

**Testimony of David F. Waskow
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**Before the Subcommittee on Commerce, Trade and Consumer Protection
of the House Committee on Energy and Commerce
Concerning the Dominican Republic-Central America Free Trade Agreement**

April 28, 2005

Thank you for the opportunity to testify before the Subcommittee today concerning the proposed Free Trade Agreement with five Central American countries and the Dominican Republic (DR-CAFTA). Friends of the Earth is a national environmental advocacy organization and a member of Friends of the Earth International, the world's largest grassroots environmental network, with more than one million members in 70 countries worldwide.

We believe that international trade and investment can and should be supportive of environmental protection. However, this agreement's lack of adequate environmental provisions threatens the environment and public health in one of the world's most environmentally sensitive and biologically rich regions. Moreover, DR-CAFTA would undermine hard-won environmental protections by allowing foreign investors to challenge environmental laws and regulations in all of the countries, including the U.S., that are parties to the agreement. Because of DR-CAFTA's negative implications for environmental protection, a wide range of major U.S. environmental organizations, together with dozens of environmental groups in Central America, oppose this agreement.

DR-CAFTA is an extremely important trade agreement in environmental terms. My comments will focus on Central America, one of the most biodiversity rich regions on the planet, with more than 8% of all living species in the world. Four of the five Central American countries included in DR-CAFTA have tropical areas identified as "critical regions" that require the protection of biodiversity. Three out of four migratory bird routes in the Western Hemisphere pass through the DR-CAFTA countries, making the forests in this tiny strip of land an essential habitat for the survival of 225 species of birds.

In the midst of already fragile ecological zones, Central America is battling with a wide range of environmental problems. Central America has already lost more than 70% of its forest cover, and the depletion of forests has led to increased soil erosion, the deterioration of watersheds, and decreased biodiversity. Urban pollution, including air pollution, low levels of sewage and solid waste treatment, and chemical and pesticide runoff into water supplies, are rampant.

Unfortunately, essential environmental protections are lacking in much of the region. For instance, in its Environmental Review of the agreement, USTR itself determined that Guatemala and Honduras are lacking even the most basic environmental laws, such as protections for water, forests, sanitation, and biodiversity. Most countries in the region have disjointed and under funded policies that have led to severe environmental degradation.

DR-CAFTA would only exacerbate the existing problems in the region by opening Central America to substantial changes in industrial and agricultural development, many of which would worsen the environmental situation if left unregulated. Unfortunately, DR-CAFTA's environmental provisions are inadequate, contain numerous loopholes, and would not improve environmental protection.

DR-CAFTA does not mandate any country to adopt and maintain a set of basic environmental laws and regulations, a serious omission given the weak environmental standards currently existing in much of the region. Only one environmental provision – that countries effectively enforce their already existing laws – is subject to dispute settlement, and the agreement fails to provide parity between enforcement of commercial and environmental provisions, a clear step backward from the U.S.-Jordan Free Trade Agreement.

The environmental provisions also contain numerous loopholes. For instance, countries can evade the requirement to enforce their environmental laws through an escape hatch that allows them to use enforcement resources as they see fit. None of the agreement's provisions apply to judicial decisions, even including repeated failures by a country's court system to enforce environmental laws. And the requirement that countries enforce their own laws does not apply to any laws whose "primary purpose" is natural resource management, such as a forestry management plan.

Given the numerous environmental challenges facing Central America, DR-CAFTA ought to be accompanied by firm commitments to meet the capacity building needs of these countries, backed up by a permanent, dedicated and adequate source of new funding not taken from already existing programs. Unfortunately, the agreement includes no such funding. And the recently appended Environmental Cooperation Agreement fails to ensure anything more than the establishment of a multi-agency commission without even a required mandate for specific cooperative activities to improve environmental protection.

In addition, although DR-CAFTA establishes a citizen submission process to allege enforcement failures, it does not provide for any clear outcomes or actions to actually ensure that citizens of the region can achieve enforcement of environmental laws. In a step backward from NAFTA, the secretariat charged with oversight of citizen submissions is an economic institution with no environmental expertise. Moreover, the citizen submission process' lack of enforcement tools contrasts starkly with the monetary compensation that private investors can demand of governments under DR-CAFTA's investor suit rules.

The investor suit rules, found in Chapter 10 of DR-CAFTA, pose a substantial threat to environmental protection in all of the agreement's participating countries. These investor suit rules are similar to NAFTA's Chapter 11, which has allowed foreign investors to challenge environmental and public health standards before international tribunals, bypassing domestic courts. Using these rules, which provide foreign investors broad rights that do not exist under U.S. or other countries' laws, multinational investors have been able to demand compensation for the implementation of legitimate environmental protections.

Under NAFTA, Mexico and Canada have lost Chapter 11 challenges to domestic environmental protections, and the U.S. has already spent millions defending itself against claims totaling more than \$1 billion. The challenges thus far have involved a wide range of concerns, including hazardous waste, toxic gasoline additives, mining remediation measures, and food safety requirements, as well as many other public interest protections.

With DR-CAFTA, the threat of these challenges could discourage the further development of much needed environmental standards, especially for developing Central American countries and the Dominican Republic. Attempts to improve environmental standards in Central America could be chilled by the impending threat of investor litigation before international tribunals.

During debate over the Trade Act of 2002, many members of Congress, including several on the Energy and Commerce Committee, raised significant concerns about the provisions in NAFTA Chapter 11. The Trade Act of 2002 requires that trade agreements give foreign investors "no greater substantive rights" than U.S. citizens have under U.S. law. In introducing the relevant amendment, Senator Baucus instructed USTR to place a "ceiling" on investor rights at the level of U.S. law.

Unfortunately, however, DR-CAFTA would still provide foreign investors with rights to challenge environmental protections that go far beyond the rights provided under U.S. law. In its supposed fixes to the agreement's investment provisions, USTR cherry picked a few legal standards from a single Supreme Court case, taking those standards completely out of context and ignoring many key principles from U.S. Constitutional law.

The agreement continues to allow foreign investors to assert that environmental laws have caused an "indirect expropriation," or regulatory taking, of their business interests or have violated a "minimum standard of treatment" in a wide range of circumstances that would not be compensable in U.S. courts. For instance, the agreement does not include the critical Supreme Court principle that a governmental action must permanently interfere with a property in its entirety in order to constitute a taking. Nor does DR-CAFTA ensure the Constitutional principle that the government can regulate a public nuisance – such as pollution released from a property – without compensating the property owner.

In several critical respects, DR-CAFTA's investor suit rules also provide investors rights greater than those found in NAFTA. DR-CAFTA expands the definition of an "investment" to cover a wide variety of economic interests that go far beyond what is considered property in U.S. law regarding regulatory takings. The agreement also explicitly grants foreign investors the right to challenge any aspect of government decisions about natural resource agreements, such as federal oil, gas, and mineral leases.

Finally, I would like to touch on two key additional concerns regarding the agreement: agriculture and intellectual property. One of DR-CAFTA's most significant impacts is likely to be the dumping of subsidized U.S. agricultural products on Central America, a practice that under NAFTA drove small-scale farmers off their land and impoverished many others. In Mexico, this forced many small farmers to clear-cut forest areas to provide increased farming opportunities or replacement sources of income, while industrial farms have increased the levels of nitrogen and other pollution. Under DR-CAFTA, impacts for the millions of Central American small farmers whose livelihoods depend on the agricultural sector are likely to be similarly harmful.

DR-CAFTA's intellectual property rules, which go beyond World Trade Organization requirements, could threaten the region's biodiversity and put the rights of small farmers and indigenous people at risk. By requiring the patenting of a wide range of life forms, the agreement creates potential conflicts with the Convention on Biological Diversity and could limit the ability of small farmers to maintain traditional practices, such as seed saving, which help protect and sustain agricultural biodiversity. In addition, DR-CAFTA could impede efforts to ensure that the origins of traditional community knowledge utilized in seeds and medicinal treatments are fully acknowledged and appropriately compensated.

Let me conclude by saying that DR-CAFTA will have serious impacts not only in Central America. It will set critical parameters for broader U.S. trade policy, including regional agreements such as the Free Trade Area of the Americas (FTAA). Unfortunately, we believe this agreement sets our trade policy on a wrong and unsustainable course for the environment.