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Free Trade and Sustainability Through the Lens of Nicaragua: How CAFTA-DR Should Be Amended to Promote the Triple Bottom Line

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FREE TRADE AND SUSTAINABILITY THROUGH THE LENS OF NICARAGUA: HOW CAFTA-DR SHOULD BE AMENDED TO PROMOTE THE TRIPLE BOTTOM LINE

PAULETTE L. STENZEL*

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INTRODUCTION

It is time for a new approach to international trade. Environmentalists and labor leaders in the United States have been saying so for many years. Now, U.S. political leaders are saying so, too. During his 2008 presidential election campaign, President Barack Obama pledged:

I will work with the leaders of Canada and Mexico to fix NAFTA ["North American Free Trade Agreement"] so that it works for [U.S.] workers. I believe that NAFTA and its potential were oversold to the [U.S.] people.¹ It has not created the jobs and wealth that were promised. We can, and must, make trade work for [U.S.] workers by opening up foreign markets to U.S. goods and maintaining strong labor and environmental standards.²

A new emphasis on making trade fair is evident in the U.S. Congress also. In the November 2008 U.S. elections, "[a]t least 41 new [F]air-[T]raders were elected to House and Senate seats, which represent a net gain of 33 in Congress' overall economic justice contingent. This comes on top of the 37 net [F]air-[T]rade pick-ups in the 2006 congressional elections."³

¹ President Obama referred to "American" workers and people, as do many speakers from the United States. Yet people in Mexico, Central America, and South America consider themselves to be Americans. Therefore, in this article, remaining references to "American" have been changed to "U.S."

² Massimo Calabresi, *Where They Stand On: Trade*, TIME, Oct. 30, 2008, http://www.time.com/time/specials/packages/article/0,28804,1855269_1855265_1855208,00.html.

³ Todd Tucker & Lori Wallach, *Fair Trade Victory*, FOREIGN POL'Y IN FOCUS, Nov. 21, 2008, <http://www.fpif.org/fpiftxt/5692>.

These results of the 2008 federal elections parallel recent voicing of opposition to free trade agreements. For example, the U.S.-Colombia Free Trade Agreement is currently stalled in the U.S. Congress, and talks in the Doha Round of the General Agreement on Tariffs and Trade (“GATT”)⁴ have made little progress.⁵ According to Xavier Becerra, U.S. Representative from California, “I submit to you that our trade policies are just not working—they are unworkable. We need to create a future of beneficial trade growth by insisting on verifiable standards of conduct in [the Dominican Republic-Central American Free Trade Agreement] CAFTA[-DR].”⁶ He adds, “CAFTA[-DR] was the very first trade deal I have voted against in my close to fourteen years of congressional service.”⁷

The elections of a new President and members of Congress who are ready to revise the U.S. approach to trade show that the tides have turned in the United States since January 1, 2006,⁸ when the CAFTA-DR debuted quietly.⁹ At that time, while there was limited public discussion of CAFTA-DR in the United States, citizens of other member countries spoke up loudly against the free trade agreement. There was heated opposition to the agreement by citizens in Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua.¹⁰ The minimal public

⁴ General Agreement on Tariffs and Trade (“GATT”), Oct. 30, 1947, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc.

⁵ Matthew Bristow, *Congress Won't Pass US-Colombia Free-Trade Pact in '10—US Envoy*, TRUTH ABOUT TRADE & TECH., Jan. 26, 2010, <http://www.truthabouttrade.org/news/latest-news/15496-congress-wont-pass-us-colombia-free-trade-pact-in-10-us-envoy>; Lawrence L. Herman, *International Trade At the Crossroads?*, FINANCIER WORLDWIDE.COM, Mar. 2010, <http://www.financierworldwide.com/article.php?id=6244>.

⁶ Xavier Becerra, *CAFTA, Legal Reform and the Political Dimension*, 12 SW. J.L. & TRADE AM. 319, 320 (2006).

⁷ *Id.* at 328.

⁸ A bill is pending in Congress that would require a review of existing trade agreements including, NAFTA and CAFTA-DR. The Trade Reform, Accountability, Development, and Employment Act, S. 2821, 111th Cong. § 3(b) (1st Sess. 2009), H.R. 3012, 111th Cong. § 3(b) (1st Sess. 2009).

⁹ Dominican Republic-Central America Free Trade Agreement, U.S.-Guat.-El Sal.-Hond.-Nicar.-Costa Rica-Dom. Rep., Aug. 5, 2004, 19 U.S.C. § 4001 *et seq.*, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR].

¹⁰ *U.S. Trade Pact Is Protested in Costa Rica*, N.Y. TIMES, Oct. 1, 2007, <http://www.nytimes.com/2007/10/01/world/americas/01costarica.html>; see also Elisabeth Malkin, *Central American Trade Deal Is Being Delayed by Partners*, N.Y. TIMES, Mar. 2, 2006, <http://www.nytimes.com/2006/03/02/business/02cafta.html>; see also James C. McKinley, Jr., *U.S. Trade Pact Divides the Central Americans, with Farmers and Others Fearful*,

discussion of CAFTA-DR in the United States at the time of its debut also sharply contrasted with the flurry of debate that occurred in the United States when NAFTA was approved in 1993 and took effect in 1994.¹¹

CAFTA-DR was ratified and implemented in El Salvador, Guatemala, Honduras, and Nicaragua by mid-2006, and it was passed by a referendum in Costa Rica in October 2007.¹² Its purpose is to “eliminate tariffs and trade barriers and expand regional opportunities for the workers, manufacturers, consumers, farmers, ranchers and service providers of all the [members].”¹³ In that vein, NAFTA and CAFTA-DR are based on the assertion that their members will benefit from comparative advantage.¹⁴ However, comparative advantage is only one feature that CAFTA-DR and NAFTA are designed to deliver. NAFTA and CAFTA-DR also set out to achieve the goal of sustainable development in their respective preambles, and CAFTA-DR speaks of it in Article 17.9.¹⁵

This article focuses on whether CAFTA-DR’s provisions are sufficient to achieve sustainability. Therefore, a definition of sustainability is necessary. In 1987, the United Nations (“UN”) sponsored the World Commission on the Environment and Development (“World Commission”) and released the results of a four-year study addressing ecological and economic threats to Earth. Called the Brundtland Report, it was published as *Our Common Future*.¹⁶ In it, the World Commission said, “[h]umanity has the ability to make development sustainable to ensure that it meets

N.Y. TIMES, Aug. 21, 2005, <http://www.nytimes.com/2005/08/21/international/americas/21cafta.html>; For discussion of protests in Costa Rica against CAFTA-DR and the Plan Puebla Panama, an economic development plan facilitating CAFTA-DR, see Paulette L. Stenzel, *Plan Puebla Panama: An Economic Tool That Thwarts Sustainable Development and Facilitates Terrorism*, 30 WM. & MARY ENVTL. L. & POL’Y REV. 555, 591 (2006).

¹¹ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; see, e.g., *The ‘Great Debate’ over NAFTA*, N.Y. TIMES, Nov. 9, 1993, at A16, available at <http://www.nytimes.com/1993/11/09/opinion/the-great-debate-over-nafta.html>.

¹² *CAFTA Wins in Razor-Close Costa Rica Vote*, ALTERNET, Oct. 8, 2007, <http://www.alternet.org/economy/64680/>.

¹³ Office of the United States Trade Representative (“USTR”), CAFTA-DR Final Text, http://ustraderep.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited Mar. 6, 2010).

¹⁴ GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 22 (1993).

¹⁵ NAFTA, *supra* note 11, pmb.; CAFTA-DR, *supra* note 9, pmb., art. 17.9.

¹⁶ WORLD COMM’N ON ENV’T & DEV., OUR COMMON FUTURE (1987), available at <http://worldinbalance.net/pdf/1987-brundtland.pdf> [hereinafter OUR COMMON FUTURE]. The report is sometimes referred to as the Brundtland Report due to the chairmanship of the World Commission by former Norwegian prime minister Gro Harlem Brundtland. *Id.*

the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁷

The World Commission's emphasis on the needs of future generations aligns with the views of indigenous people of the Western Hemisphere. Many indigenous people speak and think of the interdependence of human beings; every action, even the smallest step, has effects now and into the future.¹⁸ Their teachings emphasize that “[w]e cannot simply think of our survival; each new generation is responsible to ensure the survival of the seventh generation,” and “[t]he prophecy given to us, tells us that what we do today will affect the seventh generation and because of this we must bear in mind our responsibility to them today and always.”¹⁹ This perspective is essential in the context of this article as it examines the effects of CAFTA-DR on the people in its developing members, many of whom are indigenous.

Going beyond basic definitions, it is important to talk about ways to measure sustainable development. The Triple Bottom Line is one such tool that describes what factors must be considered if companies and individuals are to pursue sustainable practices and lives in meaningful ways. It is defined as economy, social equity, and environment.²⁰ Andrew W. Savitz and Karl Weber say in their book *The Triple Bottom Line*, “[s]ustainability in practice can be seen as *the art of doing business in an interdependent world*.”²¹

¹⁷ *Id.* at 24. For discussion of the report and its effects, see ANDRES R. EDWARDS, *THE SUSTAINABILITY REVOLUTION: PORTRAIT OF A PARADIGM SHIFT 16–20* (2005).

¹⁸ This is from a 1992 report that draws upon the teachings of indigenous people of North America and India. LINDA CLARKSON ET AL., INT'L INST. FOR SUSTAINABLE DEV., *OUR RESPONSIBILITY TO THE SEVENTH GENERATION: INDIGENOUS PEOPLES AND SUSTAINABLE DEVELOPMENT* 3, 19 (1992), available at http://www.iisd.org/pdf/seventh_gen.pdf.

¹⁹ *Id.* at 3, 24.

²⁰ See, e.g., Goethe-Institute, *Sustainability—From Principle to Practice*, <http://www.goethe.de/ges/umw/dos/nac/den/en3106180.htm> (last visited Mar. 6, 2010) (referring to the “three pillars of sustainability” of economy, environment, and social institutions); STAFF REPORT TO THE CITY COUNCIL OF DAVIS, CALIFORNIA 7 (2009), available at <http://cityofdavis.org/meetings/councilpackets/20091215/07%20Community%20Sustainability%20Workshop.pdf> (the Report encourages a Sustainability Plan that will focus on environment, economy, and society). This trilogy is also sometimes referred to as “people, planet, profits.” See, e.g., Catawba College, *“People, Planet, Profits” Motivate Duke Energy’s Decisions*, Oct. 2, 2008, http://www.catawba.edu/news/archive/2008/10/02/ruff_dukeenergy.aspx. For clarity, the term “social equity” is used in this article.

²¹ ANDREW W. SAVITZ & KARL WEBER, *THE TRIPLE BOTTOM LINE: HOW TODAY’S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO* x (2006).

Fifteen years of experience under NAFTA reveal that it promotes development that is not sustainable as defined by the Triple Bottom Line. Workers in various sectors of the economy in the United States and Mexico have suffered, especially in Mexico. Congressperson Becerra says, “[w]e have displaced over a million Mexican small farmers who can no longer survive because they cannot compete with our agribusiness that sends corn, wheat, and soybeans down to Mexico.”²²

Moreover, NAFTA has led to increased social inequities and harm to the natural environment. Based on experience under NAFTA and an examination of current economic, social, and environmental conditions in CAFTA-DR’s developing members, lawmakers and businesspeople cannot assume that CAFTA-DR will lead to sustainable development. Therefore, CAFTA-DR deserves close scrutiny by people in business, law, government, and throughout society.

Through NAFTA, two developed countries, Canada and the United States, joined forces with one developing country, Mexico.²³ Through CAFTA-DR, six developing countries are partners with one economic giant, the United States.²⁴ The developing members of CAFTA-DR share many common characteristics.²⁵ Poverty and unemployment levels are high.²⁶ For those who have jobs, wages are extremely low. For example, a Nicaraguan worker in the agricultural sector lives on an average of \$1.38²⁷ per day, while a Nicaraguan worker in the manufacturing sector lives on an average of \$1.86 per day.²⁸ The developing members share similar challenges as they work to protect their agricultural sectors, reduce poverty, improve infrastructure, pursue sustainable economic development, protect and clean up the natural environment, and respect the cultures of their citizens. In most, a majority of the population is completely or partially indigenous.²⁹

²² Becerra, *supra* note 6, at 323.

²³ See generally NAFTA, *supra* note 11.

²⁴ See generally CAFTA-DR, *supra* note 9.

²⁵ Some authors refer to the “Central American members,” but that label ignores the Dominican Republic, a Caribbean country. Therefore, developing nation members of CAFTA-DR will be referred to as “developing members” throughout this article.

²⁶ Wilson Center OnDemand, Central America’s Economic Dilemma, <http://www.wilsoncenter.org/ondemand/index.cfm?fuseaction=Media.play&mediaid=536B275B-0F80-4B6B-CA3C49D5D6EE61E5> (last visited Mar. 6, 2010).

²⁷ Unless otherwise noted, all references to monetary amounts are in U.S. Dollars.

²⁸ Don McIntosh, *CAFTA Fight Boils Down to Who Will Benefit in Trade*, NW. LAB. PRESS, www.nwlaborpress.org/2005/5-20-05CAFTA.html (last visited Mar. 07, 2010).

²⁹ See Donna Lee Van Cott, *Latin America’s Indigenous Peoples*, 18 J. DEMOCRACY 127, 128 tbl. (2007), available at http://muse.jhu.edu/journals/journal_of_democracy/v018/18.4van-cott.pdf.

As a result, each country will face challenges as it strives to protect the culture and heritage of its people. Nevertheless, a look at one country provides perspectives on the problems of the various developing members.

This article shows that CAFTA-DR fails to meet the Triple Bottom Line for its developing members. It begins with a survey, using examples from Costa Rica, the Dominican Republic, El Salvador, Guatemala, and Honduras. It then focuses on Nicaragua.³⁰ Nicaragua is an apt choice for focus because the United States has historically dominated its economy and politics.³¹ It is also the poorest of the CAFTA-DR nations.³² In view of the fact that the poor are those who suffer the most from unsustainable development, Nicaragua provides a heightened case for an examination of the threats posed by CAFTA-DR. Nicaragua provides a microcosm to show why CAFTA-DR does not meet the Triple Bottom Line for its developing members.

U.S. citizens share the problems faced by people in the developing members of CAFTA-DR. These problems will not go away because they are forgotten or repressed. The problems and their causes must be explored if they are to be resolved in creative ways. This article explores the problems facing CAFTA-DR's developing members, with a focus on Nicaragua. It also proposes a framework for the pursuit of sustainable development in those countries within the context of CAFTA-DR.

Part I of this article provides background on the foundations of free trade and the context of CAFTA-DR, and it introduces concepts that are integral to discussion of CAFTA-DR. Part II explores the environmental and historical context of free trade agreements between the United States and other Western Hemisphere countries. Part III explores CAFTA-DR's provisions as well as the positions of its opponents and supporters. Part IV surveys the actual and potential effects of CAFTA-DR on Costa Rica, the Dominican Republic, El Salvador, Guatemala, and Honduras. Then, Parts V and VI focus on Nicaragua's needs and the prospects for Nicaragua to develop in sustainable ways under CAFTA-DR. CAFTA-DR presents a major threat to the poor in Nicaragua and other developing members because it does not promote the three legs of the Triple Bottom Line.

³⁰ This author traveled within Nicaragua in 2007 and interviewed businesspeople, government officials, and labor organizers in Managua, San Juan de Oriente, Estelí, Ducuale Grande, Nueva Vida, and San Juan de Limay.

³¹ See *infra* text accompanying notes 371–375.

³² Central Intelligence Agency, The World Factbook: Nicaragua, <https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html> (last visited Mar. 7, 2010) (designating Nicaragua “the poorest country in Central America”).

Therefore, this article proposes that companies operating pursuant to CAFTA-DR in its developing members be required to demonstrate their meaningful pursuit of sustainable development by participating in the Global Reporting Initiative (“GRI”), a global reporting mechanism that measures efforts to pursue sustainability.³³ Over 1,500 organizations around the world are now submitting sustainability reports to the GRI, and it has “become the de facto global standard for reporting.”³⁴ The closing sections of this article outline a plan of action for requiring use of the GRI framework by U.S. companies operating in the CAFTA-DR region, thereby encouraging those firms to conduct sustainable operations in that region.

I. BACKGROUND: PREMISES OF FREE TRADE AND THE CONTEXT FOR CAFTA-DR

This section provides background on CAFTA-DR. It begins by exploring two premises on which CAFTA-DR is based. The first is the assertion that CAFTA-DR promotes economic development for all through comparative advantage. The second is the assumption that development under CAFTA-DR is sustainable. It also introduces the concept of the Triple Bottom Line, which is a tool for examination of whether actions by business and government promote sustainable development. It ends with a review of the framework on which NAFTA and CAFTA-DR are based.

A. *Examining the Assumption That Free Trade Promotes Comparative Advantage: What Is the Comparative Advantage?*

Comparative advantage, an economic theory first presented by David Ricardo in 1817, states that a country can always benefit from foreign trade so long as it finds its niche and relies on it.³⁵ In *The Principles*

³³ Global Reporting Initiative (“GRI”), What is GRI?, <http://www.globalreporting.org/AboutGRI/WhatIsGRI/> (last visited Mar. 7, 2010). The term “GRI” refers to both a framework of international measurement standards and an organization. Throughout this article the phrase “GRI Framework” refers to the international standards and “GRI administration” refers to the organization itself.

³⁴ Sino-Swedish Corporate Social Responsibility (“CSR”) Cooperation, The Global Reporting Initiative (GRI), <http://csr2.mofcom.gov.cn/aarticle/chtfa/200905/20090506246547.html> (last visited Mar. 7, 2010).

³⁵ STEPHEN M. SURANOVIC, INTERNATIONAL TRADE THEORY AND POLICY ch. 40-0, <http://internationalecon.com/Trade/Tch40/T40-0.php> (last visited Mar. 7, 2010).

of *Political Economy and Taxation*, Ricardo asserts that “what matters is not the absolute cost of production, but rather the ratio between how easily the two countries can produce the products.”³⁶ This concept, known as comparative advantage, “states that it can be beneficial for two countries to trade without barriers as long as one is more efficient at producing goods or services needed by the other.”³⁷ What is important, as Ricardo states, is the “relative efficiency” of the production, not the absolute cost of production.³⁸ In the twenty-first century, many U.S. businesses are relying on comparative advantage to justify their ventures in foreign countries.³⁹ Free trade advocates assert that free trade agreements promote and create a market in which each member contributes to the overall development of the trade region. “The notion is that trade is based on natural comparative advantages between trading partners. A country that has skilled workers is going to do much better with products that require skilled labor than some other country that does not have skilled workers.”⁴⁰

B. Assertion That NAFTA and CAFTA-DR Promote Sustainable Development

Proponents of free trade agreements say that the agreements bring economic development that trickles down benefits to all, lifting all boats through a rising tide of greater prosperity and development.⁴¹ They also assert that the development is sustainable.⁴² Opponents of free trade agreements assert that the development promoted through such agreements is unsustainable.⁴³

³⁶ S. TAMER CAVUSGIL, GARY KNIGHT & JOHN R. RIESENBERGER, *INTERNATIONAL BUSINESS: STRATEGY, MANAGEMENT, AND THE NEW REALITIES* 98 (2008).

³⁷ *Id.*; see also SURANOVIC, *supra* note 35, ch. 40-0.

³⁸ CAVUSGIL ET AL., *supra* note 36, at 98; see also SURANOVIC, *supra* note 35, ch. 40-0.

³⁹ CAVUSGIL ET AL., *supra* note 36, at 109.

⁴⁰ Becerra, *supra* note 6, at 321.

⁴¹ Paulette L. Stenzel, *CAFTA: Its Origins and Its Provisions*, *GLOBALEDGE BUS. REV.*, Vol. 2, No. 2, 2008, at 1, 1, available at <http://globaledge.msu.edu/newsAndViews/businessReviews/gBR2-2.pdf>.

⁴² Environmentalists focus on NAFTA's and CAFTA-DR's language, but businesspeople do not: It has been pointed out that free trade agreements are “not designed to improve the environment.” Alan Deardorff, Professor of Economics, Univ. of Mich., Panel Discussion on Global Economics Sponsored by the Mission Marketplace, Chelsea, Michigan (May 18, 2008).

⁴³ See, e.g., Rachel Anderson, *CAFTA Is a Disaster: Vignettes from the Nicaraguan Countryside and Marketplace*, *WITNESS FOR PEACE.ORG* 1 (2008), available at <http://www.witnessforpeace.org/downloads/W4P%20CAFTA%20report%20article.doc>.

Our Common Future, the 1987 report by the UN Brundtland Commission, examined the possibility for “a new era of economic growth, one that must be based on policies that sustain and expand the environmental resource base.”⁴⁴ The report emphasized the interconnectedness of economic and environmental issues and that “many forms of development erode the environmental resources upon which they must be based, and environmental degradation can undermine economic development.”⁴⁵ In the aftermath of that report, businesspeople, environmentalists, and government officials embraced the concept of sustainability wholeheartedly.⁴⁶ The term is used in many contexts. Managers speak of sustainable development in connection with their business operations,⁴⁷ and governments include language about sustainable development in trade agreements and treaties.⁴⁸

In 1991, author Lester Brown said, “[t]he term sustainable development is widely used throughout the world today, but few understand what it means.”⁴⁹ That observation is true over eighteen years later. For example, Mark Langdale, former U.S. Ambassador to Costa Rica, in a speech supporting CAFTA-DR said, “[s]ustainable development is a popular buzzword these days: a big concept that lots of people latch onto. Everyone is looking for a sustainable development model.”⁵⁰ He continued, “[s]ustainable development is a big vessel into which everyone pours [his or her] hopes and dreams. A sustainable development model is the Holy Grail of economic development.”⁵¹

An articulation of the goal of sustainable development has become standard in trade agreements between the United States and other countries of the Western Hemisphere. NAFTA set the model and mentions the

⁴⁴ OUR COMMON FUTURE, *supra* note 16, at 18.

⁴⁵ *Id.* at 19.

⁴⁶ For an introduction to OUR COMMON FUTURE, see *supra* text accompanying note 16. See also EDWARDS, *supra* note 17, at 16–20 (discussing how OUR COMMON FUTURE provided a foundation for the sustainability movement).

⁴⁷ See, e.g., Michael Laff, *Triple Bottom Line: Creating Corporate Social Responsibility That Makes Sense*, T+D (Feb. 2009), http://www.astd.org/TD/Archives/2009/Feb/Free/0902_Triple_Bottom_Line.htm.

⁴⁸ NAFTA, *supra* note 11, pmbl.

⁴⁹ LESTER R. BROWN ET AL., SAVING THE PLANET: HOW TO SHAPE AN ENVIRONMENTALLY SUSTAINABLE GLOBAL ECONOMY 12 (1991).

⁵⁰ Mark Langdale, U.S. Ambassador to Costa Rica, The Importance of Sustainable Development, Address before the Costa Rican-American Chamber of Commerce Executive Luncheon (Apr. 18, 2007).

⁵¹ *Id.*

pursuit of sustainable development and environmental protection three times in its Preamble.⁵² However, a distinction must be made between aspirational words and mechanisms that give teeth to a goal. While NAFTA includes the words, it does not require pursuit or attainment of sustainable development, and the Statement of Objectives within the body of NAFTA does not mention the term.⁵³ It does include an Environmental Side Agreement called the North American Agreement on Environmental Cooperation (“NAAEC”).⁵⁴ However, NAAEC does not establish new environmental law.⁵⁵ In essence, it states that each country will enforce its own environmental laws.⁵⁶ Moreover, even if the environmental provisions included meaningful mechanisms for the pursuit of environmental protection, that addresses only one leg of the Triple Bottom Line. Sustainable development, as defined by the Triple Bottom Line, requires provisions for social equity and economic interests of multiple stakeholders as well.⁵⁷

Similarly, U.S. government representatives assert that CAFTA-DR promotes sustainable development.⁵⁸ In the spring of 2007, shortly before Costa Rica signed CAFTA-DR, Ambassador Langdale stated that Costa Rica’s policies, including a “Development Plan for the 21st Century,” pave the way for Costa Rica to become the “first developed country in Latin America by . . . 2021.”⁵⁹ He said, “[t]hat plan is based on the assumption that Costa Rica will be part of CAFTA[-DR].”⁶⁰ Ambassador Langdale continued,

The truth is that the key to the riddle of finding a sustainable development model is right here in this room. You all represent sustainable businesses (i.e., generate a profit) that add value to your customers’ lives, treat your employees well, and help provide for their families, and you

⁵² NAFTA, *supra* note 11, pmb1.

⁵³ *Id.* art. 102.

⁵⁴ North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 8–14, 1993, 32 I.L.M. 1480, *available at* <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567> [hereinafter NAAEC].

⁵⁵ *Id.*

⁵⁶ *Id.* For in-depth discussion of NAFTA’s environmental provisions, see Paulette L. Stenzel, *Can NAFTA’s Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423 (1995).

⁵⁷ *See infra* text accompanying notes 62–76 (discussing the Triple Bottom Line).

⁵⁸ Langdale, *supra* note 50.

⁵⁹ *Id.*

⁶⁰ *Id.*

all give time and invest in making Costa Rica a better place. There is no better example of sustainable development than the private sector that you all represent.⁶¹

While Langdale's definition emphasizes that profits generated by business add values to lives of customers and employees, his words refer only to the economic leg of the Triple Bottom Line.

C. *The Triple Bottom Line and Tools for Measuring Sustainable Development*

Sustainability is "not simply a matter of good corporate citizenship" or a "matter of business ethics," but rather a "fundamental principle of smart management."⁶² Businesses are talking about a philosophical shift towards sustainable business practices, and thousands of companies are "measuring and reporting their performance in the environmental, economic, and social spheres."⁶³ In recent years, business managers, business professors, and environmentalists have begun to label this pursuit the "Triple Bottom Line."⁶⁴ This concept, coined by John Elkington,

challenges companies to look not merely at the economic or profit aspect of their business but also at the environmental and social costs:

At its narrowest, the term '[T]riple [B]ottom [L]ine' is used as a framework for measuring and reporting corporate performance against economic, social and environmental parameters. At its broadest, the term is used to capture the whole set of values, issues and processes that companies must address in order to minimize any harm resulting from their activities and to create economic, social and environmental value.⁶⁵

⁶¹ *Id.*

⁶² SAVITZ & WEBER, *supra* note 21, at xiv.

⁶³ *Id.* For a discussion of these companies generally, see *id.*

⁶⁴ *Id.*

⁶⁵ EDWARDS, *supra* note 17, at 50.

The Triple Bottom Line gives businesses a tool to help measure whether their actions promote sustainable development. In this article, the terms economy, social equity, and environment are used to identify the Triple Bottom Line.⁶⁶

Although businesspeople like to enumerate benefits of their efforts, it is not possible to quantify all facets of the Triple Bottom Line. Nevertheless, businesses can use a variety of tools to analyze whether they are addressing and balancing all three legs of the Triple Bottom Line. Those tools include:

- Economic:
 - Sales, profits, and return on investment (“ROI”),⁶⁷
 - Taxes paid,
 - Monetary flows, and
 - Jobs created.⁶⁸
- Environmental:
 - Air quality,
 - Water quality,
 - Energy used,
 - Waste produced, and⁶⁹
 - Carbon footprint.⁷⁰
- Equity (the social effects):
 - Labor practices,
 - Community impacts,
 - Human rights, and
 - Product responsibility.⁷¹

⁶⁶ Another set of terms used to identify the concept is “people, planet, and profits.” Abby Ellin, *M.B.A.’s With Three Bottom Lines: People, Planet and Profit*, N.Y. TIMES, Jan. 8, 2006, http://www.nytimes.com/2006/01/08/education/edlife/mba.html?_r=1. A third variation is “economics, environment, and society” as used by the Dow Chemical Company. The Dow Global Public Report 2003, http://www.socialfunds.com/csr/reports/Dow_Chemical_Global_Public_Report_2003.pdf (last visited Mar. 8, 2010).

⁶⁷ ROI is a “measure of a corporation’s profitability, equal to a fiscal year’s income divided by common stock and preferred stock equity plus long-term debt. ROI measures how effectively the firm uses its capital to generate profit; the higher the ROI, the better.” Investor Words.com, ROI Definition, <http://www.investorwords.com/4316/ROI.html> (last visited Mar. 08, 2009).

⁶⁸ SAVITZ & WEBER, *supra* note 21, at xiii.

⁶⁹ *Id.*

⁷⁰ Elisabeth Rosenthal, *Environmental Cost of Shipping Groceries Around the World*, N.Y. TIMES, Apr. 26, 2008, <http://www.nytimes.com/2008/04/26/business/worldbusiness/26food.html>.

⁷¹ SAVITZ & WEBER, *supra* note 21, at xiii.

Of course, these measuring devices are an oversimplification. “Just as meaningful financial reporting cannot be reduced to one number, so sustainability does not sum precisely.”⁷²

In the past, social, environmental, and economic pursuits were addressed separately by corporations. For example, a business might encourage its employees to engage in volunteer work, but it was for a one-day event.⁷³ In today’s business world, companies that want to pursue sustainable development must integrate the social element into “an organization’s daily functions so that it becomes more than just a one-time event.”⁷⁴ A “truly sustainable company would have no need to write checks to charity or ‘give back’ to the local community, because the company’s daily operations wouldn’t deprive the community, but would enrich it.”⁷⁵

The Triple Bottom Line “captures the essence of sustainability by measuring the impact of an organization’s activities on the world.”⁷⁶ Even without precise measurement tools, it provides a meaningful way for companies to evaluate their performances in the area of sustainability.⁷⁷ The evaluation tools can facilitate discussion between businesses supporting free trade and other citizens who are concerned about the effects of free trade.⁷⁸

Today, businesses are embracing the pursuit of sustainability, and in recent years, the Triple Bottom Line has been adopted by a plethora of businesses as a tool for measuring progress in that pursuit.⁷⁹ The GRI framework has “become the world’s leading benchmark for measuring, monitoring, and reporting corporate sustainability efforts.”⁸⁰ Figure 1 shows the increased numbers of organizations that have reported to the GRI administration.

⁷² *Id.*

⁷³ Laff, *supra* note 47.

⁷⁴ *Id.*

⁷⁵ SAVITZ & WEBER, *supra* note 21, at 21.

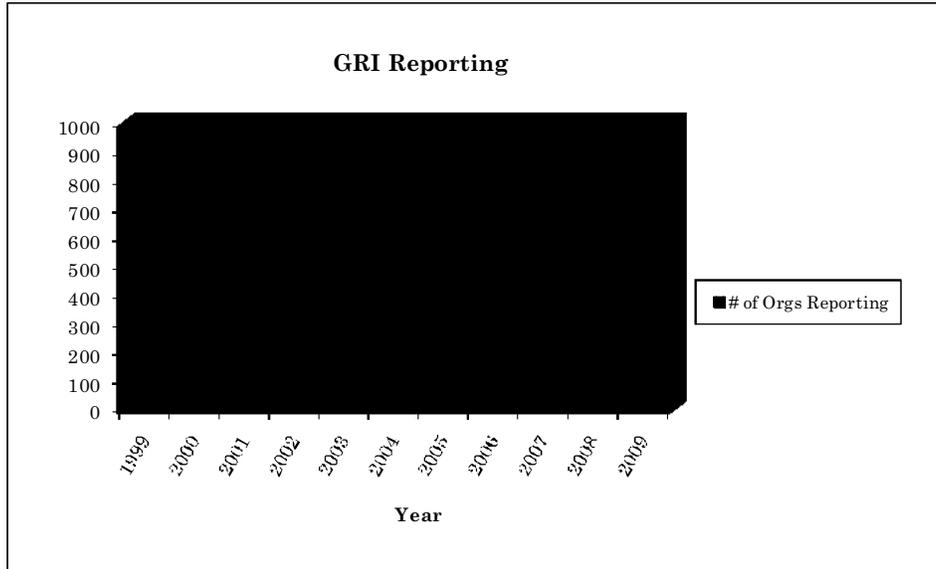
⁷⁶ *Id.* at xiii.

⁷⁷ *See, e.g.*, EDWARDS, *supra* note 17, at 50–51 (describing one company’s use of triple bottom line measurements).

⁷⁸ Compare Ana Isabel Eiras, *Why America Needs to Support Free Trade*, BACKGROUNDER (Heritage Found., Washington, D.C.), May 24, 2004, available at http://www.heritage.org/Research/tradeandeconomicfreedom/upload/63821_1.pdf (supporting free trade), with La Via Campesina, Stop Free Trade Agreements!, http://viacampesina.org/en/index.php?option=com_content&view=article&id=825:india-mangalores-port-blocked-for-hours-no-to-destructive-imports&catid=38:stop-free-trade-agreements&Itemid=61 (last visited Mar. 8, 2010) (documenting global struggles to prevent free trade).

⁷⁹ EDWARDS, *supra* note 17, at 50. For discussion of the progression from environmentalism to sustainability and development of the concept of the Triple Bottom Line, see *id.* at 11–27.

⁸⁰ SAVITZ & WEBER, *supra* note 21, at 211–12.

Figure 1: Growth in GRI reporting 1999–2008.⁸¹

The organization's "vision is that disclosure on economic, environmental, and social performance become as commonplace as and comparable to financial reporting, and as important to organizational success."⁸² The initiative is emerging as a leading model that is widely applauded both for its Triple Bottom Line standards and reporting controls.⁸³ According to Marc Orlitzky, a professor of management at Penn State University, "[i]f a company takes the [T]riple [B]ottom [L]ine seriously, then they [sic] need a balanced scorecard with equal weight given to each category. . . . It has to be judged for sustainability and not just recruiting purposes otherwise it is set up for failure."⁸⁴ This comment reflects the holistic nature of the Triple Bottom Line. The GRI framework encourages companies to capture as much information in their sustainability reports as possible.⁸⁵

⁸¹ Statistics compiled by Matthew Shaw using data from 2008 GRI Reports List, <http://www.globalreporting.org/GRIReports/GRIReportsList/> (follow "GRI Reports List" hyperlink) (last visited Mar. 17, 2009).

⁸² GRI, About GRI, <http://www.globalreporting.org/AboutGRI/> (last visited Mar. 8, 2010).

⁸³ SAVITZ & WEBER, *supra* note 21, at 211–17.

⁸⁴ Laff, *supra* note 47.

⁸⁵ GRI, Completeness, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportContent/LowerBlock/Completeness.htm> (last visited Mar. 8, 2010).

The GRI administration does not rank a firm's sustainability report based on its social, economic, or environmental performance, but rather evaluates it based on two sets of broad principles.⁸⁶ The first set involves four GRI principles that define the context of a report. They are: materiality, stakeholder inclusiveness, sustainability context, and completeness.⁸⁷ Materiality refers to the report's ability to describe the organization's impact on environmental, social, and economic factors.⁸⁸ Stakeholder inclusiveness refers to a firm's ability to list its stakeholders and detail how the expectations and needs of each stakeholder are being met.⁸⁹ Sustainability context looks at elements of sustainability and identifies how the firm is aiming to improve Triple Bottom Line elements in the future.⁹⁰ Completeness refers to covering the areas of boundary, scope, and time in such a way that stakeholders are able to make a well-reasoned assessment of the organization over a given period.⁹¹

Six additional GRI factors determine a report's quality: clarity, reliability, balance, comparability, accuracy, and timeliness.⁹² Clarity demands that information be accessible and understandable to all stakeholders who will use the report.⁹³ Reliability refers to the processes used to prepare a report; this includes gathering, recording, and analysis of data.⁹⁴ A balanced report takes into account both positive and negative perspectives of a firm's performance.⁹⁵ In order to be comparable, information needs

⁸⁶ GRI, G3 Online, <http://www.globalreporting.org/ReportingFramework/G3Online/> (last visited Mar. 8, 2010).

⁸⁷ These four phrases are key terms used internationally by the GRI. GRI, Defining Report Content, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportContent/> (last visited Mar. 8, 2010).

⁸⁸ GRI, Materiality, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportContent/LowerBlock/Materiality.htm> (last visited Mar. 8, 2010).

⁸⁹ GRI, Stakeholder Inclusiveness, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportContent/LowerBlock/StakeHolderInclusiveness.htm> (last visited Mar. 8, 2010).

⁹⁰ GRI, Sustainability Context, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportContent/LowerBlock/SustainabilityContext.htm> (last visited Mar. 8, 2010).

⁹¹ GRI, *supra* note 85.

⁹² GRI, Defining Report Quality, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportQuality/> (last visited Mar. 8, 2010).

⁹³ GRI, Clarity, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportQuality/LowerBlock/DefiningReportQualityClarity.htm> (last visited Mar. 8, 2010).

⁹⁴ GRI, Reliability, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportQuality/LowerBlock/DefiningReportContentReliability.htm> (last visited Mar. 8, 2010).

⁹⁵ GRI, Balance, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportQuality/LowerBlock/Sustainability+Context.htm> (last visited Mar. 8, 2010).

to be reported consistently and in a way that allows a reader to track the organization's performance over a period of time.⁹⁶ Accurate qualitative information includes clarity,⁹⁷ balance, and detail.⁹⁸ Accurate quantitative data can be judged on the methods used to analyze and gather data.⁹⁹ Information needs to be disclosed in a timely manner to make it readily accessible to stakeholders.¹⁰⁰

Several other movements in the business world are congruent with the GRI framework. The Corporate Social Responsibility ("CSR") movement was developed in the 1990s, and many companies continue to speak of it today. According to Savitz, CSR "emphasizes the benefits to social groups *outside* the business, whereas sustainability gives equal importance to the benefits enjoyed by the corporation itself."¹⁰¹

One organization that helps monitor environmental performance is the International Organization for Standardization ("ISO"). The ISO 9000 series standards are well-known metrics that measure a firm's management and quality control.¹⁰² The ISO 14000 series standards measure environmental performance in a similar fashion.¹⁰³ Additionally, the ISO is planning on developing the ISO 26000 series for social responsibility by 2010.¹⁰⁴

⁹⁶ GRI, Comparability, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportQuality/LowerBlock/DefiningReportQualityComparability.htm> (last visited Mar. 8, 2010).

⁹⁷ Though clarity is a GRI standard for report quality, it is also used by the GRI as a descriptor for accuracy. GRI, Accuracy, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportQuality/LowerBlock/DefiningReportQualityAccuracy.htm> (last visited Mar. 8, 2010).

⁹⁸ The GRI recognizes that there can be accuracy in both qualitative and quantitative information. The organization has developed detailed methods to determine accuracy of both information types. These methods can be found online on the organization's web page. *Id.*

⁹⁹ *Id.*

¹⁰⁰ GRI, Timeliness, <http://www.globalreporting.org/ReportingFramework/G3Online/DefiningReportQuality/LowerBlock/DefiningReportQualityTimeliness.htm> (last visited Mar. 8, 2010).

¹⁰¹ SAVITZ & WEBER, *supra* note 21, at xi–xii.

¹⁰² *Id.* at 76; International Organization for Standardization [ISO], ISO 9000 Essentials, http://www.iso.org/iso/iso_9000_essentials (last visited Mar. 8, 2010).

¹⁰³ ISO, ISO 14000 Essentials, http://www.iso.org/iso/iso_14000_essentials (last visited Mar. 8, 2010). For discussion of the ISO 14000-series, see Paulette L. Stenzel, *Can the ISO 14000 Series Environmental Management Standards Provide a Viable Alternative to Government Regulation?*, 37 AM. BUS. L.J. 237 (2000); see also David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENVTL. AFF. L. REV. 79 (2009).

¹⁰⁴ ISO, Social Responsibility, <http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html> (last visited Mar. 8, 2010).

ISO standards are relevant tools that a Triple Bottom Line-focused organization can utilize.¹⁰⁵

The Dow Jones Sustainability Index is another metric for firms to use to measure their Triple Bottom Line performances.¹⁰⁶ The GRI framework evaluates the quality of a company's report in two ways.¹⁰⁷ First, it examines a company's monitoring processes.¹⁰⁸ Second, it measures the data submitted by the company.¹⁰⁹ In contrast, the Dow Jones Sustainability Index directly measures a firm's performance in the area of sustainability.¹¹⁰ The Index also compares a firm against others in its respective industry.¹¹¹

Major firms including Shell, Telefónica Movistar Ecuador, and Coca-Cola report to the GRI administration, and the number of smaller firms joining them is growing rapidly.¹¹² In 2009, Fort Collins Utilities became the first municipal utility to submit a sustainability report with the GRI administration.¹¹³ Fort Collins Utilities focuses on economic viability, environmental factors, and social responsibility to align itself with the GRI framework.¹¹⁴ In 2008, four universities around the world also submitted their sustainability reports.¹¹⁵

The use of the GRI framework by such a diverse set of organizations demonstrates its versatility.¹¹⁶ Moreover, its use and acceptance by multinational corporations and smaller organizations opens the door to its use in the context of trade facilitated by free trade agreements such as

¹⁰⁵ SAVITZ & WEBER, *supra* note 21, at 76.

¹⁰⁶ See David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151, 190 (2004).

¹⁰⁷ See SAVITZ & WEBER, *supra* note 21, at 211–13.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Monsma & Buckley, *supra* note 106, at 190 n.150.

¹¹¹ See SAVITZ & WEBER, *supra* note 21, at 74–76.

¹¹² The GRI itself is considered a small enterprise and submits its own sustainability reports. GRI Reports List, *supra* note 81; GRI, Project News, <http://www.globalreporting.org/currentpriorities/supplychain/grigtzproject/projectnews> (news from Jul. 10, 2007, "Reporting Initiative Targets Small Suppliers").

¹¹³ *In Brief: City Joins Group for Sustainability*, FORT COLLINS COLORADOAN, Mar. 7, 2009.

¹¹⁴ See [fcgov.com](http://www.fcgov.com/utilities/gri.php), City of Fort Collins Utilities for the 21st Century, <http://www.fcgov.com/utilities/gri.php> (last visited Mar. 8, 2010).

¹¹⁵ They are Singapore Polytechnic (Singapore), Turku University of Applied Science (Finland), the University of Birmingham (England), and the University of Southern Queensland (Australia). GRI Reports List, *supra* note 81.

¹¹⁶ See *supra* text accompanying notes 112–115.

CAFTA-DR.¹¹⁷ The following sections explore the provisions of CAFTA-DR and the need for tools to ensure that development under that agreement is sustainable.

II. CAFTA-DR'S PLACE IN U.S.-RELATED FREE TRADE IN THE WESTERN HEMISPHERE

A. *Free Trade Agreements: Context, Provisions, and Benefits Expected*

The pursuit of free trade through NAFTA, CAFTA-DR, and other free trade agreements is based on interrelated assumptions and practices. First, it is assumed that a rising tide lifts all boats and that free trade agreements, through comparative advantage, cause such rising tides.¹¹⁸ "So, the argument supporting the 'race to the top' theory is that 'expanded market access . . . offers the best hope for raising incomes and standards' in poorer countries."¹¹⁹ Thus, if benefits accrue to businesses in a developing country (such as in Mexico under NAFTA or in Nicaragua under CAFTA-DR), people throughout various sectors of each member's economy will benefit.¹²⁰ As people earn more money, their earning power rises, and they buy more goods and live more comfortable lives.¹²¹

This accompanies a second assumption: that comparative advantage is good for all members of trade agreements and their citizens.¹²² For example, in textiles, the comparative advantage for the developing members is their cheap labor force.¹²³ Under CAFTA-DR, Nicaragua is expected to take advantage of its comparative advantage in the areas of textile manufacturing and coffee and *pitaya* production.¹²⁴

¹¹⁷ *Id.*

¹¹⁸ Gene Sperling, *How to Refloat These Boats*, WASH. POST, Dec. 18, 2005, at B3.

¹¹⁹ Christian Brandt, Note, *Laboring Toward Equality: NAFTA's Effects and CAFTA's Wisdom*, 27 HAMLINE J. PUB. L. & POL'Y 77, 89–90 (2005) (quoting DANIEL GRISWOLD & DANIEL IKENSON, THE CASE FOR CAFTA: CONSOLIDATING CENTRAL AMERICA'S FREEDOM REVOLUTION 11 (Cato Institute: Center for Trade Policy Studies 2004) available at <http://www.freetrade.org/pubs/briefs/tbp-021es.html>).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 88–90 (noting that proponents of CAFTA believe that the U.S. and Central America will both benefit from the agreement).

¹²³ See Claudio Grossman, *The Evolution of Free Trade in the Americas: NAFTA Case Studies*, 11 AM. U. J. INT'L L. & POL'Y 687, 751–52 (1996).

¹²⁴ See globalEDGE, Nicaragua: Economy, <http://globaledge.msu.edu/countryInsights/economy.asp?countryID=136®ionID=4> (last visited Mar. 8, 2010); CENTER FOR

A third assumption is that the private sector is the best engine for growth as compared to government-sponsored initiatives.¹²⁵ In theory, the mechanisms of free trade promote and create a free market, unrestricted (or least minimally restricted) by government regulation.¹²⁶ Developing countries enter free trade agreements as a means of attracting foreign investment.¹²⁷ As an additional enticement to investors, countries often privatize public services in conjunction with adoption of free trade agreements.¹²⁸ For example, a wave of privatization in Mexico prepared the way for and accompanied NAFTA.¹²⁹ CAFTA-DR's developing members are following a similar path as they privatize in areas such as health care, financial institutions, telephone services, electricity, and water.¹³⁰ To speed up the privatization, developing countries often give substantial tax breaks to investors.¹³¹

Proponents of NAFTA and CAFTA-DR assume that the agreements will promote the free flow of goods and create a free market leading to overall economic growth.¹³² The primary objective is to stimulate the entire

UNDERUTILISED CROPS, PAVUC FACT SHEET NO. 9 (University of Southampton 2007) available at http://www.pavuc.soton.ac.uk/fruits/fruits_factsheets/Factsheet_9_pitahaya_final_3006.pdf. *Pitaya* is a beautiful fruit with red or creamy flesh that grows in the tropical climates of Central America. See College of Health and Human Sciences, Oregon State University, Pithaya, Dragon Fruit, Pitaya, <http://food.oregonstate.edu/glossary/p/pithaya.html> (last visited Mar. 8, 2010). There is irony in telling Nicaragua to grow *pitaya* as its comparative advantage to turn around its economy when most people in the United States have never heard of *pitaya*.

¹²⁵ See Eisuke Suzuki, *The Fallacy of Globalism and the Protection of National Economies*, 26 YALE J. INT'L L. 319, 319–20 (2001).

¹²⁶ See Douglas A. Irwin, *International Trade Agreements*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2008), <http://www.econlib.org/library/Enc/InternationalTradeAgreements.html> (last visited Mar. 8, 2010).

¹²⁷ See Suzuki, *supra* note 125, at 321.

¹²⁸ See Fernando Margáin & Walter Russell Mead, *A Fast Track for Mexico*, N.Y. TIMES, June 24, 2001, at 4–13.

¹²⁹ *Id.*

¹³⁰ See ECON. COMM'N FOR LATIN AM. AND THE CARIBBEAN, PROGRESS IN THE PRIVATIZATION OF WATER-RELATED PUBLIC SERVICES: A COUNTRY-BY-COUNTRY REVIEW FOR MEXICO, CENTRAL AMERICA, AND THE CARIBBEAN 1 (1998), available at http://www.eclac.org/publicaciones/xml/5/4735/r1697_re.pdf; THE STOP CAFTA COALITION, DR-CAFTA YEAR TWO: TRENDS & IMPACTS 44 (2007), available at http://www.share-elsalvador.org/programs/advocacy/CAFTAYear2_monitoring_eng.pdf.

¹³¹ See ANDRES OPPENHEIMER, BORDERING ON CHAOS 83–110 (1998) (describing close ties between government leaders and a select few wealthy leaders of private sector businesses who were given favorable tax and regulatory treatment as they took over government-owned businesses in the 1990s).

¹³² See *supra* text accompanying notes 118–131.

economy through growth.¹³³ This growth is measured by the gross domestic product (“GDP”);¹³⁴ free trade advocates assume that a free trade agreement is a success when GDP rises.¹³⁵ The problem is that GDP evaluates only the economic leg of the Triple Bottom Line. Moreover, even when GDP rises, that rise does not ensure that the economic lives of the majority of people in that country are improved.¹³⁶ For example, GDP does not distinguish between the \$10,000 spent by a wealthy person on a diamond-studded watch and the \$10,000 spent by 100 people buying \$100 worth of rice and beans to feed their families.¹³⁷ Thus, GDP is a faulty measure of economic well-being across a society. In short, free trade agreements rely primarily on the economic leg of the Triple Bottom Line, and that leg is weak.

A free trade agreement sets rules for trade which can overrule local, state, and national laws, and those rules focus on protecting the interests of investors. Additionally, it creates its own enforcement mechanisms.¹³⁸

¹³³ *Id.*

¹³⁴ See generally BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, MEASURING THE ECONOMY: A PRIMER ON GDP AND THE NATIONAL INCOME AND PRODUCT ACCOUNTS (2007) [hereinafter MEASURING THE ECONOMY] (describing the practice of calculating U.S. GDP). GDP “measures the value of the goods and services produced by [an] economy in a given time period.” *Id.* at 1.

¹³⁵ The practice of using GDP, GDP per capita, or gross national product (“GNP”) as tools to measure a country’s development has recently come under fire by noted economists. Amartya Sen, a development economist at Harvard University and winner of the Nobel Prize in Economics, asserts that GNP and GDP per capita are insufficient measures of development because they fail to account for the quality of life of a country’s citizens. Therefore, she asserts that they should not be relied upon to present a holistic picture of development. AMARTYA SEN, DEVELOPMENT AS FREEDOM, 5–6, 14 (1999). Other economists, including Columbia professor and former World Bank chief economist Joseph Stiglitz, find GDP lacking in that it does not account for natural resource depletion. Justin Fox, *Don’t Ditch the GDP*, TIME, Apr. 10, 2008, <http://www.time.com/time/magazine/article/0,9171,1729697,00.html>.

¹³⁶ SEN, *supra* note 135, at 5–6.

¹³⁷ See MEASURING THE ECONOMY, *supra* note 134.

¹³⁸ The United States makes a distinction between treaties and Congressional-Executive Agreements. A treaty is approved by a 2/3 majority of the U.S. Senate and then sent to the President for approval, while a Congressional-Executive Agreement is submitted to both houses of Congress for approval by a simple majority and then sent to the President for approval. U.S. CONST. art. II, § 2, cl. 2; CONG. RESEARCH SERV., LIBRARY OF CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 4–5 (2001), available at http://www.au.af.mil/au/awc/awcgate/congress/treaties_senate_role.pdf. Although NAFTA and CAFTA-DR are called “agreements” in English for purposes of the United States, they are called *tratados* (treaties) in Spanish (*e.g.*, NAFTA for Mexico and CAFTA-DR for its developing members). See Imer B. Flores,

NAFTA and CAFTA-DR reduce barriers to trade in many ways. They deal with tariffs on goods including automobiles, agricultural products, textiles, and electronics.¹³⁹ In theory, free trade agreements eliminate tariffs on these goods.¹⁴⁰ In practice, some are eliminated, others are phased out over time, and still others are retained to protect sensitive goods.¹⁴¹ Also, the agreements address subsidies and price supports for specific products.¹⁴² They open domestic markets to competition in service areas including advertising, entertainment, and information, as well as financial and legal services.¹⁴³ Telecommunications is another important area.¹⁴⁴

Proponents of free trade agreements say the agreements bring many benefits, including:

- Specialization boosts productivity, and countries can import what they are not producing with funds from exports. This argument is, essentially, a variation on comparative advantage.¹⁴⁵
- Free trade opens markets, leading to increased exports.¹⁴⁶
- Consumers enjoy a greater variety of products and lower prices.¹⁴⁷
- Foreign investment stimulates growth.¹⁴⁸
- Better jobs are created as export industries flourish.¹⁴⁹
- Economic growth means higher standards of living for all citizens.¹⁵⁰
- Open markets lead to open governments.¹⁵¹

Reconstituting Constitutions—Institutions and Culture: The Mexican Constitution and NAFTA: Human Rights Vis-à-Vis Commerce, 17 FLA. J. INT'L L. 693, 705 (2005).

¹³⁹ USTR, NAFTA Partners Speed up Elimination of Tariffs on \$25 Billion in Trade, <http://www.ustr.gov/about-us/press-office/press-releases/archives/2002/january/nafta-partners-speed-elimination-tariffs-> (last visited Mar. 8, 2010).

¹⁴⁰ See Irwin, *supra* note 126.

¹⁴¹ Foreign Agricultural Service (“FAS”), NAFTA Agriculture Fact Sheet: Tariff Elimination, <http://www.fas.usda.gov/itp/policy/nafta/tariff.html> (last visited Mar. 8, 2010).

¹⁴² See, e.g., CAFTA-DR, *supra* note 9, art. 3.14.

¹⁴³ See, e.g., *id.* ch. 12 (financial services) and ch. 15 (intellectual property).

¹⁴⁴ See, e.g., *id.* ch. 13.

¹⁴⁵ Irwin, *supra* note 126.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Suzuki, *supra* note 125, at 319–20.

¹⁴⁹ Eiras, *supra* note 78, at 3.

¹⁵⁰ Brandt, *supra* note 119, at 89.

¹⁵¹ Export.gov, U.S. Free Trade Agreements, <http://www.export.gov/fta/> (last visited Feb. 19, 2010).

These arguments will be applied to CAFTA-DR in the discussion below using Nicaragua as an example.¹⁵²

B. Faltering Plans for Integrated Trading Market in Western Hemisphere

1. Global Context: Doha Talks Faltering

The global context for trade agreements provides further perspective. Since 2001, World Trade Organization (“WTO”) members have engaged in on-again, off-again efforts to renegotiate GATT in what is known as the “Doha Round” of negotiations.¹⁵³ The talks collapsed on July 29, 2008.¹⁵⁴ Hopes for a deal among the 153 WTO members must be tempered with a great deal of patience.¹⁵⁵ The *New York Times* reported that “[d]eep skepticism about the advantages of free trade was on vivid display during the Democratic primaries and it is growing in Europe, particularly as France, Italy and other countries have fallen into an American-style economic malaise.”¹⁵⁶ This is a “massive blow to confidence in the global economy” according to Peter Power, a spokesperson for the European Commission.¹⁵⁷ Moreover, economists fear that the people may be tempted to turn to protectionism.¹⁵⁸ There was not even mention of resuming Doha talks until the G20 summit in London in April of 2009.¹⁵⁹ After those talks, Chen Deming, the Chinese Minister of Commerce, told the media that Doha talks would resume at the G8 conference in July 2009.¹⁶⁰

Thus, regional trade agreements may take on even greater importance in the near future. We need new ways of thinking. If countries around

¹⁵² See *infra* Parts V–VI and accompanying text (discussing effects of CAFTA-DR in Nicaragua).

¹⁵³ GATT, *supra* note 4; *A Trade Deal in Doha*, N.Y. TIMES, Nov. 15, at A30.

¹⁵⁴ Steven Castle & Mark Landler, *After 7 Years, Talks Collapse on World Trade*, N.Y. TIMES, July 30, 2008, at A1.

¹⁵⁵ For a list of current members of the WTO, see World Trade Organization, Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 9, 2010).

¹⁵⁶ Castle & Landler, *supra* note 154.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* As the 2008–2009 recession deepens there are multiple instances of countries—including, for example, the United States—turning to protectionist measures. *Brussels Warns US on Protectionism*, DEUTSCHE WELLE, Jan. 30, 2009, <http://www.dw-world.de/dw/article/0,,3988551,00.html>.

¹⁵⁹ See Daisy Ku, *Doha Round to Resume in July*, REUTERS, Apr. 3, 2009, <http://in.reuters.com/article/businessNews/idINIndia-38859220090402>.

¹⁶⁰ *Id.*

the world reject the GATT and NAFTA models, as appears to be happening,¹⁶¹ governments and businesses must find new ways to facilitate sustainable trade. This article focuses on CAFTA-DR. Therefore, the next subsection takes a closer look at NAFTA, the model for CAFTA-DR.

2. NAFTA Under Fire, Columbia and Panama Agreements on Hold, and CAFTA-DR Meets Mixed Reviews

Since January 1, 1994, the date NAFTA took effect, the United States has promoted its trade policy in the Western Hemisphere through a series of bilateral and multilateral trade agreements.¹⁶² The agreements are designed to promote investment and development by reducing barriers to trade.¹⁶³ Proponents of the agreements assume that, when businesses grow, benefits will trickle down to workers in developing countries.¹⁶⁴ The problem is that over a period of more than sixteen years NAFTA has not fulfilled this expectation.¹⁶⁵ The paradigm has evidenced major flaws.¹⁶⁶ Therefore, it is inappropriate to continue to proceed with CAFTA-DR without examining that paradigm.

When NAFTA took effect, the members announced plans to extend the model throughout the Western Hemisphere (with the exception of Cuba).¹⁶⁷ The Free Trade Area of the Americas ("FTAA") would link thirty-four countries from Canada all the way to Chile.¹⁶⁸ Although it was claimed that all thirty-four countries would quickly sign and by January of 2005 it would be before the U.S. Congress for approval, plans stalled nearly completely by May of that year.¹⁶⁹ The FTAA is, if not dead, at least on hold for the foreseeable future.¹⁷⁰

Because plans for FTAA have failed to solidify, the United States has been focusing on a variety of bilateral and multilateral agreements

¹⁶¹ See Castle & Landler, *supra* note 154.

¹⁶² See *supra* text accompanying notes 9, 11.

¹⁶³ See *supra* text accompanying notes 139–144.

¹⁶⁴ See *supra* text accompanying notes 118–131.

¹⁶⁵ See Kevin Gallagher & Timothy Wise, *Fixing Nafta's Flaws*, GUARDIAN.CO.UK, Jan. 7, 2010, <http://www.guardian.co.uk/commentisfree/cifamerica/2010/jan/07/us-trade-nafta-development>.

¹⁶⁶ *Id.*

¹⁶⁷ John F. McManus, *FTAA/CAFTA Opposition Rising*, NEW AM., May 30, 2005, at 44.

¹⁶⁸ Free Trade Area of the Americas ("FTAA"), Antecedents of the FTAA Process, http://www.ftaa-alca.org/View_e.asp (last visited Mar. 9, 2010).

¹⁶⁹ See McManus, *supra* note 167.

¹⁷⁰ Simon Romero, *Frustrated, U.S. Will Seek Bilateral Trade Pacts*, N.Y. TIMES, Nov. 19, 2003, at C2; *FTAA Stalls at Summit of the Americas*, NEW AM., Nov. 28, 2005, at 6.

that could build a framework for FTAA.¹⁷¹ The United States is working to create free trade agreements with every country in the Western Hemisphere, with the exception of Cuba.¹⁷² Mark Langdale, U.S. Ambassador to Costa Rica, says,

free trade agreements are a cornerstone of U.S. foreign policy in this region. We have negotiated FTAs with countries that represent 75% of the GDP of Latin America. We are close to achieving an integrated trading market that (except for Ecuador) runs along the entire 36,300 kilometer Pacific coastline from the Canadian Arctic to Tierra del Fuego in Chile.¹⁷³

The United States is working persistently to increase its trade linkages through a series of agreements with the countries of Latin America.

The United States has negotiated a series of bilateral free trade agreements in its pursuit of an integrated Western Hemisphere trading market.¹⁷⁴ In recent years, the U.S. Congress has approved bilateral agreements with Chile and Peru.¹⁷⁵ The agreement with Chile, signed in 2003, was the first free trade agreement signed and implemented between the United States and a South American country.¹⁷⁶ President Bush signed the implementing law for the U.S.-Peru Trade Promotion Agreement on December 14, 2007, after it was easily approved by Congress.¹⁷⁷ Since that date, however, the tides have turned.

¹⁷¹ Romero, *supra* note 170.

¹⁷² Stenzel, *supra* note 41, at 1.

¹⁷³ Langdale, *supra* note 50.

¹⁷⁴ See Stenzel, *supra* note 41, at 1.

¹⁷⁵ USTR, Chile Free Trade Agreement, <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta> (last updated Apr. 24, 2010); USTR, Peru Trade Promotion Agreement, <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> (last updated Feb. 18, 2010).

¹⁷⁶ United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>; *Chile and U.S. Sign Accord on Free Trade*, N.Y. TIMES, June 7, 2003, <http://www.nytimes.com/2003/06/07/business/chile-and-us-sign-accord-on-free-trade.html>; see also Heather Corbin, Note, *The Proposed United States-Chile Free Trade Agreement: Reconciling Free Trade and Environmental Protection*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 119 (2003).

¹⁷⁷ United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>. President Bush signed the U.S.-Peru Trade Promotion Agreement after it was easily approved by the U.S. Congress. Steven R. Weisman, *Senate Approves Peru Trade Deal*, N.Y. TIMES, Dec. 5, 2007, <http://www.nytimes.com/2007/12/05/business/05trade.html>; *Bush*

More recently, the United States has negotiated free trade agreements with Colombia and Panama.¹⁷⁸ Both agreements are on hold.¹⁷⁹ The U.S.-Colombia Free Trade Agreement (“U.S.-Colombia FTA”) was negotiated in 2006 under U.S. Trade Promotion Authority (“TPA”).¹⁸⁰ The agreement with Colombia was expected to sail through Congress as did the agreement with Peru. But in April 2008, observers were surprised when the U.S. House of Representatives exercised its right to change its rules, deciding to allow an unlimited number of days for consideration of the agreement.¹⁸¹ In the wake of that decision, the agreement is simply on hold within that body.¹⁸²

Among the many reasons for opposition to that agreement is that it will hurt peasants on small farms in Colombia.¹⁸³ They will be forced out

Signs U.S.-Peru Free Trade Agreement, CHRON: BUSINESS, Dec. 14, 2007, available at <http://www.chron.com/disp/story.mpl/business/5379524.html>.

¹⁷⁸ Interview by Sean McCormack with Charles Shapiro, Senior Coordinator for the Western Hemisphere Affairs Free Trade Task Force (May 8, 2008), available at <http://link.brightcove.com/services/player/bcpid1857622883?bctid=1782598627> (discussing U.S.-Colombia free trade agreement).

¹⁷⁹ Daniella Markheim, *Pass Pending Trade Agreements with Colombia, Panama, and South Korea in 2009*, HERITAGE FOUND., Dec. 12, 2008, <http://www.heritage.org/research/tradeandeconomicfreedom/wm2167.cfm>. Such agreements are also being negotiated with countries in other areas of the world. They include one with South Korea and one with Thailand. *Id.* The future of each is unclear. For example, talks related to a U.S.-Thailand free trade agreement are stalled because people of Thailand believe the United States is being unfair with its demands related to drug patents. See *US-Thailand Free Trade Agreement: MSF Calls on Thailand to Protect Access to Medicines in the Face of US Pressure*, DOCTORS WITHOUT BORDERS, Jan. 11, 2006, <http://www.doctorswithoutborders.org/press/release.cfm?id=1651>.

¹⁸⁰ USTR, United States and Peru Sign Trade Promotion Agreement, <http://www.ustr.gov/about-us/press-office/press-releases/archives/2006/april/united-states-and-peru-sign-trade-promotion> (last updated Apr. 21, 2009). A TPA agreement can be approved or disapproved by Congress, but Congress cannot amend it. Brett D. Schaefer, *Congress Should Support Extension of TPA*, HERITAGE FOUND., Mar. 21, 2005, <http://www.heritage.org/research/tradeandeconomicfreedom/em965.cfm>.

¹⁸¹ Teleconference led by Greg Delawie, U.S. Dep't of State, and Charles Shapiro, Senior Coordinator for the Western Hemisphere Affairs Free Trade Task Force (Apr. 24, 2008). Participants included professors from various U.S. universities including this author.

¹⁸² Nicole Gaouette, *Columbia Trade Pact on Hold*, L.A. TIMES, Apr. 11, 2008, <http://articles.latimes.com/2008/apr/11/nation/na-uscolombia11>.

¹⁸³ Paulette L. Stenzel, *The U.S.-Colombia Free Trade Agreement*, GLOBALEDGE BUS. REV., Vol. 2, No. 6, 2008, at 1, available at <http://globaledge.msu.edu/resourcedesk/gbr/gbr%202-6.pdf>. Other serious concerns include violence and guerilla warfare throughout Colombia. Daniel Griswold & Juan Carlos Hidalgo, *A U.S.-Colombia Free Trade Agreement: Strengthening Democracy and Progress in Latin America*, FREE TRADE BULL., Feb. 7, 2008, available at <http://www.cato.org/pubs/ftb/FTB-032.pdf>; see also Jack Epstein, *Bad Business:*

of business because they cannot compete with cheap food imports from the United States, which subsidizes its farmers.¹⁸⁴ This has happened in other developing countries that have entered trade agreements with the United States. For example, low priced corn (subsidized by the U.S. government) has forced many small Mexican farmers out of business since 1994 when NAFTA took effect.¹⁸⁵ It was expected that when the tariffs on corn were fully eliminated in Mexico “there [would] be even more displaced or marginalized farmers.”¹⁸⁶

As of 2010, debate centers on whether NAFTA should be amended or abandoned,¹⁸⁷ as well as on whether the U.S. Congress should ratify the U.S.-Colombia FTA.¹⁸⁸ When interviewed about the 2009 Summit of the Americas,¹⁸⁹ one commentator said,

[t]he biggest blow to trade thus far in 2009 has been the fact that the global economic crisis has taken a huge bite out of world flows of imports and exports, reducing them by almost a third over the past year. Further, the Doha Round of trade talks has stalled and America’s once vaunted deals with Colombia, Panama and South Korea were stopped dead as a Democrat-controlled U.S. Congress embraced union-led “Just Say No” trade policies.¹⁹⁰

In this climate, CAFTA-DR is also being questioned.

U.S. Trade Preference Should Not Be a Reward for Colombia’s Tolerating Political Violence, LATIN TRADE, Oct. 2007, at 18; Rainbow Nelson, *Dangerous Friends: Companies Feel the Squeeze as U.S. Laws Clamp Down on Bribes Paid Abroad in the Name of Security*, LATIN TRADE, Aug. 2007, at 22 (discussing the connection between U.S. business and terrorism in Colombia).

¹⁸⁴ See *A Level Playing Field for Poor Farmers*, INT’L FOOD POL’Y RES. INST., Mar. 2003, at 1, available at http://www.ifpri.org/sites/default/files/publications/if1_0.pdf.

¹⁸⁵ Interview by Multinational Monitor with Anuradha Mittal, *Losing the Farm: How Corporate Globalization Pushes Millions off the Land and into Desperation*, MULTINATIONAL MONITOR, July–Aug. 2003, at 30, 30.

¹⁸⁶ Calvin Terbeek, Note, *Love in the Time of Free Trade: NAFTA’s Economic Effects Ten Years Later*, 12 TUL. J. INT’L & COMP. L. 487, 505 (2004).

¹⁸⁷ Stenzel, *supra* note 183; see also Roger Lowenstein, *Tariff to Nowhere*, N.Y. TIMES, June 15, 2008, <http://www.nytimes.com/2008/06/15/magazine/15wwln-lede-t.html>.

¹⁸⁸ Stenzel, *supra* note 183. For discussion of the U.S.-Colombia FTA, see *supra* text accompanying notes 178–185.

¹⁸⁹ See Debbie Ransome, *What the Summit Achieved*, BBC CARIBBEAN, Apr. 21, 2009, http://www.bbc.co.uk/caribbean/news/story/2009/04/090421_summitwrap.shtml.

¹⁹⁰ David Rothkopf, *Ahead of the Summit: The Hemisphere’s Incredible Shrinking Trade Agenda*, LATIN TRADE, Mar.–Apr. 2009, at 12.

Ratification of CAFTA-DR took nearly two years, and its effective dates, by country, were:

- United States—January 1, 2006,
- El Salvador—March 1, 2006,
- Honduras—April 1, 2006,
- Nicaragua—April 1, 2006,
- Guatemala—July 1, 2006,
- Dominican Republic—March 1, 2007,
- Costa Rica—October 7, 2007.¹⁹¹

Debate leading up to the referendum in Costa Rica was heated. Those voting against the agreement viewed it as lopsided, favoring U.S. interests.¹⁹² Proponents predicted that a defeat of the proposal would result in a loss of jobs, a major decline in foreign investment, and an exodus of well-educated Costa Rican citizens.¹⁹³ Costa Rica's President Óscar Arias publicly predicted that it would be "collective suicide" if Costa Ricans did not approve CAFTA-DR.¹⁹⁴ Despite the President's words, there was substantial opposition to it.¹⁹⁵ One commentator observed, "the issue is class-based: the rich favor [CAFTA-DR], while the poor invariably oppose it."¹⁹⁶ Costa Rican voters narrowly passed CAFTA-DR through a referendum with only fifty-two percent favoring it.¹⁹⁷ This was in spite of the fact that

¹⁹¹ GlobaLex, Francisco Avalos & Maureen Garmon, Basic Info and Online Sources for NAFTA & CAFTA Research, Oct. 2006, http://www.nyulawglobal.org/globalex/NAFTA_CAFTA_Research.htm; globalEDGE, Dominican Rep.: Economy, <http://globalede.msu.edu/countryInsights/economy.asp?countryID=120®ionID=4> (last visited Mar. 9, 2010); *Costa Rica & CAFTA: What Next?*, LATIN BUS. CHRON., Oct. 9, 2007, <http://www.latinbusinesschronicle.com/app/article.aspx?id=1697>. Costa Rica was the last of CAFTA-DR's developing members to sign the agreement. Her citizens raised concerns related to "farm trade, textiles, telecoms and insurance liberalization demands." Jos' Eduardo Mora, *Trade: Costa Rica Signs Treaty, Anti-CAFTA Unions Plan Protests*, INTER PRESS SERVICE, Jan. 29, 2004, available at http://www.citizenstrade.org/pdf/ips_costarica.pdf.

¹⁹² Cassidy Rush, *Despite What President Arias Might Want You to Believe: Why Costa Rica Might Not Need CAFTA After All, and Why It May Be a Bad Deal for the Average Costa Rican*, COUNCIL ON HEMISPHERIC AFF., Oct. 5, 2007, <http://www.coha.org/despite-what-president-arias-might-want-you-to-believe-why-costa-rica-might-not-need-cafta-after-all-and-why-it-may-be-a-bad-deal-for-the-average-costa-rican/>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Marianela Jimenez, *Costa Rica Leader: Trade Pact Passes*, WASH. POST, Oct. 8, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/07/AR2007100700529.html>.

Costa Rica is one of the United States' oldest trading partners in the Central American region.

CAFTA-DR illustrates that the free trade model, as it has been used by the United States since the 1990s, is not working. Therefore, this article now turns to an examination of CAFTA-DR.

III. CAFTA-DR: THE BASICS

This section focuses on CAFTA-DR's history and provisions. It also surveys reasons why businesses and government leaders support specific provisions of the agreement, and it examines reasons for opposition to those provisions.

A. *Who Supports CAFTA-DR and Why?*

CAFTA-DR's supporters assert that multiple benefits will accrue to citizens of the developing members.¹⁹⁸ They predict more jobs, increased income for workers, and access to better and less expensive consumer goods.¹⁹⁹

In May 2004, then-United States Trade Representative Robert Zoellick commented, "[CAFTA-DR] will do much to create the new economic opportunity that will bolster the democratic commonwealth in the hemisphere. It will eliminate tariffs, open markets, promote transparency and establish state-of-the-art rules for 21st Century commerce."²⁰⁰ U.S. government leaders say citizens of all member countries will live better at a later date if business is first permitted to grow and generate profits.²⁰¹ Additionally, U.S. government officials argue that each member can participate in regional markets by relying on its comparative advantage.²⁰²

U.S. business managers support CAFTA-DR because developing members can supply labor that is even less expensive than labor in Mexico while staying in relatively close proximity to the United States.²⁰³ Current

¹⁹⁸ Eiras, *supra* note 78.

¹⁹⁹ *Id.*

²⁰⁰ As quoted in GREG SPOTTS, CAFTA AND FREE TRADE: WHAT EVERY AMERICAN SHOULD KNOW 15 (2005).

²⁰¹ HUFBAUER & SCHOTT, *supra* note 14, at 665; see *supra* text accompanying notes 14–15, 35–40 (discussing comparative advantage).

²⁰² See HUFBAUER & SCHOTT, *supra* note 14, at 665.

²⁰³ See Erika Morphy, *The Rocky Path to Regional Free Trade*, FOREIGN DIRECT INVESTMENT MAG., Oct. 3, 2005, http://www.fdimagazine.com/news/fullstory.php/aid/1440/The_rocky_path_to_regional_free_trade.html.

average minimum daily wages in *maquiladoras* in Mexico are about \$8.50.²⁰⁴ In contrast, current minimum daily wages in Nicaragua are about \$1.86.²⁰⁵ Thus, there is even greater incentive to move to Nicaragua and CAFTA-DR's other developing members. Without CAFTA-DR, its supporters fear that U.S. companies that currently use completion factories in Central America will relocate these factories to China or Southeast Asia to take advantage of the lower cost of labor.²⁰⁶

In addition to profiting from lower labor costs under CAFTA-DR, U.S.-based companies operating in developing members can ship goods to the United States without paying stiff value-added taxes; most exports from developing members enter the United States "basically tariff-free."²⁰⁷ Thus, goods entering the United States are cheaper for U.S. consumers. Supporters state that CAFTA-DR allows U.S.-based companies to continue manufacturing product parts in Central America without being subjected to high tariff rates.²⁰⁸

As compared to previous trade regulation, CAFTA-DR eliminates quotas for many goods being imported and exported between the United States and CAFTA-DR's developing members.²⁰⁹ In some cases, such as in the textile industry, quotas are still in place, but, as compared to pre-CAFTA-DR, they allow greater quantities of specified goods to be traded between the countries.²¹⁰

Many government leaders and businesspeople of the developing members share the perspectives of U.S. government and businesses. Marco Vinicio Ruíz, Costa Rica's Minister of Commerce, views CAFTA-DR as a positive force for his country.²¹¹ He predicts that, in response to CAFTA-DR,

²⁰⁴ *Mexico: Wages, Maquiladoras, NAFTA*, MIGRATION NEWS, Feb. 1998, http://migration.ucdavis.edu/mn/more.php?id=1451_0_2_0. The term *maquiladora* is used in Mexico and in most literature. In Nicaragua, many business people and government officials use the term *maquila*. WITNESS FOR PEACE, BEHIND THE SEAMS: MAQUILAS AND DEVELOPMENT IN NICARAGUA 4 (2000). For history and discussion of the *maquiladora* program, which originated between the United States and Mexico, see David W. Eaton, *Transformation of the Maquiladora Industry: The Driving Force Behind the Creation of a NAFTA Regional Economy*, 14 ARIZ. J. INT'L & COMP. L. 747 (1997); *Mexico: Wages, Maquiladoras, NAFTA*, *supra* 204.

²⁰⁵ McIntosh, *supra* note 28.

²⁰⁶ See Morphy, *supra* note 203.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Stenzel, *supra* note 41.

²¹⁰ *Id.*; see *infra* text accompanying notes 517–533 (discussing the textile industry in Nicaragua).

²¹¹ See interview by Marison Rueda with Marco Vinicio Ruíz, *Free Trader*, LATIN TRADE, Apr. 2007, at 18.

Costa Rican exports of electronics, foods, and agriculturally-related products to the United States will grow.²¹² Costa Rica will take in about \$1.50 billion in foreign direct investment from 2006 to 2010, which Ruiz says is “70% of the total coming to Central America.”²¹³ Moreover, business leaders within the developing members look to Standard & Poor’s (“S&P”) analysis of CAFTA-DR.²¹⁴ S&P projects “considerable improvement for the region’s growth.”²¹⁵

B. CAFTA’s Provisions

CAFTA-DR’s primary purpose is to promote trade.²¹⁶ It does so through provisions designed to remove tariff barriers and non-tariff barriers.²¹⁷ Those non-tariff barriers include laws related to intellectual property protection, financial services, and investment.²¹⁸ It also covers labor and environmental laws, at least in limited ways.²¹⁹ This section surveys CAFTA-DR’s provisions in those areas.

1. Textiles and Agricultural Goods

In the textiles arena, CAFTA-DR eliminates the United States’ quantitative import restrictions of textiles and clothing.²²⁰ CAFTA-DR also includes a wide array of provisions that focus on agriculture.²²¹ One major provision is that countries must adhere to tariff rate quotas (“TRQs”) described in the agreement.²²² The agreement also states that participants “share the objective of the multilateral elimination of export subsidies for

²¹² *Id.* Ruiz explains that the Central American region has trade agreements with eighty percent of its trading partners and that Costa Rica is trying to become a member of the Asia-Pacific Economic Cooperation (“APEC”) organization to strengthen its relationship with Asian countries. *Id.*

²¹³ *Id.*

²¹⁴ Morphy, *supra* note 203.

²¹⁵ *Id.*

²¹⁶ USTR, *supra* note 13; Stenzel, *supra* note 41.

²¹⁷ SAMUEL MORLEY, INT’L FOOD POL’Y RES. INST., TRADE LIBERALIZATION UNDER CAFTA: AN ANALYSIS OF THE AGREEMENT WITH SPECIAL REFERENCE TO AGRICULTURE AND SMALL-HOLDERS IN CENTRAL AMERICA 2 (2006), available at http://www.ruta.org/documentos_no_indexados/CAFTA_marzo06/caftapaper3SamMorley.pdf.

²¹⁸ *Id.*

²¹⁹ CAFTA-DR, *supra* note 9, chs. 16, 17.

²²⁰ CAFTA-DR, *supra* note 9, art. 3.22.

²²¹ *Id.* ch. 3, § F.

²²² *Id.* art. 3.13.

agricultural goods and shall work together toward an agreement in the WTO to eliminate those subsidies and prevent their reintroduction in any form.”²²³ This section also requires that an agricultural review commission be formed.²²⁴

2. Trade in Services

CAFTA-DR covers a significant number of sectors of the economy with variations accommodating needs of individual countries. The sectors include financial services, telecommunications, tourism, computer services, entertainment, energy, transportation, engineering, advertising, and environmental services.²²⁵ In addition, CAFTA-DR includes provisions designed to promote transparency in regulatory processes such as administrative procedures for making rules and regulations.²²⁶ Transparency requires, among other things, publication of those regulations.²²⁷ These rules are expected to create a more desirable investment climate.²²⁸ Transparency is good for all citizens in society, not just businesses. With information, people can speak up in informed ways.²²⁹ While investment provisions focus on economy, provisions for transparency contribute to social equity.

3. Investment Protection

Another set of CAFTA-DR provisions provides for reciprocal rights for investors among members.²³⁰ Investors can establish and operate investments under the same conditions as local investors with some limited exceptions.²³¹ Subjects covered include business organizations, contracts,

²²³ *Id.* art. 3.14.

²²⁴ *Id.* art. 3.18.

²²⁵ *Id.* ch. 11; CARLOS FELIPE JARAMILLO & DANIEL LEDERMAN, CHALLENGES OF CAFTA: MAXIMIZING THE BENEFITS FOR CENTRAL AMERICA 52–55 (2006).

²²⁶ CAFTA-DR, *supra* note 9, ch. 18.

²²⁷ *Id.* art. 18.2.

²²⁸ For discussion of the need for transparency in developing members of CAFTA-DR, particularly with respect to business transactions, see generally Omar E. García-Bolívar, *Dispute Resolution Process and Enforcing the Rule of Law: Is Arbitration a Viable Alternative to Solving Disputes in Central America?*, 12 SW. J.L. & TRADEAM. 381 (2006).

²²⁹ For discussion of legislation designed to facilitate decision-making by citizens, see generally Paulette L. Stenzel, *Right to Act: Advancing the Common Interests of Labor and Environmentalists*, 57 ALB. L. REV. 1 (1993); Paulette L. Stenzel, *The Need for a National Risk Assessment Communication Policy*, 11 HARV. ENVTL. L. REV. 381 (1987).

²³⁰ CAFTA-DR, *supra* note 9, ch. 10.

²³¹ *Id.* art. 10.3; JARAMILLO & LEDERMAN, *supra* note 225, at 56; see also Amy K. Anderson, Note, *Individual Rights and Investor Protections in a Trade Regime: NAFTA and CAFTA*, 63 WASH. & LEE L. REV. 1057, 1083–84 (2006).

and debt instruments.²³² It also guarantees fair market value if property is expropriated.²³³ These provisions protect U.S. investors who wish to enter markets in developing members.

4. Intellectual Property Rights

CAFTA-DR includes several types of provisions designed to protect the intellectual property rights of investors. First, members promised to ratify a number of other existing international agreements. Those agreements relate to trademarks, patents, satellite television, and new plant varieties.²³⁴ Second, members established standards related to such specific categories as internet domains, rights of authors, satellite signals, and patents.²³⁵ This included an extension of the period of copyright protection from fifty to seventy years.²³⁶ Third, members addressed the need for procedures and resources to enforce intellectual property rights.²³⁷

5. Labor Rights

Participating countries in CAFTA-DR must reaffirm their participation in the International Labour Organization ("ILO").²³⁸ CAFTA-DR recognizes the rights of individual countries to create and support domestic labor standards, but also asks participants to uphold the most stringent international labor standards.²³⁹ These internationally recognized standards include: the right of association, the right to collectively bargain, prohibition of forced labor, elimination of the worst forms of child labor, creation of a minimum age for workers, and provisions for "minimum wages, hours of work, and occupational safety and health."²⁴⁰

²³² CAFTA-DR, *supra* note 9, ch. 10.

²³³ *Id.* art. 10.7.

²³⁴ *Id.* ch. 15.

²³⁵ *Id.* arts. 15.4 (Internet domain names), 15.5, 15.6 (protections for authors), 15.8 (satellite signals), and 15.9 (patents).

²³⁶ *Id.* art. 15.5; JARAMILLO & LEDERMAN, *supra* note 225, at 56–58.

²³⁷ JARAMILLO & LEDERMAN, *supra* note 225, at 56–58.

²³⁸ CAFTA-DR, *supra* note 9, art. 16.1; *see also* International Labour Organization [ILO], <http://www.ilo.org> (last visited Mar. 9, 2010). For discussion of CAFTA-DR and the ILO, *see generally* Emily Miyamoto Faber, Note, *Pregnancy Discrimination in Latin America: The Exclusion of "Employment Discrimination" from the Definition of "Labor Laws" in the Central American Free Trade Agreement*, 16 COLUM. J. GENDER & L. 297 (2007).

²³⁹ CAFTA-DR, *supra* note 9, art. 16.1.

²⁴⁰ *Id.* art. 16.8.

6. Environmental Protection

CAFTA-DR's Chapter 17 deals with environmental protection.²⁴¹ Article 17.1 states that each country has the right "to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies" and shall "encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies."²⁴² Countries agree to enforce their environmental laws, but they are in violation of CAFTA-DR *only if* there has been a "sustained or recurring course of action or inaction."²⁴³ Additionally, the chapter forbids the governments from relaxing environmental laws and regulations to encourage trade and investment.²⁴⁴

Article 17.5 establishes an Environmental Affairs Council that must meet annually to oversee implementation of Chapter 17.²⁴⁵ It coordinates its work with the Dominican Republic-Central America-United States-Environmental Cooperation Agreement ("DR-CA-US-ECA"), established separately.²⁴⁶ Pursuant to that agreement, "[t]he Parties agree to cooperate to protect, improve and conserve the environment, including natural resources. The objective of the Agreement is to establish a framework for such cooperation among the Parties."²⁴⁷

If a country fails to enforce its environmental laws and regulations, the complaint process is long and involves many steps.²⁴⁸ And, if a country is found to have failed to enforce its laws and regulations, fines are at a maximum of \$15 million per year (a small amount as compared to many companies' operating expenses).²⁴⁹

C. Privatization Accompanying CAFTA-DR

"Privatization and market liberalization are widely considered to be complementary reforms in transition economies. . . . [A]nalysis suggests

²⁴¹ *Id.* ch. 17.

²⁴² *Id.* art. 17.1.

²⁴³ *Id.* art. 17.2.

²⁴⁴ *Id.*

²⁴⁵ CAFTA-DR, *supra* note 9, art. 17.5.

²⁴⁶ Agreement Among the Governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States of America on Environmental Cooperation ("DR-CA-US-ECA"), Feb. 18, 2005, *available at* <http://www.state.gov/documents/organization/131456.pdf>.

²⁴⁷ *Id.* art. II.

²⁴⁸ CAFTA-DR, *supra* note 9, arts. 17.7–.11.

²⁴⁹ *Id.* art. 20.17.

that when pursued too vigorously, privatization may actually impede the transition process following market liberalization and reduce social welfare.²⁵⁰ As has been the case under NAFTA, a wave of privatization of public services has accompanied CAFTA-DR. One major area is in the production of electricity.

In many . . . Central American countries, privatization of electricity production has already proven disastrous in numerous ways. . . . This ranges from the privatization of electricity generation, transmission, or distribution to actually selling state-run generation facilities like dams to private entities, thereby completely eliminating the government's role and responsibilities in the electricity sector.²⁵¹

Privatization was expected to increase competition, but there is little incentive for that because two companies control seventy to ninety percent of private electricity production in the Central American countries.²⁵² “[O]ne serious consequence of privatization that Costa Rica now shares with other Central American countries is the devastating environmental impact.”²⁵³ Hydroelectric power plants cause serious damage to watersheds and the plant and animal life in them by making the river inhospitable.²⁵⁴ Some dams divert water from miles of riverbeds, removing water supplies from plants, animals, and people that depend on them.²⁵⁵ Moreover, the developers uproot and displace indigenous communities living in the watershed areas.²⁵⁶

Thus, privatization of electricity production and building of hydroelectric dams brings some economic benefit to companies that run them and a social gain to people who gain access to electricity. But, it brings serious harm to others on all three legs of the Triple Bottom Line: economy, social equity, and environment.²⁵⁷ Speaking of the Plan Puebla Panama (“PPP”),

²⁵⁰ Rachael E. Goodhue, Gordon C. Rausser, & Leo K. Simon, *Privatization, Market Liberalization, and Learning in Transition Economies*, 80 AM. J. AGRIC. ECON. 724, 724 (1998).

²⁵¹ R. Victoria Lindo, Note, *Hydroelectric Power Production in Costa Rica and the Threat of Environmental Disaster Through CAFTA*, 29 B.C. INT'L & COMP. L. REV. 297, 304 (2006).
²⁵² *Id.*

²⁵³ *Id.* at 305.

²⁵⁴ *Id.* at 299.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 299.

²⁵⁷ For discussion arguing that Costa Rica must close loopholes in its environmental laws, enforce those laws, and increase restrictions on privatization, see Lindo, *supra* note 251.

an economic development plan that paved the way for CAFTA-DR, one author says, “[i]nternational agreements like the PPP tend to share one disturbing feature: the benefits of privatization are enjoyed almost entirely by the international organizations, and those benefits come at a very high cost to the citizens and the environments of these countries.”²⁵⁸

As illustrated through the discussion above of CAFTA-DR, its effects reach into the economy, society, and environment of its developing members. The next section of this article addresses the important accompanying question: Do those effects support or thwart sustainable development?

IV. CAFTA-DR FAILS TO SUPPORT THE TRIPLE BOTTOM LINE IN DEVELOPING MEMBERS

The following sections review some of the detriments that have come to or are expected in Costa Rica, the Dominican Republic, El Salvador, Guatemala, and Honduras. Nicaragua will be discussed in greater depth in the next section of this article. These sections show that CAFTA-DR fails to support economy, social equity, and environment in sustainable ways. They also reveal the interconnectedness of the three legs of the Triple Bottom Line.²⁵⁹

A. *Economy*

This section gives examples of CAFTA-DR’s effects in several areas: agricultural subsidies, textiles, and services. Opponents of CAFTA-DR assert that it will result in a large loss of small, independently owned businesses within the developing members.²⁶⁰ It is estimated that 5.5 million

²⁵⁸ *Id.* at 299. For in-depth discussion of the PPP and its ramifications, see Stenzel, *supra* note 10.

²⁵⁹ The examples below have been categorized under the headings economy, social equity, and environment, but all are interconnected. The interconnectedness makes it difficult to classify examples under one heading. This interconnectedness is at the heart of the Triple Bottom Line. *See infra* Part IV.D.

²⁶⁰ *See, e.g.,* Anuradha Mittal, *CAFTA Will Hurt Family Farmers, Workers, & Small Businesses*, THE AGRIBUSINESS EXAMINER, Aug. 1, 2005, *reprinted at* Organic Consumers Association, <http://www.organicconsumers.org/Politics/cafta080105.cfm> (last visited Mar. 9, 2010); Laura Carlsen, *Memo Reveals Manipulation Scheme*, COUNTERPUNCH, Oct. 4, 2007, <http://www.counterpunch.org/carlsen10042007.html> (“[CAFTA opponents] emphasized the impact on job loss in small and medium-sized industries”); The SHARE Foundation, *10 Reasons You Should Oppose CAFTA*, available at <http://www.share-elsalvador.org/cafta/Flyer10-7.pdf> (“Central American small-farmers will be devastated”).

small farmers in Central America currently making their living from traditional agricultural methods will be quickly forced out of the market.²⁶¹ This is because CAFTA-DR will eliminate import tariffs on those crops that traditional agricultural methods emphasize: beans, corn, and rice.²⁶² The International Food Policy Research Institute estimates that CAFTA-DR will result in a loss of \$8.3 billion per year to developing members.²⁶³

Critics say that, when the final text of CAFTA-DR was reviewed, "the Bush administration [had fallen to the pressure from U.S. business and] heavily distorted CAFTA[-DR's] sugar and textile provisions so as to handicap Central America in precisely those sectors where it should have benefitted the most."²⁶⁴ For instance, CAFTA-DR imposes strict import regulations on the sugar industry, and "after 15 years, Central America will only get a market access quota representing 1.7 percent of total U.S. production."²⁶⁵ Moreover, a steep tariff will be imposed on any imports that exceed the quota limit.²⁶⁶

Costa Ricans will be forced to compete with subsidized agricultural goods. Most agricultural tariffs will be phased out in stages ranging from immediate cancellations to a final phase-out at the end of twenty years.²⁶⁷ One report said, "the average *tico* [Costa Rican] farmer [will] have to compete against Cargill and Archer Daniels Midland and other US multinationals, which [will] undercut domestically produced foodstuffs in the Costa Rican market."²⁶⁸ CAFTA-DR's sugar provisions are of particular concern because they provide substantial protection for U.S. sugar producers, despite the fact that sugar is one of the few industries in which Costa Rica has a comparative advantage over the United States.²⁶⁹

²⁶¹ Daniel P. Erikson, *Central America's Free Trade Gamble*, WORLD POL'Y J., Winter 2004/2005, at 19, 25. For further discussion of the displacement of the rural sector, see Brandt, *supra* note 119, at 97.

²⁶² CAFTA-DR, *supra* note 9, art. 3.3. This is ironic and disturbing in the wake of recent shortages of rice and other staple food products in developing countries. See Keith Bradsher, *A Drought in Australia, a Global Shortage of Rice*, N.Y. TIMES, Apr. 17, 2008, <http://www.nytimes.com/2008/04/17/business/worldbusiness/17warm.html>.

²⁶³ Erikson, *supra* note 261, at 25.

²⁶⁴ *Id.* at 26.

²⁶⁵ *Id.* at 21.

²⁶⁶ *Id.*

²⁶⁷ CAFTA-DR, *supra* note 9, ch. 3, annex 3.3.

²⁶⁸ Rush, *supra* note 192.

²⁶⁹ Paulette L. Stenzel, *Why CAFTA Faces Opposition from Citizens of Central America and the Dominican Republic*, 2 GLOBALEDGE BUS. REV., No. 3, at 1 (2008); see also *Free Trader*, *supra* note 211 ("We were very careful with what the U.S. subsidizes, such as rice, with tariffs that come with a 10-year phasing-out period, and dairy products and some meats such as pork and chicken").

Honduras' history contradicts the claim that reduction of tariffs on agricultural products through CAFTA-DR will benefit developing members. Honduras reduced tariffs in 1991 when it faced a severe rice shortage.²⁷⁰ Historians refer to the set of events as the *arrozazo*, or rice scandal.²⁷¹

Prior to the 1991 tariff reduction, there were 25,000 rice producers in Honduras, and the Honduran rice industry employed 150,000 people, directly and indirectly. In an effort to boost supplies after a 1991 drought, the Honduran government drastically reduced tariffs, and subsidized imported rice immediately flooded the country.

As rice prices dropped, Honduran producers failed to make payments on their loans and went bankrupt. In spite of ten years of efforts by the Honduran government to reverse the decline, the Honduran rice industry is now just a shadow of its former self. By 2002, domestic rice production was just 14% of the 1990 level, and there were less than 2,000 rice producers left in the country.

Hondurans now must feed themselves with 95% imported rice. A country that was once self-reliant in a staple of the local diet is now exposed to the volatile international markets for commodities and currency exchange. The simple act of feeding the Honduran people now requires sending precious hard currency out of the country and increasing the Honduran trade deficit.²⁷²

Experience in Honduras shows that, by reducing tariff rates on staple products, CAFTA-DR hurts citizens of its developing members. According to a 2004 report by the relief agency Oxfam International, the Central American region's "rice industry [will] be decimated, jeopardizing 1.5 million jobs."²⁷³ The job losses in the struggling farm sector could likely promote increased migration of people to the United States.²⁷⁴ U.S. businesses are anxious to gain market access in the areas of agriculture and manufactured goods.²⁷⁵

²⁷⁰ SPOTTS, *supra* note 200, at 50–51.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Marla Dickerson, *Pact Seen as Threat to Latin Farmers*, L.A. TIMES, Nov. 16, 2004, <http://articles.latimes.com/2004/nov/16/business/fi-rice16>.

²⁷⁴ *See id.*

²⁷⁵ *See* Export.gov, U.S.-CAFTA-DR Free Trade Agreement: How U.S. Companies Can Benefit, <http://www.export.gov/FTA/cafta-dr/index.asp> (last visited Mar. 9, 2010).

Citizens of developing countries are concerned, however, that their people will receive little in return.²⁷⁶

The textile industry is closely tied to agriculture.²⁷⁷ CAFTA-DR imposes rules of origin on the textile and apparel industries—two significant sectors of the economies of the developing members.²⁷⁸ To avoid tariffs, the rules of origin require Central American exporters to produce goods with regionally made components.²⁷⁹ Prior to CAFTA-DR, Central American exporters used components from places outside the region, such as China and Southeast Asia.²⁸⁰ However, CAFTA-DR's rules essentially force exporters located in its developing members to purchase their components from U.S. suppliers, which charge higher prices.²⁸¹ This policy benefits U.S. businesses while impairing the developing members.²⁸² Critics of CAFTA-DR say the "purpose of forcing [the rules of origin] on the Central Americans is to secure a customer base for U.S. textile products."²⁸³

Unfortunately, the textile industries of the developing members face additional, significant challenges in the world arena. January 1, 2005 marked the end of quotas on textile industrial goods by WTO members.²⁸⁴ In 2005, the WTO estimated that "China's market share of U.S. imports will leap from 11 to 18 percent in [direct] textiles, and from 16 to 50 percent in clothing."²⁸⁵ Accordingly, market shares for other countries will decrease. The WTO estimates that "Mexico's market share of U.S. imports will drop from 10 to 3 percent, and the market share for the rest of the

²⁷⁶ See Citizens Trade Campaign, Opposition in Central America and the Dominican Republic, http://www.citizenstrade.org/opposition_ca_dr.php (last visited Mar. 9, 2010) (containing links to many articles and reports on the subject); Stenzel, *supra* note 269.

²⁷⁷ Many textiles are produced from cotton, a significant product in most of the developing CAFTA-DR nations. Cotton production affects water use and is often accompanied by use of pesticides made from petro-chemicals. Run-off contaminates water supplies, and chemicals on the fabric adversely affect the health of textile workers. For further discussion of pollution in relation to the Indian textile industry, see Tamil Nadu, "Permanent Solution" to Pollution Issue Needed, HINDU, July 6, 2006, <http://www.hindu.com/2006/07/06/stories/2006070604390500.htm>; see also Paul Schneider, *The Cotton Brief*, N.Y. TIMES, June 20, 1993, <http://www.nytimes.com/1993/06/20/style/the-cotton-brief.html> (discussing the use of agricultural chemicals in cotton production).

²⁷⁸ Erikson, *supra* note 261, at 21.

²⁷⁹ CAFTA-DR, *supra* note 9, ch. 4.

²⁸⁰ See Erikson, *supra* note 261, at 21.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* (quoting GRISWOLD & IKENSON, *supra* note 119).

²⁸⁴ *Id.* at 24.

²⁸⁵ *Id.*

Americas will shrink from 16 to 5 percent.”²⁸⁶ In a “‘post-quota’ world,” Central American countries are facing a tough battle to maintain market share.²⁸⁷ With the added free trade provisions in CAFTA-DR, the developing members may be facing their toughest battle yet to maintain their already weak industries.

The provisions of CAFTA-DR that relate to agriculture and textiles are leading to major hardships for developing members that are already having a difficult time attracting investors and funding in all of these areas. As a result, the main source of revenue in El Salvador is “capital from all the shipments of money that Salvadorans send [to El Salvador] from the United States” and “it is just money from Salvadorans living outside of the country.”²⁸⁸ CAFTA-DR is going to set these countries back even further on their quests to create sustainable economies.

B. *Social Equity*

“Adversaries worry that CAFTA[-DR] will undermine fundamental social rights of the people of Central America and the Dominican Republic.”²⁸⁹ In fact, CAFTA-DR perpetuates and exacerbates social inequity in various areas. This section will focus on two sets of CAFTA-DR provisions: intellectual property and labor rights. CAFTA-DR’s patent provisions protect some economic interests and run counter to others. They promote social inequity by hindering health care.²⁹⁰ The labor provisions also fail to protect the needs of workers and their families.

The effects of CAFTA-DR’s intellectual property provisions in developing members may turn out to be devastating. Currently, it is estimated that 300,000 people in the developing members are infected with HIV/AIDS, of whom 35,000 require antiretroviral drugs.²⁹¹ Unfortunately, only around 6,000 individuals receive the required drugs.²⁹² Prices are so high that it is virtually impossible for individuals infected with HIV/AIDS in the Dominican Republic and Guatemala to purchase a single dose of

²⁸⁶ Erikson, *supra* note 261, at 24.

²⁸⁷ *Id.*

²⁸⁸ *An Invitation to Disaster: Corporate Power and Central America’s Environmental Future Under CAFTA*, MULTINATIONAL MONITOR, Apr. 2004, at 19, 21.

²⁸⁹ Brandt, *supra* note 119, at 94.

²⁹⁰ See Jill Replogle, *Central American Trade Pact May Limit Access to Generics*, 363 LANCET 1612, 1612 (2004).

²⁹¹ *Id.* at 1613.

²⁹² *Id.*

the necessary medicine.²⁹³ In 2003, the price of a year's supply of anti-retroviral treatments was "only slightly less than the per capita annual gross domestic income in Guatemala . . . and the Dominican Republic."²⁹⁴

Enforcement of CAFTA-DR's intellectual property provisions is likely to contribute to increased deaths from HIV/AIDS in the Dominican Republic and Guatemala. U.S. Representative Henry Waxman said CAFTA-DR would block Costa Rican authorities from "approving the sale of generic drugs for at least five years after a new [pharmaceutical drug] is introduced . . . even if the drug's patent has already expired."²⁹⁵ "Without access to generic medicines due to the strict provisions of CAFTA[-DR], Costa Rica's universal healthcare system is in jeopardy."²⁹⁶

Generic equivalents to patented drugs could provide an alternative for some people; however, CAFTA-DR's provisions will eliminate nearly all options for generic drugs to fight HIV/AIDS.²⁹⁷ As a result, CAFTA-DR will shorten the lives of those who suffer from HIV/AIDS in the Dominican Republic, Guatemala, and other developing members. CAFTA-DR's intellectual property rights provisions "make access to generic medications nearly impossible."²⁹⁸ Through these provisions, questions arise surrounding the availability of affordable health care to citizens of the developing members. Guillermo Murillo, assistant director at Agua Buena, a human rights organization in California, explained CAFTA-DR's intellectual property rights provisions as putting the "rights of patent owners . . . above human rights."²⁹⁹ Prior to CAFTA-DR's adoption, generic drugs were inexpensive in the developing countries.³⁰⁰ Now, critics argue that CAFTA-DR's provisions will essentially eliminate generic drug usage in the developing members because, through CAFTA-DR, pharmaceutical companies can control their patents for up to ten years.³⁰¹ Murillo says the provisions of CAFTA-DR "essentially grant pharmaceutical companies a monopoly on new drugs registered in" developing members.³⁰²

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Rush, *supra* note 192.

²⁹⁶ Kate E. Kaiser, Note, *The Fight for Access to AIDS Medications: How the Central American Free Trade Agreement Conflicts with Costa Rica's Constitutional Courts*, 25 WIS. INT'L L.J. 535, 550 (2007).

²⁹⁷ *See id.*

²⁹⁸ Replogle, *supra* note 290, at 1612.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

In short, the patent protections of CAFTA-DR support the economic interests of pharmaceutical companies, but they are detrimental to the public health, promoting social inequity.³⁰³ Also, treatment of HIV/AIDS has significant economic ramifications for the developing members. Paul Farmer, an infectious disease specialist, argues that treatment makes sense from an economic standpoint.³⁰⁴ “There is an overwhelming need to prolong millions of productive lives” in developing countries.³⁰⁵ When children are orphaned and families collapse, there is a danger of economic collapse.³⁰⁶

The labor provisions of CAFTA-DR also fail to promote social equity. Labor and human rights advocates have worked hard to be sure that these rights are included in the agreements, but others oppose their inclusion. Two of the main arguments against inclusion of labor rights are (1) that they lower developing countries’ comparative advantage of lower wages, and (2) they intrude on the sovereignty of developing countries.³⁰⁷ CAFTA-DR’s labor provisions are incorporated in its text instead of in a separate agreement as with NAFTA.³⁰⁸ However, they are less protective of workers. The North American Agreement on Labor Cooperation (“NAALC”) included an eleven-part definition of labor laws that included the “elimination of employment discrimination,” while CAFTA-DR condensed the list to a five-part definition and did not include “employment discrimination.”³⁰⁹ Some commentators asserted that “‘NAALC held potential to strengthen labor.’ Unfortunately, the signatories have interpreted NAALC’s obligations narrowly; and, as a result, many of the concerns expressed by workers have been ignored.”³¹⁰

³⁰³ For in-depth discussion, see Rahul Rajkumar, Note, *The Central American Free Trade Agreement: An End Run Around the Doha Declaration on TRIPS and Public Health*, 15 ALB. L.J. SCI. & TECH. 433 *passim* (2005).

³⁰⁴ Paul Farmer, M.D., Partners in Health, *Infections and Inequalities: The Microbial Burden of Poverty*, Report Presented to the House Subcommittee on Biomedical Research (Sept. 26, 2001) (transcript available at <http://www.publicanthropology.org/TimesPast/Farmer.htm>).

³⁰⁵ *Id.*

³⁰⁶ *Id.* (noting that “it has been estimated that if it were not for malaria, Africa’s GDP would have been \$100 billion higher than it was last year. HIV has had an even more cataclysmic impact,” and “[t]he war against the major infectious killers is also the war against poverty and social inequalities”). For an in-depth discussion of the problem see PAUL FARMER, *INFECTIONS AND INEQUALITIES: THE MODERN PLAGUES* (1999).

³⁰⁷ Faber, *supra* note 238, at 299.

³⁰⁸ CAFTA-DR, *supra* note 9, ch. 16; *see also* USTR, *CAFTA-DR Accomplishes More for Worker Rights than Trade Preference Programs*, available at http://ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file111_7787.pdf.

³⁰⁹ Faber, *supra* note 238, at 299.

³¹⁰ Brandt, *supra* note 119, at 107.

Costs of labor are an essential factor in business decisions, and those costs can be reduced significantly by moving U.S. factories into international territory. This action of a “profitable business . . . exploiting international wage differences” is referred to as labor arbitrage.³¹¹ Jack Welch, former CEO of General Electric, took a favorable view of the practice suggesting “that the ideal factory would be on a barge that would move from country to country, taking advantage of the cheapest labor available at any given time.”³¹² The use of labor arbitrage accelerated in the 1990s and early twenty-first century.³¹³

Business managers also consider the provisions of labor and health and safety laws and the costs of compliance. CAFTA-DR includes a chapter on labor that parallels its environmental chapter.³¹⁴ It requires that members enforce their own current domestic labor laws and regulations.³¹⁵ Thus, it does not provide an incentive for the developing members to increase the level of protection they give to workers. To the contrary, the need to attract investment provides an incentive for CAFTA-DR countries to maintain the status quo. “CAFTA[-DR] actually reduces protections for workers’ rights that exist in current trade programs [in Central America] . . . where workers are easily barred from union organizing, collective bargaining can be avoided entirely, and strikes are routinely declared illegal.”³¹⁶ Sadly, there is strong evidence that the overall labor situation in CAFTA-DR’s developing members is worse than in Mexico.³¹⁷ Human Rights Watch states that the labor laws of the developing CAFTA-DR members “do not meet international standards, falling short in such areas as freedom of association, protection against anti-union discrimination, and ensuring

³¹¹ SPOTTS, *supra* note 200, at 23.

³¹² *Id.* at 17. Welch’s successor Jeffery Immelt seems to be moving GE in a new direction. Immelt understands that environmentally and socially beneficial practices can also be good for business. It was under Immelt’s leadership that GE launched its new Ecomagination initiative. GE Ecomagination, <http://ge.ecomagination.com/index.html> (last visited Mar. 10, 2010).

³¹³ See U.N. Dep’t of Econ. and Soc. Affairs [DESA], *Working Paper: Globalization, Offshoring and Economic Insecurity in Industrialized Countries*, 22–26, U.N. Doc. ST/ESA/2009/DWP/87 (Nov. 2009) (prepared by William Milberg & Deborah Winkler), available at http://www.un.org/esa/desa/papers/2009/wp87_2009.pdf.

³¹⁴ JARAMILLO & LEDERMAN, *supra* note 225, at 59–60.

³¹⁵ *Id.*

³¹⁶ Brandt, *supra* note 119, at 93–94.

³¹⁷ For details and analysis of the approach to protections for workers in Mexico and two CAFTA-DR members, see Laura Glass-Hess, Note, *Ready or Not, Here Comes DR-CAFTA: Comparing the Right of Association in Mexico, Guatemala, and El Salvador*, 35 GA. J. INT’L & COMP. L. 333 (2007).

fair treatment of women.”³¹⁸ While the International Labor Organization argues that the laws of CAFTA-DR’s developing members may indeed meet international standards, “there is little doubt that enforcement remains problematic and that labor abuses are widespread.”³¹⁹

Through free trade agreements, “multinational companies are making a fortune [by] closing down their plants in the [United States] and moving production to countries where labor is cheap and government regulation is nonexistent.”³²⁰ When NAFTA was passed, critic Ross Perot estimated that by moving U.S. factories to Mexico, companies would save \$10,000 per job.³²¹ Such moves allow companies to escape U.S. environmental, health, and safety regulations.³²² U.S. labor arbitrage is not just anecdotal; from July 2000 to July 2003, three million U.S. manufacturing jobs were lost through labor arbitrage, “and those jobs are never coming back.”³²³

Under NAFTA, Mexico’s economy is closely tied to the U.S. economy. “When trade between Mexico and the U.S. increased by volumes after NAFTA was signed, wealth was created. However, this wealth did not find its way to the Mexican workers who build the products for Mexico.”³²⁴ As early as 2000, U.S. companies were closing down *maquiladoras*, many of which were in the U.S.-Mexico border region, and moving to China.³²⁵ The recession beginning in 2008 in the United States has had a devastating impact on the Mexican economy, causing *maquiladoras* to reduce their production, leaving Mexicans without work.³²⁶

³¹⁸ Erikson, *supra* note 261, at 23.

³¹⁹ *Id.*

³²⁰ SPOTTS, *supra* note 200, at 23.

³²¹ On the Issues, Ross Perot on Jobs, http://www.issues2000.org/Celeb/Ross_Perot_Jobs.htm (last visited Mar. 10, 2010).

³²² AFL-CIO, *Exploiting Both Sides—US/Mexico Free Trade*, 2 SOC. CONT. 33, 35 (1991), available at <http://www.thesocialcontract.com/pdf/two-one/Afl-cio.pdf>.

³²³ SPOTTS, *supra* note 200, at 23–24.

³²⁴ Becerra, *supra* note 6, at 323.

³²⁵ Ginger Thompson, *Fallout of U.S. Recession Drifts South into Mexico; Jobs Are Scarce and the Outlook Becomes Dismal*, N.Y. TIMES, Dec. 26, 2001, <http://www.nytimes.com/2001/12/26/business/fallout-us-recession-drifts-south-into-mexico-jobs-are-scarce-outlook-becomes.html>; see also Sidney Weintraub, *Trade, Investment, and Economic Growth*, in NAFTA’S IMPACT ON NORTH AMERICA: THE FIRST DECADE 5 (Sidney Weintraub ed., 2004).

³²⁶ *General Motors: Plant Shutdowns Will Pinch Juarez Maquilas*, TRADINGMARKETS.COM, Apr. 24, 2009, <http://www.tradingmarkets.com/.site/news/Stock%20News/2289560/>. The slump began in 2001. “The year 2001 was without a doubt the blackest in the history of the Maquiladora Industry, dating back to its origins in 1965.” Maquiladora Industry Outlook, <http://www.maquilaportal.com/public/artic/artic188e.htm> (last visited Feb. 23, 2010). “Over the course of the year . . . the number of operating maquiladoras [sic] plants fell from 3,703 to 3,450, a net loss of 253 plants—facilities that were closed permanently or at least

Under CAFTA-DR, U.S. companies can locate factories in the developing members to “take advantage of lower labor costs and a weak regulatory environment that condones violations of labor rights.”³²⁷ Overall, the labor provisions in CAFTA-DR fail to deal with the problems created by labor arbitrage and abuses of labor law. CAFTA-DR calls for members to enforce their own labor laws, but it does nothing to ensure that the laws are enforced or that they meet international standards.³²⁸ While the drafters of CAFTA-DR may have had good intentions, “good intentions are no substitute for the enforceability of rules.”³²⁹ An analysis of NAALC in Mexico and comparing the likely effects of CAFTA-DR concludes: “Without strong enforcement of labor provisions, [CAFTA-DR] will only hasten the ‘race to the bottom’ in Latin America, with disastrous results for Central American workers.”³³⁰

C. *Environment*

CAFTA-DR is also extremely weak in the environmental leg of the Triple Bottom Line. In spite of the fact that the agreement acknowledges the importance of environmental protection by including an environmental section, it is not sufficient to support environmental sustainability.³³¹ Although proponents of CAFTA-DR say that environmental protection can be achieved, environmentalists fear a race to the bottom in terms of environmental laws and their enforcement.³³² “Due to the disparity of environmental regulation between the United States and Central American countries, CAFTA[DR] presents countries with weak regulatory schemes, like Honduras and Guatemala, as attractive locations for factories and natural resource extraction.”³³³ “Even if strong enforcement language

temporarily.” *Id.*; see also Tim Higgins, *Juarez Trade Officers Fear Economy*, DET. FREE PRESS, Apr. 19, 2009, <http://www.freep.com/article/20090419/BUSINESS01/904190493/>.

³²⁷ Erikson, *supra* note 261, at 21.

³²⁸ *Id.* at 24.

³²⁹ *Id.*

³³⁰ Glass-Hess, *supra* note 317, at 368. For additional comparison of NAALC to the labor provisions of CAFTA-DR, see Kristi Schaeffer, Note, *Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States*, 45 COLUM. J. TRANSNAT'L L. 829, 851–54 (2007).

³³¹ See *supra* text accompanying notes 241–249 (discussing CAFTA-DR's environmental provisions).

³³² See Bradley N. Lewis, Comment, *Biting Without Teeth: The Citizen Submission Process and Environmental Protection*, 155 U. PA. L. REV. 1229, 1229–31 (2007).

³³³ Nathaniel Hemmerick Hunt, Note, *One Step Forward, Two Steps Back: The Central American Free Trade Agreement and the Environment*, 35 GA. J. INT'L & COMP. L. 545,

existed in Chapter Seventeen, the fact that only existing environmental laws fall under the Agreement means that there is currently very little to enforce.”³³⁴

CAFTA-DR’s developing members face major environmental challenges, and its opponents list environmental degradation as one of its potential long-term consequences.³³⁵ This section gives examples from two countries: El Salvador, one of those hard hit in terms of environmental degradation, and Costa Rica, which is comparatively more active in environmental protection.

CAFTA-DR’s developing members face serious environmental degradation including deforestation, destruction of habitat, and destruction of species.³³⁶ Between 1950 and 1990 the Central American region lost over seventy percent of its forest cover.³³⁷ Deforestation is brought by activities including logging, mining, and agricultural production.³³⁸ Moreover, citizens of the developing members must deal with polluted water, air pollution, hazardous and non-hazardous waste, and more. A report by the Inter-American Development Bank (“IDB”) found that about seventy-five percent of the people in Central America live with water pollution, scarce water resources, land and housing shortages, emissions from industrial facilities and vehicles, and congestion from vehicles.³³⁹ These problems, in turn, reduce productivity of citizens, threaten public health, and lead to increased violence.³⁴⁰

551 (2007). Hunt adds that these “[e]nvironmental concerns over the potential exploitation of Central America’s natural resources partially stem from the consequences of free trade under NAFTA,” where different environmental laws may have created “pollution havens” in certain countries. *Id.*; see also Lewis, *supra* note 332, at 1241–45.

³³⁴ Benjamin W. Jenkins, Comment, *The Next Generation of Chilling Uncertainty: Indirect Expropriation under CAFTA and Its Potential Impact on Environmental Protection*, 12 OCEAN & COASTAL L.J. 269, 282 (2007).

³³⁵ Tony Silberfeld, *Trading Green for Green*, RISK MGMT. MAG., July 1, 2005, <http://www.rmmag.com/MGTtemplate.cfm?Section=RMMagazine&NavMenuID=128&template=/Magazine/DisplayMagazines.cfm&MGPreview=1&Volume=52&IssueID=242&AID=2816&ShowArticle=1>. Critics say the developing members are “going to pay a very high [ecological] price.” *An Invitation to Disaster*, *supra* note 288, at 21; see also Jenkins, *supra* note 334, at 281–83.

³³⁶ Hunt, *supra* note 333, at 550.

³³⁷ *Id.*

³³⁸ WILLIAM P. CUNNINGHAM & MARY ANN CUNNINGHAM, PRINCIPLES OF ENVIRONMENTAL SCIENCE: INQUIRY AND APPLICATIONS 128–29 (3d ed. 2005).

³³⁹ See Inter-American Development Bank [IDB], *Facing the Challenges of Sustainable Development: The IDB and the Environment: 1992–2002* 7 (2002), available at http://www.iadb.org/sds/doc/IDB_and_the_Environment.pdf.

³⁴⁰ *Id.*

CAFTA-DR's environmental provisions hurt El Salvador, where small farmers are pushed off their land because it is economically impossible for them to produce their crops.³⁴¹ These lands, previously maintained and protected by the small farmers, are destroyed; the trees are all cut down and the land is divided into smaller sections and sold for developmental purposes.³⁴²

Prior to CAFTA-DR, there was a three-kilometer zone on the coasts of El Salvador that big fleets were prohibited from entering.³⁴³ That zone has been removed.³⁴⁴ Big nets come with big fleets.³⁴⁵ The big nets not only catch more shrimp, but they also catch species such as sea turtles that the smaller fishermen do not catch.³⁴⁶ For every pound of shrimp caught by the big fleets, twelve or thirteen pounds of other marine life are destroyed.³⁴⁷ The law requires the big fleets to use special nets that permit sea turtles to escape.³⁴⁸ However, more often than not, the big fleets do not use the special nets; when fishers see the police, they merely pull up the illegal nets.³⁴⁹

The root of the problem in El Salvador is that the government does not enforce existing environmental laws: "environmental protection is being relaxed more and more."³⁵⁰ CAFTA-DR is likely to exacerbate this environmental dilemma as "CAFTA[-DR] requires that international enterprises be subjected to rules no more strict than those for national enterprise[s]."³⁵¹ "[E]cologically [and environmentally, El Salvador is] going to pay a very high price" when the full effects of CAFTA-DR are experienced.³⁵²

Costa Rica has been hailed as the leader in environmental protection laws in Central America³⁵³ and is a leader in eco-tourism in the area.³⁵⁴ "The concept behind this rapidly growing industry is that the profits generated by tourism can be used to sustain the local culture and

³⁴¹ *An Invitation to Disaster*, *supra* note 288, at 21.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *An Invitation to Disaster*, *supra* note 288, at 21.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ See Lindo, *supra* note 251, at 301.

³⁵⁴ See Jeremy Nisen & Richard Kaplan, "Sweet" Green Adventures in Costa Rica and Panama, *HISP. BUS.*, July-Aug. 2008, at 60.

environment, and the vacation should incorporate an appreciation for the local ecosystem.”³⁵⁵ Yet, Costa Rica continues to face environmental challenges. For example, in the Osa Peninsula of southwest Costa Rica, “deforestation continues to threaten the stability of the ecosystem.”³⁵⁶ Costa Rica has “conflicting [environmental] laws . . . to guide corporations.”³⁵⁷ Moreover, CAFTA-DR threatens Costa Rica’s rights to protect its waterways because it facilitates harmful methods of hydroelectric production.³⁵⁸ This threatens the environment and social equity. “Hydroelectric dams are also notorious for forcibly uprooting and displacing entire indigenous surrounding communities around the world.”³⁵⁹ CAFTA-DR does not address those concerns; two legs of the Triple Bottom Line are threatened.

D. *Interconnectedness*

Above, this article breaks down the Triple Bottom Line into its three legs. In reality, however, harm to economy, social equity, and environment are interrelated and inseparable. Indigenous people of the Western Hemisphere recognize and honor this fact in their daily lives.³⁶⁰ The Maya believe that “[t]he roots of all living things are tied together. When a mighty tree is felled, a star falls from the sky. Before you cut down a mahogany, you should ask permission of the keeper of the forest and you should ask permission of the keeper of the star.”³⁶¹ In his book *The Triple Bottom Line*, Savitz also stresses this interconnectedness.³⁶²

Authors Mark D. Belcher and James W. Newton speak of international legal development in the context of CAFTA-DR saying, “the world

³⁵⁵ *Id.*

³⁵⁶ Lauren A. Hopkins, Note, *Protecting Costa Rica’s Osa Peninsula: CAFTA’s Citizen Submission Process and Beyond*, 31 VT. L. REV. 381, 382 (2007).

³⁵⁷ Silberfeld, *supra* note 335.

³⁵⁸ See Lindo, *supra* note 251, in which the author presents an in-depth discussion of CAFTA-DR’s environmental provisions with a focus on its threat both to Costa Rica’s environment, as well as its ability to meet social needs.

³⁵⁹ *Id.* at 299.

³⁶⁰ See generally JAMES DAVID AUDLIN (DISTANT EAGLE), *CIRCLE OF LIFE: TRADITIONAL TEACHINGS OF NATIVE AMERICAN ELDERS* (2006) (presenting traditional Native American teachings on various subjects, from warfare to intangible notions such as reality and awareness). The Triple Bottom Line is moving businesses toward recognition of this interconnectedness. “Management of social issues all the way up and down the supply chain is one of the new challenges posed by the sustainability imperative in an interconnected world.” SAVITZ & WEBER, *supra* note 21, at 49.

³⁶¹ AUDLIN, *supra* note 360, at 117.

³⁶² SAVITZ & WEBER, *supra* note 21.

today is far more interconnected than ever before, and only continues to be more so each day.”³⁶³ Businesspeople must recognize how this correlates with each leg of the Triple Bottom Line. Environmental degradation affects social equity. Economic policies protect the environment or lead to its degradation. Economic policies lead to the creation or elimination of jobs and affect social equity. Some business and government leaders ignore these interrelationships and the resulting synergies, but others are demonstrating a new cognizance of these links as a result of their discussions about the Triple Bottom Line. The next section of this article will highlight the interconnectedness and interdependence of the three legs by discussing the challenges Nicaragua faces under CAFTA-DR.

V. CAFTA-DR IN NICARAGUA—INTERCONNECTEDNESS OF THE LEGS OF THE TRIPLE BOTTOM LINE

CAFTA-DR affects many facets of life in Nicaragua. These various facets are interrelated just as the three legs of the Triple Bottom Line are interrelated. This section gives a brief introduction to Nicaragua’s turbulent history and then looks at Nicaragua’s current social indicators and what they reveal about sustainable development in Nicaragua. Next, it addresses the following topics, all of which relate to the pursuit of sustainable development in Nicaragua: wages, free trade zones, labor, textiles, agriculture, and debt. All relate to the Triple Bottom Line. This section concludes that CAFTA-DR fails to support the three legs of the Triple Bottom Line.

A. *Nicaragua’s Turbulent History*

Nicaragua has suffered from foreign intervention, wars, political instability, crushing poverty, and natural disasters since the arrival of the Spaniards over 500 years ago.³⁶⁴ More recently, it has also suffered major environmental contamination resulting from industry, cattle-rearing, and agricultural practices.³⁶⁵ CAFTA-DR is being brought into a country that suffers seriously in all three legs of the Triple Bottom Line.

³⁶³ Mark D. Belcher & James W. Newton, *International Legal Development: A Complex Problem Deserving of a “Complex” Solution and Implications for the CAFTA Region*, 12 SW. J.L. & TRADE AM. 189, 212–13 (2006).

³⁶⁴ THOMAS WALKER, *NICARAGUA: LIVING IN THE SHADOW OF THE EAGLE passim* (4th ed. 2003).

³⁶⁵ Bill Gibson, *The Environmental Consequences of Stagnation in Nicaragua*, 24 WORLD DEV. 325, 333–34 (1996).

When the Spaniards arrived in Nicaragua in 1522, there were three main indigenous groups: the Nicarao (between the Pacific coast and Lake Nicaragua), the Chorotega (along the Pacific coast, north of Lake Nicaragua), and the Maribio (encompassed by Chorotega territory on the Pacific coast).³⁶⁶ Other major indigenous groups of Nicaragua included the Sumu, Rama, and Matagalpa.³⁶⁷ Shortly after setting up permanent settlements in the region, the Spaniards began using the indigenous people as slaves on the Spaniards' estates and mines.³⁶⁸ Nicaragua remained a part of the Mexican empire until 1821 when it became part of the United Provinces of Central America.³⁶⁹ It became an independent republic in 1838, and assumed its present day shape in 1894 when the Mosquito Coast on the Atlantic, also known as Bluefields, was formally annexed by Nicaragua.³⁷⁰

During the twentieth century, the United States dominated Nicaragua's economy. The United States intervened militarily, in part because of its interests in a proposed Nicaragua Canal.³⁷¹ The United States occupied Nicaragua for most of the period from 1912 to 1933.³⁷² The United States left Nicaragua in 1933 in response to a revolt.³⁷³ Yet, the United States continued its involvement in Nicaragua through its support of Anastasio Somoza García, who was Nicaragua's dictator until he was assassinated in 1956.³⁷⁴ He was succeeded by his two sons, both of whom had close ties to the United States.³⁷⁵

Since the late nineteenth century, Nicaragua has been dominated economically by the United States, and Nicaraguans have suffered from environmental degradation attendant to that domination. For example, banned pesticides were used in agricultural development:

In the mid-1970s, Dow warned Dole of dangers associated with human contact with the chemical [dibromo-chloropropane ("DBCP")], and ended production, according to

³⁶⁶ LINDA A. NEWSON, INDIAN SURVIVAL IN COLONIAL NICARAGUA 27 fig. 4, 48–49 (1987).

³⁶⁷ *Id.* at 27 fig. 4.

³⁶⁸ WALKER, *supra* note 364, at 11–12.

³⁶⁹ JAIME BARQUERO, THIS IS NICARAGUA 16 (1988).

³⁷⁰ See Michael Gismondi & Jeremy Mouat, *Merchants, Mining and Concessions on Nicaragua's Mosquito Coast: Reassessing the American Presence, 1893–1912*, 34 J. LATIN AM. STUD. 845, 849–52 (2002) (discussing the Nicaraguan annexation of the Mosquito Coast, beginning in 1894).

³⁷¹ WALKER, *supra* note 364, at 83.

³⁷² *Id.* at 20.

³⁷³ LUCIANO BARACCO, NICARAGUA: THE IMAGINING OF A NATION: FROM NINETEENTH-CENTURY LIBERALS TO TWENTIETH-CENTURY SANDINISTAS 40–46 (2005).

³⁷⁴ WALKER, *supra* note 364, at 26–28.

³⁷⁵ BARQUERO, *supra* note 369, at 20–21.

testimony. But Dole, according to court papers, threatened to sue if Dow did not honor an earlier production contract. The firm then accepted about 500,000 gallons of the chemical, including quantities that Dow had reclaimed from other users, and sent much of it to banana plantations in Central America.³⁷⁶

“Acute . . . exposure to DBCP in humans results in moderate depression of the central nervous system . . . and pulmonary congestion from inhalation, and gastrointestinal distress and pulmonary edema from oral exposure.”³⁷⁷

Activities related to the timber industry also caused economic degradation. From 1945 to 1960, the U.S.-based Nicaraguan Long Leaf Pine Company paid millions of dollars to the Somoza family.³⁷⁸ In return, it received favors, which included waiving the requirement to reforest cleared land.³⁷⁹ Nicaragua also became the largest beef supplier to the United States in the 1970s.³⁸⁰ The ranching of cattle in Latin America has led to deforestation and erosion of lands.³⁸¹ To this day, Nicaraguans suffer from the effects of those activities. The economic activities adversely affect environment as well as social equity. Erosion of lands, deforestation, and illness and death attendant to use of harmful pesticides affects social equity, too.

In December 1972, the Managua earthquake struck.³⁸² Over 10,000 people were killed and hundreds of thousands were left homeless.³⁸³ International relief was sent, but embezzlement by Somoza and members of his National Guard prevented much of it from reaching the people of Nicaragua.³⁸⁴

This set off international protests and was one of the triggers for the civil war that began in 1979.³⁸⁵ The government was taken over by the *Frente Sandanista de Liberación* (“FSLN”—Sandanista National Liberation

³⁷⁶ John Spano, *Dole Must Pay Farmworkers \$3.2 Million*, L.A. TIMES, Nov. 6, 2007, <http://articles.latimes.com/p/2007/nov/06/local/me-dole6>.

³⁷⁷ U.S. Environmental Protection Agency, 1,2-Dibromo-3-Chloropropane (DBCP), <http://www.epa.gov/ttn/atw/hlthef/dibromo-.html> (last visited Mar. 12, 2010).

³⁷⁸ Nica Land, *The Somoza Dynasty (1936–1979)*, <http://www.nicaland.com/samoza.html> (last visited Mar. 12, 2010).

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Emilio F. Moran, *Deforestation and Land Use in the Brazilian Amazon*, 21 HUM. ECOLOGY 1, 1 (1993).

³⁸² WALKER, *supra* note 364, at 31.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 34–40.

Front).³⁸⁶ During the 1980s, however, the United States backed Samoza's National Guard, called the Contras, which had fled to Honduras.³⁸⁷ The United States supported the Contras with arms and funding.³⁸⁸ The United States also attacked Nicaragua's ports and oil rigs and laid mines inside her harbors.³⁸⁹

Between 1990 and 2006, the country was led in turn by the National Opposition Union, the Liberal Alliance, and the Constitutional Liberal Party.³⁹⁰ In 2006, however, leadership returned to the FSLN when Daniel Ortega was elected.³⁹¹

Meanwhile, Nicaragua has struggled with natural disasters. She was hit hard by Hurricane Mitch in 1998³⁹² and again by Hurricane Felix (a category five hurricane on a scale of one to five, with five being the strongest) in 2007.³⁹³

Overall, Nicaragua has suffered great hardships, many at the hands of U.S.-based businesses and others at the hand of nature. She is in the position of the weak sibling in her relationship with the United States under the CAFTA-DR. It was in this environment that CAFTA-DR was conceived and ratified.

B. *Nicaragua's Weak Legal System*

A country needs a strong legal system to uphold its domestic laws and international agreements such as CAFTA-DR, but Nicaragua's legal system is extremely weak and lacks legitimacy.³⁹⁴ International lawyer Omar E. García-Bolívar says,

³⁸⁶ *Id.* at 39–40.

³⁸⁷ THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY, 1–2 (Peter Kornbluh & Malcolm Byrne eds., 1993).

³⁸⁸ *Id.* at 1.

³⁸⁹ *Id.* at 3.

³⁹⁰ HARRY E. VANDEN & GARY PREVOST, POLITICS OF LATIN AMERICA: THE POWER GAME, 544–45, 558 (2d ed. 2009).

³⁹¹ James C. McKinley, Jr., *Nicaraguans' Votes Are In, and Ortega Is Back*, N.Y. TIMES, Nov. 8, 2006, at A10 http://www.nytimes.com/2006/11/08/world/americas/08nicaragua.html?_r=1.

³⁹² On September 28 and 29, 2007, the author of this article visited a village outside of San Jan de Limay in the northern mountains of Nicaragua in the area called *Río Abajo* (the River Below). All survivors of the village had been relocated from their homes, which were totally destroyed by Hurricane Mitch.

³⁹³ Marc Lacey, *Hurricane Felix Hammers Nicaragua and Honduras*, N.Y. TIMES, Sept. 5, 2007, http://www.nytimes.com/2007/09/05/world/americas/05felix.html?_r=1.

³⁹⁴ García-Bolívar, *supra* note 228, at 383–88.

[e]fficient processes, transparent decision-making procedures, experienced and well-trained judges, and court officers, independent and impartial courts, and proper physical infrastructures are all needed for an adequate judicial system. Unfortunately, Central American judicial systems lack many of these necessities.³⁹⁵

The U.S. Embassy in Managua describes Nicaragua saying, “[t]he legal system is weak, cumbersome, and members of the judiciary, including those at senior levels, are widely believed to be corrupt or subject to political pressure. A commercial code and bankruptcy law exist, but both are outdated.”³⁹⁶ The Embassy continues, “[e]nforcement of court orders is frequently subject to nonjudicial considerations.”³⁹⁷ This lack of legitimacy is a major challenge in Nicaragua and CAFTA-DR’s other developing members.³⁹⁸

C. *Nicaragua’s Infrastructure Needs*

Nicaragua’s infrastructure is in miserable condition. Roads between major cities are two-lane and most are in varying states of disrepair.³⁹⁹ This hinders economic development. People need potable water and sewage treatment, and the air carries dangerous pollutants.⁴⁰⁰ *La Chureca* is the primary dump site for hazardous and non-hazardous waste on the edge of Managua.⁴⁰¹ Over 1,600 people live and work there, including at least 500 children.⁴⁰² People light fires to burn coatings from computer

³⁹⁵ *Id.* at 401.

³⁹⁶ Embassy of the United States, Managua, Nicaragua, Country Commercial Guide for U.S. Companies, <http://nicaragua.usembassy.gov/chapter6.html> (last visited Mar. 12, 2010); see also García-Bolívar, *supra* note 228, at 385.

³⁹⁷ Embassy of the United States, *supra* note 396; see also García-Bolívar, *supra* note 228, at 385.

³⁹⁸ “Guatemala’s reputation for corruption means that there is little public confidence in state institutions, including most public agencies and the courts.” Louise D. Williams, *Out of the Gray: Building the Case and the Conditions for Enterprises to Join the Formal Economy in Central America*, 12 SW. J.L. & TRADE AM. 329, 349 (2006).

³⁹⁹ See Vianica.com, Nicaragua, Transportation, <http://www.vianica.com/nicaragua/4-transportation.html> (last visited Mar. 12, 2010).

⁴⁰⁰ *University: Managua Air Pollution Increases*, BUS. NEWS AM., Apr. 6, 2000, http://www.bnamericas.com/news/waterandwaste/University:_Managua_Air_Pollution_Increases.

⁴⁰¹ See José Adán Silva, *Nicaragua: Fighting over Society’s Scraps*, INTER PRESS SERVICE, Mar. 20, 2008, <http://ipsnews.net/news.asp?idnews=41676>.

⁴⁰² *Id.*; see also Manna Project International, Nicaragua, La Chureca, <http://www.manna-project.org/nicaragua#chureca> (last visited Mar. 12, 2010).

parts and electronic equipment to extract metals to sell for a few cents.⁴⁰³ Nicaragua's waters are polluted, especially its two largest lakes: Lake Managua (also known as *Lago Xolotlán*) and Lake Nicaragua.⁴⁰⁴ Lake Managua is considered one of the most polluted lakes in the world, containing pollutants such as mercury.⁴⁰⁵ This pollution hurts the environment and hurts local communities, thus thwarting the pursuit of social equity. When communities suffer from chemical contamination and lack waste management infrastructure, economic development and the environment are harmed.

In 2005, less than seventy percent of Nicaraguans had access to electricity.⁴⁰⁶ In Nicaragua, twenty-four hour electricity service is available only to the wealthy, and Nicaraguans live with daily planned electrical outages of approximately six to eight hours.⁴⁰⁷ This is a problem in homes and restaurants because people cannot cook or run appliances and electric pumps cannot be operated to provide running water.⁴⁰⁸ It is also a problem for small businesses because they cannot run the equipment,

⁴⁰³ Observed by the author of this article on Sept. 21, 2007 (photos on file with the author).

⁴⁰⁴ Nancy L. Pontius, *United States Works to Reduce Water Pollution in Central America*, NEWS BLAZE, Nov. 14, 2008, <http://newsblaze.com/story/20081114085031tsop.nb/topstory.html>; Kenny Bruno, *Niagara to Nicaragua*, MULTINATIONAL MONITOR, Jan.–Feb. 1992, http://multinationalmonitor.org/hyper/issues/1992/01/mm0192_05.html.

⁴⁰⁵ See Bruno, *supra* note 404. Elpesa, a Nicaraguan chlor-alkali plant, began operations in 1968 and was finally ordered to close on January 7, 1992. It released significant amounts of mercury into the lake and often released chlorine into the air. *Id.*

⁴⁰⁶ INTERNATIONAL ENERGY AGENCY [IEA], WORLD ENERGY OUTLOOK 2006 571 (2006), available at <http://www.iea.org/textbase/nppdf/free/2006/weo2006.pdf>.

⁴⁰⁷ This author experienced this during her stay in Nicaragua, seeing outages from 10:00 a.m. to 4:00 p.m. each day in one neighborhood of Managua and from 2:00 p.m. to 8:00 p.m. in another. In San Juan de Oriente there was no electricity from 10:00 a.m. to 4:00 p.m. or later. Similar outages are experienced each day in San Juan de Limay. At the Holiday Inn Managua the lights flickered each evening at 10:00 p.m. as the hotel shifted from a public power supply to power from its own generator. These observations are based on this author's stay in Nicaragua September 20 through October 2, 2007. See also *Invertia, Unión Fenosa Informa de Apagones de Cuatro a Seis Horas Diàrias por Deficit* (May 23, 2007), <http://www.invertia.com/noticias/noticia.asp?idnoticia=1752414> (reporting four to six hour power outages for all of Nicaragua during the week of May 23, 2007); see also IDB, *The Power Sector in: Nicaragua* (1999), available at http://www.iadb.org/sds/IFM/publication/publication_2885_2063_e.htm (click on hyperlink to "Nicaragua") (reporting increasing power system losses over the 1991 to 1995 period, from twenty-three percent to just under thirty percent).

⁴⁰⁸ While this author was staying at a hotel in San Juan de Limay, cold beverages were not available during the day. The managers did not want to open the refrigerator and lose remaining cold air while waiting for electrical power to be restored. This was true in the various places where she stopped for meals or beverages during her travel.

such as sewing machines, that they need to manufacture their products.⁴⁰⁹ *Maquiladoras* serving large businesses, and hotels and restaurants serving tourists, purchase generators to produce their own electricity when the public grid goes down.⁴¹⁰ Small businesses, however, cannot afford to do so.⁴¹¹ This is a severe impediment to economic development and is a strong example of social inequity. CAFTA-DR purports to promote sustainability, but it does not address problems with roads, waste management, and electricity. In pursuit of sustainable development, these problems must be addressed.

D. Nicaragua's Debt & Pressures from the International Monetary Fund ("IMF")

Nicaragua's economic problems have led to high levels of international debt, and Nicaragua's inability to pay that debt has led to borrowing to pay the interest on loans.⁴¹² In 1994, Nicaragua received a \$20 million loan from the IMF and a \$130 million loan from the World Bank in agreement to pay \$226 million in interest payments.⁴¹³ Thus, Nicaragua has even less money to fund social needs.

How did Nicaragua get into this predicament? The IMF makes loans to developing countries, and it attaches specific budgetary conditions to those loans, or "arrangements."⁴¹⁴ The loans are renegotiated every three years with the borrowing country's central government.⁴¹⁵ These plans are called Structural Adjustment Programs ("SAPs").⁴¹⁶ Because of the conditions attached to the SAPs, the debt becomes a hook for the IMF to

⁴⁰⁹ Interview with four members of *Colectivo Sancuaajoche*, San Juan de Oriente, Nicaragua (Sept. 25, 2007). The group is a collective of women who make Fair Trade cotton clothing such as blouses and dresses. A collective is similar to a cooperative and is a typical way of doing business for Fair Trade businesses in Nicaragua.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² For discussion of Nicaragua's debt, see Witness for Peace, *Condemned to Debt: The External Debt in Nicaragua*, <http://www.witnessforpeace.org/article.php?id=241> (last visited Mar. 12, 2010).

⁴¹³ *Happy New Year from the IMF*, ENVÍO, Jan. 1994, <http://www.envio.org.ni/articulo/1742>.

⁴¹⁴ International Monetary Fund [IMF], *Factsheet: IMF Lending*, Sept. 9, 2009, <http://www.imf.org/external/np/exr/facts/howlend.htm>.

⁴¹⁵ *Id.*

⁴¹⁶ John Briggs & Ian E. A. Yeboah, *Structural Adjustment and the Contemporary sub-Saharan African City*, 33 *AREA* 18, 18 (2001); see also Anup Shah, *Structural Adjustment—A Major Cause of Poverty*, *GLOBAL ISSUES*, (2010), <http://www.globalissues.org/article/3/structural-adjustment-a-major-cause-of-poverty>.

control a country's internal decisions.⁴¹⁷ The United States has tremendous control over IMF decision-making. An IMF decision requires sixteen percent of the available votes, and the United States holds a seventeen percent interest.⁴¹⁸ Thus, the United States has the ability to control IMF loans and the conditions attached to them. Many people say that U.S. policy equals IMF policy.⁴¹⁹

The heavy debts of developing nations to the IMF and the conditions attached to loans have led to public protests, including protests by the developing members of CAFTA-DR.⁴²⁰ In response to protests against their practices, the World Bank and IMF created the Highly Indebted Poor Countries ("HIPC") Initiative in 1996.⁴²¹ It was touted as "good news for the poor."⁴²² The purpose of the HIPC Initiative is "to bring a country's debt burden to sustainable levels . . . in order to ensure that adjustment and reform efforts are not put at risk."⁴²³

Nicaragua joined the HIPC Initiative in 2000 with the promise that up to seventy percent of its debt would be forgiven.⁴²⁴ In 2004, full application of HIPC Initiative relief began.⁴²⁵ However, it was not the relief that Nicaraguans anticipated. New loans were extended to Nicaragua with conditions that paralleled those attached to earlier loans.⁴²⁶ More structural adjustments were required as conditions for Nicaragua's HIPC status.⁴²⁷

⁴¹⁷ See Briggs & Yeboah, *supra* note 416, at 1.

⁴¹⁸ Benoît Chervelier, *The Reform of the IMF: The Tree Which Hides the Forest*, GERMAN MARSHALL FUND OF THE U.S., May 9, 2006, <http://www.gmfus.org/publications/article.cfm?id=203>.

⁴¹⁹ See, e.g., Arthur MacEwan, *Economic Debacle in Argentina: The IMF Strikes Again*, AM. PROGRAM, Jan. 2, 2002, http://americas.irc-online.org/commentary/2002/body_0201argentina.html.

⁴²⁰ *10,000 Protest IMF in Ecuador*, DEMOCRACY NOW, Feb. 12, 2001, http://www.democracynow.org/2001/2/12/10_000_protest_imf_in_ecuador. For discussion of protests related to the effects of trade agreements in Central America, see Stenzel, *supra* note 10, at 599.

⁴²¹ IMF, Factsheet: Debt Relief Under the Heavily Indebted Poor Countries ("HIPC") Initiative, Feb. 18, 2010, <http://www.imf.org/external/np/exr/facts/hipc.htm>.

⁴²² Media Briefing, Oxfam Int'l, Debt Relief and Poverty Reduction: Failing to Deliver, Apr. 2000, http://oxfam.org.uk/resources/policy/debt_aid/downloads/debt_povred_failing.rtf (quoting Jim Wolfensohn, president, World Bank in 1996).

⁴²³ PAUL S. ZEITZ, A REVIEW OF EXPERIENCES IN INTEGRATING AN EXPANDED HIV/AIDS RESPONSE TO THE DEBT RELIEF PROCESS IN AFRICA: 1999–2000 7 (2000), available at http://aidsalliance.3cdn.net/09765b704b40622f4c_sfm6vwk4e.pdf.

⁴²⁴ Press Release, IMF, IMF and World Bank Support \$4.5 Billion in Debt Service Relief for Nicaragua, Jan. 23, 2004, <http://www.imf.org/external/np/sec/pr/2004/pr0411.htm>.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

Moreover, funds are being used to pay Nicaragua's internal debt of \$1.5 billion instead of being used to meet social needs such as education, health care, and infrastructure improvements.⁴²⁸ The IMF has said that internal debt payment is urgently needed to ensure a healthy debt market.⁴²⁹ In the midst of this, it is alleged that funds have been misused. For example, there were land confiscation payoffs with widespread accusations of fraud.⁴³⁰ High interest bonds were issued for bank bailouts.⁴³¹ The allegations were investigated for corruption, and the bonds were declared illegal by the program's comptroller.⁴³²

Additional steps to relieve Nicaragua's debt came in 2006 with the G8 Multilateral Debt Relief Initiative ("G8").⁴³³ The G8 financed a complete cancellation of IMF and World Bank loans for nineteen countries, including Nicaragua, but there were contingencies attached to the plan.⁴³⁴ To get cancellation, the debtor must be a HIPC with prior SAPs.⁴³⁵ Nicaragua qualified under the plan in 2004, and received cancellation of close to eighty percent of its foreign debt.⁴³⁶ This came at a significant cost. Witness for Peace reports,

[a]t its culmination, the HIPC initiative will reduce Nicaragua's debt by \$3.5 billion dollars. Under HIPC Nicaragua's debt and debt payments will be made more "sustainable"—in other words, the IMF and World Bank will keep receiving

⁴²⁸ See USAID, Nicaragua, <http://www.usaid.gov/policy/budget/cbj2006/lac/ni.html> (last visited Mar. 12, 2010).

⁴²⁹ E.g., Hemant Shah et al., *Public Debt Markets in Central America, Panama, and the Dominican Republic*, 130–32 (IMF, Working Paper No. WP/07/147, 2007), available at <http://www.imf.org/external/pubs/ft/wp/2007/wp07147.pdf>. See generally S. M. Ali Abbas & Jakob E. Christensen, *The Role of Domestic Debt Markets in Economic Growth: An Empirical Investigation for Low-income Countries and Emerging Markets* (IMF, Working Paper No. WP/07/127, 2007), available at <http://www.imf.org/external/pubs/ft/wp/2007/wp07127.pdf> (using data from 1975 to 2004 from ninety-three low-income countries and emerging markets, the study analyzes the market behavior of domestic debt at different levels and debt's positive and negative effects on the economies at large).

⁴³⁰ See Rikke J. Broegaard, *Land Tenure Insecurity and Inequality in Nicaragua*, 36 DEV. & CHANGE 845, 858 (2005).

⁴³¹ See Karla Jacobs, *CENIs Scandal: The Biggest Fraud in Nicaraguan History*, TORTILLA CON SAL, June 25, 2009, <http://www.tortillaconsal.com/cenis.html>.

⁴³² *Id.*

⁴³³ World Bank, Multilateral Debt Relief Initiative MDRI: Fact Sheet, http://siteresources.worldbank.org/INTDEBTDEPT/Resources/mdri_eng.pdf.

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ Norwegian Agency for Development Cooperation [NORAD], Nicaragua, available at <http://www.norad.no/en/Tools+and+publications/Publications/Publication+Page?key=119237>.

their payments on time. To complete the HIPC initiative, Nicaragua will undergo another series of stringent Structural Adjustment policies, including the completion of the privatization of state enterprises such as electricity, water, and telephone service.⁴³⁷

Writing about Nicaragua and other coffee producing countries, Fair Trade expert Dean Cycon says,

[e]ven during the best of times, farm communities have rarely been able to make meaningful improvements in the basics of water supply, education, health care, and housing. Not only does the coffee crop not generate enough money, but the World Bank, the IMF, and the international lending community have greatly inhibited the ability of national governments to assist farming communities by forcing them to slash rural health care and environmental and educational budgets under “structural adjustment” policies.⁴³⁸

When the IMF promised a new \$100 million loan to Nicaragua, it was with the stipulation that Nicaragua cap public salaries in line with inflation.⁴³⁹ This came at a terrible time for Nicaragua’s health care system; it was during a debilitating doctors’ strike in Nicaragua, with doctors demanding higher salaries.⁴⁴⁰ To put this in perspective, currently, “[f]or every \$1 spent on health care, Nicaragua spends \$5 on debt service payments.”⁴⁴¹ Thus, Nicaragua was, and is, being forced to cut down on health care, a major component of social equity.

Her duty to pay international debt hurts Nicaragua’s ability to provide other social services, too. “To balance the budget, Nicaragua has to reduce social spending on services such as health, education, and environmental protection.”⁴⁴² Thus, the SAPs and HIPC Initiative hurt Nicaragua

⁴³⁷ Witness for Peace, *supra* note 412.

⁴³⁸ DEAN CYCON, JAVATREKKER: DISPATCHES FROM THE WORLD OF FAIR TRADE COFFEE xi–xii (2007).

⁴³⁹ Ben Beachy, *Swindling the Sick: The IMF Debt Relief Sham*, COMMONDREAMS.ORG, Jan. 27, 2006, <http://www.commondreams.org/views06/0127-32.htm>.

⁴⁴⁰ *Id.*

⁴⁴¹ Witness for Peace, *supra* note 412.

⁴⁴² *Id.*; see also Michael J. Pisani, *The Negative Impact of Structural Adjustment on Sectoral Earnings in Nicaragua*, 35 REV. RADICAL POL. ECON. 107 (2003) (concluding that structural adjustment policies in the 1990s caused workers to suffer a decline in wages with the brunt of the harm falling on women and workers in the informal sector).

with respect to all three legs of the Triple Bottom Line. This is relevant because it coincides with the CAFTA-DR era in Nicaragua.

E. Nicaragua's Social Indicators

The Nicaraguan people have desperate needs in all legs of the Triple Bottom Line, but especially in the area of social equity. Most of her people lack basic employment, education, and health care.⁴⁴³ In addition, access to such services as electricity and clean water can be limited.⁴⁴⁴

Most of Nicaragua's people are unemployed or underemployed.⁴⁴⁵ Officially, 3.8% of economically active Nicaraguans are unemployed, but that figure does not include 900,000 unpaid homemakers.⁴⁴⁶ Moreover, official figures fail to count many people who are on the margins of society, so the actual unemployment totals are inevitably higher.⁴⁴⁷ Unofficially, Nicaragua has an underemployment rate of 46.5%.⁴⁴⁸ And those who are employed often do not earn enough to support their families.⁴⁴⁹ The Nicaraguan government sets a minimum wage for each sector of its economy.⁴⁵⁰ A recent study revealed that in *every* sector the monthly minimum wage was below \$174 (3,000 *córdobas*)—the monthly amount the Nicaraguan government estimates is needed by an urban family for a basic basket of goods.⁴⁵¹

Nicaragua's poverty and unemployment result from and perpetuate extremely low levels of education.⁴⁵² Even though schools are free, parents

⁴⁴³ See UNICEF, At a Glance: Nicaragua, <http://www.unicef.org/infobycountry/nicaragua.html> (last visited Mar. 12, 2010). According to data from 2005, 48.3% of Nicaraguans live below the poverty line, and 17% live in extreme poverty; 40% of the population have no access to health services; approximately 24% of children are not in the school system. *Id.*

⁴⁴⁴ See *supra* text accompanying notes 406–09 (discussing a lack of electricity).

⁴⁴⁵ globalEDGE, Nicaragua: Economy, <http://globaledege.msu.edu/countries/nicaragua/economy/> (last visited Mar. 12, 2010).

⁴⁴⁶ CBS News World, Country Fast Facts: Nicaragua, http://www.cbsnews.com/stories/2007/09/19/country_facts/main3277489.shtml (click on "Economy" tab) (last visited Mar. 12, 2010) (data as of 2006).

⁴⁴⁷ See globalEDGE, *supra* note 445.

⁴⁴⁸ CBS News World, *supra* note 446.

⁴⁴⁹ *Id.* Nicaragua has the third-lowest per capita income in the Western Hemisphere, and the distribution of that income is "one of the most unequal on the globe." *Id.*

⁴⁵⁰ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NICARAGUA § 6(e) (2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61734.htm>.

⁴⁵¹ *Id.*

⁴⁵² See International Fund for Agricultural Development [IFAD], Rural Poverty in Nicaragua, <http://www.ruralpovertyportal.org/web/guest/country/home/tags/nicaragua>

cannot afford the books and uniforms required for school attendance.⁴⁵³ Therefore, they cannot afford to support their children through primary and secondary school, much less a university education. As a consequence, “[i]t takes an average of 10.3 years to complete the mandatory six years of schooling, and only 29 [percent] of children complete primary schooling.”⁴⁵⁴ Not surprisingly, one-third of the population over fifteen years of age is illiterate.⁴⁵⁵ People with little education earn little.⁴⁵⁶

Medical care is also inadequate. “The number of doctors per 10,000 Nicaraguans has decreased from 6 to 3.8 since 1996.”⁴⁵⁷ One out of six Nicaraguans lacks access to basic medicines.⁴⁵⁸ The situation appears to be improving, at least slightly, since 2006 under the administration of President Ortega.⁴⁵⁹ One city-level government official reported that citizens who lack funds for basic medicines now can obtain them when they visit public health centers.⁴⁶⁰

Nutrition is also a major problem in Nicaragua. Twenty-two percent of the population is undernourished.⁴⁶¹ About twenty percent of children

(last visited Mar. 12, 2010) (noting that poverty in Nicaragua occurs mostly in rural areas, where access to education and other public services is limited).

⁴⁵³ Interview with Ms. Yamileth Pérez, Director General, Barrio Acahualinca (neighborhood level director for the Acahualinca neighborhood of Managua) and *Directora de Medio Ambiente, Distrito II* (Director of Environment, District II) for the city of Estelí, Nicaragua (Sept. 28, 2008).

⁴⁵⁴ United Nations Girls’ Education Initiative [UNGEI], Nicaragua: Background, <http://www.ungei.org/infobycountry/nicaragua.html> (last visited Mar. 13, 2010).

⁴⁵⁵ Danna Harman, *Ortega Hoping for a Second Act in Nicaragua*, USA TODAY, Oct. 6, 2005, http://www.usatoday.com/news/world/2005-10-06-ortega_x.htm.

⁴⁵⁶ See World Bank, *Republic of Nicaragua: Poverty Assessment*, at i–iii, Report No. 14038-NI (June 1, 1995), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1995/06/01/000009265_3961019105405/Rendered/PDF/multi0page.pdf; see also World Bank, *Nicaragua: Poverty Assessment*, <http://www.worldbank.org/> (search for “Poverty Analysis—Nicaragua: Poverty Assessment”) (last visited Mar. 13, 2010). “Poor households also have less education than the nonpoor, another key factor explaining low earnings capacity.” *Id.*

⁴⁵⁷ Witness for Peace, *Nicaragua at a Glance*, <http://www.witnessforpeace.org/article.php?id=239> (last visited Mar. 13, 2010).

⁴⁵⁸ Bristol-Myers Squibb, Infrastructure Support, http://www.bms.com/foundation/reducing_health_disparities/donations/Pages/infrastructure.aspx (last visited Mar. 13, 2010) (noting that nearly 800,000 Nicaraguans have no access to healthcare).

⁴⁵⁹ See James M. Roberts, *Nicaragua’s President Ortega: The Balancing Act after One Year*, BACKGROUND, Jan. 11, 2008, at 6, available at http://www.heritage.org/research/latinamerica/upload/bg_2097.pdf (noting that Ortega’s budget for 2008 increased funding for health care).

⁴⁶⁰ Interview with Yamileth Pérez, *supra* note 453.

⁴⁶¹ STATISTICS DIV., FOOD & AGRIC. ORG. OF THE UNITED NATIONS [FAO], NICARAGUA: MONITORING PROGRESS TOWARDS HUNGER REDUCTION TARGETS OF THE WORLD FOOD

younger than five years of age suffer from chronic malnutrition resulting in a delay of growth.⁴⁶²

All of these problems prompt Nicaraguans to seek work in other countries.⁴⁶³ They simply see no alternatives if they want to survive.⁴⁶⁴ Nicaraguans remaining in their country rely heavily on income from foreign remittances.⁴⁶⁵ The number of Nicaraguan migrants in Costa Rica increased by 393% from the 1980s to 2000 (45,885 to 226,374).⁴⁶⁶ There are an estimated 800,000 to 1,000,000 Nicaraguan migrants in Costa Rica and 500,000 in the United States, including seasonal and undocumented migrants.⁴⁶⁷ In 2004, remittances to Nicaragua represented 17.8% of GDP—the highest percentage among all Central American countries.⁴⁶⁸ This shows Nicaragua's serious need for jobs. CAFTA-DR can create employment, but it is essential that this development be sustainable.

F. Free Trade Zones, Wages, and Labor under CAFTA-DR

1. Free Trade Zones

Nicaragua is attractive to foreign investors because of its relative proximity to the United States, its ready (although poorly educated)

SUMMIT (WFS) AND THE MILLENNIUM DEVELOPMENT GOALS (MDG) (2008), http://www.fao.org/fileadmin/templates/ess/documents/food_security_statistics/monitoring_progress_by_country_2003-2005/Nicaragua_e.pdf.

⁴⁶² Programa Especial para la Seguridad Alimentaria Centroamérica [PESA—Special Program for Food Security in Central America], Organización de las Naciones Unidas para la Agricultura y la Alimentación [Food & Agric. Org. of the United Nations], Indicadores de Seguridad Alimentaria Nutricional en Centroamérica [Statistics of Nutrition and Food Security in Central America], http://www.pesacentroamerica.org/pesa_ca/indicadores.htm (last visited Mar. 13, 2010).

⁴⁶³ See José Luis Rocha, *Why Do They Go? Theories on the Migration Trend*, ENVÍO, July 2003, <http://www.envio.org.ni/articulo/2105> (noting that Nicaragua's "shortages, features and mechanisms converge to make [it] such a major league expeller of migrants that [it] validate[s] almost any model" of migration).

⁴⁶⁴ See *id.* "Desperation is a variable seldom considered. Hunger produces despairing people. More than refugees and political asylum seekers, Nicaraguan politics produces [sic] desperate utopian refugees. Very few people are prepared to put their money on Nicaragua and some have even declared it unviable." *Id.*

⁴⁶⁵ See *id.* (noting that, in some municipalities, remittances constitute sixty percent of monthly family income).

⁴⁶⁶ *Id.*

⁴⁶⁷ Witness for Peace, *supra* note 457.

⁴⁶⁸ Dovelyn Agunias, *Remittance Trends in Central America*, MIGRATION INFO. SOURCE, Apr. 2006, <http://www.migrationinformation.org/Feature/display.cfm?id=393>.

workforce, and its lack of taxes on exports.⁴⁶⁹ Among the fifty companies operating in Nicaragua's free trade zones (industrial parks), almost all are from the United States, Taiwan, or South Korea.⁴⁷⁰ Nearly 45,000 people are employed in twelve free trade zones, and, among the employees, eighty percent are women and fifty-six percent are single mothers.⁴⁷¹

The largest free trade zone in Nicaragua is *Las Mercedes* in Managua.⁴⁷² In December 2007, Nicaragua's free trade zone had 120 companies, directly employed 85,750 people, and exported \$1,243,000 worth of goods.⁴⁷³ A serious global economic downturn is reducing these numbers.⁴⁷⁴ For example, on March 3, 2009, it was announced that the Korean-based textile *maquiladora*, Yu Jin, is closing and will leave 500 workers unemployed.⁴⁷⁵ This follows the closure of Cone Denim, a U.S.-based textile firm that announced a fourteen-month shutdown earlier in 2009.⁴⁷⁶ That shut down, leaving 800 unemployed, has also been attributed to the global economic downturn.⁴⁷⁷ This provides evidence that neither U.S. nor other foreign-based businesses can be expected to bring a meaningful influx of jobs to Nicaragua's free trade zones in the foreseeable future.

Critics of free trade say that it promotes a race to the bottom for wages, labor standards, and environmental protection.⁴⁷⁸ Many of the

⁴⁶⁹ See Lauren Russell, *Textile Industry Teeters: On the Eve of an International Trade Deadline, an Industry Struggles to Survive*, FLA. FLYINS, 2004, <http://www.internationaljournalism.com/TextileIndustry.html> (discussing factors affecting foreign investment in Nicaragua's textile industry).

⁴⁷⁰ Found. for Sustainable Dev., Human Rights Issues in Nicaragua, <http://fsdinternational.org/ntlopps/country/nicaragua/humanrights> (last visited Mar. 13, 2010).

⁴⁷¹ See *id.* ("[Eighty percent] of all FTZ workers are women, of whom . . . 70% are single mothers").

⁴⁷² UK Trade & Investment, Nicaragua: Background and Geography, https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/countries?_nfls=false&_nfpb=true&_pageLabel=CountryType1&navigationPageId=nicaragua (click on "Background and Geography" hyperlink) (last visited Mar. 13, 2010).

⁴⁷³ GUSTAVO BERMÚDEZ, ORGANIZACIÓN INTERNACIONAL DEL TRABAJO, NICARAGUA: COMISIÓN TRIPARTITA DE ZONAS FRANCAS: DIÁLOGO SOCIAL FRENTE A LA CRISIS 2 cuadro 1 (2009).

⁴⁷⁴ See generally Peter S. Goodman & Floyd Norris, *No Quick Fix to Downturn*, N.Y. TIMES, Jan. 13, 2008, at A1 (discussing economic downturn).

⁴⁷⁵ Posting of Rafael Lara to El Nuevo Diario, *500 Trabajadores Irán al Desempleo por Cierre de Empresa Coreana*, <http://www.elnuevodiario.com.ni/nacionales/44611/> (Mar. 4, 2009, 13:04).

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ See Kimberly Ann Elliott, *Labor Standards, Development, and CAFTA*, INT'L ECON. POL'Y BRIEFS (Inst. for Int'l Econ. & Ctr. for Global Dev., Washington, DC), Mar. 2004, at 1, available at <http://www.iie.com/publications/pb/pb04-2.pdf> (noting that some argue

zones, including *Las Mercedes*, are state-owned,⁴⁷⁹ and the state provides huge tax incentives to businesses that establish facilities in them.⁴⁸⁰ Owners of *maquiladoras* pay virtually no taxes. For example, they are 100% exempt from income, municipal, property, capital gains, and sales tax.⁴⁸¹ They are also 100% exempt from taxes on the importation of raw materials, equipment, machinery, and spare parts.⁴⁸²

This refutes the assertion that CAFTA-DR will bring Nicaragua monies to meet its needs for infrastructure and social programs. Nicaragua gives up tax monies it desperately needs because it must compete so hard to bring businesses to its free trade zones. With low wages and few or no tax dollars coming in from the *maquiladoras*, the rising tide is an illusion.

2. Low Wages and Few Restrictions through Labor Laws

Something is better than nothing, but the “something” brought to employees working in Managua’s free trade zone is very little indeed. Nicaragua’s government sets a minimum monthly wage for each employment sector, but none of the employment sectors meet the amount that Nicaragua’s government estimates is needed for a family of four to buy basic goods each month.⁴⁸³ These low wages are a significant enticement for companies considering locating a production facility in the country.⁴⁸⁴ Emilio C. Noguera Cáceres, *Asesor Laboral* for Managua’s free trade zone, acknowledges that he would like to offer higher paying jobs to his fellow Nicaraguans, but he has to face realities.⁴⁸⁵ The low-wage

that “failure to include labor standards in trade agreements increases inequality and leads to a race to the bottom for workers worldwide”).

⁴⁷⁹ UK Trade & Investment, *supra* note 472.

⁴⁸⁰ See Comisión Nacional de Zonas Francas [Nicaragua], Incentives, http://www.cnzf.gob.ni/index.php?option=com_content&view=article&id=28%3Aincentivos&lang=en (last visited Mar. 13, 2010) (listing tax incentives).

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ For discussion, see Brandie Ballard Wade, *CAFTA-DR Labor Provisions: Why They Fail Workers and Provide Dangerous Precedent for the FTAA*, 13 L. & BUS. REV. AM. 645, 666 (2007). Using 2004 figures, Wade lists \$141 as the estimated amount needed for basic goods in a month for a family of four. A more recent source lists \$155 as the amount for 2005. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 450, § 6(e); see also *supra* text accompanying notes 450–451.

⁴⁸⁴ See Elliott, *supra* note 478, at 4. “Developing countries usually have abundant labor and therefore a comparative advantage in low-wage, labor-intensive activities.” *Id.*

⁴⁸⁵ Interview with Emilio C. Noguera Cáceres and visit to the *Las Mercedes* free trade zone, Managua, Nicaragua (Sept. 24, 2007). *Asesor Laboral* translates as “labor consultant,” see THE OXFORD SPANISH DICTIONARY 67, 445 (1994) (translating *asesor* as “consultant” and

jobs are the best he and his colleagues can bring to their country at the present.⁴⁸⁶

Low wages alone do not bring in new businesses; managers also consider a country's labor climate. On paper, Nicaragua's laws appear to be highly protective of employees. The Labor Code requires acceptable working conditions with respect to minimum wages, work hours, and occupational safety and health standards.⁴⁸⁷ Workers have the right to collectively organize, bargain, and strike.⁴⁸⁸ Yet, employers in Nicaragua are notorious for behavior that violates those laws.⁴⁸⁹ The government lacks money and motivation for enforcement of laws and regulations that would protect workers.⁴⁹⁰ Even if it had funding, the government would likely hesitate to enforce those laws strictly because of the dire need for jobs.

For example, Nicaragua's labor code calls for an eight-hour work day and forty-eight-hour work week.⁴⁹¹ Yet, factory managers in Nicaragua confirm that the standard work day is longer.⁴⁹² The law states that overtime is voluntary⁴⁹³ and that workers must be paid double time for it.⁴⁹⁴ In practice, forced overtime has been common, at least prior to the current U.S. and worldwide recession; some workers report working up to

laboral as "labor"), but it is an important position. The *Asesor Laboral* is the Nicaraguan government's representative to the country's *Corporación de Zonas Francas* (free trade zones).

⁴⁸⁶ Interview with Noguera Cáceres, *supra* note 485.

⁴⁸⁷ For a directory of Nicaragua's labor standards, see ILO, Nicaragua, http://www.ilo.org/dyn/natlex/country_profiles.basic?p_lang=en&p_country=NIC (click on "Basic Laws" hyperlink) (last visited Mar. 13, 2010).

⁴⁸⁸ *The Labor Code: Workers' Rights vs. Economic Recovery?*, ENVÍO, Sept. 1992, <http://www.envio.org.ni/articulo/2546> (discussing a proposed expansion of workers' rights).

⁴⁸⁹ Interview with Gladys Manzares, a union leader who has worked in numerous *maquilas* in Managua's *zona franca* (free trade zone), in Managua, Nicaragua (Sept. 25, 2007).

⁴⁹⁰ See Elliott, *supra* note 478, at 5. "[P]overty, lack of resources, and weak governmental capacity are not the only reasons why developing countries do not effectively enforce labor standards. Some also lack the political will to do so. . . ." *Id.*

⁴⁹¹ FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, NICARAGUA: A COUNTRY STUDY ch. 3 (Tim Merrill ed., 1994), available at <http://lcweb2.loc.gov/frd/cs/nitoc.html> (follow "Labor: Employment Conditions" hyperlink). The forty-eight hours are achieved through a six-day work week. *Id.*

⁴⁹² During this author's visit to a factory on September 24, 2007, she took photos of a sign in *Formosa Textil*, a major textile factory, which notifies employees that they must work from 8:00 a.m. to 5:30 p.m., Monday through Friday, and 8:30 a.m. to noon each Saturday.

⁴⁹³ See Wade, *supra* note 483, at 665 (noting that the Nicaraguan Constitution prohibits forced labor).

⁴⁹⁴ ALVARADO Y ASOCIADOS, GUIDE TO DOING BUSINESS IN NICARAGUA 2010 38 (2010), available at http://www.lexmundi.com/images/lexmundi/PDF/GuidesToDoingBusiness/Guide_Nicaragua.pdf.

twenty-four-hour shifts, and payment is not the double time required by law.⁴⁹⁵ Managers at *Las Mercedes* say that time-and-a-half is standard.⁴⁹⁶ In other locations, workers complain of forced overtime without pay.⁴⁹⁷ They also complain of poor working conditions and of being told if and when they may use the restroom.⁴⁹⁸ Pregnant women are guaranteed three months paid maternity leave, and the law says employers are not allowed to release women because of pregnancy.⁴⁹⁹ In one *maquiladora*, however, "several pregnant women complained that management would not allow them to visit the doctor for medical appointments during work hours."⁵⁰⁰ Sometimes miscarriages happen in the factory because of strenuous working conditions.⁵⁰¹ Additionally, pregnant women are fired, and maternity leave is often denied.⁵⁰² These issues are particularly important in the context of CAFTA-DR.

Nicaragua's employers are required to pay into the national Social Security fund for their employees.⁵⁰³ In practice, some companies take deductions from employees' paychecks but do not pay the deductions into Social Security.⁵⁰⁴ Additionally, the law requires paid sick leave.⁵⁰⁵ In practice, many employers simply disobey the law.⁵⁰⁶ Similarly, occupational safety and health laws guarantee workers the right to safe and sanitary

⁴⁹⁵ Interview with Manzares, *supra* note 489.

⁴⁹⁶ Interview with Noguera Cáceres, *supra* note 485.

⁴⁹⁷ Wade, *supra* note 483, at 666.

⁴⁹⁸ *Id.*

⁴⁹⁹ *The Labor Code*, *supra* note 488 (discussing a bill providing that the three-month period for maternity leave be made obligatory and that employers must transfer pregnant women engaging in hazardous work to less hazardous positions without any salary loss).

⁵⁰⁰ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 450, § 6(e).

⁵⁰¹ See Liza Featherstone, *The Student Movement Comes of Age*, *THE NATION*, Oct. 16, 2000, at 23, 26 (describing a factory in the *Mil Colores* free trade zone where "women routinely have miscarriages in the bathroom").

⁵⁰² In Mexico, for comparison, "[o]nce a woman is hired and becomes pregnant, 'maquiladora managers sometime[s] attempt to reassign women to more physically difficult work or demand overtime work in an effort to force the pregnant woman worker to resign.'" Emily Miyamoto Faber, *Pregnancy Discrimination in Latin America: The Exclusion of "Employment Discrimination" from the Definition of "Labor Laws" in the Central American Free Trade Agreement*, 16 *COLUM. J. GENDER & L.* 297, 306 (2007) (quoting HUMAN RIGHTS WATCH, *NO GUARANTEES: SEX DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR* (1996), available at <http://www.hrw.org/reports/1996/Mexi0896.htm>).

⁵⁰³ Campaign for Labor Rights, *Fighting for Our Rights in Managua*, <http://www.clrlabor.org/alerts/2005/nov07-milcolores.htm> (last visited Mar. 13, 2010).

⁵⁰⁴ *See id.*

⁵⁰⁵ Experience Nicaragua, Labor, <http://library.thinkquest.org/17749/labor.html> (last visited Mar. 13, 2010).

⁵⁰⁶ *See* Campaign for Labor Rights, *supra* note 503.

conditions.⁵⁰⁷ Yet, there are many reports by Nicaraguan workers of dangerous practices such as a lack of hygiene in workplaces and forced unpaid overtime.⁵⁰⁸

The National Labor Committee is a coalition of groups that works to defend the rights of workers throughout the world.⁵⁰⁹ It has prepared at least twenty-eight reports documenting labor problems in Nicaragua.⁵¹⁰ For example, a 2003 report on KB Manufacturing, located in Granada, Nicaragua, documented numerous problems, including the following:

- 10.5- to 14-hour work days with up to 70 hours per week expected of individual workers;
- Pressure to produce at shocking rates: “Corporate time motion study breaks the 150 operations necessary for sewing a J.C. Penney or Sears blazer into time frames of 1/100th of a second, while assigning piece rates as low as 6/100ths of a cent”;⁵¹¹
- Workers shortchanged on their pay;
- Repeated threats to move work to China;
- Mandatory pregnancy tests for all new female employees and harassment of pregnant women;
- Lint and dust in the air as well as high levels of noise and inadequate lighting;
- And many other abuses.⁵¹²

Union leaders have little to no power in Nicaragua.⁵¹³ And the government, even if it would like to support union leaders, cannot afford

⁵⁰⁷ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 450, § 6(e).

⁵⁰⁸ *Id.*

⁵⁰⁹ Nat'l Labor Comm., Mission Statement, <http://www.nlcnet.org/about> (last visited Mar. 13, 2010). It serves as an information center, drawing from a database including over 22,000 individuals and organizations. *Id.* Members include labor, women, students, and civil rights, religious, and grassroots groups. *Id.* For details and links to copies of over 100 reports, see Nat'l Labor Comm., Newsroom, <http://www.nlcnet.org/newsroom> (last visited Mar. 13, 2010).

⁵¹⁰ Nat'l Labor Comm., Search Results (Nicaragua), <http://www.nlcnet.org/searchresults.php?country=Nicaragua> (last visited Mar. 13, 2010). Some of the reports cover several countries, one of which is Nicaragua. *Id.*

⁵¹¹ Nat'l Labor Comm., KB Manufacturing (Oct. 10, 2005), <http://www.nlcnet.org/reports.php?id=454>.

⁵¹² *Id.*

⁵¹³ See Glass-Hess, *supra* note 317, at 334, 363. This is similar to the situation in Mexico, El Salvador, and Guatemala. In Mexico, employers prevent formation of unions

to risk the wrath of *maquiladora* managers. Tensions between union leaders and factory managers run high. In February 2003, Managua's newspaper *La Prensa* reported on a dispute between union leaders and managers of Presitex, a textile company, saying, "*Taiwanese exigent cabezas de sindicalistas*" ("Taiwanese demand unionists' heads.")⁵¹⁴

In practice, in Nicaragua, compliance with labor, health, and safety laws depends on the good will of businesses. As a result, compliance with labor laws was not a major expense for employers operating in Nicaragua prior to CAFTA-DR, and CAFTA-DR does not change the situation. One author says, "[w]ithin the body of [CAFTA-DR], the signatory parties linked the capability to trade with international labor rights, providing procedures in the event that one of the parties fails to meet its obligations under the labor provisions."⁵¹⁵ She concludes, "the labor rights provisions in free trade agreements, specifically CAFTA-DR, fall tragically short of international standards and fail to produce any meaningful changes or consequences."⁵¹⁶

G. *Textiles Presented as Nicaragua's Comparative Advantage*

This section turns to Nicaragua's primary *maquiladora* industry: textiles. The textile industry has become Nicaragua's largest *maquiladora* sector because people with few skills can be quickly trained to do the work.⁵¹⁷ Nicaragua has many people seeking work, but they lack skills because of Nicaragua's poor educational system.⁵¹⁸

CAFTA-DR's supporters say it provides a new competitive edge for Nicaragua in textiles.⁵¹⁹ They point out that, before CAFTA-DR, the United

by terminating workers who want to start them. *Id.* They are allowed to do so through exclusion clauses. In El Salvador and Guatemala, exclusion clauses are prohibited but, instead, workers who demand their rights receive death threats and face lengthy court struggles. *Id.*

⁵¹⁴ Adolfo Olivas Olivas & Martha Marina González, *Taiwanese exigen cabezas de sindicalistas*, LA PRENSA (Nicar.), Feb. 24, 2003, <http://archivo.laprensa.com.ni/archivo/2003/febrero/24/regionales/regionales-20030224-03.html>. Accusations flew on both sides, from the company and the employees' union. *Id.*

⁵¹⁵ Wade, *supra* note 483, at 645.

⁵¹⁶ *Id.*

⁵¹⁷ Interview with Noguera Cáceres, *supra* note 485. Mr. Noguera expressed sincere concern for his fellow citizens and explained that he is doing the best he can to bring jobs to Managua. He must work within economic and political constraints. *Id.*

⁵¹⁸ See *supra* text accompanying notes 452–456 (discussing the economic importance of education).

⁵¹⁹ *Dead-End Trade Deal Nears Dead End*, WITNESS FOR PEACE, July 16, 2007, available at <http://citizen.typepad.com/eyesontrade/deadend.pdf>.

States required that fabric used in the Nicaraguan *maquiladoras* come from the United States or Central America to get the U.S. tariff exemption on the finished product.⁵²⁰ Under CAFTA-DR, there is a new Trade Preference Level (“TPL”).⁵²¹ The TPL allows 100 million square meters of fabric to come from countries that offer it for less money.⁵²² CAFTA-DR’s proponents argue that quotas bring cheaper fabrics into the country, which leads to lower production costs.⁵²³ In turn, lower costs lead to more competitive contracts as compared to those offered by other countries, such as China.⁵²⁴ With more *maquiladoras* coming to Nicaragua, CAFTA-DR’s proponents say more will be produced in Nicaragua with more employers providing jobs.⁵²⁵

However, Nicaragua faces new impediments in the global arena. From 1974 to 2004, under the Multi-Fiber Agreement (“MFA”), the United States granted significant textile quotas to small countries, including Nicaragua, and imposed highly restrictive quotas on larger countries, including China.⁵²⁶ Post-MFA, the world of textiles is changing significantly, and Nicaragua faces major competition from non-CAFTA-DR countries. For example, in January 2004, China exported 941,000 cotton shirts to the United States.⁵²⁷ In January 2005, Chinese exports of cotton shirts to the U.S. increased to 18.2 million, and Chinese cotton trouser exports to the U.S. increased by an annual rate of 1,332%.⁵²⁸

The owner of a *maquiladora* in Nicaragua states bluntly, “China can pay its workers less than what I’m legally required to pay these people.”⁵²⁹ A *maquiladora* manager says, “[t]he TPL means nothing to the brands. They only care about the wages.”⁵³⁰

The statistics on production and factories show that Nicaragua has been hit hard by competition. From January to June 2007, the following occurred in Managua’s free trade zone:

- There were thirty-fifty percent reductions in orders from brands;

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*; see also JARAMILLO & LEDERMAN, *supra* note 225, at 51.

⁵²³ *Dead-End Deal Nears Dead End*, *supra* note 519.

⁵²⁴ *Id.*

⁵²⁵ *See id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ *Dead-End Deal Nears Dead End*, *supra* note 519.

⁵³⁰ *Id.*

- Two textile *maquiladoras* closed;
- Seven textile *maquiladoras* fired workers;
- Two new textile *maquiladoras* opened;
- An estimated 3,880 to 4,120 textile jobs were lost; and
- 176 textile jobs were gained.⁵³¹

Overall, progress was limited at best.

Moreover, the United States is in the midst of a serious economic downturn that has been accelerating since the figures given above were compiled.⁵³² In the wake of this downturn, the closures, and the disappearance of jobs in Nicaragua, neither the U.S. nor other foreign-based businesses can be expected to bring a meaningful influx of jobs to Nicaragua's free trade zones in the foreseeable future.⁵³³

H. Agriculture: Red Beans and Coffee Beans under CAFTA-DR

1. One-Sided Nature of Agricultural Exchange: *Rojos Chiquitos*

In addition to CAFTA-DR's lopsided agricultural provisions that benefit U.S. businesses in most cases, the U.S. government is working to reduce reliance on a strain of red beans that is crucial for Nicaragua's domestic consumption.⁵³⁴ Nicaragua is home to a strain of red beans that cannot be found anywhere else.⁵³⁵ However, the bean is not likely to provide Nicaragua with a comparative advantage because the U.S. Department of Agriculture ("USDA") funded a research venture through which it developed a bean that has the same qualities as the Nicaraguan bean.⁵³⁶ This bean, developed by researchers at the University of Washington, is called the *rojo chiquito*.⁵³⁷ A representative of the USDA's Agricultural Research Services says "rojo chiquito is primarily intended as an edible dry bean crop that U.S. farmers can grow for export markets in Honduras, Nicaragua, El Salvador, and other Central American countries."⁵³⁸ A major Nicaraguan newspaper called the U.S. plans to complete *rojo chiquito* "potentially more

⁵³¹ *Id.*

⁵³² See Goodman & Norris, *supra* note 474.

⁵³³ See *supra* text accompanying notes 474–477.

⁵³⁴ Tom Ricker, *Competition or Massacre? Central American Farmers' Dismal Prospects Under CAFTA*, MULTINATIONAL MONITOR, Apr. 2004, at 9, 11.

⁵³⁵ *Id.*

⁵³⁶ *Id.*

⁵³⁷ *Id.* *Rojos chiquito* means "little red one."

⁵³⁸ *Id.*

devastating than Hurricane Mitch.”⁵³⁹ CAFTA-DR is “forc[ing] farmers in [Nicaragua] to compete, not against U.S. farmers but against U.S. taxpayers and the world’s most powerful treasury.”⁵⁴⁰

2. An Illusory Comparative Advantage: Coffee

Coffee provides nearly one-third of Nicaragua’s agricultural employment.⁵⁴¹ In 2000, coffee comprised more than twenty-five percent of Nicaragua’s total exports, making it the country’s largest export.⁵⁴² Forty-two percent of Nicaragua’s economically active workers owe some portion of their income to Nicaragua’s coffee production.⁵⁴³ Therefore, at first glance, it appears to be a product that can provide Nicaragua with a comparative advantage. This is not the case, however, because of the volatile nature of coffee prices.⁵⁴⁴

A typical coffee plantation in Nicaragua is operated by one landowner with many tenant workers.⁵⁴⁵ Coffee is the only product; there is no cultivation of basic grains such as rice and corn for consumption.⁵⁴⁶ Coffee prices often fluctuate wildly. For example, between 1997 and 2002 the “value of coffee exports [fell] by \$4 billion.”⁵⁴⁷ The situation in the

⁵³⁹ *Id.* Hurricane Mitch was a devastating hurricane that struck in November of 1998; Nicaragua and Honduras were hit particularly hard. See James C. McKinley, Jr., *The Hurricane Is History, but for Battered Honduras the Agony Lingers*, N.Y. TIMES, Dec. 25, 1998, at A6, available at <http://query.nytimes.com/gst/fullpage.html?res=9D03E7DF1F3CF936A15751C1A96E958260&scp=14&sq=hurricane%20mitch&st=cse>.

⁵⁴⁰ Ricker, *supra* note 534, at 10 (quoting Stephanie Weinberg of Oxfam America).

⁵⁴¹ Press Release, FAO, Coffee Crisis: FAO Helps Nicaragua’s Small-Scale Growers: Seeds, Basic Tools for 3,000 of Worst-Affected Coffee Producers, U.N. Doc. SAG/214 (Jan. 20, 2004), available at <http://www.un.org/News/Press/docs/2004/sag214.doc.htm>.

⁵⁴² Panos Varangis et al., *Dealing with the Coffee Crisis in Central America: Impacts and Strategies* 6 (World Bank Dev. Research Group, Policy Research Working Paper No. 2993, 2003), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/04/23/000094946_03040404262852/Rendered/PDF/multi0page.pdf.

⁵⁴³ *Id.* at 70.

⁵⁴⁴ Madhav Jeyachandran, ResearchAndMarkets.com, Coffee Price Risk Management in SMEs (Sept. 2009), http://www.researchandmarkets.com/research/81264d/coffee_price_risk.

⁵⁴⁵ For an account of the lives of some coffee farmers in Nicaragua, and how Fair Trade projects are helping them deal with the multitude of problems they face, see CYCON, *supra* note 438, at 164–82.

⁵⁴⁶ *Id.* at xi. This limits the ability of families to feed themselves, and it depletes the land. “In many countries the farmers are keenly aware of the importance of interplanting and maintaining biodiversity for the health of the land and of their families. ‘Shade-grown’ and ‘Bird-friendly’ were concepts well known to small farmers long before international environmental groups took an interest in the coffeelands.” *Id.*

⁵⁴⁷ Tim Weiner, *Low Prices Threaten Coffee Farmers’ Livelihood, Report Says*, N.Y. TIMES,

coffee industry was described effectively by an Oxfam report: "Asking some of the poorest and most powerless people in the world to negotiate in an open market with some of the richest and most powerful results, unsurprisingly, in the rich getting richer and the poor getting poorer."⁵⁴⁸ With massive price fluctuations and the powerful negotiating with the powerless, workers suffer.⁵⁴⁹

When coffee is sold at prices below the cost of production or does not sell at all, tenant families have no income and fall into debt.⁵⁵⁰ Without paychecks, they do not have the money to buy beans, corn, and rice to eat. A partial safeguard would be for families to grow staple products on their own land. But, as tenants on the coffee plantation, they are using the plantation owner's land to grow coffee; they do not have their own land. They have nowhere to grow food to feed their families.⁵⁵¹

Low prices for coffee hurt people throughout Central America, including Nicaraguans. In Central America about 540,000 coffee plantation workers have lost their employment in recent years.⁵⁵² That figure equals almost ten percent of Nicaragua's total population of 5.89 million.⁵⁵³

The reasons for the swings in coffee prices are complicated. One factor is that the global supply and demand for coffee swing wildly.⁵⁵⁴ The World Bank makes recommendations to countries around the world that affect supply and often create more competition in the coffee market.⁵⁵⁵ Large roasting companies make purchasing decisions without considering the needs of workers and landowners in Nicaragua.⁵⁵⁶ Moreover, climate change is likely to continue to fuel the uncertainty and hardship surrounding coffee.⁵⁵⁷ In short, the factors are not within control of Nicaragua's coffee workers or the owners of the coffee-producing lands. Nicaragua's

Sept. 19, 2002, at A7, available at <http://query.nytimes.com/gst/fullpage.html?res=9404E5DE1330F93AA2575AC0A9649C8B63&scp=1&sq=coffee%20prices&st=cse>.

⁵⁴⁸ *Id.* (quoting Oxfam).

⁵⁴⁹ See CYCON, *supra* note 438, at xi.

⁵⁵⁰ See Weiner, *supra* note 547, at A7.

⁵⁵¹ For discussion of the Nicaraguans' need for land, see Anderson, *supra* note 43.

⁵⁵² Jan McGirk, *Growing Coffee: It's Black, No Sugar*, MSNBC, Aug. 2002, <http://www.msnbc.msn.com/id/3072120/>.

⁵⁵³ globalEDGE, Nicaragua: Introduction, <http://globaledege.msu.edu/countries/country.asp?CountryID=136> (last visited Mar. 13, 2010).

⁵⁵⁴ See CYCON, *supra* note 438, at xi.

⁵⁵⁵ See *id.* at xi–xii.

⁵⁵⁶ See *id.* at xi.

⁵⁵⁷ For discussion of the effects of global warming on coffee, see Andréanne Hamel, *The Impact of Global Warming on Coffee Plants and Beans*, NAT. NEWS, Feb. 5, 2008, <http://www.naturalnews.com/022591.html>.

dependence on coffee has far-reaching consequences for her people. With substantial dependence on one product, the whims of the market determine the livelihood of workers, the national food supply, and the overall stability of the economy.

Workers in Nicaragua have spoken up, demanding their interrelated needs for food, work, and land.⁵⁵⁸ In 2002, more than 3,000 agricultural workers from the *Las Tunas* area marched from the hills onto the Pan-American Highway.⁵⁵⁹ They were demanding food, work, and land.⁵⁶⁰ After continuing protests and confrontations, an agreement was reached giving them access to land to grow their own food.⁵⁶¹ But, this is a limited solution for a limited number of people that leaves the major problem unsolved: people need land and a stable source of income to be able to provide food for their families. “The current state of the global economy is placing increased strain on food availability” and the resulting increases in food prices are exacerbating Nicaragua’s problems.⁵⁶² In Nicaragua, the rate of inflation for domestic food prices increased from 10.7% annually to 34.2% annually, comparing January 2006 to August 2008.⁵⁶³ CAFTA-DR fails to address citizens’ interrelated needs for food, land, and work.

I. Environmental Laws and Conditions in Nicaragua

1. Nicaragua’s Environmental Needs and Problems

Nicaraguans have the same needs as all human beings: unspoiled water, air, and land. These environmental needs intertwine with social needs for adequate and nutritious food, education, housing, and medical care. Unfortunately, Nicaragua’s environmental laws have not prevented environmental problems, nor are they leading to the cleanup of existing problems. This section surveys a few of the most severe problems.

“Famous as the ‘Land of Lakes and Volcanoes,’ and reveling in its status in Central America as the country with the most fresh water,

⁵⁵⁸ Equal Exchange, History of Coffee in Nicaragua, <http://www.equalexchange.coop/history-of-coffee-in-nicaragua> (last visited Mar. 13, 2010).

⁵⁵⁹ Luis Hernández Navarro, *To Die a Little: Migration and Coffee in Central America*, AM. PROGRAM, Dec. 13, 2004, <http://americas.irc-online.org/am/959>.

⁵⁶⁰ Equal Exchange, *supra* note 558.

⁵⁶¹ *Id.*

⁵⁶² Nadia McGill, *Global Economy Worsens Food Access in Rural Nicaragua*, ADVENTIST DEV. & RELIEF AGENCY, Mar. 31 2009, <http://www.alertnet.org/thenews/fromthefield/219487/123853469123.htm>.

⁵⁶³ *Id.*

Nicaragua . . . has very little safe drinking water. Those who cannot afford to purchase water are extremely vulnerable to a variety of health issues.⁵⁶⁴ Land rights and access to land are another environmental issue, and they are closely intertwined with social equity. "Most of Nicaragua's land issues constitute an expanding gap between landless farmers and commercial logging, mining and agricultural interests."⁵⁶⁵

A related major problem is deforestation caused by logging and clearing of lands for crops and pasture.⁵⁶⁶ Even businesspeople question whether 2005 legislation prohibiting illegal logging will have any effect.⁵⁶⁷ Lisandro D'Leon, a Nicaraguan environmental crimes prosecutor, estimates that illegal loggers account for seventy to seventy-five percent of Nicaragua's wood exports, and that, at current rates of deforestation, Nicaragua will have no more forests in ten to fifteen years.⁵⁶⁸ Nicaragua has a new law against logging, but there is skepticism as to whether that law will be enforced.⁵⁶⁹ The perspectives of the manager of the Nicaraguan timber company, Exotic Wood International, are described as follows:

Black market cutting sullies the timber industry's image and distorts market prices. . . . But . . . he questions the passage of green measures . . . in the absence of evidence that the government can make its legislation stick.

"Nicaragua already has laws on the books to prevent unregulated logging, they just don't enforce them," he says. "So instead of enforcing old laws, they are passing new laws."⁵⁷⁰

Illegal logging contributes to social problems and inequities. For example, the destruction caused by Hurricane Mitch was exacerbated by the preexisting deforestation.⁵⁷¹ Additionally, the use of pesticides on agricultural land causes major problems.⁵⁷² Pesticides used on fruit and cotton

⁵⁶⁴ Found. for Sustainable Dev., *Environmental Issues in Nicaragua*, <http://www.fsdinternational.org/?q=ntlopps/country/nicaragua/environment> (last visited Mar. 14, 2010).

⁵⁶⁵ *Id.*

⁵⁶⁶ Tim Rogers, *Two New Environmental Laws in Nicaragua*, *ECOAMÉRICAS*, Nov. 2005, at 5.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ Found. for Sustainable Dev., *supra* note 564.

⁵⁷² *Id.*

plantations have harmed several generations of Nicaraguan workers.⁵⁷³ For example, DBCP continued to be used in Nicaragua into the 1980s after it was banned in 1979 in the United States.⁵⁷⁴ Health problems associated with it include cancers, nervous disorders, and miscarriages.⁵⁷⁵ Many people have died as a result of exposure to the chemical, and victims continue to suffer.⁵⁷⁶ “At the end of 2006, court orders against several multinational companies in Nicaragua (headquartered in the U.S.) were still awaiting implementation or were the subject of repeated appeals by the multinational companies.”⁵⁷⁷ In addition, cotton was a major export in the 1970s, hitting a peak during the 1977–78 season, but it brought the use of ever increasing amounts of pesticides.⁵⁷⁸ This led to health problems for workers, killed fish, and contaminated wells.⁵⁷⁹ In addition, insects grew resistant to the pesticides, and pesticide use increased to the point at which it was fifty percent of production costs.⁵⁸⁰ As a result, by 1990, Nicaragua’s cotton production was reduced to less than twenty percent of its previous level.⁵⁸¹

Within a well balanced economy, funds can be allocated to provide the infrastructure required for environmental needs such as processing of drinking water, treating of sewage, storing hazardous and non-hazardous wastes, and cleaning up of environmental contaminants. In a thriving economy, funding can be allocated to implement and enforce environmental regulations. However, Nicaragua’s economy is seriously unbalanced, and funds are not available for that purpose. Even the gains in GDP or GNP in Nicaragua are illusory from the perspective of most Nicaraguans.

Economist Eric A. Davidson says,

[o]ur current system values the growth of gross national product over conservation of essential natural resources, and it falsely separates the economic system from the ecological system upon which our well-being depends. The economic pyramid must be placed within the ecological pyramid

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*

⁵⁷⁷ Found. for Sustainable Dev., *supra* note 564.

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

for either system to work well into the foreseeable, sustainable future. Futuristic technologies are not the most important ingredient for solving our environmental problems, although some of them will certainly help. Rather, we must change our way of thinking by acknowledging that economic and ecological systems are interdependent.⁵⁸²

This article is based on the premise that economy, social equity, and environment are interdependent. Nicaragua is unable to address the three legs of the Triple Bottom Line; therefore, its development is currently not sustainable. Economic policies underlying CAFTA-DR's provisions contribute to that lack of sustainability.

2. Nicaragua's Environmental Laws

Overall, Nicaragua's environmental laws are weak. They are basically a patchwork without a comprehensive plan, and there is little funding for implementation.

The 1987 Constitution, with the 1995 Reforms, provides some provisions relating to the environment.⁵⁸³ Additionally, there are general laws for environmental protection, and they are supplemented by *reglamentos* (regulations) and *decretos* (decrees).⁵⁸⁴ The *Ministerio del Ambiente y Los Recursos Naturales de Nicaragua* (Ministry of Environment and Natural Resources of Nicaragua ("MARENA")) administers most of those laws, regulations, and decrees.⁵⁸⁵

The general law on environment is the 1996 *Ley General de Medio Ambiente y Los Recursos Naturales* (General Law on the Environment and National Resources).⁵⁸⁶ The legislature supplements it with other laws

⁵⁸² ERICA A. DAVIDSON, YOU CAN'T EAT GNP: ECONOMICS AS IF ECOLOGY MATTERED 214 (2000).

⁵⁸³ Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. IV, ch. III, tit. VI, ch. I, La Gaceta [L.G.] 9 January 1987, as amended by Ley No. 192, Reforma Parcial de la Constitución Política de la República de Nicaragua, Feb. 1, 1995, available at <http://pdba.georgetown.edu/Constitutions/Nica/nica95.html>.

⁵⁸⁴ MINISTERIO DEL AMBIENTE Y LOS RECURSOS NATURALES [MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES], REGLAMENTOS/DECRETOS [REGULATIONS/DECREES], http://www.marena.gob.ni/index.php?option=com_content&task=view&id=52&Itemid=170 (last visited Mar. 14, 2010).

⁵⁸⁵ *Id.*

⁵⁸⁶ Ley No. 217, 2 May 1996, *Ley General del Medio Ambiente y los Recursos Naturales* [Ley del Medio Ambiente] [Environmental Law] tit. III, ch. II, sec. I, La Gaceta [L.G.], 6 June 1996 (Nicar.), available at <http://faolex.fao.org/docs/texts/nic7854.doc> (recently amended by Ley No. 647, 26 Mar. 2008, *Modifica la Ley No. 217, Ley General del Medio*

from time to time. For example, the 2005 *Ley Especial de Delitos Contra el Medio Ambiente y los Recursos Naturales* (Special Law of Crimes Against the Environmental and Natural Resources).⁵⁸⁷ The Logging Moratorium Law is designed to protect forests along the borders with Costa Rica and Honduras.⁵⁸⁸ Timber is frequently smuggled out of Nicaragua across those borders.⁵⁸⁹ The law places a ten-year ban on new permits for cutting mangrove, cedar, mahogany, and *pochote* trees.⁵⁹⁰

Nicaragua's numerous environmental decrees supplement the general laws. For example, decrees which create wildlife protection zones, such as the *Protección a los Animales Silvestres Consiguina Zona de Asilo* (Protection of Wildlife in the Consiguina Zone of Asylum),⁵⁹¹ supplement the *Nueva Ley Para la Protección de Nuestra Fauna Nacional* (New Law for Protection of Our National Fauna),⁵⁹² and the *Prohíbese Apprehensión y Caza de Toda Clase de Animales Silvestres y Exportación de Tuevo de Tortugas* (Prohibition Against Catching and Hunting of All Types of Wild Animals and Export of Turtle Eggs).⁵⁹³ Additionally, Nicaragua has a series of *reglamentos* (regulations) providing guidance for enforcement of the general laws and decrees.⁵⁹⁴

Ambiente y los Recursos Naturales, La Gaceta [L.G.], 3 Apr. 2008 (Nicar.), available at <http://faolex.fao.org/docs/texts/nic86097.doc>.

⁵⁸⁷ Ley No. 559, 26 Oct. 2005, *Ley de Delitos Contra el Medio Ambiente y los Recursos Naturales*, La Gaceta [L.G.], 21 Nov. 2005 (Nicar.), available at <http://faolex.fao.org/docs/texts/nic63374.doc>.

⁵⁸⁸ Rogers, *supra* note 566, at 5.

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

⁵⁹¹ Decreto No. 13, *Protección a los Animales Silvestres Consiguina Zona de Asilo*, La Gaceta [L.G.] 206, 3 Nov. 1956; see also Comisión Centroamericana de Ambiente y Desarrollo, Legislación y Políticas, <http://www.ccad.ws/legislacion/Nicaragua.html> (last visited Mar. 17, 2010).

⁵⁹² See, e.g., Convención sobre el Comercio Internacional de Especies Amenazadas de Fauna y Flora Silvestres (Convention on International Trade in Endangered Species of Wild Fauna and Flora), Mar. 3, 1973, 993 U.N.T.S 243.

⁵⁹³ Ley No. 625, 28 Mar. 1977, *Prohíbese Apprehensión y Caza de Toda Clase de Animales Silvestres, y Exportación de Huevos de Tortugas*, La Gaceta [L.G.], 16 May 1977 (Nicar.), available at http://www.marena.gob.ni/index.php?option=com_remository&Itemid=181&func=startdown&id=46. Text and description of Nicaragua's laws are available through a website provided by ECOLEX, <http://www.ecolex.org> (last visited Mar. 14, 2010). This website provides copies and summaries of environmental law for countries around the world. ECOLEX is operated by the United Nations Environmental Programme ("UNEP"), the FAO, and the International Union for Conservation of Nature ("IUCN"). For a comprehensive list (in Spanish) of Nicaragua's Decrees and links to them, see *Ministerio de Ambiente y los Recursos Naturales*, http://www.marena.gob.ni/index.php?option=com_remository&Itemid=181&func=select&id=2 (last visited Mar. 14, 2010).

⁵⁹⁴ MINISTERIO DEL AMBIENTE Y LOS RECURSOS NATURALES, *supra* note 584.

3. What Is Needed?

CAFTA-DR, like its predecessor NAFTA, is based on the assumption that free trade will lead to a trickle-down effect of economic benefits that raise the standard of living of citizens in all member countries.⁵⁹⁵ This trickle-down effect is expected to allow citizens to meet their needs in terms of food, housing, education, health care, water supplies, and myriad others. It is all supposed to happen through comparative advantage.⁵⁹⁶ Sadly, it has not worked under NAFTA, nor is it likely to happen under CAFTA-DR.

A look at the individual members of CAFTA-DR shows their elusive comparative advantages—such as human beings who will work for extremely low wages—cannot generate the trickle-down and rising tides needed.⁵⁹⁷ A more in-depth analysis of Nicaragua confirms that premise.⁵⁹⁸

Examination of Nicaragua's situation through the lens of the Triple Bottom Line reveals CAFTA-DR allows unsustainable practices or even exacerbates them. Therefore, new ways of doing things must be identified and adopted. In-depth discussion of alternatives is beyond the scope of this article, but a few will be introduced here. Change can and should begin with individuals in every sector of society. That includes government officials, business executives, and private citizens from the United States as well as other developed nations.

Many writers in recent years have alerted people to the problems of a top-down approach to economics. In short, profit-driven motives of corporate leaders take precedence over the needs of citizens in developing and developed countries.⁵⁹⁹ Those who have issued such warnings include, for example, John Perkins, author of *Confessions of an Economic Hit Man*⁶⁰⁰ and *The Secret History of the American Empire: Economic Hit Men, Jackals, and the Truth about Global Corruption*.⁶⁰¹ In both books, he provides disturbing accounts of how U.S. government leaders help businesses

⁵⁹⁵ J.F. HORNBECK, CONG. RESEARCH SERV., THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR) 3–4 (2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL31870.pdf>.

⁵⁹⁶ *Id.*

⁵⁹⁷ See Sandra Polaski & Viji Rangaswami, Carnegie Endowment for Int'l Peace, CAFTA-DR: No Pride in a Teaspoon of Sugar a Week (May 12, 2005), <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=16924>.

⁵⁹⁸ See *supra* text accompanying notes 483–516.

⁵⁹⁹ See JOHN PERKINS, THE SECRET HISTORY OF THE AMERICAN EMPIRE: ECONOMIC HIT MEN, JACKALS, AND THE TRUTH ABOUT GLOBAL CORRUPTION 2–3 (2007).

⁶⁰⁰ JOHN PERKINS, CONFESSIONS OF AN ECONOMIC HIT MAN (2004).

⁶⁰¹ PERKINS, *supra* note 599.

by promoting agreements and projects that leave developing nations in massive debt.⁶⁰² In *When Corporations Rule the World*, David Korten describes how corporate power benefits companies and investors, but destroys democratic institutions and ecosystems.⁶⁰³ He blames corporations for many of the environmental and social problems around the world.⁶⁰⁴

In the wake of such revelations, however, those same authors and many others are speaking of the readiness of people around the world to move into a new era.⁶⁰⁵ In *The Post Corporate World*, Korten sets out his hopes for a new system of market economies that honor principles advocated by Adam Smith.⁶⁰⁶ In *The Great Turning*, Korten explores how and why people must transform “a corporate-led global economy to a planetary system of community-led local living economies.”⁶⁰⁷ He describes the need for strong communities as a foundation for security and economic stability.⁶⁰⁸ Perkins works through the Dream Change Coalition, a non-profit organization through which people around the world join to create and practice sustainable ways of living.⁶⁰⁹ Dr. Ervin Laszlo, a philosopher of science and systems theorist, speaks of an overall shift of consciousness in this world and the desire to change in the face of myriad problems.⁶¹⁰ He uses words that parallel those of many who supported NAFTA and CAFTA-DR: A “rising tide should and will lift all boats.”⁶¹¹ There is truth

⁶⁰² *Id.* at 2–3; PERKINS, *supra* note 600, at x–xi.

⁶⁰³ DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD passim* (1995).

⁶⁰⁴ *Id.*

⁶⁰⁵ *See, e.g.*, DAVID C. KORTEN, *THE GREAT TURNING: FROM EMPIRE TO EARTH COMMUNITY* 21 (2006) (calling for an end to the “five-thousand-year era of Empire that has reproduced hierarchies of domination at all levels of human organization”); PAUL HAWKEN, *BLESSED UNREST: HOW THE LARGEST MOVEMENT IN THE WORLD CAME INTO BEING AND WHY NO ONE SAW IT COMING* 22 (2007).

⁶⁰⁶ DAVID C. KORTEN, *THE POST-CORPORATE WORLD: LIFE AFTER CAPITALISM* 152–62 (1999).

⁶⁰⁷ KORTEN, *supra* note 605, at 15.

⁶⁰⁸ *Id.* at 14–15. DAVID C. KORTEN, *AGENDA FOR A NEW ECONOMY: FROM PHANTOM WEALTH TO REAL WEALTH* (2009) continues this discussion of ways to move away from the economic crisis faced by the United States.

⁶⁰⁹ For information about the Dream Change Coalition and information about seminars and books as well as links to information about programs around the world, see <http://www.dreamchange.org/> (last visited Mar. 14, 2010). The website includes links to hundreds of groups (“Wakeful Organizations”) working to protect the earth in areas including building sustainability, business as an agent of change, community wisdom, cross-cultural & sacred expeditions, earth stewardship, ecology & sustainability, education, Fair Trade & indigenous rights, forest preservation, and green chemistries & biotechnologies. *Id.*

⁶¹⁰ One Minute Shift, Ervin Laszlo on 2012, http://oneminuteshift.com/videos/ervin_laszlo_video/2012 (last visited Mar. 14, 2010). Dr. Laszlo is from Hungary and is a systems and integral theorist. *Id.*

⁶¹¹ *Id.*

in the adage, but free trade agreements do not illustrate this truth. Neither NAFTA nor CAFTA-DR creates a trickle-down that can raise the tide and lift the lives of most citizens in its developing members.

Therefore, it is time to seek new ways to promote free trade that is truly sustainable trade. Alternatives are needed that will truly raise the tides for citizens throughout the countries that participate in trade agreements.

In a recent letter to the editor of *TIME*, U.S. Senator Sherrod Brown responded to proposals to deal with the U.S. annual trade deficit of \$800 billion, saying, “[i]t takes real change in trade policy—labor and environmental standards that will raise living standards at home and abroad, . . . and no more NAFTAs and other corporate trade deals. We need more trade—but under a very different set of rules that work for our families and our communities.”⁶¹² The conclusions presented in this article parallel Senator Brown’s conclusions. The world needs a rising tide that will lift families and communities, not just corporate stakeholders.

The need for that rising tide is being recognized now, step-by-step. People around the world are working toward new ways to promote sustainable development. Paul Hawken describes a worldwide movement of people working to heal the planet in *Blessed Unrest: How the Largest Movement in the World Came into Being and Why No One Saw It Coming*.⁶¹³ Andres R. Edwards describes how the world is on the cusp of a sustainability revolution in *The Sustainability Revolution: Portrait of a Paradigm Shift*.⁶¹⁴ “The Sustainability Revolution presents an alternative that supports economic viability and healthy ecosystems by modifying consumption patterns and implementing a more equitable social framework.”⁶¹⁵ This article is designed to be part of a wake-up call. The effects of free trade on Nicaragua are unsustainable and unacceptable. The example of Nicaragua demonstrates that CAFTA-DR does not work in a small, poor, developing country.

After awakening, the next step is to choose a different path and take action. Korten, Perkins, Hawken, Edwards, and tens of thousands of other thoughtful and committed people around the world are taking specific steps to work toward the new sustainability paradigm. One way is through microloans from organizations such as the Grameen Bank,⁶¹⁶

⁶¹² Sen. Sherrod Brown, Letter to the Editor, *The Art of the Export*, *TIME*, June 23, 2008, at 10.

⁶¹³ HAWKEN, *supra* note 605 *passim*.

⁶¹⁴ EDWARDS, *supra* note 17, at 50.

⁶¹⁵ *Id.* at 3.

⁶¹⁶ This program was founded by Professor Muhammad Yunus in 1976. Grameen Bank, A Short History of Grameen Bank, <http://www.grameen-info.org/index.php?option=com>

Kiva,⁶¹⁷ and MicroPlace.⁶¹⁸ A second way is through the promotion of organic foods, which protects consumers and agricultural workers from the effects of harmful chemicals.⁶¹⁹ Another way is through Fair Trade, a process that promotes sustainable development through the implementation of multiple principles and practices.⁶²⁰ “Characteristics of [F]air [T]rade include fair wages, cooperative workplaces, consumer education, environmental sustainability, direct trade, financial and technical support [for producers], community development, respect for cultural identity, and public accountability (transparency).”⁶²¹ It is a process that should be explored for the benefit of Nicaragua, other developing countries, and developed countries.

As more people become aware of the reality of human interdependence, human beings will have the ability to shift in a positive direction. Much of the discord related to the effects of CAFTA-DR and other trade agreements can give way to more cooperative efforts from the ground up to help each other. In doing so, people will promote a strong economy, social equity, and a healthy environment. This article illustrates that Nicaragua’s economic, social, and environmental problems are interdependent. Nicaragua’s problems are illustrative of the problems of the other five developing members of CAFTA-DR. The example of one small nation provides important lessons for countries throughout the world.

_content&task=view&id=19&Itemid=164 (last visited Mar. 14, 2010). It now makes loans in at least 43 countries. Grameen Bank, Micro Loans for the Very Poor, http://www.grameen-info.org/index.php?option=com_content&task=view&id=336&Itemid=373 (last visited Mar. 14, 2010).

⁶¹⁷ For information about KIVA, through which anyone wishing to help can be linked to an entrepreneur who needs a small loan, see Kiva: Loans that Change Lives, <http://kiva.org/> (last visited Mar. 14, 2010). KIVA makes loans to people in Nicaragua and other developing countries. See Kiva, Kiva’s Field Partners, <http://www.kiva.org/partners> (last visited Mar. 14, 2010), for a list of the partners through which Kiva lends.

⁶¹⁸ MicroPlace, <https://www.microplace.com/> (last visited Mar. 14, 2010). MicroPlace is a subsidiary of eBay that was started in 2006 and operates in a similar way to KIVA except that lenders earn interest. MicroPlace, MicroPlace History, https://www.microplace.com/learn_more/history (last visited Mar. 14, 2010); MicroPlace, How MicroPlace Works, https://www.microplace.com/learn_more/howitworks (last visited Mar. 14, 2010).

⁶¹⁹ The United States and many other countries have legislation establishing processes for certification and regulation of organic foods. See Organic Foods Production Act of 1990, 7 U.S.C. § 6501 (2006). For a list of 385 organizations from around the world that certify organic foods, see Organic (Ltd), Certify, <http://www.organic.com.au/certify/> (last visited Mar. 14, 2010).

⁶²⁰ Paulette L. Stenzel, *What Is Fair Trade?*, GLOBALEDGE BUS. REV., Vol. 2, No. 5, 2008, at 1, available at <http://globaledge.msu.edu/NewsAndViews/businessReviews/gBR2-5.pdf>.

⁶²¹ *Id.*

VI. THE BOTTOM LINE: WILL CAFTA-DR BRING SUSTAINABLE DEVELOPMENT TO NICARAGUA?

Inquiry into Nicaragua's economic, social, legal, and environmental climate helps answer the question: Does, or can, CAFTA-DR promote sustainable development in Nicaragua? Using the three legs of the Triple Bottom Line to construct a response, CAFTA-DR does not. This section will summarize what this article reveals.

Economic growth under CAFTA-DR will continue to be distributed unevenly. Foreign investors as well as business owners in Nicaragua gain a variety of benefits. For a period of seventeen years preceding CAFTA-DR, companies in the free trade zones enjoyed extraordinary freedom from taxes.⁶²² During those years, the activities of companies in the free trade zones failed to lift the lives of Nicaragua's people in meaningful ways, and CAFTA-DR perpetuates that system. Under CAFTA-DR, factory owners continue to be exempt from a bundle of taxes: export, property, and sales.⁶²³ Nicaragua's leaders feel that they have no option but to give up taxes in order to lure investors. Therefore, economic activity brought by CAFTA-DR will not generate the funds Nicaragua needs for infrastructure improvements. Thus, the economic leg of the Triple Bottom Line is unstable.

CAFTA-DR lacks mechanisms needed to establish essential social equity. Limited numbers of people may have gotten jobs in Nicaragua because of CAFTA-DR, but even those jobs have disappeared in the worldwide economic recession of 2008–09. Wages earned by *maquiladora* workers are barely sufficient to buy the rice and beans for *gallo pinto*, the staple of the diet of most Nicaraguans.⁶²⁴ People continue to live on dumpsites such as *La Chureca*.⁶²⁵ In fact, the number of residents there is growing, and there are similar sites in other cities such as León.⁶²⁶ People lack drinking water,

⁶²² See *supra* text accompanying notes 480–482 (describing some of the tax privileges enjoyed by *maquiladoras* in Nicaraguan free trade zones).

⁶²³ See *id.*

⁶²⁴ *Gallo pinto* is made of red beans and rice that are slowly cooked over a wood fire. The poorest Nicaraguans eat it for breakfast, lunch, and dinner. Those who can afford it may add a piece of cheese, chicken, or meat at the midday meal.

⁶²⁵ See *supra* notes 401–403.

⁶²⁶ Compare Chris Kenning, *City's Poorest Inspire Louisville Volunteers*, COURIER-J. (Louisville, Ky.), Feb. 20, 2005, <http://www.courier-journal.com/article/20050220/NEWS01/502200388/City%5C-s-poorest-inspire-Louisville-volunteers> (estimating, in 2005, 700 residents of La Chureca), with Jeff Hoagland, *Inspired by the Children of La Chureca*, DAILY LOC. NEWS (Chester County, Pa.), Jan. 15, 2010, <http://www.dailylocal.com/articles/2010/>

sewage treatment, electricity, education, health care, and many other social services.⁶²⁷ CAFTA-DR brings little or no prospect for change in those areas, and the social equity leg of the Triple Bottom Line fails.

Finally, Nicaragua faces serious environmental problems. Massive investments are needed to clean up contamination. Nicaragua's environmental laws are weak, and personnel are needed to enforce them. CAFTA-DR does little to reverse the downward spiral of contamination of air, water, and land. It does nothing to reverse the serious deforestation process that has been inflicted on Nicaragua for decades. CAFTA-DR leaves enforcement of environmental and natural resource-related laws to each of its member countries, but these countries lack the resources to do so.⁶²⁸

In summary, under CAFTA-DR, prospects are dim for Nicaragua on all three legs of the Triple Bottom Line. Moreover, Nicaragua's fellow developing members share those dim prospects. One commentator says, "[t]rade agreements in the mold of NAFTA have been given a chance to produce the mutually beneficial results upon which they are advertised. They have been given a chance, and they have failed."⁶²⁹ The experiences of CAFTA-DR's developing members confirm this indictment.

VII. RECOMMENDATION: INCORPORATE THE TRIPLE BOTTOM LINE INTO CAFTA-DR BY REQUIRING THAT BUSINESSES PARTICIPATE IN THE GRI FRAMEWORK

The developing members of CAFTA-DR are sorely in need of sustainable development as is exemplified by Nicaragua's situation. Yet, this article reveals that CAFTA-DR fails to promote sustainable development as measured by the Triple Bottom Line. Tools to ensure that the Triple Bottom Line is addressed through CAFTA-DR are needed. This section proposes a new requirement for firms that wish to do business in CAFTA-DR developing members. These firms will be required to participate in the GRI framework.⁶³⁰ This mechanism is a significant step toward

01/15/news/srv0000007336622.txt (estimating, in 2010, "upward of a thousand" residents of La Chureca). For a firsthand description of the León equivalent to La Chureca, see Wendy Barnhardt, North Carolina Ultrasound Society, Echocardiography Research Trip to Leon, Nicaragua, http://www.ncus.org/main/index.php?option=com_content&view=article&id=49:echocardiography-research-trip-to-leon-nicaragua&catid=34:general&Itemid=55 (last visited Mar. 14, 2010).

⁶²⁷ See *supra* text accompanying notes 399–411 and 452–456.

⁶²⁸ See *supra* Part V.I.

⁶²⁹ Brandt, *supra* note 119, at 113.

⁶³⁰ For a thorough discussion of the GRI reporting framework and its support for the Triple Bottom Line, see *supra* text accompanying notes 79–117.

sustainable development because it will require that firms examine their actions in light of the Triple Bottom Line and reveal those actions to the public.

A. *Mechanisms of Proposal*

A Sustainability Side Agreement should be added to CAFTA-DR.⁶³¹ All companies that have a primary place of business in a CAFTA-DR nation and do business in another CAFTA-DR nation will be required to adhere to the new side agreement. New investors will be required to comply before entering the new country, and existing investors would have a period of three years to file. Reports will be filed with the GRI administration and the United States Trade Representative ("USTR").⁶³²

Under the plan, covered companies will compose sustainability reports and submit them to the GRI administration. Even though some companies currently report to the GRI administration every two years,⁶³³ under the CAFTA-DR Sustainability Side Agreement, companies will report annually to the GRI administration. Initial and annual reports must be simultaneously filed with the USTR. The USTR will publish this information through a website open to the public. It will also publish a list of companies that fail to comply. This proposed action will require a small increase in staffing within the USTR, and a marginal fee from the company filing its report to cover administrative expenses.

To ensure compliance, there will be sanctions for violations. Non-compliant companies already operating in the area will have three years from the effective date of the Side Agreement to comply. For new and existing investors, non-compliance will include failure to file annually, with both the GRI administration and USTR, after the initial filing. Companies that fail to report to the USTR would be subject to fines of at least \$10,000 and up to \$500,000 annually, based on the extent of the company's investment in the region. Any fines will be used to help administer the costs of this program.

An additional and desirable provision would be to require that CAFTA-DR countries promise to refuse permits to non-complying companies for operation in that host country. They would also promise to

⁶³¹ As a separate agreement, a Sustainability Side Agreement would require the signatures and ratification of all CAFTA-DR members.

⁶³² USTR, <http://www.ustr.gov> (last visited Mar. 14, 2010).

⁶³³ See GRI Reports List, *supra* note 81, for a list of companies and their reporting frequencies.

revoke the permits of non-complying corporations. This may be impracticable, however, for reasons articulated below.⁶³⁴ Yet, even if this provision is omitted from this author's proposal, the Sustainability Side Agreement will bring many benefits.

B. Benefits of This Proposal

This proposal has several positive attributes contributing to the Triple Bottom Line. First, the United States can set an example for sustainable business, and the Sustainability Side Agreement can serve as a model for other trade agreements around the world. Next, it is cost effective, and a minimal administrative burden will be placed on the U.S. government. In regard to business, there would also be minimal regulatory burden for firms operating in CAFTA-DR countries. Firms would simply have to report actions in the form of a sustainability report. The process of filing with the USTR requires only a minimal layer of bureaucracy.⁶³⁵ The plan also allows companies to be monitored by an independent body rather than government.⁶³⁶ This is similar to the widely successful ISO 9000 International Management Series and 14000 International Environmental Series Standards.⁶³⁷ Moreover, the U.S. Environmental Protection Agency's Toxic Release Inventory has been successful because companies do not want to be listed as major polluters.⁶³⁸ A company pays more attention to environmental issues when its reputation is at stake.⁶³⁹

For developing members of CAFTA-DR, this proposal may be more problematic. It is probably beyond their political will, in today's economic climate, to refuse a business entry based on failure to file with the GRI administration.⁶⁴⁰ In fact, it is asking a great deal of a developing country such as Nicaragua to refuse entry to a prospective investor in the midst of

⁶³⁴ See *infra* text accompanying notes 640–642.

⁶³⁵ See USTR, Mission of the USTR, <http://www.ustr.gov/about-us/mission> (last visited Mar. 14, 2010) (describing the USTR and its organizational structure).

⁶³⁶ "The [GRI] is a registered not-for-profit organization located in Amsterdam, the Netherlands. It relies on the financial and in-kind support of generous contributors from the network who ensure that GRI can deliver its programs and products." GRI, Funding, <http://www.globalreporting.org/AboutGRI/Funding/> (last visited Mar. 14, 2010).

⁶³⁷ For discussion of these standards, see *supra* text accompanying notes 102–105.

⁶³⁸ Jeffrey C. Terry & Bruce Yandle, *EPA's Toxic Release Inventory: Stimulus and Response*, 18 *MANAGERIAL & DECISION ECON.* 433, 433 (1997).

⁶³⁹ *Id.*

⁶⁴⁰ Enforcement may be another problem. See *supra* notes 394–398, discussing, as an example, Nicaragua's weak legal system.

an economic downturn. Nicaragua has shown herself to be in such need of investment and jobs that she is willing to allow investors to enter and operate in her *maquiladora* zones practically tax-free.⁶⁴¹

Moreover, the weak and corrupted legal system in Nicaragua is not likely to enforce such a provision.⁶⁴² The ideal would be a world in which Nicaragua can afford to deny permits and is willing and able to enforce such a provision. But, even if this particular facet of the Sustainability Side Agreement were deleted, the remaining provisions will be extremely valuable because the U.S. will make important information available to the public through publishing reports adherent to the GRI framework and lists of non-compliant companies.

A filing with the GRI administration encourages a business to examine itself in a critical way that is likely to lead to activities in the CAFTA-DR developing members that promote the Triple Bottom Line.⁶⁴³ Firms can take action based on what is revealed through the GRI framework to realize cost savings and improve their market shares.⁶⁴⁴ The plan also gives companies a way to showcase outstanding corporate citizenship in a format that the public will recognize.⁶⁴⁵ In other words, a company can enhance its image in a way that is more than merely “green washing.”⁶⁴⁶ Moreover, as more companies participate in this process, the GRI framework will become more widely recognized.⁶⁴⁷

The plan provides transparency that will lead to better consumer and investor awareness of the need to pursue the Triple Bottom Line.⁶⁴⁸

⁶⁴¹ See *supra* text accompanying notes 480–482.

⁶⁴² See *supra* text accompanying notes 395–399 (discussing Nicaragua’s legal system).

⁶⁴³ See Interview by Liliana Anam, Manager, CSRinfo, with Scott McAusland, Press Manager, GRI (Nov. 27, 2008), available at <http://www.globalreporting.org/NR/rdonlyres/6726F6B7-B9CF-463B-A106-11CC1B12979F/0/CSRIInfoPolandNov08.pdf>.

⁶⁴⁴ LAURA QUINN & JESSICA BALTES, CTR. FOR CREATIVE LEADERSHIP, LEADERSHIP AND THE TRIPLE BOTTOM LINE: BRINGING SUSTAINABILITY AND CORPORATE SOCIAL RESPONSIBILITY TO LIFE 4–7 (2007), available at <https://www.ccl.org/leadership/pdf/research/tripleBottomLine.pdf>.

⁶⁴⁵ Interview by Liliana Anam with Scott McAusland, *supra* note 643.

⁶⁴⁶ For discussion of “greenwashing,” see Jonathan D. Glater, ‘Greenwash’: A Way to Say ‘Hogwash,’ N.Y. TIMES, May 17, 2006, at G7; Posting of James Kanter to N.Y. Times Green Inc. Blog, <http://greeninc.blogs.nytimes.com/2009/04/30/study-for-consumers-green-is-greenwash/> (Apr. 30, 2009, 8:45 EST).

⁶⁴⁷ See Press Release, Soc. Inv. Forum, Number of S&P 100 Firms Producing Sustainability Reports Jumps by More Than a Third; Nearly All Offer Sustainability Information (Dec. 17, 2009), <http://www.socialinvest.org/news/releases/pressrelease.cfm?id=148>; see also Interview by Liliana Anam with Scott McAusland, *supra* note 643.

⁶⁴⁸ Mollie Painter-Morland, *Triple Bottom-Line Reporting as Social Grammar: Integrating*

Transparency is good for all citizens in society, not just businesses.⁶⁴⁹ With information, people can take individual action in their purchases, and they can speak up in the public arena in informed ways. Companies may, in turn, be held accountable by consumers and investors.

Finally, the proposal supports the GRI administration's credibility.⁶⁵⁰ The goal of sustainability is made more concrete through the use of specific tools for measuring progress toward it.⁶⁵¹ That is what the GRI framework provides. As businesspeople and consumers become familiar with the GRI framework, they will gain the ability to recognize meaningful pursuit of sustainable development.⁶⁵²

C. *Limitations of the Proposal*

There are some limitations inherent in this proposal. First, the GRI administration requires a firm to engage in self-examination and report its findings accurately.⁶⁵³ However, the GRI administration does not require that the company fulfill all three legs of the Triple Bottom Line at the present.⁶⁵⁴ Rather, the process of reporting to the GRI administration requires companies look critically at their operations, and the assumption underlying this requirement is that this examination will lead to continuous improvement.⁶⁵⁵ Another limitation is that companies will have to allocate resources for staff and studies to generate the reports.⁶⁵⁶ While this may initially be viewed as a problem for some firms, in many cases these expenses will pay off in the form of additional business and better profits.⁶⁵⁷

Overall, the proposed action places reasonable requirements on the investing companies. Additionally, the host countries will benefit from investment by companies that focus on the Triple Bottom Line.

Corporate Social Responsibility and Corporate Codes of Conduct, 15 BUS. ETHICS: EUR. REV. 352, 352–58 (2006).

⁶⁴⁹ See Interview by Liliana Anam with Scott McAusland, *supra* note 643 (discussing the importance of transparency).

⁶⁵⁰ See *id.*

⁶⁵¹ See *id.*

⁶⁵² See *id.*

⁶⁵³ GRI, Reporting Framework Overview, <http://www.globalreporting.org/ReportingFramework/ReportingFrameworkOverview/> (last visited Mar. 14, 2010).

⁶⁵⁴ See *id.*

⁶⁵⁵ See Painter-Morland, *supra* note 648, at 356–57.

⁶⁵⁶ Tamara Richards & Debbie Dickinson, *Guidelines by Stakeholders, for Stakeholders: Is it Worth the Effort?*, J. CORP. CITIZENSHIP, Spring 2007, at 19, 20–21.

⁶⁵⁷ QUINN & BALTES, *supra* note 644, at 7–8.

From the perspective of CAFTA-DR's developing members, a limitation must be recognized. Those countries desperately need foreign investment and jobs.⁶⁵⁸ Therefore, they may not have the political will to revoke permits. This is why it is important that information be filed with the USTR. Even if permits are not revoked by developing members of CAFTA-DR, consumers and investors will have access to information about non-complying companies and can make informed decisions about their purchases and investment decisions. This proposal provides leverage for CAFTA-DR members that do not have the political will or economic power to refuse to admit an investor.

D. Viability of This Proposal: The Time Is Right

The time is right for this proposal. As discussed in this article, people in government, business, and throughout society are questioning the results of the free trade model underlying NAFTA, CAFTA-DR, and other agreements. This, accompanied by the recent economic downturn, is leading companies to seek ways to stay in business. Some prominent textile companies, representing a major industry in the CAFTA-DR region, have found that sustainability and profits can be pursued at the same time.⁶⁵⁹ As a result, some of them are turning to the GRI framework. Within the last three years, the Gap, Nike, the Timberland Company, Impahla Clothing, the Adidas Group, and others have submitted reports to the GRI administration.⁶⁶⁰ It should be noted, however, that while each of the companies listed has filed a report with the GRI administration, some have only filed once.⁶⁶¹ Thus, it is important to continue to monitor such reporting.

Finally, the emerging and rapidly growing green economy is tied to doing the right thing for the environment and society while making a profit. Sandy Wiggins is a chairperson at a new bank that emphasizes

⁶⁵⁸ For discussion of how Nicaragua allows companies to operate in its *maquiladora* zones nearly tax-free because it is so desperate to attract foreign investment, see *supra* text accompanying notes 480–482.

⁶⁵⁹ See, e.g., *The Case for Sustainable Business Practices*, BUS. ISSUES BULL. (Int'l Fin. Corp.), No. 4, 2004, at 2, available at [http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/BIB-4-CAM-ENG/\\$FILE/BIB-4-CAM-ENG.pdf](http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/BIB-4-CAM-ENG/$FILE/BIB-4-CAM-ENG.pdf) (providing examples of sustainable textile companies in Cambodia and the Dominican Republic).

⁶⁶⁰ GRI Reports List, *supra* note 81.

⁶⁶¹ *Id.* (Nike has only filed in 2007, and Adidas only in 2005).

lending to companies that demonstrate their efforts to pursue the Triple Bottom Line.⁶⁶² She is quoted as saying,

[t]he financial industry has a large role to play in the societal shift to a sustainable world. The emerging green economy needs to be fueled by financial products and services specifically designed to accelerate its growth, and serviced by financial experts who ‘get it’ and who understand the urgency of this shift.⁶⁶³

Considering the current economic downturn, the emerging green economy, and challenges to free trade agreements, a Sustainability Side Agreement is timely and necessary.

E. Summary of Proposal’s Benefits

Implementation of this proposal will be a significant step toward sustainable development in the CAFTA-DR region. It will shift from mere use of the words “sustainable development” in a trade agreement, to a mechanism that actively promotes its pursuit.⁶⁶⁴ The proposal recognizes that sustainability is a process, rather than an end result.⁶⁶⁵ Implementation of the plan will be one significant step in that process.

CONCLUSION

Lawmakers have used the term sustainable development in various trade agreements, including CAFTA-DR, but they fail to define it clearly.⁶⁶⁶ Moreover, they fail to include provisions that will ensure the pursuit of sustainability.⁶⁶⁷ Simultaneously, the developing members of CAFTA-DR are home to low wages, and their environmental and labor laws are lax

⁶⁶² See *Region’s First Green Triple Bottom Line Bank to Launch in Philadelphia*, BUS. WIRE, July 14, 2008.

⁶⁶³ *Id.*

⁶⁶⁴ See DESA, *From Globalization to Sustainable Development: UNEP’s Work on Trade, Economics, and Sustainable Development: Background Paper No. 1*, 2–3, U.N. Doc. DESA/DSD/PC4/BP1 (May 2002), available at <http://www.unep.ch/etu/wssd/BGpapp4fin.pdf>.

⁶⁶⁵ See *id.*

⁶⁶⁶ CAFTA-DR speaks of sustainable development in its preamble and in Article 17.9, CAFTA-DR, *supra* note 9, pmb., art. 17.9, but does not contain a definition of “sustainability.”

⁶⁶⁷ See DESA, *supra* note 664.

and poorly enforced.⁶⁶⁸ Companies operating in the CAFTA-DR region take advantage of these low standards, resulting in unsustainable development.

This article discussed the Triple Bottom Line, describing how it measures sustainability by examining three sets of effects of development on economy, social equity, and environment. As a next step, it explained the GRI framework and how it is used to measure a company's progress toward the Triple Bottom Line. Next, this article used the Triple Bottom Line to show that CAFTA-DR does not promote sustainable development in CAFTA-DR's nations. A more in-depth look at one country, Nicaragua, revealed that development under CAFTA-DR fails to meet the criteria of the Triple Bottom Line.

Therefore, this article proposed that a Sustainability Side Agreement be added to CAFTA-DR. Under the side agreement, U.S.-based firms doing business in CAFTA-DR's developing members will be required to participate in the GRI framework. New investors will be required to comply before entering the country, and existing investors will have a period of three years to file. Reports will be prepared according to the GRI framework and be filed with the GRI administration and the USTR. This mechanism will be a significant step toward sustainable development because it will require that firms examine their actions in light of the Triple Bottom Line and reveal those actions to the public.

This proposal will compel U.S.-based companies operating in CAFTA-DR's developing members to examine their activities in the light of the Triple Bottom Line. The results of this self-examination will be open to the public. In return, consumers and investors will be able to make informed decisions in light of the information revealed through the reports. Overall, this proposal is straightforward, low-cost, and simple to administer. Additionally, it promotes transparency, allowing businesses, investors, communities, and consumers to make informed choices in the marketplace.

This plan serves individuals, businesses, and governments in several ways. If trade is not fair, it is not sustainable.⁶⁶⁹ The United States

⁶⁶⁸ Citizens of CAFTA-DR countries tend to distrust their legal systems. See James Flannigan, Comment, *CAFTA Overview: Regional Coordination, Harmonization and Law Reform: A Comment*, 12 SW. J.L. & TRADE AM. 231, 232 (2006).

⁶⁶⁹ To make trade fair, governments, businesses, and individuals must pursue many inter-related objectives including respect for workers, wage equity, gender equity, cooperative workplaces, education, respect for cultural identity, and public accountability. Another tool for pursuit of those goals is through the Fair Trade movement, which includes informal standards and certification programs for Fair Trade goods. This author is currently writing a law review article exploring how Fair Trade promotes sustainable development.

will lead the CAFTA-DR countries in a new direction, making trade more fair for citizens in the region. Moreover, the Sustainability Side Agreement will serve as a model for future trade agreements as well as amendments to existing agreements. Under the agreement, the United States and its CAFTA-DR partners will require that companies file under the GRI framework and with the USTR. In turn, the USTR will make that information available to the public through the Internet. Through this process, the United States will set an example for countries throughout the world. Adoption and implementation of the Sustainability Side Agreement to CAFTA-DR will be a significant step toward a more sustainable world for future generations.