
<p><i>Provisions in favor of Developing Countries</i></p> <ul style="list-style-type: none"> Article IV of the GATS entitled <i>Increasing Participation of Developing Countries</i> provides for the increasing participation of developing country WTO Members in services trade through: (a) the strengthening of their domestic services capacity, <i>inter alia</i> through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information networks; and (c) the liberalization of market access in sectors and modes of supply of export interest to them (Art IV.1) Developed WTO Members are also to establish contact points to facilitate the access of developing country Members' service suppliers to information (Art IV.2) Additionally, particular account is to be taken of the serious difficult of the least-developed countries to make negotiated commitments (Art IV.3) Article XIX of the GATS on <i>Negotiation of Specific Commitments</i> specifies that there shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and attaching conditions to their market access commitments that fulfill their development objectives (Art XIX.2) 	<p><i>Provisions in favor of Developing Countries</i></p> <ul style="list-style-type: none"> There are no such provisions in the DR-CAFTA Agreement
<p><i>Technical Assistance</i></p> <ul style="list-style-type: none"> There is no formal technical assistance foreseen in the text of the WTO GATS Agreement. However, the text of the Doha Ministerial Declaration does include a section on <i>Technical Cooperation and Capacity Building</i> (paragraphs 38-41) which mandates the WTO to deliver technical assistance designed to assist developing and least-developed countries to "adjust to WTO rules and disciplines, and implement obligations and exercise the rights of membership..." 	<p><i>Technical Assistance</i></p> <ul style="list-style-type: none"> There is no technical assistance foreseen in the text of the DR-CAFTA Agreement. However, there is an institutionalized mechanism for providing capacity-building support to Central America that was set up as part of the DR-CAFTA negotiations and that continues to operate for the provision of support to phases II and III of the Hemispheric Cooperation Program, namely implementation of trade agreements and adjustment to free trade.
<p><i>Annexes</i></p> <ul style="list-style-type: none"> The GATS contains several Annexes, some of which are no longer relevant. Those still relevant include the: --Annex on Article II Exemptions --Annex on Movement of Natural Persons Supplying Services under the Agreement 	<p><i>Annexes</i></p> <ul style="list-style-type: none"> The DR-CAFTA Chapter on Cross-Border Trade in Services contains two Annexes, namely: --Annex on Professional Services which sets out provisions specific to professional services in the areas of (a) development of professional standards; (b) temporary licensing; and (c) review.

<p>--Annex on Air Transport Services --Annex on Financial Services --Annex on Telecommunications</p>	<p>--Annex on Specific Commitments which covers Express Delivery Services and contract law for Distribution Services (referenced below).</p>
<p><i>Liberalization Approach: Schedules of Commitments</i></p> <ul style="list-style-type: none"> The GATS follows a “positive list approach” to the progressive liberalization of services whereby each WTO Members chooses to include in its Schedule of Commitments those sectors and sub-sectors on which it wishes to make commitments (Art XX on <i>Specific Commitments</i>). For each of these sectors/ sub-sectors the Member’s Schedule must specify: (a) terms, limitations and conditions on market access and national treatment; (b) undertaking for additional commitments; and (c) time-frame for implementation of such commitments, where appropriate. 	<p><i>Liberalization Approach: Annexes of Non-conforming Measures</i></p> <ul style="list-style-type: none"> The DR-CAFTA Agreement follows a “negative list approach” to the liberalization of services, whereby all measures affecting all service sectors and sub-sectors must be liberalized at the time of entry into force of the agreement unless other specified in the Annexes of Non-conforming Measures (Art. 11.6). The Annexes of Non-conforming Measures contain those measures in force which do not conform to the core disciplines of the Cross-Border Trade in Services Chapter as set out in Arts. 11.2, 11.3, 11.4 and 11.5. Annex I contains current measures which are effectively reservations to the Agreement and which must be supported by specific reference to laws, regulations or decrees, while Annex II contains specific service sectors to which future measures may be applied and which effectively constitute exemptions to the Agreement.
	<p><i>Specific Commitments</i></p> <ul style="list-style-type: none"> The DR-CAFTA Agreement contains an Annex on Specific Commitments to Chapter 11 with sections relevant to Costa Rica (Section A) and to the Dominican Republic (Section B) in which these two Parties formalize their commitment to enact a new legal regime in the area of contract law.

II. FINANCIAL SERVICES

WTO GATS Agreement and Protocol V on Financial Services	DR-CAFTA Agreement Chapter 12: Financial Services
<p><i>Financial Services Treatment</i></p> <ul style="list-style-type: none"> Disciplines on financial services are those contained in the GATS Agreement, supplemented by the <i>Annex on Financial Services</i> to the GATS. Protocol V contains the results of the extended market access negotiations on Financial Services (1997). The <i>Memorandum of Understanding on Financial Services</i> also resulted from the 1997 negotiations and has been adopted by some WTO Members. It contains a model schedule of market access commitments. Financial Services are subject to the WTO Dispute Settlement Understanding, as all other areas. 	<p><i>Financial Services Treatment</i></p> <ul style="list-style-type: none"> Disciplines on Financial Services are contained in Chapter 12. The Chapter, as well as the Annex, apply to both investment and cross-border trade in financial services. Financial Services are the object of a separate Annex of Non-Conforming Measures. This area is monitored by a separate Financial Services Committee. Financial Services is subject to its own dispute settlement provisions for State-to-State disputes. Investor-State disputes are subject to the provisions of the Investment Chapter.
<p><i>Scope and Coverage</i></p> <ul style="list-style-type: none"> The GATS applies to all measures affecting trade in financial services, as set out in the <i>Annex on Financial Services</i> (para. 1). Prudential measures to protect investors, depositors, and policy holders and to ensure the integrity and stability of the financial system are excluded from the Agreement (para. 2). This “prudential carve-out” is restated in the <i>Memorandum of Understanding on Financial Services</i>. 	<p><i>Scope and Coverage</i></p> <ul style="list-style-type: none"> The chapter applies to: measures related to (a) financial institutions of another Party; (b) investors of another Party, and investments of such investors, in financial institutions; and (c) cross-border trade in financial services. Financial services include all insurance and insurance-related services and all banking and other financial services. Chapter 12 incorporates by reference some Articles from Chapter 11 on Cross-Border Trade in Services (Denial of Benefits) and from Chapter 10 on Investment (Transfers, Expropriation and Compensation, Special Formalities and Information Requirements, Denial of Benefits and Investment and Environment). Prudential measures taken in pursuit of monetary and related credit policies or exchange rate policies, or measures to prevent fraudulent practices are excluded from the obligations of the Agreement (Art.12.10).
<p><i>New Financial Services</i></p> <ul style="list-style-type: none"> There is no explicit mention of new financial services in the WTO GATS, and these would only be covered to the extent that commitments would be undertaken in national Schedules. 	<p><i>New Financial Services</i></p> <ul style="list-style-type: none"> The Agreement covers new financial services and allows for foreign financial institutions to supply any new financial service that domestic financial institutions are allowed to provide (Art. 12.6).
<p><i>Definitions</i></p> <ul style="list-style-type: none"> The <i>Annex on Financial Services</i> contains a list of covered financial services in the area of insurance and insurance-related services, and banking and other financial services excluding insurance (para. 5 under 	<p><i>Definitions</i></p> <ul style="list-style-type: none"> DR-CAFTA contains a section on Definitions that are specifically applicable to the provisions in Chapter 12, Financial Services (Art. 12.20).

<p><i>Definitions).</i></p> <p><i>Liberalization Approach</i></p> <ul style="list-style-type: none"> • The GATS follows a “positive list approach” to the progressive liberalization of services whereby each WTO Members chooses to include in its Schedule of Commitments those sectors and sub-sectors on which it wishes to make commitments. For each of these sectors/ sub-sectors the Member’s Schedule must specify: (a) terms, limitations and conditions on market access and national treatment; (b) undertaking for additional commitments; and (c) time-frame for implementation of such commitments, where appropriate (Art XX on <i>Specific Commitments</i>). • For those WTO Members signing onto the <i>Memorandum of Understanding in Financial Services</i>, the approach adopted is effectively a negative list one for all of the disciplines and modes of supply indicated. 	<p><i>Liberalization Approach: Annex of Non-conforming Measures</i></p> <ul style="list-style-type: none"> • The DR-CAFTA Agreement follows a mixed approach with respect to the liberalization of financial services, which is specific to Chapter 12 only. • Cross-border trade in financial services is subject to a positive list approach for liberalization. Annex III contains a list of specified cross-border services, including the cross-border supply of investment advice and portfolio management services. for which non-conforming measures that specify the terms and conditions under which national treatment is accorded are scheduled (Art. 12.9 in Annex III). • A negative list approach is followed for market access on investments in financial services (Art 12.9 of Annex III). Included measures must be supported by specific reference to laws, regulations or decrees • Additionally, Annex III contains some Specific Commitments for the future liberalization of certain financial services by El Salvador (for foreign banking) and by Costa Rica (for most insurance services).
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III. TELECOMMUNICATIONS

WTO GATS Agreement and the Protocol IV on Basic Telecommunications to the GATS	CAFTA/DR Agreement Chapter 13: Telecommunications
<p><i>Telecommunications Treatment</i></p> <ul style="list-style-type: none"> Disciplines on telecommunications suppliers are found in the GATS, supplemented by the <i>Annex on Telecommunications</i> to the GATS and the Reference Paper containing Regulatory Disciplines which resulted from the extended 1997 negotiations. Adoption of this Reference Paper by WTO Members is voluntary. Protocol IV contains the results of the market access negotiations on Basic Telecommunications (1997). Telecommunications are subject to the WTO Dispute Settlement Understanding, as all other areas. <i>Annex on Telecommunication</i> (para5) 	<p><i>Telecommunications Treatment</i></p> <ul style="list-style-type: none"> Telecommunications disciplines are contained in Chapter 13. With respect to the basic core obligations of most-favored nation, national treatment, market access and no local presence, telecommunications measures are included in Annex I and Annex II, along with all other service sectors (except Financial Services). Telecommunications is subject to additional dispute settlement provisions for resolving domestic telecommunications disputes. In the case of State-to-State disputes, these are subject to the provisions of the chapter on Dispute Settlement (Art. 13.12).
<p><i>Scope and Coverage</i></p> <ul style="list-style-type: none"> The obligations of the Annex on Telecommunications to the GATS are to be applied with respect to all suppliers of public telecommunications transport networks and services by whatever measures are necessary. The Annex does not apply to measures affecting the cable or broadcast distribution of radio or television programming. <i>Annex on Telecommunication</i> (para2) 	<p><i>Scope and Coverage</i></p> <ul style="list-style-type: none"> The chapter applies to measures relating to access and use of telecommunications network and services. It also applies to the provision of information services. Measures relating to broadcast or cable distribution of radio or television programming are excluded from coverage (Art. 13.1).
<p><i>General Provisions</i></p> <ul style="list-style-type: none"> The provisions in the Annex on Telecommunications apply to all WTO Members who have scheduled commitments in Telecommunications. These provisions cover regulatory principles for telecommunications services. Many of these regulatory principles and disciplines have been further elaborated in the Reference Paper on Telecommunications that applies, however, only to those WTO Members who accept it. <i>Annex on Telecommunication</i> (para6) 	<p><i>General Provisions</i></p> <ul style="list-style-type: none"> All disciplines are of general application and thus obligatory in nature. These include disciplines specific to Telecommunications and additional to those in the Chapter on Cross-Border Trade in Services, namely (Art. 13.2).
<p><i>Definitions</i></p> <ul style="list-style-type: none"> The <i>Reference Paper on Basic Telecommunications</i> contains a section on Definitions applicable to trade in telecom services. The definitions of the GATS are also relevant to Telecommunications. <i>Annex on Telecommunication</i> (para3) 	<p><i>Definitions</i></p> <ul style="list-style-type: none"> CAFTA/DR contains a section on Definitions that are specifically applicable to the provisions in Chapter 13, Telecommunications (Art. 13.17).
<p><i>Liberalization Approach</i></p> <ul style="list-style-type: none"> The GATS follows a “positive list approach” to the progressive liberalization of services 	<p><i>Liberalization Approach</i></p> <ul style="list-style-type: none"> The telecommunications sector is encompassed under Chapter 11 with respect

<p>whereby each WTO Members chooses to include in its Schedule of Commitments those sectors and sub-sectors on which it wishes to make commitments. For each of these sectors/ sub-sectors the Member's Schedule must specify: (a) terms, limitations and conditions on market access and national treatment; (b) undertaking for additional commitments; and (c) time-frame for implementation of such commitments, where appropriate (<i>Art XX on Specific Commitments</i>).</p>	<p>to Non-conforming Measures for cross-border trade, and to Chapter 10 with respect to Non-conforming Measures for investment in telecommunications. So these measures are contained in Annexes I and II.</p>
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Comment on Asymmetrical Treatment in the WTO GATS

The WTO General Agreement on Trade in Services (GATS) contains one article exclusively addressed to developing countries and four articles that mention developing countries specifically, as well the Annex on Telecommunications to the GATS. These articles and annex contain provisions that include the possibility for greater flexibility in obligations and procedures by developing countries, for “best endeavors” in specified areas by developed country WTO Members, and for the provision of technical assistance in various areas.

Flexibility in obligations and procedures

The GATS pursues the progressive liberalization of trade in services through successive rounds of negotiations that result in commitments by WTO Members. This process is to take place with due respect for national policy objectives and the level of development of individual Members. In undertaking commitments on services trade, there is to be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to these commitments limitations restricting access (aiming to achieve the objectives for developing countries that are set out in GATS Article IV). Before each round of services negotiations under GATS, the Council for Trade in Services is to establish negotiating guidelines, including those for the special treatment of least-developed country Members aimed at achieving the objectives referred to in Article IV. (*Article XIX of GATS on Negotiation of Specific Commitments*).

More flexibility is granted to developing countries, parties to an economic integration agreement liberalizing trade in services. This flexibility is to be with respect to the overall conditions of such an agreement, as well as to the individual sectors and sub-sectors included. More favorable treatment may also be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement, involving only developing countries. (*Article V:3 of GATS on Economic Integration*).

Negotiations with a view to developing the necessary multilateral disciplines on subsidies shall recognize the role of subsidies in relation to the development programs of developing countries and take into account the needs of developing country Members for greater flexibility in this area. (*Article XV:1 of GATS on Subsidies*).

The Annex on Telecommunications to the GATS also sets out the possibility for more flexibility by developing countries with respect to their obligations in this area. Specifically, the right of developing countries to place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen domestic telecommunications infrastructure and service capacity is recognized. (*Annex on Telecommunications: 5(g) on Access to and Use of Public Telecommunications Transport Networks and Services*).

Other commitments and "best endeavour clauses"

There exists a provision under the GATS which endeavors to facilitate the participation of developing countries in international services trade through negotiated specific commitments which should help developing countries through a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis; b) the improvement of their access to distribution channels and information networks; and c) the liberalization of market access in sector and modes of supply of export interest to them. Paragraph 2 sets out the obligation for developed WTO Members to establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of service suppliers from developing countries to information in developed markets. Paragraph 3 of Article IV accords special priority to the least-developed country WTO Members in negotiating specific commitments and in providing technical assistance. The paragraph also states that particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in services. (*Article IV of GATS on Increasing Participation of Developing Countries*).

Technical assistance

Technical assistance to developing countries is provided for through the requirement that WTO developed country Members establish contact points to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning: a) commercial and technical aspects of the supply of services; b) registration, recognition and obtaining of professional qualifications; and c) the availability of services technology. (*Article IV:2 of GATS on Increasing Participation of Developing Countries*).

On technical cooperation, the GATS contains two relevant points. First, the service suppliers of WTO Members in need of technical assistance are to be able to access the contact points referred to in Article IV:2 discussed above. Second, technical assistance to developing countries shall also be provided at the multilateral level by the WTO Secretariat in ways to be decided upon by the Council for Trade in Services. (*Article XXV of GATS on Technical Cooperation*).

The needs of developing countries in technical assistance are also addressed in the Annex on Telecommunications to the GATS. WTO Members are to: b) encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels; and c) make available to developing countries, where practicable, information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector. Lastly, the article states that WTO Members are to give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the expansion of their telecommunications services trade. (*Annex on Telecommunications: 6*).

The *Annex on Financial Services* does not contain any reference to the special needs or situation of developing WTO Members.

Doha Development Agenda and Asymmetrical Treatment

The WTO General Agreement on Trade in Services (GATS) commits members governments to undertake negotiations on specific issues and to enter into successive rounds of negotiations to progressively liberalize trade in services. The first round had to start no later than five years from 1995.

Accordingly, the services negotiations started officially in early 2000 under the Council for Trade in Services. Thus negotiations on services were already almost two years old when they were incorporated into the Doha Development Agenda.

Doha Ministerial Declaration

Services are treated in paragraph 15 of the text of the Doha Ministerial Declaration. The Doha Declaration endorses the work already done, reaffirms the negotiating guidelines and procedures for services (agreed in March 2001), and establishes some key elements of the timetable including, most importantly, the deadline for the conclusion of the negotiations as part of a single undertaking. Paragraph 15 explicitly references developing WTO Members and reads as follows:

The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries..... We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services.....”

Additionally, the Doha Ministerial contains several paragraphs devoted to the treatment of developing and least-developed WTO Members, namely sections on: Technical Cooperation and Capacity-Building (paras. 38-41); Least-developed Countries (paras. 42-43); and Special and Differential Treatment (para. 44), which are relevant to all of the areas covered by the Doha negotiations.

Two decisions have been taken during the ongoing GATS negotiations under the DDA that are of specific interest and relevance to developing WTO Members.

Decision on Modalities for the Treatment of Autonomous Liberalization

The Decision on *Modalities for the Treatment of Autonomous Liberalization*, agreed on 6 March 2003, fulfills a requirement set out in GATS Article XIX.3 to establish a method of dealing with the granting of credit for an autonomous liberalization measure that a “liberalizing” WTO

Member has carried out. The Decision specifies the criteria for assessing the value of autonomous liberalization measures and the procedures through which this request may be advanced and may be granted. Section IV of the Decision is addressed to Developing Countries and specifies that such modalities “shall be used inter alia as a means of promoting the economic growth and development of developing countries and their increasing participation in trade in services”. Also, in the application of these modalities, the Decision specifies that Members shall “...fully take into account the flexibility provided for individual developing country Members under the provisions referred to in para. 13 above (namely Article IV and Article XIX.2 of the GATS), as well as the level of development of developing country Members in relation to other Members.” Special consideration is to be given to the least-developed country Members.

Decision on Modalities for the Treatment of Least-Developed Country Members in the Negotiations on Trade in Services

The *Decision on Modalities for the Treatment of Least-Developed Country Members in the Negotiations on Trade in Services*, agreed on 3 September 2003, likewise fulfills a requirement set out in GATS Article XIX.3 as part of the negotiations. Its objective is to take account of the serious difficulty of least-developing country Members (LDCs) in undertaking negotiated specific commitments in view of their special economic situation and their development, trade and financial needs. The Decision describes how WTO Members shall take this into account for the LDCs in the negotiations. In particular, under para. 5, LDCs are not to be expected to offer full national treatment, nor to undertake additional commitments on regulatory issues which may go beyond their institutional and administrative capacities. The Decision also requires the WTO to provide targeted and coordinated technical assistance and capacity building programs to the LDCs in order to “strengthen their domestic services capacity, build institutional and human capacity, and enable them to undertake appropriate regulatory reforms: (para. 12).

TABLE 2
Asymmetrical Treatment in DR-CAFTA
in Selected Issue Areas

SERVICES

Asymmetrical Elements in DR-CAFTA*
A. Differentiated Schedules for Compliance with Commitments Yes: A longer time frame for the implementation of commitments in the area of telecommunications services was agreed in favor of Costa Rica (details in text below). A longer time frame for the implementation of commitments for certain financial services was agreed in favor of El Salvador and Costa Rica (details in text below).
B. Different Thresholds for Trade Remedy Action None: DR-CAFTA contains no Safeguard provision.
C. More Flexible Provisions None: The provisions are identical for all members of the DR-CAFTA Agreement.
D. Specific Provisions for Smaller and Less Developed Economies None: The provisions are identical for all members of the DR-CAFTA Agreement.
E. Technical Assistance Yes: The DR-CAFTA Agreement contains a institutional mechanism for trade capacity-building in the form of a Committee on Trade Capacity Building, set out in Article 19.4 . This Committee is to: assist in the implementation of the Agreement and in the adjustment to liberalized trade; seek the prioritization of the trade capacity building projects to be undertaken at the national and/or regional level; invite appropriate international donor institutions, private sector entities and non-governmental organizations to assist in the development and implementation of trade capacity building projects pursuant to the developing country Parties' trade capacity building strategies; and monitor and assess progress in the implementation of trade capacity building projects.

- These elements are those set out in the OAS Trade Unit Study entitled *Mechanisms and Measures to Facilitate the Participation of Smaller Economies in the Free Trade Area of the Americas: An Update*, March 1998.

Comments on Asymmetrical Treatment in the CAFTA/DR Agreement for Services:

- The provisions in the text of the CAFTA/DR Agreement are identical for all seven parties, that is Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, the Dominican Republic and the United States. There is no indication of differences in size or level of development in the text of the Agreement.
- In the CAFTA/DR, however, some countries were able to negotiate longer periods of time for the actual implementation of certain market access commitments. Such is the case of Costa Rica in the area of telecommunications, where it undertook to:
 - 1) enact a new legal framework for the national telecommunications provider no later than December 31, 2004
 - 2) put into place a new regulatory framework on telecommunications services by January 1, 2006, to conform to specific provisions in the Annex on Telecommunications Services to Chapter 13
 - 3) gradually and selectively open certain telecommunications services, namely:
 - private network services, no later than January 1, 2006;
 - Internet services, no later than January 1, 2006; and
 - Mobile wireless services, no later than January 1, 2007.

Such a longer time frame for implementation of commitments also resulted in the area of financial services.

- 1) El Salvador has committed to develop and issue prudential and other requirements that must be met by Salvadorean banks in order for them to receive authorization to apply for the establishment of branches in the United States.
- 2) Costa Rica has committed to expedite the availability of insurance services and allow branching in insurance by January 2008. All parties agree to do the same within three to four years after the agreement enters into force. The United States committed to review regulations that do not currently allow entry of non-U.S. insurance companies as a branch in a number of States.
- Other aspects of the market access outcome are contained in the various Annexes (I, II and III) of Non-conforming Measures. The measures and/or sectors that are listed in these Annexes resulted from the outcome of the negotiations and are a reflection of national priorities, national public sensitivities and the lobbying interests of national service providers. The measures and sectors schedules in the Annexes therefore vary considerably as between the parties.
- The DR-CAFTA Agreement contains a specific reference to the provision of technical assistance to assist developing parties to fulfill their negotiated obligations in the form of the Committee on Trade Capacity Building. Ongoing capacity-building efforts were undertaken in parallel to the negotiation of the DR-CAFTA Agreement and are now continuing. Such capacity-building efforts are not time-limited in nature.

Part V:

Investment

TABLE 1
BASIC COMPARISON OF WTO AND DR-CAFTA
IN SELECTED ISSUE AREAS
INVESTMENT

TRIMs Agreement	DR-CAFTA FTA
The Agreement covers one single issue : trade-related investment measures (performance requirements) in goods only.	The DR-CAFTA contains one comprehensive chapter addressing investment in goods and services. The investment chapter of the DR-CAFTA FTA has essentially four key pillars : scope and definitions, protection, market access, and dispute settlement.
	<p><i>Scope and Definitions</i></p> <p>The chapter applies to measures adopted or maintained by a Party relating to: a) investors of another Party, b) covered investments, and c) with respect to performance requirements, and investment and environment all investment in the territory of the Party (Article 10.1).</p> <p>In the event of any inconsistency between the DR-CAFTA Investment Chapter and another chapter of the Agreement, the other chapter shall prevail to the extent of the inconsistency (Article 10.2.1).</p> <p>The DR-CAFTA investment chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of the DR-CAFTA (Article 10.1.3).</p> <p>The Investment Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by the chapter on financial services (Article 10.2.3).</p> <p>The terms “investment” and “investor of a Party” are the key elements of the scope of the investment chapter. They are the main parameters identifying which investment and which investor will benefit from the provisions of the chapter (Section C, Article 10.28).</p>
	<p><i>Protection</i></p> <p>The second pillar provides the investor with a minimum standard of treatment (Article 10.5) and the right to transfer payments in a freely usable currency, as defined by the International Monetary Fund, at the market exchange prevailing on the date of transfer (Article 10.8). It also prohibits the host state from directly or indirectly nationalizing or expropriating an investment of an investor of another Party, except when done for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of prompt, adequate and effective compensation (Article 10.7). The Annex on Expropriation clearly clarifies the concept of indirect expropriation and reaffirms the right of states to regulate. The Annex states that the determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: a) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and c) the character of the government action. The Annex on</p>

	<p>Expropriation also states that “<i>Except in rare circumstances</i>, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment do not constitute indirect expropriations.” This is without a doubt the most important development in investment rule-making in recent years.</p> <p>With respect to treatment in case of strife (Article 10.6), DR-CAFTA does not, except in two situations, require a state to pay compensation in a situation where an investor of another Party suffers losses in the host country due to an armed conflict or civil strife. DR-CAFTA provides for national treatment and MFN treatment in respect to any measure a Party adopts or maintains related to those losses. The two situations for which DR-CAFTA requires compensation are: 1) where the damage results from the requisitioning of property by the host state’s forces or authorities; and 2) where the damage results from the destruction of property by the host state’s forces or authorities where the destruction was not caused in combat or required by the necessity of the situation. Annex 10-D of the DR-CAFTA states that no investor may submit to arbitration under the investor-State dispute settlement mechanism a claim alleging that Guatemala has breached the Article on treatment in case of strife as a result of an armed movement or civil disturbance and that the investor has incurred loss or damage by reason of or arising out of such movement or disturbance. A similar provision exists for investors of Guatemala with respect to other Parties.</p>
<p><i>Market Access</i></p> <p>The Agreement prohibits performance requirements (goods only) that are contrary to national treatment (GATT Article III) and the general obligation of eliminating quantitative restrictions (GATT Article XI). These prohibited measures (TRIMs) had to be eliminated by developed countries by the end of 1996; developing countries by the end of 1999, least developed countries by the end of 2001. In July 2001, seven countries requested an extension until December 31, 2003.</p>	<p><i>Market Access</i></p> <p>The chapter includes a right of establishment and provides for non-discriminatory treatment (national treatment (Article 10.2) and MFN treatment (Article 10.3)) in <i>all</i> phases of an investment, from establishment to sale.</p> <p>It prohibits seven types of performance requirements covering goods and services in <i>all</i> phases of an investment (Article 10.9). Another issue senior management and boards of directors grant to the investor the right to employ, in senior management positions, personnel within the host country without regard to the nationality or citizenship of the person concerned (also in <i>all</i> phases of an investment) (Article 10.10).</p> <p>The market access component includes a list of country-specific exceptions/non-conforming measures (“negative list approach”), which allows for the maintenance of existing measures (law, regulations, or other measures) violating some or all the above mentioned obligations (Annex I of the Agreement). Future non-conforming measures (to which the same abovementioned four articles do not apply) are set out in another annex to the Agreement (Annex II). These latter measures apply to sectors, sub-sectors or activities, and they effectively constitute permanent exceptions to the Agreement (Article 10.13).</p>
<p><i>Dispute Settlement</i></p> <p>Disputes under the TRIMs Agreement are subject to the DSU.</p>	<p><i>Dispute Settlement</i></p> <p>The fourth pillar, dispute settlement (Section B of the Investment Chapter), is a central element of an investment agreement. In addition to the general state-to-state dispute settlement mechanism, investment agreements generally include provisions for an investor-state dispute settlement mechanism, and so does DR-CAFTA. The objective of the investor-state dispute settlement mechanism is to allow the investor to seek redress against the host state by submitting a claim that the host country has breached an obligation under the investment agreement, an investment authorization, or</p>

	<p>an investment agreement and the investor has incurred a loss or damage as a result of the breach. The arbitral tribunal has the authority to award compensation to the injured investor but cannot request the host government to change its laws or regulations.</p> <p>DR-CAFTA states that no claim may be submitted to arbitration if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the alleged breach.</p> <p>It is the investor (the claimant) who chooses which forum to use to settle the investment dispute. The investor may choose between the local courts and international arbitration. The DR-CAFTA, such as other agreements (eg NAFTA) contains a “no U-turn rule,” which allows an investor to abandon the local courts before or after the award is rendered, in order to submit a claim under the investor-State dispute settlement mechanism. The investor, however, cannot return to local courts, once an FTA claim has been submitted.</p> <p>Once the investor and the host country have consented to arbitration, they have three options: 1) the ICSID rules, provided that both the State of the investor and the host country are parties to the ICSID Convention; 2) the ICSID Additional Facility Rules, provided that either the State of the investor and the host country, but not both, is a party to the ICSID Convention; or 3) under the ad hoc mechanism of the UNCITRAL Arbitration Rules. Unless the disputing Parties otherwise agree, the tribunal comprises three arbitrators, one arbitrator appointed by each of the disputing Parties and the third, who will be the presiding arbitrator, appointed by Agreement of the disputing Parties.</p> <p>A decision of the Free Trade Commission (which is composed of all the Trade Ministers of all Parties to the Agreement) declaring its interpretation of a provision of the Agreement is binding on a tribunal established the investor-State dispute settlement mechanism, and any award must be consistent with that decision.</p> <p>DR-CAFTA also states that the tribunal has the authority to accept and consider <i>amicus curiae</i> submissions from a person or entity that is not a disputing party. With respect to frivolous claims, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys’ fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal must consider whether either the claimant’s claim or the respondent’s objection was frivolous, and must provide the disputing Parties a reasonable opportunity to comment. Moreover, in the event that the Party to the dispute requests it, within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis any objection that the dispute is not within the tribunal’s competence.</p> <p>With respect to transparency of proceedings, a number of documents (notice of intent, the notice of arbitration, pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions, and minutes or transcripts of hearings of the tribunal) must be transmitted by</p>
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	<p>the respondent to the non-disputing Party and make them available to the public in general. The tribunal must conduct hearings open to the public.</p> <p>Where a tribunal makes a final award against a Party to DR-CAFTA, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.</p> <p>Each Party shall provide for the enforcement of an award in its territory. If a Party to the Agreement fails to abide by or comply with a final award, a panel must be established under the DR-CAFTA State-to-State Dispute Settlement Mechanism of the Agreement.</p> <p>DR-CAFTA also calls for the establishment of an Appellate Body.</p>
	<p><i>Other Issues</i></p> <p>The Investment Chapter also includes a provision on denial of benefits (Article 10.12) under which a Party may deny the benefits of the Investment Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:</p> <ul style="list-style-type: none"> ➤ does not maintain diplomatic relations with the non-Party; or ➤ adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments. <p>A Party may deny the benefits of the Investment Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor</p> <ul style="list-style-type: none"> ➤ if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise. <p>The article on investment and the environment (Article 10.11) states that nothing in the Investment Chapter is construed to prevent a Party from adopting, maintaining or enforcing any measure to ensure that the investment activity is undertaken in a manner sensitive to environmental concerns.</p> <p>The Agreement also includes an article on special formalities and requirements (Article 10.14).</p>

WTO SCM Agreement

The WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement) prohibits the use of export subsidies and therefore governs the use of incentives in promoting export-oriented foreign direct investment (FDI). **The SCM Agreement only regulates subsidies in the goods sector.**

Export subsidies under the SCM Agreement have been prohibited in developed countries since the WTO Agreement came into force.

DR-CAFTA FTA

<p>Since January 1, 2003, the prohibition also applies to all developing countries not referred to in Annex VII of the SCM Agreement and not granted an extension of the transition period. Countries referred to in Annex VII are the LDCs and those WTO members listed in Annex VII(b) until their GNP per capita reaches US\$1,000. Apart from the LDCs, the list includes Bolivia, Cameroon, Congo, Côte d'Ivoire, the Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka, and Zimbabwe. In addition, Honduras was included in the list through a rectification in 2001.</p>	
<p><i>Doha and the Extension of the Transition Period</i></p> <p>In the context of discussions on the implementation of the Uruguay Round Agreements and the preparation of the WTO Ministerial Conference in Doha in 2001, negotiations took place on the need to put the extension of the transition on a firmer basis. The issue was positively resolved with the Decision of 14 November 2001 taken at Doha on Implementation-related issues and concerns, which: “Having regard to the particular situation of certain developing-country Members, directs the Committee on Subsidies and Countervailing Measures to extend the transition period, under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, for certain export subsidies provided by such Members, pursuant to the procedures set forth in document G/SCM/39.”</p> <p>The Decision provides a specific procedure for the extension of export subsidies by certain developing-country members on an annual basis until December 31, 2007 (plus two further years – December 31, 2009 – to complete the phase-out). Twenty-nine countries requested an extension of the transition period for their export subsidy programs: Antigua and Barbuda, Barbados, Belize, Bolivia, Costa Rica, Dominica, Dominican Republic, El Salvador, Fiji, Guatemala, Grenada, Honduras, Jamaica, Jordan, Kenya, Mauritius, Panama, Papua New Guinea, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Uruguay. Other requests under Art. 27.4 have been made by Colombia, El Salvador, Panama, Thailand and Uruguay (G/SCM/40/rev.2 of March 13, 2002).</p>	<p>DR-CAFTA allows Costa Rica, the Dominican Republic, El Salvador, and Guatemala to each maintain existing measures ..., provided they maintain such measures in accordance with Article 27.4 of the SCM Agreement (Article 3.4).</p> <p>Costa Rica, the Dominican Republic, El Salvador, and Guatemala may not maintain any such measures after December 31, 2009 (Article 3.4).</p> <p>Nicaragua and Honduras may each maintain existing measures for such time as it is an Annex VII country for purposes of the SCM Agreement. Thereafter, Nicaragua and Honduras shall maintain any such measures in accordance with Article 27.4 of the SCM Agreement (Article 3.4).</p>

Agreement on Trade-Related Investment Measures (TRIMs)

- The Agreement covers one single issue: performance requirements for goods. It prohibits these requirements when they are contrary to national treatment (GATT Article III) and the general obligation of eliminating quantitative restrictions (GATT Article XI).
- The Agreement establishes an illustrative list of prohibited performance requirements. For example,
 - ✓ Local content and trade-balancing requirements are inconsistent with the principle of national treatment.
 - ✓ Trade and foreign exchange-balancing restrictions and domestic sales requirements are inconsistent with the obligation of eliminating quantitative restrictions.
- These prohibited measures (TRIMs) had to be eliminated by
 - ✓ Developed countries by the end of 1996.
 - ✓ Developing countries by the end of 1999.
 - ✓ Least developed countries by the end of 2001.
- On July 31, 2001, the WTO Goods Council adopted a decision to grant an **extension of the transition period** for the elimination of the prohibited measures to the following countries: Argentina, Colombia, Malaysia, Mexico, Pakistan, The Philippines, and Pakistan. The WTO General Council approves a waiver for Thailand. The 2+2 extension granted to these countries extended the transition period from January 1, 2000 to December 31, 2001 with a further two years (January 2002 to December 31, 2003), subject to certain criteria such as the submission of a phase-out plan for the TRIMs measures. On December 22, 2003, Pakistan presented a request for the extension of the transition period to December 31, 2006 (G/C/W/478). The WTO General Council has yet to take a decision on this matter.
- Article 6.2 of the TRIMs Agreement states that each Member shall notify the WTO Secretariat of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities within their territories. Dominica is the only OECS country, which has submitted a notification to the WTO under Article 6.2.
- Article 9 of the TRIMs Agreement mandates the review of the Agreement, which includes the possibility of Members proposing amendments to its text.

DOHA DEVELOPMENT AGENDA

- Paragraph 12 of the DOHA Ministerial Declaration on implementation-related issues and concerns deals with problems raised particularly by developing countries about the implementation of the current WTO Agreements, including the TRIMs Agreement. Outstanding implementation issues related to TRIMs include those discussed by the TRIMs Committee:
 - ✓ Tiret 37: Developing countries shall have another opportunity to notify existing TRIMs measures which they would be then allowed to maintain until the end of the new transition period.

- ✓ Tiret 38: The provisions of TRIMS Article 5.2 (elimination of all TRIMs) must be suitably amended and made mandatory.
 - ✓ Tiret 39: Developing countries shall be exempted from the disciplines on the application of domestic content requirement....
 - ✓ Tiret 40: Specific provisions shall be included in the TRIMs Agreement to provide developing countries the necessary flexibility to implement development policies (intended to address, among others, social, regional, economic, and technological concerns) that may help reduce the disparities they face vis-à-vis developed countries.
 - Brazil and India tabled a proposal relating to the above issue (Tiret 40) (G/TRIMS/W/25 of October 9, 2002):
 - “Article 4 of the TRIMs Agreement should be amended in order to incorporate specific provisions that will provide developing countries with the necessary flexibility to implement development policies. One possible solution is to extend the range of situations in which developing countries are allowed to deviate temporarily from the provisions of Article 2. Among the new provisions that should be included, the following should be considered.
 - Developing countries should be allowed to use TRIMs in order to:
 - A) Promote domestic manufacturing capabilities in high value-added sectors or technology-intensive sectors;
 - B) stimulate the transfer or indigenous development of technology;
 - C) promote domestic competition and/or correct restrictive business practices;
 - D) promote purchases from disadvantaged regions in order to reduce regional disparities within their territories;
 - E) stimulate environment-friendly methods or products and contribute to sustainable development;
 - F) increase export capacity in cases where structural current account deficits would cause or threaten to cause a major reduction in imports.
 - G) promote small and medium-sized enterprises as they contribute to employment generation.”
- At Doha, the Ministerial Conference urged the Council for Trade in Goods to consider positively requests that may be made by least-developed countries under Article 5.3 of the TRIMs Agreement (extension of the transition period) or Article IX.3 of the WTO

Agreement, as well as to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames (WT/MIN(01)/17).

Table 2a
Asymmetrical Treatment in the WTO
In Selected Issue Areas
Investment

A. Differential Schedules for Compliance with Commitments
1) The TRIMs Agreement provide for different schedule for the elimination of the trade-related investment measures prohibited by the Agreement. These prohibited measures (TRIMs) had to be eliminated by <ul style="list-style-type: none"> ✓ Developed countries by the end of 1996. ✓ Developing countries by the end of 1999. ✓ Least developed countries by the end of 2001. <p>On July 31, 2001, the WTO Goods Council adopted a decision to grant an extension of the transition period for the elimination of the prohibited measures to the following countries: Argentina, Colombia, Malaysia, Mexico, Pakistan, The Philippines, and Thailand. The WTO General Council approves a waiver for Thailand. The 2+2 extension granted to these countries extended the transition period from January 1, 2000 to December 31, 2001 with a further two years (January 2002 to December 31, 2003), subject to certain criteria such as the submission of a phase-out plan for the TRIMs measures.</p>
2) The WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement) prohibits the use of export subsidies in developed countries since the WTO Agreement came into force. Most developing countries had until December 31, 2002 to eliminate these subsidies. Since January 1, 2003, the only developing countries that can use export subsidies are those referred to in Annex VII of the SCM Agreement and those granted an extension of the transition period.
Countries referred to in Annex VII are the LDCs and those WTO members listed in Annex VII(b) until their GNP per capita reaches US\$1,000. Apart from the LDCs, the list includes Bolivia, Cameroon, Congo, Côte d'Ivoire, the Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka, and Zimbabwe. In addition, Honduras was included in the list through a rectification in 2001.
In the context of discussions on the implementation of the Uruguay Round Agreements and the preparation of the WTO Ministerial Conference in Doha in 2001, negotiations took place on the need to put the extension of the transition on a firmer basis. The issue was positively resolved with the Decision of 14 November 2001 taken at Doha on Implementation-related issues and concerns, which: "Having regard to the particular situation of certain developing-country Members, directs the Committee on Subsidies and Countervailing Measures to extend the transition period, under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, for certain export subsidies provided by such Members, pursuant to the procedures set forth in document G/SCM/39."
The Decision provides a specific procedure for the extension of export subsidies by certain developing-country members on an annual basis until December 31, 2007 (plus two further years – December 31, 2009 – to complete the phase-out). Twenty-nine countries requested an extension of the transition period for their export subsidy programs: Antigua and Barbuda , Barbados, Belize, Bolivia, Costa Rica, Dominica , Dominican Republic, El Salvador, Fiji, Guatemala, Grenada , Honduras, Jamaica, Jordan, Kenya, Mauritius, Panama, Papua New Guinea, Sri Lanka, St. Kitts and Nevis , St. Lucia , St. Vincent and the Grenadines , Suriname, and Uruguay. Other requests under Art. 27.4 have been made by Colombia, El Salvador, Panama, Thailand and Uruguay (G/SCM/40/rev.2 of March 13, 2002).

Table 2b
Asymmetrical Treatment in DR-CAFTA
In Selected Issue Areas

Investment
There is no explicit reference to asymmetrical treatment in DR-CAFTA
A. Differential Schedules for Compliance with Commitments None
B. More Flexible Provisions None
C. Specific Provisions for Smaller and Less Developed Economies None
D. Technical Assistance <ul style="list-style-type: none"> 1. No explicit reference to investment. In Chapter 19, DR-CAFTA Parties recognize that trade capacity building assistance is a catalyst for making the reforms and investments necessary to foster trade-driven economic growth, poverty reduction, and adjustment to liberalized trade, and hereby establish a Committee on Trade Capacity Building, comprising representatives of each Party. 2. The Committee shall: <ul style="list-style-type: none"> (a) receive the updated national trade capacity building strategies of the developing country Parties to assist in the implementation of the Agreement and in the adjustment to liberalized trade; (b) seek the prioritization of the trade capacity building projects to be undertaken at the national and/or regional level; (c) invite appropriate international donor institutions, private sector entities and non-governmental organizations to assist in the development and implementation of trade capacity building projects pursuant to the developing country Parties' trade capacity building strategies; (d) monitor and assess progress in the implementation of trade capacity building projects; (e) work with other committees or working groups established under this Agreement, including through joint meetings, in developing and implementing trade capacity building projects; and (f) provide a report annually to the Commission describing the Committee's activities. 3. During the transition period, the Committee shall meet at least twice a year unless the Committee otherwise agrees. 4. All decisions of the Committee shall be taken by consensus, unless the Committee otherwise agrees. 5. The Committee may establish terms of reference for the conduct of its work. 6. The Committee may establish <i>ad hoc</i> working groups, which may be comprised of government and/or non-government representatives. 7. The Parties recognize the importance of customs administration and trade facilitation issues and hereby establish an <i>ad hoc</i> working group on customs administration and trade facilitation under the Committee."

Note: The only different treatment afforded to a Party in DR-CAFTA relates to the issue of treatment in case of strife. Annex 10-D states that no investor may submit to arbitration under the investor-State dispute settlement mechanism of the Investment Chapter a claim alleging that Guatemala has breached paragraph 2 of the Article on treatment in case of strife as a result of an armed movement or civil disturbance and that the investor has incurred loss or damage by reason of or arising out of such movement or disturbance. A similar provision exists for investors of Guatemala with respect to other Parties. Paragraph 2 of the Article on treatment in case of strife requires compensation in case of armed conflict or civil strife in the following two situations: 1) where the damage results from the requisitioning of property by the host state's forces or authorities; and 2) where the damage results from the destruction of property by the host state's forces or authorities where the destruction was not caused in combat or required by the necessity of the situation.