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**REPORT ON NICARAGUA'S COMPLIANCE WITH CHAPTER 3 OF
THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES
FREE TRADE AGREEMENT (DR-CAFTA)**

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**Report on Nicaragua's Compliance with Chapter 3 of the Dominican Republic-
Central America-United States Free Trade Agreement (DR-CAFTA),
Particularly Regarding the Agricultural Sector
USAID/Nicaragua DR-CAFTA Implementation Project**

I. Executive Summary

This report provides a review of existing laws and regulations concerning market access and related issues addressed in Chapter 3 of the DR-CAFTA (the Agreement), focusing in particular on compliance with treaty obligations and the agricultural sector. It also reviews the need for new regulations in selected Nicaraguan agricultural sectors to comply with (or benefit from) Chapter 3 of the Agreement.

The general sense of the Government of Nicaragua (GON) is that it has implemented its market access commitments under the Agreement. This view was echoed at all bureaucratic levels and was supported by private sector and other sources that were consulted. A review of implementing legislative decrees, ministerial agreements, technical circulars and other regulations appears to confirm compliance with Chapter 3, although there may be some outstanding issues in relation to specific tariff rate quotas, agricultural export subsidies and agricultural safeguards. In the light of this finding, there appeared to be no need to draft new regulations for purposes of Chapter 3 compliance in the coffee, shrimp and fisheries sectors. The project might want to focus efforts on quality and dissemination of market access information; assisting on geographical indications for certain agricultural goods; providing training to customs officials on enforcement, including rules of origin, and providing capacity-building for the soon-to-be-established competition law authority.

II. General Considerations Relating to Implementation by Nicaragua of the Agreement

According to the GON, the main problems that Nicaragua has faced in implementing trade agreements are institutional weakness and low levels of competitiveness. In recent years, the GON has been trying to tackle these problems through institutional strengthening in administering agreements as well as a Competitiveness Program focusing on clusters, strengthening current export sectors, creating capacity in potential or non-traditional sectors, and aggressively promoting exports.¹²

¹ Los principales problemas a los que se ha enfrentado nuestro país en la implementación de los acuerdos comerciales es la debilidad institucional y los bajos niveles de competitividad; estas situaciones han sido abordadas a través de un plan de fortalecimiento institucional implementado desde el año 2002, que ha generado capacidades organizativas, jurídicas y de infraestructura física para enfrentar los retos de la administración de los Acuerdos. En el aspecto de la competitividad se implementa el Programa de Competitividad a partir del año 2003, con un enfoque de conglomerados que persigue fortalecer los sectores exportadores actuales y crear capacidades para sectores potenciales, apoyado por un programa agresivo de promoción de exportaciones.

Los principales problemas de implementación de los acuerdos comerciales pactados por Nicaragua han sido de manera general, los siguientes:

1. Una estructura institucional para la implementación de los acuerdos no adecuada. Este problema se ha venido solucionando de la siguiente manera:
 - a. Creación dentro del Ministerio de Fomento, Industria y Comercio, de una Dirección de Aplicación de Tratados, que hoy se encarga de la administración de estos acuerdos;
 - b. Creación en las demás Instituciones de Gobierno, de unidades especiales que atienden los temas específicos de su competencia, relacionados con estos acuerdos;
 - c. Implementación de mecanismos de coordinación con el sector privado para una mayor y más directa participación de los sectores económicos en la negociación y administración de los acuerdos.

2. Una base productiva insuficientemente desarrollada para aprovechar efectivamente los beneficios de las preferencias negociadas. Este problema se ha venido solucionando de la siguiente manera:
 - a. Implementación de programas sectoriales destinados a volver más competitivos a sectores como el de las MIPYMES, agropecuario, etc.
 - b. Asistencia técnica y capacitación dirigida a los sectores productivos.
 - c. Implementación de Programas como promover la modernización tecnológica de los sectores productivos.
 - d. Creación y promoción de leyes que permitan un acceso al crédito de los pequeños productores.
 - e. Desarrollo de clusters.

3. Incipiente modernización de los instrumentos de divulgación de las preferencias negociadas en los acuerdos. Este problema se ha venido solucionando de la siguiente manera:
 - a. Divulgación dirigida a sectores específicos a través de seminarios con enfoque de demanda en atención a las necesidades de los sectores.
 - b. Modernización de las herramientas de consulta, ya sea a través de la página WEB u otros medios más convencionales.
 - c. Elaboración de documentos explicativos sobre los acuerdos.
 - d. Utilización de los foros de coordinación con el sector privado.
 - e. Atención personalizada a empresas o grupos de empresas específicas para exponerles los beneficios de los acuerdos.

Response by Nicaragua to question #4 posed by Chile at the Trade Policy Review conducted by the WTO Trade Policy Review Body on July 26, 2006.

In this regard, the first phase of an Inter-American Development Bank project with the GON in the amount of \$5 million aimed at contributing to the improvement of the public management of Nicaragua's foreign trade through strengthening its capacity to formulate, negotiate and administer an effective trade policy (including implementing its commitments under trade agreements) as well as to promote exports, will be coming to a close in December 2006. See "Resumen del Proyecto Fortalecimiento de la Gestión del Comercio Exterior" February 16, 2005 available at

<http://fgce.mific.gob.ni/admon/docs/Resumen%20del%20proyecto.feb1605.pdf>. According to IDB sources, a second phase of this program will follow consisting of another four-year project of \$5 million with similar objectives. IDB interviewees expressed the desire to collaborate with the USAID/Nicaragua DR-CAFTA Implementation Project to complement efforts, avoid duplication and maximize end results.² "According to the classification of the Central Bank of Nicaragua (BCN), for export purposes traditional products are: coffee, cotton, sesame, sugar, molasses, meat, shrimp, lobster, bananas, gold and silver. Non-

The need for enhanced institutional and trade capacity-building of course became more acute for Nicaragua as it embarked on negotiating, subscribing to and administering the DR-CAFTA. On August 5, 2004 the trade ministers and representatives of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States signed the Agreement. The National Assembly of Nicaragua approved implementing legislation for the Agreement by 49 votes to 37 on October 10, 2005.

Pursuant to paragraph 1(b) of Article 22.5 of the DR-CAFTA, the Agreement entered into force on March 1, 2006 as between the U.S. and El Salvador. The two Parties then amended the entry into force provisions with respect to the other signatories to provide that the signatory and the U.S. must specify in an exchange of letters that the signatory has completed its applicable legal procedures. Pursuant to the amended paragraph 2 of Article 22.5³, the Agreement entered into force for Honduras and Nicaragua on April 1, 2006, and for Guatemala on July 1, 2006. The Dominican Republic has ratified the Agreement, but not Costa Rica.

traditional products are: bovine cattle, tobacco, groundnuts, beans, mangos, quequisque, onions, ferns, plantains, pig meat, melons and tomatoes.”(WTO, p. 63, note 14).

³ "2. De ahí en adelante, este Tratado entrará en vigor para cualquier otro signatario en la fecha en que el signatario y los Estados Unidos especifiquen en un intercambio de notas certificando que el signatario ha completado sus procedimientos jurídicos aplicables. Una vez completado el intercambio de notas diplomáticas, el signatario deberá notificar por escrito al Depositario la fecha en que el Tratado entrará en vigor para este. A menos que las Partes acuerden otra cosa, el Tratado no entrará en vigencia para un signatario después de dos años desde la fecha de entrada en vigor de este Tratado." The General Secretariat of the Organization of American States serves as depositary of the Agreement. The exchange of letters by the U.S. and Nicaragua presumably signified that the U.S. was satisfied generally with Nicaragua's implementing legislation.

III. Review of Existing Law and Regulations of Nicaragua Concerning Market Access and Related Issues Addressed in Chapter 3 of the DR-CAFTA

This reviews the status of implementation by Nicaragua of its commitments under Chapter 3 National Treatment and Market Access for Goods. The analysis excludes Section G: Textiles and Apparel (Articles 3.20-3.29), but includes Annex 3.2 National Treatment and Import and Export Restrictions, Annex 3.3 Tariff Elimination (including General Notes Tariff Schedule of Nicaragua, Appendix 1, Appendix II, and Annex 3.3 Tariff Schedule of Nicaragua), and Annex 3.15 Agricultural Safeguard Measures (General Notes and Schedule of Nicaragua). These are the commitments by Nicaragua relating to trade in agricultural goods, especially in favor of the United States, that needed to be put in place upon or during the first year of entry into force of the Agreement in compliance with its terms.⁴

a. Tariff Elimination (Art. 3.3 and Annex 3.3)

The tariff elimination schedule under DR-CAFTA contains 25 staging categories or baskets (A through Y). The relevant baskets for tariff elimination by Nicaragua are:

- A (immediate elimination)
- B (5-year, linear removal)
- C (10-year, linear)
- D (15-year, linear)
- E (15-year, non-linear, 6 year grace period)
- F (20-year, linear, 10-year grace period)
- G (continued duty-free)
- H (continued MFN—no tariff elimination)
- M (10-year, non-linear)
- N (12-year, linear)
- P (18-year, non-linear, 10-year grace period)
- Q (15-year, non-linear, duties reduced to 15% in year 1)

Pursuant to Article 3.3 of the Agreement, the Dirección General de Servicio Aduaneros (DGA) of Nicaragua has adjusted its Sistema Aduanero Automatizado (SIDUNEA++) as of April 1, 2006 to apply the tariffs on imports according to the tariff elimination

⁴ Any “to do” or rather “to have done” list necessarily implies a judgment as to what provision or discipline to capture—not to mention what constitutes full implementation or compliance with the relevant provision. Although considered, some provisions were not included as separate rubrics in the text of this section of the report because a) they do not necessarily entail a new law or regulation, just a principle, such as national treatment (Art. 3.2), to adhere to and not violate by an existing or new measure; or b) circumstances have not arisen to put these provisions into play, such as the ability to resort to export restrictions to temporarily relieve shortages of basic foodstuffs (Annex 3.2); or c) they are not addressed to Nicaragua, such as the sugar compensation mechanism (Art. 3.16); or d) their implementation is longer term, such as consultations on the operation of the Agreement as regards trade in chicken which are to occur in 2015 (Art. 3.17). Some of these provisions, however, may be referred to in the context of other provisions included as rubrics. At any rate, I believe the content of this list to be more comprehensive, detailed and up to date with respect to Chapter 3 implementation issues than what was reflected in any of the matrices provided by MIFIC and USAID.

schedule contained in Annex 3.3 (Technical Circular No. 029/2006 of March 31, 2006⁵). A spot check of the tariffs applicable to agricultural products did not reveal any inconsistencies with Nicaragua's market access commitments under the Agreement.

b. Waiver of Customs Duties (Art. 3.4)

Under Article 3.4 of the Agreement, Nicaragua may waive customs duties conditioned explicitly or implicitly on the fulfillment of a performance requirement⁶ as long "as it is an Annex VII country for purposes of the" WTO Agreement on Subsidies and Countervailing Measures (SCM). This provision of the DR-CAFTA is relevant to the free trade zones that Nicaragua is establishing or expanding. The exemption under Article 3.4 lapses as soon as Nicaragua's GNP per capita has reached \$1,000 per annum based on World Bank data (thereby no longer qualifying as an Annex VII country under the WTO SCM). It should be noted that Nicaragua's per capita GDP was \$867 in 2005.⁷

According to projections contained in the National Development Plan, Nicaraguan authorities expect real GDP growth to rise so as to make it possible to raise per capita

⁵ CT/029/2009 Derechos Arancelarios a la Importación en el Marco del Tratado de Libre Comercio República Dominicana-Centroamérica-Estados Unidos of March 31, 2006 available at <http://www.dga.gob.ni/>. According to the a DGA source, a Sistema Arancelaria Centroamérica (SAC) or Central American Tariff System with tariff rates applicable as of July 1, 2006 will be posted on the DGA's website on August 21, 2006. The SAC contains separate columns for the Derechos Arancelarios a la Importación (DAI), the selective consumption tax (ISC), the value added tax (IVA), the Free Trade Agreement (FTA) with Mexico, FTA with Dominican Republic (which will change once DR-CAFTA enters into force for the D.R.), and CAFTA. The import duty DAI is based on the Central American Tariff System (SAC), which in turn is based on the Harmonized Commodity Description and Coding System (HS) (WTO p. 29). I did not investigate the consistency of the various additional taxes on imports. The GON considers that the Impuesto Selectivo de Consumo (ISC) is non-discriminatory and has no plans to eliminate it. *Response by Nicaragua to question #4 posed by Chile at the Trade Policy Review conducted by the WTO Trade Policy Review Body on July 24, 2006.*

⁶ A "performance requirement" is defined in Article 3.31 of the Agreement as a requirement that:

- (a) a given level or percentage of goods or services be exported;
- (b) domestic goods or services of the Party granting a waiver of customs duties or import license be substituted for imported goods;
- (c) a person benefiting from a waiver of customs duties or an import license purchase other goods or services in the territory of the Party granting the waiver of customs duties or the import license, or accord a preference to domestically produced goods;
- (d) a person benefiting from a waiver of customs duties or an import license produce goods or supply services, in the territory of the Party granting the waiver of customs duties or the import license, with a given level or percentage of domestic content; or
- (e) relates in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows,

but does not include a requirement that:

- (f) an imported good be subsequently exported;
- (g) an imported good be used as a material in the production of another good that is subsequently exported;
- (h) an imported good be substituted by an identical or similar good used as a material in the production of another good that is subsequently exported; or
- (i) an imported good be substituted by an identical or similar good that is subsequently exported.

⁷ WTO, p. 1.

GDP to nearly \$1,000 by the end of 2010.⁸ Once it achieves this level, Nicaragua will be subject to WTO disciplines applicable to other developing country WTO members as regards the prohibition against subsidies contingent upon export performance. Moreover, Nicaragua will no longer be exempt under paragraph 4 of Article 3.4 of the DR-CAFTA from the prohibition against adopting any new waiver of customs duties or expanding recipients that is conditioned on fulfillment of a performance requirement (paragraph 1 of Article 3.4) or the prohibition against conditioning an existing waiver of customs duties on fulfillment of a performance requirement (paragraph 2).

c. Temporary Admission of Goods (Art. 3.5)

According to Technical Circular No. 025/2005 of March 21, 2006 (CT-025-2006)⁹ certain goods enumerated in Article 3.5.1 of the Agreement shall be granted duty-free temporary admission for one year provided the goods on arrival are accompanied by a declaration of temporary importation. There is a security requirement equivalent to the amount of charges that would be owed if the goods were not re-exported, which is consistent with Article 3.5.3 (c). The operative portion of the circular also provides for the possibility of extending the time limit for duty-free temporary admission beyond the period initially fixed as provided in Article 3.5.2 of the Agreement—subject to the deposit of a new security.

It was not possible to determine how well DGA's procedures operate for the "expeditious release of goods" admitted under this article consistently with Article 3.5.5.

The operative portion of the circular essentially tracks Article 3.5.7 to allow an importer to be relieved from any liability for failure to export the good because the good has been destroyed, and requires the importer seeking to be relieved to submit a request in writing to cancel the temporary admission and release the security deposited.

It was not possible to determine Nicaragua's compliance with Article 3.5.8 relating to vehicles and containers, which is not addressed in the circular.

⁸ *Id.* at p.11.

⁹ CT/025/2006 Reglas Generales para la aplicación de CAFTA-DR en la Aduana de Nicaragua available at <http://www.dga.gob.ni/ct-025-2006%20reglas%20grales%20aplicación%20en%20aduana%20CAFTA%20DR%20español.doc>.

According to a DGA source, the DGA considers that pursuant to its authority to issue general customs rules, it can effect these DR-CAFTA commitments via a technical circular. According to the same DGA source, this has been a point of contention with USTR.

d. Good Re-Entered after Repair or Alteration (Art. 3.6)

The operative portion of CT-025-2006 tracks the provisions of Article 3.6 of the Agreement, exempting goods re-entered after repair or alteration from customs duties.

e. Duty-Free Entry of Commercial Samples of Negligible Value and Printed Advertising Materials (Art. 3.7)

The operative portion of CT-025-2006 tracks the provisions of Article 3.7 of the Agreement, granting duty-free entry of commercial samples of negligible value and printed advertising materials.

f. Distinctive Products (Art. 3.12)

The operative portion of CT-025-2006 tracks the provisions of Article 3.12.1 of the Agreement, providing that only Bourbon Whiskey and Tennessee Whiskey manufactured in the United States in accordance with U.S. laws and regulations governing their manufacture, may be imported, exported or be in international land transit in Nicaragua.

Paragraph 2 of Article 3.12 provides for the consideration of amending the Agreement to designate other goods as distinctive products for purposes of this Article. This may be of interest to Nicaragua to pursue for some of its goods.

g. Administration and Implementation of Tariff-Rate Quotas (Art. 3.13, Appendix I, Appendix II or III to Nicaragua's Schedule to Annex 3.3)

Under the Agreement, Nicaragua may apply tariff rate quotas on the following (sensitive) products imported from the United States: pork, chicken leg quarters, milk powder, butter, cheese, ice cream, other dairy products, yellow corn, white corn, rough rice (subject to performance requirements), and milled rice. The in-quota duty is free. The out of quota tariff treatment varies: pork (D), chicken leg quarters and rice (P), dairy products (F), yellow corn (E), and white corn (H). Each DR-CAFTA Party is to implement and administer the tariff rate quotas for agricultural goods in accordance with GATT Article XIII (Non-discriminatory Administration of Quantitative Restrictions) and the WTO Import Licensing Agreement.

According to the Notes to Appendix I of Annex 3.3 of the Agreement, Nicaragua is to allocate the in-quota quantities of each qualifying good to persons based on the proportion of the total quantity of imports of the good that each person imported during a previous representative period, while also allocating a reasonable proportion of the in-quota quantities to new entrants, if any. Nicaragua is also to establish a mechanism for reallocating unused in-quota quantities to interested persons.

Notwithstanding that the Agreement entered into force for Nicaragua on April 1, 2006, Nicaragua must meet its market access commitments, including its tariff rate quota import levels, specified for year one of DR-CAFTA in 2006; in other words, Nicaragua

needs to fulfill its tariff rate quota levels for year one by the end of 2006.¹⁰ According to information publicly available on MIFIC's website, as of July 31, 2006, the tariff rate quota on **milled rice** (13, 650 metric tons) has been assigned and utilized in full, on a first come first served basis (primero en tiempo, primero en derecho). Around 92% of the TRQ on **white corn** has been utilized (all 5,100 m.t. assigned to new importers). For **yellow corn**, the utilization rate is 59% (61,425 m.t. assigned to historical importers and 6,825 m.t. to new importers¹¹) and for **rough rice** 50.5% (total 92,700 m.t. has been assigned, of which 78.92% to historical importers, 16.08% to new importers and 5% to "other"¹² importers).

The utilization (and allocated) rates for TRQs on **dairy products** so far are low (14.81% for cheese, 8.69% for ice cream, 5.54% for powdered milk) to non-existent (butter). Similarly, no TRQ license has been assigned for importation of **pork**, which is supposed to be allocated on a first come basis. Neither MIFIC nor DGA sources could explain why this was the case.

One aspect of Nicaragua's agricultural tariff rate quota system may be worth flagging. In approving the DR-CAFTA, Nicaragua's National Assembly annexed a complementary agenda within the decree¹³. The purpose of the Complementary Agenda is to allow Nicaragua to benefit better from the DR-CAFTA. Annex 1.1 sets out the principles for administering quotas under the Agreement.¹⁴ With respect to rough rice, it is specified in

¹⁰ The relevant agreements/regulations in relation to tariff rate quotas (TRQ) that I was able to locate on the MIFIC and National Assembly websites (<http://www.mific.gob.ni> and <http://legislacion.asamblea.gob.ni>) and confirm with a MIFIC source as valid are: Acuerdo Ministerial No. 007-2006 (milled rice), Acuerdo Interministerial MIFIC-MAGFOR No. 008-2006 (rough rice), Acuerdo Ministerial No. 009-2006 (pork), Acuerdo Ministerial No. 010-2006 (dairy), Acuerdo Ministerial No. 011-2006 (yellow corn), Acuerdo Ministerial No. 036-2006 (yellow corn), Acuerdo Ministerial No. 045-2006 (rough rice), and Acuerdo Ministerial No. 046-2006 (rough rice). There does not appear to be a regulation for a TRQ on chicken leg quarters since a duty-free quota does not kick in for that product until year three of the Agreement.

¹¹ According to Ministerial Accord No. 011-2006, for the first three years of the Agreement, 90% of the TRQ on yellow corn will be allocated to importers with a historical record and 10% to new importers, then as of year four, 80% to traditional importers (which will include the "new" importers of the first three years) and 20% to new importers.

¹² Article 11 of Ministerial Accord No. 008-2006.

¹³ Decreto Legislativo No. 4371, published in *La Gaceta* No. 199 of October 14, 2005 and available at <http://legislacion.asamblea.gob.ni/Normaweb.nsf/164aa15ba012e567062568a2005b564b/7358db958acd36bf062570c8005afde4?OpenDocument&Highlight=2,CAFTA>.

¹⁴ - Los procedimientos para la administración y adjudicación de las cuotas obtenidas en el contexto del CAFTA-DR se deberán hacer conforme los mecanismos establecidos en el marco de la OMC y según lo estipulado en el mismo Tratado.

- De acuerdo a lo establecido en el CAFTA-DR, las asignaciones se deberán otorgar, en primera instancia, en base al record histórico de importación de los solicitantes, dejando un porcentaje de la cuota para ser asignada a nuevos solicitantes.

- En los casos donde no exista un record histórico de importación para algún producto, las asignaciones se efectuarán de acuerdo al principio de primero en tiempo, primero en derecho, por un período de uno a tres años, tiempo durante el cuál se deberá establecer un record histórico de importación.

- **En el caso específico del arroz granza, la asignación de la cuota se deberá realizar conforme al método histórico y con la aplicación de un requisito de desempeño que exigirá la compra de arroz nacional de un volumen equivalente al volumen importado dentro de la cuota.** [bold added]

- En el caso específico de las piezas de pollo, la cuota deberá ser asignada a través de un mecanismo de

Annex 1.1 of the Complementary Agenda that the allocation of the quota must be realized according to a historical period and subject to a performance requirement whereby an equivalent quantity of domestic rice must be purchased for the quantity imported within the quota.

The regulation governing the administration of the tariff rate quota for the importation of rough rice requires an importer seeking a license *inter alia* to present documentation proving that the importer has fulfilled the performance requirement in a previous period (Article 9 e) of MIFIC-MAGFOR Inter-Ministerial Accord No. 008-2006). The performance requirement is defined as the additional condition requiring the purchase of domestically-produced rough rice in order to participate in the TRQ (Article 4 of 008-2006)¹⁵. The regulation also refers to the Program of Support to the Rice Producer (Programa de Apoyo al Productor de Arroz or PAPA), which is the convention signed between the Nicaraguan Rice Association (ANAR) and importers of rough rice. The importer is also required to accompany the importer's request for the issuance of the certificate of adjudication of the TRQs with a support letter from the ANAR specifying that the importer has satisfied its performance requirement commitment or the importer will fulfill the requirement before the expiry of the period established for importation under the TRQ (Article 17 f)).

As a general matter, conditioning the grant of a license for importing a good to the purchase of an equal amount of the good produced domestically may raise issues under the non-discriminatory principles of GATT Articles III:1 and XI:1, which are incorporated by reference into the DR-CAFTA (Articles 3.2 and 3.8). It may also raise issues under GATT XIII:2(d) as well as Article 3.2 of the WTO Agreement on Licensing. DR-CAFTA Parties are required to conform to GATT Article XIII and the Licensing Agreement (Articles 3.9 and 3.13). It should be noted, however, that at issue here is a bilateral quota for which only rice of US origin can benefit.

According to a MIFIC source, the GON considers that the performance requirement applied on rough rice is consistent with Nicaragua's obligations under the Agreement. In

subasta definido de común acuerdo entre las partes.

- Los procedimientos y mecanismos garantizarán que, cualquier persona, natural o jurídica que cumpla con los requisitos legales y administrativos, sea elegible para solicitar y considerada para la asignación de la cuota.

- Los procedimientos para la asignación de las cuotas deberán ser transparentes y no discriminatorios.

- Los procedimientos o reglamentos se darán a conocer a través de su publicación en los periódicos y además se colocarán en la página WEB del MIFIC, a fin de que cualquier persona ya sea por sus propios medios o a través de la oficina del Centro de Información y Consultas Comerciales (CICC) de la Dirección de Política Comercial del MIFIC, tenga acceso a los mismos.

- Los procedimientos y mecanismos, sin menoscabo del control y supervisión adecuada, serán ágiles, flexibles y sencillos, con la finalidad de garantizar la utilización plena de la cuota asignada.

- Los procedimientos y mecanismos garantizarán que las asignaciones se hagan en cantidades de embarque comercialmente viables y, en la medida de lo posible, en las cantidades que los importadores soliciten.

¹⁵ “**Requisito de desempeño:** Condición adicional que exige la compra de producción nacional del arroz en granza para poder participar en el contingente arancelario. Estas condiciones requieren que el importado haya adquirido un volumen de arroz en granza doméstico equivalente al solicitado para ser importado por éste bajo del presente Reglamento.”

paragraph 12 (a) of Appendix 1 of Annex 3.3 in the Agreement, it is provided that Nicaragua may maintain and administer performance requirements for rough rice existing on the date of entry into force of the Agreement provided they are:

- (i) maintained at a level not to exceed the total in-quota quantity specified for the good;
- (ii) administered so as not to impair the orderly fill of the in-quota quantity; and
- (iii) eliminated when the over-quota duty reaches zero.

It is not clear whether Nicaragua has applied a performance requirement for rough rice prior to April 2006, although Article 9 of 008-2006 implies that such a requirement may have existed. Import licenses have been authorized/distributed to 24 firms for the full amount of the TRQ quantity of rough rice provided for year one of the Agreement, although only half of the quota has been filled as of July 31, 2006.

h. Agricultural Export Subsidies (Art. 3.14)

Under paragraph 2 of Article 3.14 of the Agreement, no Party may introduce or maintain any export subsidy on any agricultural good destined for the territory of another Party (except to counter subsidized agricultural exports by a CAFTA non-Party, such as the EEC, into another CAFTA Party's market). An agricultural export subsidy is defined under the Agreement as having the same meaning as in Article 1(e) of the WTO Agreement of Agriculture (AoA); *i.e.*, subsidies contingent upon export performance.

On its face, the prohibition against subsidizing agricultural exports destined for the territory of other DR-CAFTA Parties under the Agreement goes beyond commitments undertaken by the developing country Parties under the WTO. Nicaragua made no reduction commitments on agricultural domestic support and export subsidies in the Uruguay Round. As a developing country, Nicaragua was not obliged to make reduction commitments on subsidies provided to reduce the costs of marketing exports of agricultural products as well as internal transport and freight charges on export shipments. These subsidies are considered export subsidies under the WTO AoA but developing countries may still resort to them; however, such subsidies may not be permissible under the more blanket prohibition against agricultural export subsidies of the DR-CAFTA.

As mentioned with reference to DR-CAFTA Art. 3.4 above, once Nicaragua no longer qualifies as an Annex VII country because its per capita GDP exceeds \$1,000, it will have to assume greater disciplines on applying subsidies contingent on export performance under the SCM.

i. Agricultural Safeguard Measures (Art. 3.15 And Nicaragua's Schedule to Annex 3.15))

Nicaragua's Schedule in Annex 3.15 lists the United States goods that Nicaragua may subject to an agricultural safeguard measure. The schedule also specifies the level of

imports of each such good from the U.S. that can trigger a safeguard as well as the level of the additional import duty, which is the form that the safeguard measure can take. The goods include: beef, chicken leg quarters, certain dairy products, onions, beans, yellow corn, rough rice, milled rice, sorghum and high fructose corn syrup.

According to a MIFIC source, agricultural safeguard measures do not require an Inter-Ministerial or MIFIC agreement to implement as is the case for tariff rate quotas since the level of the additional duties is specified along with the trigger volumes in Annex 3.15 of the DR-CAFTA. It is a matter of inputting these trigger and duty levels into the SIDUNEA++. However, a DGA source informed that the safeguards are not yet in the system but work is underway so that this will be operational in the first semester of 2007. It should be noted that Nicaragua is allowed under the Agreement to take safeguard action against certain imported goods from the United States but Nicaragua is not obligated to do so.

Nicaragua has had recourse to the special agricultural safeguard available under the WTO AoA only once: on four kinds of rice during the 2002-2003 period.¹⁶

j. Committee on Agricultural Trade (Art. 3.19)

The GON has designated its representative(s) to the Committee. According to MIFIC sources, none of the Committees provided for in the Agreement has yet met.

IV. Review of the Need for New Regulations in Selected Nicaraguan Agricultural Sectors to Comply with (or Benefit from) Chapter 3 of the DR-CAFTA Agreement

a. Regulatory Framework for Fish and Aquaculture (including Shrimp)

Fisheries provide Nicaragua with growing export opportunities but it faces competition especially from Asia in its major export markets¹⁷. In 2004, the major products exported by Nicaragua were: farmed shrimps (US\$26.8 million), lobsters (US\$21.3 million), sea shrimps (US\$9 million), shrimp larvae for repopulation (US\$2.4 million), and fresh or chilled fish fillets (US\$1.2 million)¹⁸.

¹⁶ Response by Nicaragua to question #14 posed by Colombia at the Trade Policy Review conducted by the WTO Trade Policy Review Body on July 24 and 26, 2006.

¹⁷ WTO, p. 66.

¹⁸ The sector "is chiefly controlled through a series of concessions and quotas. The fishing concessions include the following: 1,169 hectares of brackish land in the Padre Ramos Estuary; 18,811 hectares for shrimp farms; and 30,764 hectares in the Real Estuary. The following are the current quotas under the annual global catches quota scheme: lobsters (2.8 million lbs), Caribbean shrimps (4.5 million lbs), Pacific shrimps (0.5 million lbs) and tuna (8,205 cubic metres). Nicaragua's small-scale fishing fleet comprises 268 vessels for the country as a whole and there are 15 processing plants (shrimps and lobsters), seven on the Caribbean coast and eight on the Pacific coast, with a combined capacity of 342,000 lbs." WTO, p. 67

Law No. 489, Law on Fishing and Fish Farming, in force since December 27, 2004¹⁹, regulates fishing and fish (including shrimp) farming activities with the declared overall objective of ensuring the conservation and sustainable development of hydro-biological resources, making the best use of traditional fisheries and promoting diversification of non-traditional fisheries and fish farming (Article 1).

The law establishes a National Commission of Fisheries and Fish Farming (CONAPESCA) with government and private sector representation (Articles 16-20). The law gives preference to domestic producers and Article 6 provides that utilization of fisheries resources by foreign-registered vessels must complement the activities of national vessels, in conformity with the conditions and limitations laid down in international agreements and treaties ratified by Nicaragua. All fish and fish farming production for export must be processed in duly-authorized plants in the territory of Nicaragua (Article 43). Foreign-registered vessels are explicitly authorized to carry out scientific or leisure fishing and may be authorized for commercial fishing of freely accessible resources (“recursos de libre acceso”) but not for commercial fishing of limited access resources without prejudice to licenses already granted (Article 55). The Law also provides that special licenses may be granted to Nicaraguan vessels or foreign-registered vessels leased or chartered with or without a purchase option if Nicaraguan natural or legal persons are involved or to Nicaraguan companies with foreign participation (Article 74). There is provision for tax exemption for gasoline and diesel used in production for export as well as exemption until 30 June 2010 for imports and sale of raw materials, intermediate goods and capital goods intended for small-scale (“artesanal”) fishing and fish farming (Article 111).

The private sector participated in the drafting of Law No. 489. According to a producer association source, the law represents 90% of what the domestic industry had sought. Another private sector source expressed satisfaction with the general legal and regulatory framework under which his shrimp farming business operated. He did complain about all the paperwork he had to go through, particularly for importing needed raw materials for his business. However, he did not want the bureaucratic procedures diminished at the expense of quality control, since his marketing image depended on his product being additive-free. For his particular business, the DR-CAFTA did not represent a significant new market opportunity in the U.S. since Nicaraguan shrimp exports already received duty-free treatment under the Caribbean Basin Initiative. According to a producer association source, there have only been two recent instances of Nicaraguan shipments (from companies not affiliated with the association) being rejected in the U.S. for not fulfilling requirements for imported foodstuffs. He opined that more could be done for small-scale fisherman in the area of capacity-building and quality control but that this could be assumed by Nicaraguan processors/buyers and associations.

b. Regulatory Framework for Coffee

Coffee is still one of the main engines of growth for Nicaragua, with green coffee remaining Nicaragua's leading export (US\$126.8 million) and accounting for 17.4 per

¹⁹ Ley de Pesca y Acuicultura, *La Gaceta* No. 251 of December 27, 2004.

cent of total exports in 2004²⁰. In the same year, Nicaragua exported US\$6 million worth of instant coffee.

Law No. 368, Law on Coffee, in force since March 2001²¹ regulates the production, processing and commercial activities of coffee produced in Nicaragua with the declared objective of promoting and defending national interest with regard to the development, cultivation, processing and sale of coffee, as well as of reconciling the interests of all agents participating in the coffee industry (Article 1).

The law establishes a National Coffee Council (CONACAFE) with government and private sector representation (Articles 14-19) whose functions include promoting Nicaraguan coffee and managing the special fund (FOCAFE) intended for the development of promotion and rehabilitation projects for the national coffee industry. The Council is to receive from the State US\$ 0.50 per quintal of green coffee exported (Article 21), with which the Council is to fund *inter alia* promotion projects presented by the coffee sector (Article 22). The law provides various tax breaks such as for the acquisition of coffee production and processing machinery that avoids environmental contamination. According to the terms of the law, these tax breaks expired in March 2006 (Articles 4-11). The law also sets out required terms for contracts for the sale and purchase of coffee (Articles 27-30).

According to a producer association source, the law provides a satisfactory regulatory framework. However, the source stated that the GON has not funded the National Coffee Council as provided, thus compromising the ability of the Council to fulfill its role of promoting and supporting the coffee industry. According to the same source, the technical secretariat for the Council, which is charged with proposing and coordinating research and technological development (Articles 25-26), is not operational.

The coffee sector has benefited from considerable donor funding, such as IDB funding to rehabilitate coffee plantations, USAID funding for a coffee certification laboratory, funding for organic certification, International Coffee Council-funded project for small producers and exporters, a Japanese-funded study with MAGFOR and IICA of the agro-industrial coffee chain, and an EU-funded project with MAGFOR on food security. The latter project produced a study for UPANIC²², which it would like to use to further promote a strategy of certification, classification of coffee farms by altitude, and varietal and quality control for the three coffee-growing zones (seven sub-zones) in Nicaragua. According to an UPANIC source, there is interest in having the DR-CAFTA Implementation Project provide assistance for establishing a “denominación de origen controlado” for the various respective Nicaraguan coffee regions.

²⁰ WTO, p. 64. “Some 30,400 households grow coffee and around 150,000 to 200,000 households earn part of their income from coffee production, processing and marketing. Nicaragua's coffee producers have taken several steps to improve the image and marketing of their product internationally, notably special, organic and selected coffees. These include the electronic sale of coffee.” *Id.*

²¹ Ley de Cafe, *La Gaceta* No. 251 of January 24, 2001.

²² “Mejoramiento y fortalecimiento en los procesos de certificación de calidades y comercialización del café” which is not publicly available.

V. Review of Some Other Issues Directly or Indirectly Related to the Agreement

a. Customs Administration

Customs administration is covered under Chapter 5 of DR-CAFTA; some aspects overlap with and affect Chapter 3 market access provisions. Rules of origin are dealt with under Chapter 4.

The GON maintains that it has fewer document requirements for imports and exports than the average for Latin American countries, taking three hours to authorize an export transaction and up to twenty minutes for clearing imports at the frontier with prepayment.²³ While GON has a single window (“ventanilla única”) or one-stop shop for export transactions, it does not have a single entity to centralize import transactions²⁴. This may be one area that the project could consider pursuing/supporting as bureaucratic obstacles to importation of needed inputs may serve as barriers to production and exportation.

A DGA source informed that there would be a technical circular on express shipments published during the week of August 21, 2006. Under Article 5.7 of the Agreement, Nicaragua is required to adopt or maintain expedited customs procedures for express shipments.

The Complementary Agenda speaks of improving export and import procedures and modernizing customs. Two versions of a draft General Law on Customs, one from the government²⁵ (assisted by an IDB consultant) and the other from the private sector

²³ “Desde el año 2000, Nicaragua redujo a 3 horas la autorización de un trámite de exportación, cuando en la década de los 90 duraba hasta una semana. En el año 2005 se estableció una efectiva modernización del trámite a favor del exportador, se ha iniciado la implementación de un Servicio Electrónico de trámite las 24 horas del día y los 365 días del año, a través de la Web, desde cualquier punto de acceso a Internet, lo que elimina la presencia física del solicitante y reduce costos en tiempo y transporte...Por el lado de las importaciones, los trámites se realizan directamente en la DGA, mediante el sistema automatizado y de autodespacho (desde finales de 1997 “Ley Autodespacho”). En el marco de la Integración Centroamericana, el despacho puede realizarse en frontera mediante el prepago, lo cual demora como máximo 20 minutos y como mínimo depende de la agilidad del importador en presentar los documentos del despacho ante el servicio aduanero. Actualmente la declaración aduanera es electrónica, no así los documentos adjuntos a la declaración lo que logrará presentarse electrónicamente en el año 2007.” *Response by Nicaragua to question #4 posed by Colombia at the Trade Policy Review conducted by the WTO Trade Policy Review Body on July 24 and 26, 2006.*

²⁴ *Response by Nicaragua to question #3 posed by Colombia at the Trade Policy Review conducted by the WTO Trade Policy Review Body on July 24 and 26, 2006.* The GON also has a one-stop shop or single window for investors. On a visit to MIFIC, I and other consultants went to the office/window for investors but found no one there.

²⁵ “El anteproyecto de Ley General de Aduanas, pretende fusionar en una sola norma jurídica las diversas normas aduaneras dispersas, de forma que sea complementaria a la normativa aduanera regional. Se busca tener un texto que congloba normas que, entre otras, hoy se encuentran dispersas en:

- Ley de Autodespacho
- Ley sobre Defraudación y Contrabando Aduaneros
- Ley de Valoración en Aduanas (artículos vigentes).
- Decreto sobre Puertos Libre (Duty Free)

(assisted by an IICA consultant) are in the Office of the President. According to a DGA source, the GON is undertaking consultations with the private sector to reconcile the two versions. The expectation is to have the President forward by September 15, 2006 a proposed law to the National Assembly for its approval. There is also a draft foreign trade law being prepared which aims to reorganize current legislation on the subject.²⁶

Several proposed laws, technical circulars, and procedures drafted earlier by the IICA consultant were reviewed. It was found that where the drafts did cover areas governed by DR-CAFTA, the drafts did not fully address or track DR-CAFTA requirements in some respects. As drafted it was also difficult to determine how the proposals modified existing legislation and rules. (The local project legal adviser has written comments on the matter.) The work by the IICA consultant, a local customs expert, was reviewed because this work figured prominently in an early matrix of DR-CAFTA obligations (pending at the time) as prepared by MIFIC. According to a DGA source, the latest version from the private sector of a draft customs law (around 500 articles), which draws from the IICA consultant's work, is largely redundant as it duplicates the existing Central American Uniform Customs Code (CAUCA III).

The DGA source consulted was not involved in organizing training for customs officials but expressed the general need for capacity-building in risk analysis and rules of origin enforcement, not only for customs officials located throughout the country but also for the broader business community, including customs brokers and chambers of commerce.

b. Sanitary and Phytosanitary (SPS) Measures

Chapter 6 of the Agreement basically reaffirms the parties' rights and obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and establishes a Committee to address bilateral and plurilateral SPS matters. MAGFOR has named its representative to the Committee.

Paragraph 8 of the Complementary Agenda speaks of strengthening animal health, plant health, and food safety control so that products for domestic consumption and for export can meet sanitary and quality standards, with the aim of supporting the export sector in meeting international market requirements and of assuring the quality of imports.

A producer and exporter association source expressed concern at the relatively short list of Nicaraguan produce approved by APHIS compared to other Central American countries. He also expressed interest in obtaining geographical indication protection for Nicaraguan dragonfruit ("pitahaya").

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- Normativa para la garantía de agentes de aduana y depósitos aduaneros.
 - Disposiciones sobre Resoluciones Anticipadas
 - Normativas relativas al Arancel, Normas de Origen, para vincularlas directamente a la normativa aduanera."

Response by Nicaragua to questions posed by Argentina and Japan at the Trade Policy Review conducted by the WTO Trade Policy Review Body on July 24 and 26, 2006.

²⁶ WTO, p. 15.

A MAGFOR source expressed satisfaction generally with the technical cooperation MAGFOR is receiving from USDA/APHIS in the SPS area. The source noted that IDB is also assisting MAGFOR, MINSA and MIFIC in legal reform. He suggested that the DR-CAFTA Implementation Project could provide in-depth legal advice, particularly on the laws regulating seeds, sanitary registry and animal health.

c. Dispute Settlement

Provisions governing the settlement of disputes between the parties under the Agreement can be found in Chapter 20. According to a MIFIC source, DR-CAFTA parties have not yet finalized the roster of individuals willing and able to serve as panelists (Article 20.7) or the members of the Advisory Committee on Private Commercial Disputes (Article 20.22). Nicaragua has enacted a law on arbitration and mediation as referred to in the Complementary Agenda.

d. Competition Policy

There are no commitments on competition policy in the Agreement. The Complementary Agenda speaks of the need to enact a competition law. A draft law is about to be approved by the National Assembly.²⁷ The DR-CAFTA Implementation Project might explore assisting in capacity-building for the new anti-trust entity that will be created.

²⁷ El proyecto de ley de competencia, se encuentra en proceso de dictamen en la Comisión Económica de la Asamblea Nacional, la que ha previsto someterla a consideración del Plenario, para su aprobación, a finales de agosto del corriente año. Se ha realizado un amplio proceso de consulta con vistas a lograr consenso sobre el tema, iniciado desde el año 2002 que abarca seminarios y foros, publicación de diversos artículos, y conferencias a Universidades y Gremios.

El objetivo de esta ley es promover y tutelar la libre competencia entre los agentes económicos, para garantizar la eficiencia del mercado y el bienestar de los consumidores, mediante el fomento de la cultura de la competencia, la prevención, la prohibición y sanción de prácticas anticompetitivas.

La Ley prevé la creación de una entidad o agencia para su aplicación, de naturaleza autónoma con personalidad jurídica propia, independencia administrativa y funcional. En cuanto a las prácticas prohibidas, se refiere a conductas anticompetitivas de los agentes económicos, generalmente aceptadas en el ámbito internacional, a saber: a) los acuerdos o convenios entre competidores para fijar precios, repartirse o asignarse territorios o áreas geográficas, acuerdos en las ofertas en licitaciones públicas; asignación de cuotas de producción; acuerdos para boicotear o sacar del mercado a nuevos competidores entrantes. b) abuso de la posición de dominio y otras practicas verticales que se dan en la cadena de comercialización, tales como practicas predatorias, conducta exclusoria, distribuciones exclusivas anticompetitivas, y toda aquella tendencia que tenga por objeto limitar o restringir la competencia o impedir el acceso o eliminar del mercado a cualquier agente económico. c) Control de concentraciones, fusiones y/o adquisiciones.

Tiene un Capitulo de abogacía y promoción de la cultura de competencia. Este aspecto novedoso permitirá que la actividad de la agencia no se centre de forma exclusiva en la investigación y sanción de conductas empresariales, si no que practique, además, una actividad preventiva educativa y de defensa y abogacía de la competencia.

Los temas de procedimiento sanciones y debido proceso se han delineado con el rigor técnico necesario a fin de dar seguridad jurídica y transparencia a los agentes económicos.

Response by Nicaragua to question #2 posed by the European Community at the Trade Policy Review conducted by the WTO Trade Policy Review Body on July 26, 2006

e. Market Information

MIFIC sources expressed interest in having the DR-CAFTA Implementation Project assist in improving online and other information for the benefit of Nicaraguan potential exporters on access requirements to the U.S. market, particularly regarding rules of origin, SPS measures and technical barriers to trade and standards. A review of the MIFIC website revealed various word documents (static and with few hyperlinks) providing some information for some products (fichas producto mercado). These products were selected by MIFIC on the basis of immediate free access to the U.S. A visit to the MIFIC Centro de Información y Consultas Comerciales revealed that market inquiries are often channeled to NICAEXPORT or IICA²⁸. The MIFIC public library had a mixed assortment of publications (e.g., data on Japan from 2000). It would seem that more could be done to collate, make more user-friendly and update (as well as keep updated) market access information for use by interested producers and potential or actual exporters. An APEN source expressed interest in collaborating in providing practical export tips.

With IDB funding, the MIFIC negotiating team prepared an excellent explanatory document on the DR-CAFTA. It was only available in hard copy and there are no more copies available. It would be useful to reproduce this and have it available online.

VI. Concluding Observations

It remains to be seen whether the tariff rate quota levels that Nicaragua committed to under DR-CAFTA on yellow corn, rough rice, dairy products and pork originating from the United States will be fully utilized by importers in 2006. Nicaragua has yet to make operational the agricultural safeguard system that it may apply under DR-CAFTA to imports from the United States of beef, chicken leg quarters, certain dairy products, onions, beans yellow corn, rough rice, milled rice, sorghum and high fructose corn syrup. The current scope under DR-CAFTA and the WTO for Nicaragua to pursue certain export promotion practices may lapse in the medium- or long-term as the country's level of economic development rises (above the GNP per capita \$1,000 per annum threshold).

The project may wish to focus efforts on:

- a) improving the quality, dissemination and timely updating of market access information by MIFIC and other sources to assist current and potential Nicaraguan exporters to benefit from market opportunities offered by DR-CAFTA;
- b) providing in-depth legal assistance to the GON and/or private stakeholders on the laws regulating seeds, sanitary registry and animal health;
- c) providing in-depth legal assistance to the GON and/or private stakeholders on geographical indications for non-traditional (pitahaya) and traditional (coffee) export products;

²⁸ IICA has elaborated its own fichas. IICA sells its information and has established a DR-CAFTA information center. See *Informe Anual 2005*, available at http://www.iica.int/ni/Estudios_PDF/Info_IICA_2005.pdf

- d) streamlining/centralizing the processing of import transactions, particularly for inputs needed for production and exportation;
- e) training of customs officials and brokers on customs enforcement, including rules of origin; and
- f) capacity-building activities for the new competition law authority.

Persons Interviewed

Asociación de Productores y Exportadores de Nicaragua (APEN)

Jorge Brenes Abdalah, Gerente General

Camara de la Pesca de Nicaragua (CAPENIC)

Armando Segura

Camarones de Nicaragua, S.A. (Camanica)

Larry Drazba, General Manager (APENN, CONPES)

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Manuel Antonio Mayorga Duarte, Sub Director General Técnico

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Ambrosia Lezama Zelaya, Directora, Registro de Propiedad Intelectual de Nicaragua

José Moreno, Dirección Aplicación de Tratados (solución de controversias)

Urania Ráudez, Dirección Aplicación de Tratados (contingentes arancelarios)

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Naomi C. Fellow, Economic Officer

Ervin F. Leiva, Agricultural Specialist

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