

2006

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Recommended Citation

Nina Rohe, *Update: The Central American Free Trade Agreement - A Survey and Comparison to the Treaty of the European Community*, 12 LAW & BUS. REV. AM. 73 (2006)
<https://scholar.smu.edu/lbra/vol12/iss1/5>

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UPDATE: THE CENTRAL AMERICAN FREE TRADE AGREEMENT – A SURVEY AND COMPARISON TO THE TREATY OF THE EUROPEAN COMMUNITY

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I. INTRODUCTION

THE Central American Free Trade Agreement (CAFTA)¹ is a multilateral treaty between the United States and the Central American states of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, which was concluded and signed by the representatives of these states on May 28, 2004. The Dominican Republic acceded to this treaty on August 5, 2004.²

CAFTA is the basis of a free trade zone between the treaty states and is slated to be ratified by their parliaments. The agreement is mostly determined under the influence of the North American Free Trade Agreement (NAFTA) of 1994, which was concluded and signed by Canada, Mexico, and the United States, creating a free trade zone between those states.

It is the purpose of this article to give the reader an overview of the important CAFTA provisions and to highlight differences between it and the Treaty of the European Community (EC treaty).

The first part of the article gives an insight into the CAFTA text and provides the reader with a summary of the treaty. The second part introduces elementary and comparable parts of the EC treaty, which are compared to the law under CAFTA in the third part of the article. The conclusion of this survey is a summary of the current situation, with an outlook on the future developments.

* This article was composed during an internship in the law office of Rodriguez, Langstadt, & Aguero in Coral Gables, Florida. Clemens W. Pauly edited the English translation of this article. Nina.Rohe@gmx.de.

1. Central American Free Trade Agreement, May 28, 2004, *available at* <http://www.ustr.gov/TradeAgreements/Bilateral/CAFTA/CAFTA-DRFinalTexts/SectionIndex.html> [hereinafter CAFTA].
2. Press Release, Office of the United States Trade Representative, Dominican Republic to Join Central American Nations in Free Trade Agreement with United States (July 23, 2004), *available at* <http://www.ustr.gov/DocumentLibrary/PressReleases/2004/July/DominicanRepublictoJoinCentralAmericanNationsinFreeTradeAgreementwithUnitedStates.html>.

II. CAFTA IN A SURVEY

CAFTA creates a free trade zone between the parties, which is intended to facilitate trade and to extend the volume of trade relations from its current amount of approximately \$32 billion.³ The motivation to establish this free trade zone was also to deepen the friendly contacts between the parties by establishing a mostly common market.⁴

There are different principles laid down in the CAFTA text concerning labor, environment, and intellectual property rights (IP-rights), which are intended to be recognized and nationally enforced by the treaty parties.

The goals of the free trade agreement are to intensify the free trade relations between the parties and to facilitate them by furtherance of a common market economy, to establish common competition conditions in a free trade zone, to further the state's expansion, and to safeguard the security of the IP-rights in the particular states.⁵

The signed CAFTA text contains twenty-two parts. Parts 1 through 9 of the treaty deal with general national conditions of common market access including: customs and their gradual abolition in the trade zone and administrative and technical issues.⁶ These parts of the agreement are not discussed in this article.

The treaty is further concerned with questions of investment, IP-rights, labor and environmental law, and financial and telecommunications services in the treaty states.⁷

In article 15 CAFTA, the parties admit their duties under the Trade-Related Aspects of Intellectual Property Rights Agreement of the World Trade Organization (WTO) and the intellectual property agreements, which are created and administrated by the World Intellectual Property Organization.⁸ This part of the treaty is also not the subject of this article because of the complexity of this topic.⁹

A. INVESTMENT UNDER ARTICLE 10 CAFTA

Article 10 CAFTA is the so-called Most-Favored Nation Clause. With this clause the parties bind themselves to treat investments from other states in the same way as national investments.¹⁰ Moreover, the national governments are obliged to give investments from one treaty state the same consideration as investments from other treaty or non-treaty

3. See CAFTA-Freizhandelszone, <http://www.internetkanzlei.to/caftafreizhandelszone.html> (last visited Jan. 18, 2006).

4. CAFTA, *supra* note 1, pmbl.

5. *Id.* art. 1.2.

6. *Id.* arts. 1-9.

7. See *id.* arts. 10, 15, 16, 17, 12, & 13. See the articles in this order.

8. See World Trade Organization, <http://www.wto.org> (last visited Jan. 17, 2006); see also World Intellectual Property Organization, <http://www.wipo.int> (last visited Jan. 17, 2006).

9. For further explanations on this topic, see RAOUL DUGGAL & VIOLA FROMM-RUSSENSCHUCK, *WTO UND TRIPS: UNMITTELBARE AUSWIRKUNGEN AUF DIE RECHTSPRAXIS*, (Carl Heymans Verlag 2004).

10. CAFTA, *supra* note 1, art. 10.3.

states.¹¹ In this context, the treaty state has the duty to give the investor an international minimum standard of fair treatment and full police protection and security, as defined in article 10 CAFTA. This includes the state's duty not to refuse legal rights to investors and to provide them with civil, criminal, or administrative legal protection, if necessary.¹²

Furthermore, there are duties to provide for compensation in the case of the investor's financial loss.¹³ The states are required to allow transfers of funds, which are connected with the investment in the state. In this context, however, it is possible to issue national restrictions concerned with insolvency problems or the creditors' rights.¹⁴ Moreover, the regulation of the import or export of goods, the prohibition of certain goods, or the restriction of access to certain regional markets is not allowed.¹⁵

These parts of the treaty, combined with the customs regulations, build the base of the free trade zone. Not all goods are duty-free from the beginning; rather there is a transition period of ten or twenty years during which customs shall be adapted to the new scheme.¹⁶ On the base of this free trade zone a mostly common market of all parties arises.

Section B of article 10 CAFTA provides regulations for the settlement of a conflict between investors and treaty states. The preferred method of dispute resolution is arbitration and the treaty sets forth the mechanism of how to select a panel as well as for the proceedings.

B. LABOR REGULATIONS UNDER ARTICLE 16 CAFTA

Article 16 CAFTA is concerned with labor law and the conditions of the labor market. The goal of these regulations is the standardization and improvement of labor conditions in the treaty states. The parties incorporate their obligations as members of the International Labor Organization (ILO) into national law particularly to observe the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998).¹⁷ This includes essentially the freedom of association of the worker, the abolition of child labor, and the fight against discrimination at the workplace.¹⁸

Labor law regulations and rights under CAFTA are left to be governed by existing national law, and treaty states are obliged to fulfill national obligations under labor law. It is forbidden to abandon these obligations because of better trade relations or investments.

11. *Id.* art. 10.4.

12. *Id.* art. 10.5.

13. For detailed requirements, *see id.* art. 10.6.

14. *Id.* art. 10.8.

15. *Id.* art. 10.9.

16. *Id.* art. 3.

17. *Id.* art. 16.1.

18. *See also* International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work, <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE> (last visited Jan. 18, 2005).

In article 16.3 CAFTA, you can find a guarantee for persons with special interests or intentions to assert their labor dispute or the observance of the national labor rights before a national tribunal. This guarantee is to be fulfilled by the parties on their own.

Tribunal proceedings have to be open to the public. Furthermore, the tribunal's decision must be in writing and include the legal reasoning. The decision has to be published without delay and must be based on the information and evidence that the parties had the opportunity to express themselves.¹⁹ The correction of a possible wrong result is to be guaranteed by the treaty states. Therefore there has to be a remedy available for the parties, for example a fine, to enforce their rights.²⁰ The treaty also prescribes that states publish the labor law statutes and make it possible for employees to access these statutes.

The treaty also creates the Labor Affairs Council that observes the compliance of national labor laws and that has a partner in the labor departments of every treaty state.²¹

It is also possible for the states to ask for a meeting with another party if the purpose of this meeting lies in questions concerning article 16 of the treaty.²² There will also be a group of individuals, as discussion partners, who are available in the case of a dispute. This group should consist of individuals from member states and non-member states who have experience in labor law and its enforcement, international trade and the settlement of disputes, and who are independent from the parties.²³

C. ENVIRONMENTAL INTERESTS UNDER ARTICLE 17 CAFTA

Article 17 CAFTA is constructed similarly to article 16 CAFTA and addresses environmental interests. The parties are obliged to comply with the national environmental regulations or statutes and to improve on them. The regulations or statutes are to satisfy a high level of environmental protection.²⁴

An Environmental Affairs Council shall be nominated that will observe the environmental interests under CAFTA and that has the same structure as the Labor Affairs Council. The functions of the Environmental Affairs Council are to ensure the observation of the Central America Environmental Cooperation Agreement and to supervise its enforcement.²⁵

The parties are obliged to supervise the compliance of the environmental laws and to guarantee a cause of action in the case of failure, just as in

19. CAFTA, *supra* note 1, art. 16.3.3.

20. *Id.* art. 16.3.6.

21. *Id.* art. 16.4.

22. *Id.* art. 16.6.

23. *Id.* art. 16.7.

24. *Id.* art. 17.1.

25. For the draft text of the ECA see U.S. Department of State, Draft Environmental Cooperation Agreement (ECA) (Jan. 27, 2004), <http://www.state.gov/g/oes/rls/or/2004/28577.htm>.

article 16.3 CAFTA.²⁶ There shall be a group of representatives who are able to discuss and settle a potential conflict.²⁷ These individuals are nominated in the same way as their counterparts in article 16 CAFTA. The further proceedings are also the same as in article 16 CAFTA.

D. COMMISSIONS UNDER ARTICLE 19 CAFTA

Finally, CAFTA establishes commissions with the mandate of supervising the realization of the treaty.²⁸ Among those commissions are the Free Trade Commission, which consists of the economy or trade ministers of the member states, and shall meet once a year; the Free Trade Agreement Coordinators, which is a group composed of the directors of the member states' trade departments; and the national Administration of Dispute Settlement Agreement and the Committee on Trade Capacity Development, which work on trade strategies and consist of officials nominated by the treaty states.

III. LAW UNDER THE EC TREATY IN A SURVEY

The following introduction to the EC treaty is only a short survey over the goals, institutions, and most important parts of the treaty.

In the preamble of the EC treaty, the goals of the member states are named as improvement of the economic and social conditions of the member states; harmonization of the political and economic connections of the member states; and peace, freedom, and solidarity between the nations.²⁹

The central desire of the member states is the establishment of a common market, the implementation of a common currency, and the economic union of those states. By using the terms between the member states to abolish customs and provide for unlimited import and export of goods, the common market between the member states as a free trade zone was established.³⁰ Furthermore, the people in the European Community were given extensive rights by the treaty, including freedom of settlement and freedom of work in the territory of the European Union, so that there are no limitations for citizens of the European Union any more (freedom of movement and work).³¹

Furthermore, article 130r of the EC treaty lays down the common environmental goals and regulations of the member states, which are related to conservation, protection, and improvement of the current environmental standards.³²

26. CAFTA, *supra* note 1, art. 17.3.

27. *Id.* art. 17.11.

28. *Id.* art. 19.

29. Treaty Establishing the European Economic Community pmbl., Mar. 25, 1957, 298 U.N.T.S. 11.

30. *Id.* art. 9.

31. *Id.* pt. III.

32. *Id.* art. 130r.

Finally, the treaty lays down the principles for the division of powers among the institutions of the European Community, which are the European Parliament, the European Council, the European Commission, the European Court of Justice, and the Audit Office.³³ These institutions conduct, regulate, and enforce the affairs of the European Union pursuant to the EC treaty, thus laying a new level on top of the jurisdictions of national governments. It is worth mentioning that the European Community lets new parties gain access to the community, thus enlarging the free trade zone and union, which in turn strengthens the union's position of power towards other states.

IV. COMPARISON OF THE AGREEMENTS

A comparison of the two treaties reveals some differences and similarities, but the differences predominate.

Similarities exist in the regulations concerning trade, labor law, and environmental law, among others. Furthermore, in both treaties a common market is established, or will be established, where customs and import regulations are abolished.

A significant difference between the two agreements lies in the fact that the EC treaty establishes immediately binding regulations while CAFTA does not provide for such a mechanism, but rather leaves the implementation of the general CAFTA goals to the national legislators.

Moreover, the EC treaty is more differentiated in the particular parts and more detailed than CAFTA. Also, you can find in the body of the EC treaty some statements that bind the member states, while you can find this only in the preamble of CAFTA.

The most significant difference between the agreements consists in the characteristic of the EC treaty as a true common market aimed at using the same currency in every member state. CAFTA only establishes a free trade zone, which simplifies the import and export of goods and harmonizes the ground rules in certain areas of environmental law, labor law, and IP-rights, without the additional unities of common institutions with regulatory and enforcement powers. Under CAFTA, national law still prevails and the treaty regulations are not immediately binding national law in the member states.

Unlike the EC Treaty, there is no new level of jurisdiction under CAFTA. The commissions, mentioned in the second part of this article, which supervise the compliance and management of CAFTA, are not comparable to the institutions of the European Union, because they themselves have no immediate enforcement powers and do not represent a new level of government or jurisdiction. The rights of the commissions are limited. Only the nomination of the arbitration committee in article 10 CAFTA can be seen as a new level of jurisdiction or dispute resolution mechanism. But this mechanism is only engaged with the field of invest-

33. *Id.* pt. V.

ment. Conversely, the institutions of the European Community have extensive rights and functions created by the EC treaty.

Moreover, the implementation of a common currency in the CAFTA member states is not scheduled, which is another important difference between the contracts.

It is worth mentioning that the EC treaty gives the citizens of its member states particular rights (European basic rights, such as free settlement or free choice of workplace), which can be individually perceived and enforced on a national as well as on a European level. Through this, the EC treaty provides the citizens mostly uniform rights. In the context of CAFTA, the parties are obliged to obey their national rights and to align them with international standards, as in the case of the labor law regulations. Individual rights are not given to the citizens of a CAFTA party by way of the treaty. The citizens of the treaty states are also neither given nor hold a prospect to a specific common CAFTA citizenship such as is the case under the EC treaty.

Finally, CAFTA lays down a principal measure for the free trade zone and the harmonization of the trade relations between the member states. Also, in other fields of the contract (labor and environmental law), there are laid down certain principles.

The EC treaty goes beyond that, which can be traced back to the progressed development of the contract. The principles for the establishment of the European Union were included in the original EC treaty, so that it is not a characteristic of the further development of the treaty.

Accordingly, the most decisive difference between the contracts is that for the Central American free trade zone, a union of the states is neither scheduled nor prospected. In contrast to the EC treaty, the simple free trade zone in Central America will probably remain.

V. RÉSUMÉ AND OUTLOOK

The text of CAFTA has been criticized in many states and there are anti-CAFTA movements that want to prevent both the establishment of the treaty and its ratification in the member states.³⁴ These critics call the extensive free trade regulations under CAFTA a sale of many economic areas of the states to the superiority of the United States.

The anti-CAFTA movement criticizes that big companies profit from the agreement while small agriculturists or tradesmen will fail under this treaty and, as a consequence, workers will be paid worse than before and lose their jobs. Furthermore, the critics see the danger of big companies gaining too much power, which they could use to manipulate the free market.³⁵

Additionally, the labor organizations see insufficient protections of the worker in the CAFTA regulations. The labor organizations demand uni-

34. See Stop CAFTA, <http://www.stopcafta.org> (last visited Jan. 15, 2006).

35. *Id.*

form rights for the employees in the member states, such as the uniform freedom of association. Moreover, the organizations fear a further deterioration of the conditions for employees as has been blamed on NAFTA. The fear is that the implementation of CAFTA will lead to a further increase of unemployment as well as lower wages.³⁶ Altogether it remains to be seen how CAFTA could be developed in its weak points.

Regardless of its critics, the CAFTA parties are satisfied with the prospects of better access to the U.S. market for their own producers that came at the price of giving in to additional U.S. demands in the fields of investment protection and IP-rights.³⁷

The critics of CAFTA will probably not be able to prevent its ratification because this treaty can be seen as another important step toward the Free Trade Area of the Americas (FTAA). The FTAA Draft Agreement includes the establishment of an all-American free trade zone respecting the principles of harmonization in fields such as labor, environment, investment, and IP-rights as they are provided for in the CAFTA text.³⁸ This free trade agreement can be understood as an American answer to the European Union. The United States regards the European Union as a powerful partner but also as a competitor. With the implementation of the European constitution, the respect for the European competition will grow even stronger. Therefore, an all-American free trade zone would be a significant step for the U.S. government to harmonize and combine the American continent's market powers as a balance against the European Union. It remains to be seen how much further the efforts to create an American free trade zone can be put into action and what kind of advantages and disadvantages it will bring for the member states and the European Union.

36. IAM Headquarters Online, *Stopping CAFTA: The Next Trade Battle to Protect Workers' Rights*, <http://www.iamaw.org/content.cfm?cid=3775> (last visited Jan. 18, 2006).

37. Andreas Behn, >>Freihandel<< Stück für Stück: Dominikanische Republik tritt dem Abkommen mit USA bei. Zunehmende Kritik an Investitionsklausel, JUNGE WELT, Mar. 25, 2004, available at <https://www.jungewelt.de/loginFailed.php?ref=/2004/03-25/006.php>.

38. See also Free Trade Area of the Americas, <http://www.ftaa-alca.org> (last visited Jan. 15, 2006).

Comment and Casenotes

