Analysis of the Central American Free Trade Agreement (CAFTA) Concerning Agriculture

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Overview: The posting of the CAFTA text by the Office of the U.S. Trade Representative on February 2 gives the public a chance to read what has until now been available only to government officials, cleared industry advisors and their colleagues. Indeed, incomplete agricultural tariff schedules and annexes have made it difficult for industry advisors, much less the public, to analyze CAFTA.[1]

In late February, the administration of President George W. Bush notified Congress of his intent to sign CAFTA. Congressional opposition to agricultural trade provisions, particularly concerning sugar, may delay a vote on CAFTA until after the November 2004 elections, although nothing is ever a certainty in Washington. In January and then again in February, sugar industry officials reminded the White House that the sugar industry was present in 19 U.S. states, including many considered crucial in the upcoming presidential election.[2]

The CAFTA text is consistent with U.S. positions in bilateral and multilateral trade agreements: aggressive in market access, particularly regarding agriculture and the services industries; demanding of strong intellectual property and investment protection; very weak on protection for environment and labor; and calling for the eventual elimination of agricultural export subsidies. The text stipulates committees for both regular and emergency consultations regarding market access, sanitary and phytosanitary matters (largely food safety regulations and their implementation) and technical barriers to trade.

Aspects of CAFTA that would pertain to agricultural trade and agribusiness investment are distributed through several chapters. In this brief review, we consider some of these aspects in the following order: Chapter Six: Sanitary and Phytosanitary (SPS) Measures; Chapter Fifteen: Intellectual Property Rights; Chapter Three: National Treatment and Market Access for Goods; Annexes to Chapter 3; and Chapter Ten: Investment.

Sanitary and Phytosanitary Measures: This chapter provides for the creation of a committee "to enhance the implementation of the [WTO] SPS Agreement, protect human, animal and plant life and health, enhance consultation and cooperation on sanitary and phytosanitary matters, and facilitate trade between the Parties" (Article 6.3.2). Any dispute settlements that arise from challenges to a member's SPS measures on traded products will have to be adjudicated within the WTO. The CAFTA SPS Committee will seek to resolve differences over food safety issues before they rise to the level of WTO disputes. SPS problems concerning horticultural exports from Central America to the United States are an example of a topic that the Committee could resolve through technical consultations. More complicated SPS issues, for example, concerning the export of genetically engineered crops or animals, would be settled at the WTO.

Intellectual Property Protection: This Chapter covers copyrights, trademarks, geographical indicators (e.g. Burgundy wine), domain names on the Internet, enforcement of intellectual property protection and patents. Issues concerning the patenting of life forms, particularly genetically modified organisms (GMOs) most directly pertain to agriculture. The Chapter

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[1] "Incomplete CAFTA Information Plagues Agriculture Reports", INSIDE U.S. TRADE, March 5, 2004.

[2] "Bush Notifies Intent to Sign CAFTA, Congressional Action Uncertain", INSIDE U.S. TRADE, February 27, 2004; "Zoellick Says CAFTA Approval Less Likely This Year Than Other FTAs" and "Top Political Advisor Played Role In Removing Sugar From Australia FTA", INSIDE U.S. TRADE, February 13, 2004.

asserts (Article 15.1.7) that the CAFTA Parties will not be able to deviate from their rights and obligations under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). This assertion means that in theory, all Parties can avail themselves of the TRIPS exceptions on patenting for public health or environmental reasons (Article 27). However, CAFTA also requires that all CAFTA Parties ratify or accede to a host of additional patent, copyright and trademark protocols, agreements and treaties, including the Union for the Protection of New Varieties of Plants convention of 1991 (UPOV 1991). As far as we know, this is the first trade treaty to require accession to or ratification of UPOV 1991.

Whereas the 1978 UPOV convention allowed farmers to save and replant plant breeder developed seed, the UPOV 1991 makes plant breeders rights "more like patents, extending the scope of the monopoly granted to the certificate holder".[3] UPOV 1991 ratification strengthens the legal position of GMO developers who could use this provision of the CAFTA to have their government seek sanctions against other CAFTA members alleged not to have protected a plant breeder's intellectual property. One such form of protection of plant breeders' rights would be to prosecute for patent "piracy" farmers who had replanted genetically modified seeds. This UPOV 1991 provision of the CAFTA text will restrict the ability of the Parties to use the TRIPS exemptions on patentable subject matter for public health or environmental reasons. One use of such exemptions would be to prohibit patenting of genetic modification of germ plasma in seed to avoid out-crossing of GM seed pollen into landraces that are vital for plant breeding. The contamination of corn (maize) landraces in Mexico by GM corn from the U.S. underlines the vulnerability of landraces despite the TRIPS exemptions that could be used to protect biodiversity.[4]

Furthermore, this CAFTA Chapter requires that the Parties enforce intellectual property protection whether or not they can afford to do so (Article 15.11.1). We are unaware of such an enforcement requirement in a regional or multilateral treaty.

Another possible source of restriction on the ability of CAFTA members to take advantage of flexibility in TRIPS for national laws is the Substantive Patent Law Treaty (SPLT) currently under negotiation at the World Intellectual Property Organization (WIPO). The SPLT would lead to a system of world patents governed by WIPO that would exert enormous legal and economic control over development. Flexibility in granting patents subject to the working of patents or technical transfer requirements for development goals would be eliminated in the SPLT.[5]

Finally, in a tortuous paragraph long sentence, the chapter protects developers of agricultural chemicals from having to divulge to the public "undisclosed data concerning the safety or efficacy of a product that was previously approved in another territory" (Article 15.10.1b) when seeking to market a patented product in "another territory". Once an agricultural chemical is approved for commercial use in one "territory" (this term is undefined, but presumably could include more than one CAFTA member country), regulators in another "territory" cannot disclose to the public data about the product's safety and efficacy that was not disclosed during the first regulatory review. This provision apparently seeks to prevent data used to secure a patent on the agricultural chemical from entering the public domain after the initial regulatory review, even if the data concerns the safety and efficacy of the product. So if permission is

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[3] Martin Teitel and Hope Shand, *The Ownership of Life: When Patents and Values Clash* (June 1997) INSTITUTE FOR AGRICULTURE AND TRADE POLICY and the HKH FOUNDATION, 54.

[4] "Fear –Reviewed Science: Contaminated Corn and Tainted Tortillas – Genetic Pollution in Mexico's Centre of Biodiversity", THE ETC GROUP, Communiqué no. 74 (January/February 2002) at http://www.etcgroup.org

[5] "One Global Patent System? WIPO's Substantive Patent Law Treaty", GRAIN at http://www.grain.org

sought for commercialization approval of an agricultural chemical patented in the United States, a regulator in Costa Rica, for example, could not demand to see all data pertaining to safety and efficacy of the chemical but only that data which were released to U.S. regulators when they approved the chemical for commercialization.

National Treatment and Market Access and Annexes: "Section F: Agriculture" of Chapter Three contains Articles on Tariff-Rate Quota Implementation and Administration; Export Subsidies; Agricultural Safeguard Measures; Sugar Compensation Mechanism; Consultation on Trade in Poultry; and a Committee on Agriculture Trade to monitor implementation and administration of the Section on agriculture. The controversy over negotiations to allow Central American countries to increase sugar exports to the United States has drawn greatest public attention. We will comment on just some of these Articles after drawing attention to a couple of provisions of CAFTA that are unique to it, as far as we know.

One of the peculiar features of Chapter 3 is the requirement that "Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua shall not, as a remedy for a violation or alleged violation of any law, regulation or other measure regulating or otherwise relating to the relationship between any dealer or any person of another Party, restrict or prohibit imports from another Party" (Article 3.8.11). While the application of this requirement is not specific only to agricultural trade, it would apply to agricultural trade. Central American countries that have determined transnational corporate trade violates their laws are prohibited in this Article from cutting off trade as a way of disciplining illicit traded goods or trade practices. Given the unlikelihood that Central American courts could successfully pursue a case against U.S.-based transnational corporations, this CAFTA provision guarantees continued trade and investment, whether the trading practices are legal or not according to national laws.

In "Section F: Agriculture", there is a provision that could discriminate against certified fair traded products by non-government organizations and producer cooperatives or their delegated representatives. Certified fair trade products, which include coffee, bananas, and chocolate, set environmental and social standards for their production. They are often traded by producer-run cooperatives and non-governmental organizations. A sub-Article concerning Tariff-Rate Quota (TRQ) Implementation and Administration states "[n]o Party may allocate any portion of a TRQ to producer groups or non-government organizations or delegate administration of a TRQ to such groups or organizations, except as otherwise provided in this Agreement" (Article 3.12.7). This provision requires some interpretation and explanation.

A tariff is an administrative tax on imports that is determined according to a schedule negotiated by the parties to a trade agreement. The schedule sets a certain annual volume (e.g. metric tons of corn) or monetary value of a product that may enter a country without a tariff or at a lower tariff rate. After that volume or value has been achieved, a higher tariff can be levied on the imported product. A tariff quota ensures that a certain volume or a certain monetary value of an imported product can enter a market despite a high tariff (e.g. 200 percent of the value of full cream milk). (The current WTO Agreement on Agriculture (AoA) requires a minimum volume of imports equivalent to 5 percent of domestic consumption, even if domestic producers could satisfy all domestic consumption. Current AoA negotiating proposals seek to increase that minimum import level to 10 percent.) Companies that receive a Tariff Rate Quota (TRQ) from a government get to trade at the lower tariff rate, i.e. they get more market access.

In terms of a product-based analysis, it is not clear why CAFTA prohibits allocation of TRQs both to non-governmental organizations and to producer groups that would allow them to import at the lower tariff rate. A quick line by line scan of the 184 -page U.S. tariff schedule shows that

coffee beans, green teas, most seeds, the raw materials for spices, and bananas -- all fair traded products to greater or lesser extent -- will enter duty free into the United States under CAFTA.[6] The U.S. TRQ Annex I, includes such products as beef, sugar, peanuts and various dairy products[7], none of which are internationally fair-traded in great volume. The prohibition may be targeted categorically, and not on a product specific basis, at non-governmental organizations that have a for-profit importing arm that might compete in the future with free trading entities. While assuming that the trade negotiators have some rationale for the prohibition, we are at a loss to explain what it is in terms of actual products traded.

It is not clear whether the legal status of the for-profit trading entity would allow NGOs to elude this prohibition. To our knowledge, this is the first regional trade agreement to discriminate explicitly again a class of traders and could quash competition between fair and free traded products, in the name of free trade. The rationale behind prohibiting TRQ allocation to producer groups is even less clear, since the only products that producer groups likely would import would be agriculture inputs such as seeds and fertilizer.

The general direction of CAFTA's rules pertaining to tariffs is towards their elimination (Article 3.3) and towards an increasing amount of goods and commodities being traded tariff free. For example, over a fifteen-year period, there is a gradual escalation in the tariff free metric tonnage of Central American sugar exports. No specific commodities are exempt from tariff reductions.

Furthermore, once an agricultural good has been traded without tariffs, CAFTA forbids the use of agricultural safeguard measures (Article 3.1.46) against import surges. Presumably this prohibition against agricultural safeguard measures, which usually cannot be applied for longer than a year, will remain in force even if the imports are dumped at below cost of production. The pressure to eliminate all tariffs on agricultural exports, combined with the prohibition against using agricultural safeguards once a tariff on an export has been eliminated leave CAFTA signatories very vulnerable to dumping. As documented in the Institute for Agriculture and Trade Policy's recent report, U.S. based companies are engaging in widespread agricultural dumping of corn, soybeans, wheat, rice and cotton onto international markets.[8] Without adequate safeguards and a ban on dumping, farmers in CAFTA countries will have trouble competing with U.S. exports of these crops.

There is only one safeguard measure in CAFTA that might protect national food security. In Annex 3.2: National Treatment and Export Restrictions, only Nicaragua has reserved use of agricultural safeguards for up to one year to maintain control over the export of eleven basic foodstuffs, in the event of a "critical shortage of that particular food item" ('Section F: Measures of Nicaragua").

On the controversial issue of Central American sugar exports, the United States protects Central American sugar exporters, not producers, by means of a Sugar Compensation Mechanism: "In any year, the United States may, at its option, apply a mechanism that results in compensation to 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 established for that party in the United States' Schedule to Annex 3.3" (Article 3.15). By means of this compensation mechanism, the United States would

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[6] Annex 3.3: Tariff Schedule of the United States (February 9, 2004) at http://www.ustr.gov/new/fta/Cafta/text/03-ma-us-schedule.pdf

[7] U.S> TRQ Annex I (March 2, 2004) at http://www.ustr.gov/new/fta/Cafta/text/03-ma-us-schedule-trq.pdf

[8] Mark Ritchie, Sophia Murphy and Mary Beth Lake, "United States Dumping on World Agricultural Markets", INSTITUTE FOR AGRICULTURE AND TRADE POLICY, WTO Cancún Series Paper No. 1 (February 2003) and the February 2004 update to this report, both at http://www.tradeobservatory.org

both satisfy the revenue needs of Central American sugar exporters and protect U.S. sugar producers and processors. However, the implementation of the Mechanism is entirely at the discretion of a U.S. government, which could decide never to implement the Mechanism, even if U.S. sugar producers demonstrated harm to their operations due to a global increase in tariff free sugar imports.

U.S. sugar processors have calculated that under the CAFTA market access terms for sugar and under current sugar prices, the U.S. government might have to pay Central American sugar exporters $28 million in the first year of the agreement. In comments submitted by the U.S. Trade Representative's Agricultural Technical Advisory Committee (ATAC) for Trade in Sweeteners and Sweetener Products and made public on March 22, the processors' representatives stated, "[W]e do not understand how policy makers could justify spending $28 million per year in support of the sugar program, with checks being written to overseas interests, at the same time that other commodity programs may be squeezed at home".[9] Sugar producer representatives on the ATAC likewise criticized the Sugar Compensation Mechanism.

However, sugar processors on ATAC recommended, in a minority opinion, that Congress should approve CAFTA. Sugar producers on the Committee, in a majority opinion opposed the agreement, stating that the world sugar "market is characterized by chronic dumping" and that CAFTA would "expose the U.S. market to ruinous world dumped market prices, and severely disrupt the U.S. sugar import and domestic program". The ATAC producer representatives also stated that the U.S. Trade Representatives had evaded their requests for a study of the cumulative impacts of sugar market access being proposed in regional and bilateral Free Trade Agreements.[10]

The first year CAFTA ceiling on tariff or duty free exports of Central American sugar is about 97,000 metric tons. In the fifteenth year, the ceiling is about 138,000 metric tons. The Office of the U.S. Trade Representative has defended these levels of duty free tonnage by noting that the tariff above those tonnage levels would be a trade prohibitive 100 percent and by arguing that "[s]ugar imports have declined by about one-third since the mid-nineties. CAFTA would not even come close to returning U.S. imports to those levels."[11] The Central American Sugar Association (AICA) claims that the impact of Central American sugar exports on the U.S. sugar industry would be "miniscule".[12] AICA also contends "[t]he sugar access obtained by Central American in CAFTA enabled many key U.S. agricultural commodities to have received the access they sought to the region's consumer markets".[13]

Opponents of allowing any duty free sugar tonnage into the U.S. via CAFTA argue that CAFTA will set a precedent for other regional and bilateral Free Trade Agreements whose duty free sugar tonnage provisions will collectively destroy the U.S. sugar industry. Senator Byron Dorgan of North Dakota stated in a Senate hearing that the result of allowing sugar imports "is death by a thousand cuts to our domestic sugar industry", alleging that CAFTA and other sugar exports will

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[9] "Producer, Processors Join in Criticism of Sugar Safeguard in CAFTA", INSIDE U.S. TRADE, April 2, 2004.
[10] Ibid. and "Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Central America Free Trade Agreement (CAFTA), Agricultural Technical Advisory Committee for Trade in Sweeteners and Sweetener Products (March 19, 2004) at http://www.ustr.gov.
[11] "Sugar: Putting CAFTA Into Perspective" OFFICE OF THE U.S. TRADE REPRESENTATIVE, January 26, 2004 at http://www.ustr.gov.
[12] "Louisiana Study Underscores Minimal Impact On Sugar In CAFTA", AZUCAREROS DEL ISTMO CENTROAMERICANO, October 2003.
[13] "The Legitimacy of Sugar in CAFTA", AZUCAREROS DEL ISTMO CENTROAMERICANO, February 2004.

be dumped into the U.S. at below their cost of production.[14] Indeed, the American Sugar Alliance, an association of growers, processors and refiners of sugar beets and sugar cane, acknowledges that for a 16 year period ending in the 1998/1999 growing season, the world price for sugar was "barely more than half of the world average costs of producing sugar".[15]

The Sugar Alliance contends that because of the extent of sugar dumping on world markets, "the drastic reform necessary to correct the world sugar market can only be achieved in comprehensive, global negotiations in the World Trade Organization"[16] and not in bilateral or regional Free Trade Agreements, such as CAFTA. However, there is not any framework in the WTO Agreement on Agriculture to reduce dumping, nor are there any proposals to do so in current AoA negotiations. The lack of political will to institute "drastic reform" against dumping derives from the aforementioned political clout of transnational agribusiness that profits handsomely by exporting commodities at below their cost of production.[17] Insofar as CAFTA is modeled on the North American Free Trade Agreement (NAFTA) and the results of NAFTA's agricultural chapter have been devastating for family farmers,[18] it would be little short of astonishing if family farmers benefited from CAFTA.

There is support for and opposition to CAFTA among agricultural groups. The Sugar Alliance is almost alone among U.S. commodities organizations, which have both agribusiness and large volume farmer members, in opposing CAFTA. On March 22, thirty-nine commodity and agribusiness organizations sent a letter to President Bush that stated their support for CAFTA. They noted that "[o]ver half of U.S. agriculture products will enter CAFTA countries and the Dominican Republic duty free immediately upon implementation of the agreement". Even the National Corn Growers Association, a member of the Sugar Alliance whose members benefit from various subsidies leading to the production of high fructose corn syrup, signed the letter to President Bush.

With the exception of the American Farm Bureau,[19] which is usually allied with agribusiness, farmer based agricultural groups have come out strongly against CAFTA. National Farmers Union President David Frederickson noted that the U.S. agricultural trade deficit with CAFTA countries was $900 million and that CAFTA "offer little prospect that the trade deficit with these countries will be reversed". He also contended that "CAFTA further encourages a race to the bottom for producer prices and fails to address major issues that distort fair trade"[20] The American Corn Growers Association called on Congress to reject CAFTA "or any other trade agreement which advance other sectors of the U.S. economy at the expense of U.S. farm families"[21]. Similarly, Family Farmer Defenders, attacked CAFTA in the context of recently

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[14] Senator Byron Dorgan, "Resolution to the U.S. Senate", January 23, 2004
[15] Don Phillips, "Trade Agreements: Impact on the U.S. Sugar Industry", AMERICAN SUGAR ALLIANCE, February 21, 2003 at http://www.sugaralliance.org
[16] ibid.
[17] See Mark Ritchie, Sophia Murphy and Mary Beth Lake, "United States Dumping on World Agricultural Markets" INSTITUTE FOR AGRICULTURE AND TRADE POLICY (February 2003) and the update to this report (February 2004) at http://www.tradeobservatory.org
[18] e.g. "Down on the Farm: NAFTA's Seven-Years War on Farmers and Ranchers in the U.S., Canada and Mexico", PUBLIC CITIZEN (June 2001) at http://www.citizen.org, various studies at the Study Center for Change in the Mexican Countryside at http://www.ceccam.org.mx and "Free Trade: Is it working for farmers?" NATIONAL FARMERS UNION OF CANADA (August 2002) at http://www.nfu.ca
[19] "Farm Burea Endorses CAFTA, But Will Wait To Lobby Congress", INSIDE U.S. TRADE, March 19, 2004
[20] "National Farmers Union Opposes CAFTA", Press release (December 19, 2003) at http://www.quixote.org/cafta/National_Farmers_Union_Statement.pdf
[21] "American Corn Growers Call Upon Congress to Reject U.S./Australian Trade Pact" Press release (February 9, 2004)at http://www.acga.org/news/2004/020904.htm

concluded bilateral trade negotiations.[22] The National Family Farm Coalition, in a statement with U.S. and Mexican family farm groups and non-governmental organizations, announced its opposition to CAFTA in February.[23]

Investment: This Chapter emulates the provisions of the investment Chapter 11 of the North American Free Trade Agreement (NAFTA). As with the NAFTA chapter, there are no performance requirements (e.g. job creation or technology transfer) of investors, despite the extensive list of privileges and rights granted by the Parties to the extremely broad definition of "investor" and "investment" (Article 10.9). Government laws or regulations "necessary to protect human, animal or plant life or health" or related to the "conservation of living or non-living exhaustible natural resources" (Article 10.9.3c) may limit the investors' otherwise unbridled freedom to profit from an investment. However, these limitations, which could certainly apply to agribusiness investments, may well be eroded by the proposals in the General Agreement on Trade in Services to discipline government regulation of the service industries that typically facilitate investments.[24]

As in NAFTA, the relation between investment and environmental resources is of a weak, best-endeavor nature that calls on Parties "to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns" (Article 10.11).. Factory farm, banana plantation and coffee plantation investors are among those who historically have not been "sensitive to environmental concerns".

However, CAFTA gives investors the right to seek through an arbitration procedure monetary compensation from governments for "measures equivalent to expropriation or nationalization" (Article 10.7), such as environmental regulations deemed to deprive the investor of the value of the investment. U.S. environmental organizations that oppose CAFTA have noted that it violates the "Trade Act of 2002" by granting to foreign investors "rights and privileges that go significantly beyond U.S. law", such as the right to receive monetary compensation for the potential effect on investment of a regulatory measure.[25]

Thus far no agribusiness firm has gone through the dispute resolution process to seek monetary compensation and/or changes to federal or sub-federal government actions and rules. However, in October 2003, Archer Daniels Midland announced its intention to submit a claim against Mexico under Chapter 11 to seek compensation for Mexico's tax on high fructose corn syrup.[26] Claims filed against the governments of the United States, Canada and Mexico concern a wide range of economic sectors and government laws and regulations.[27] The investment chapter puts a very heavy burden on governments to prove that their laws and regulatory measures are not "tantamount to expropriation". Therefore, it is not surprising that investors have won all the disputes that have gone all the way through arbitration, though several complaints have been withdrawn.

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[22] "Oppose Australia and US Trade Bill", FAMILY FARM DEFENDERS (January 2004) at http://www.wnpj.org/a040130a.shtml

[23] "Joint Statement from the 2nd USA-Mexico Forum on Agriculture and Free Trade", February 12, 2004 at http://www.ncrlc.com/Joint-Statement.html

[24] See Ellen Gould, "TACD Background Paper on Trade in Services," TRANSATLANTIC CONSUMER DIALOGUE (February 2003) at http://www.tacd.org

[25] Letter from the Center for International Environmental Law et al. to Members of Congress, February 18, 2004.

[26] "ADM Files Notice of Intent to Submit Claim Against Government of Mexico For Violations of the Investment Provisions of the North American Free Trade Agreement", News Release (October 14, 2003) at http://www.admworld.com

[27] "NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy", PUBLIC CITIZEN (September 2001) at http://www.citizen.org and at http://www.naftalaw.org

As with NAFTA, in CAFTA's investment chapter there is no penalty for the filing of a frivolous challenge by an investor against government laws or regulations. In the investor-state arbitration procedure "the tribunal shall have the authority to accept and consider *amicus curiae* (friend of the court) submissions from a person or entity that is not a disputing party" (Article 20.20.3). But there is no criteria given to justify which submissions are accepted by the tribunal and which are rejected. Hence the ability of public interest groups to intervene in support of government laws and regulations apparently will depend upon the disposition of each dispute settlement panel. A panel hostile to public interest group intervention in a dispute could presumably reject all friend of the court submissions.

Conclusion: The applications of CAFTA provisions to agricultural trade and investment are many and difficult to summarize in a short space. These applications and the impacts of CAFTA will be hotly debated during the coming year. But even without detailed economic analysis of these impacts, the discriminatory nature of some of the unique features described above indicates that CAFTA's prime beneficiary is the transnational investor, even one whose investment practices have been shown to violate a government's rules and laws.