

**Center for Policy Analysis on Trade and Health (CPATH)**  
**PUBLIC HEALTH BRIEFING PAPER ON THE**  
**US-CENTRAL AMERICAN FREE TRADE AGREEMENT (CAFTA)**  
**April, 2004**

**OVERVIEW: EMERGING TRADE AGREEMENTS DEEPEN THREATS TO HEALTH**

The US-Central American Free Trade Agreement (CAFTA) and other pending agreements could lock in threats to public health and health care that have become evident in previous trade agreements. A number of provisions could reduce affordable access to vital human services including health care, water supply, education and energy, as well as medications. The agreement would impose trade rules at the regional level of the Americas, in broad areas of concern for health.

CAFTA proposes to establish rules for trade among seven nations (United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic). CAFTA chapters directly related to health cover trade in services, including vital human services such as health care, water, education and energy; intellectual property, which addresses access to affordable medications; standards for the safety of plants and food; and rules on how governments procure goods and services, and allocate subsidies.

Many of these areas are already matters of controversy within global-level agreements covered under the World Trade Organization (WTO), such as the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS), and the Government Procurement Agreement.

This Briefing Paper reviews five core public health concerns regarding CAFTA, with reference to some other emerging trade agreements.

- 1. Public health is unrepresented in trade negotiations.**
- 2. Health takes secondary importance to trade**
- 3. People across the globe are threatened with reduced access to vital services including health care, water supply and sanitation, education, and energy. Trade agreements facilitate privatization of these services, making them less affordable and accountable. Health is recognized as a human right.**

**BOX: CAFTA Rules on Services**

- 4. CAFTA rules preempt the authority of public officials to protect health standards: professional licensing, environmental and occupational health, alcohol and tobacco protections, privacy rules, and patients' rights**
  - 4A. CAFTA's "Domestic Regulation" rule challenges state and federal protections**
  - 4B. Professional Licensing**

**BOX: Exclusions From Services And Conditions On Professional Licensing Listed By CAFTA Countries**
  - 4C. Undermining public policy objectives and protections through government procurement**
  - 4D. Private, foreign corporations can directly challenge domestic laws and regulations**
- 5. CAFTA prevents the production and humanitarian distribution of affordable lifesaving medications.**

**Conclusion; The Public Health and Health Care Community: Reframing the Trade Debate to Prioritize Health**

## CORE PUBLIC HEALTH CONCERNS

### 1. Public Health Is Unrepresented In Trade Negotiations.

In the past, the US Centers for Disease Control and Prevention (CDC) has provided agency advice to the US Trade Representative (USTR). There is presently no formal or informal relationship between the CDC and the Office of the USTR.

A number of federal agencies have assigned staff to the Trade Policy Staff Committee. Health is not actively represented on this Committee.

The statutorily created system of advisory committees to the USTR includes Industry Sector Advisory Committees, all exclusively composed of representatives from businesses. Several overarching advisory committees address the concerns of local and state governments, or labor and the environment. None of these committees addresses public health.

CAFTA establishes a number of working groups on various topics. Some Central American countries have chosen to include their Ministries of Health where relevant. The US has not. For example, Annex 7.8 creates a Committee on Technical Barriers to Trade (TBT). Costa Rica names its Ministry of Health as a member of the Committee, in addition to its trade and other offices. The US does not name any representative for health on this committee. The TBT agreement at the level of the World Trade Organization has provided the basis for key decisions about asbestos exposure and tobacco imports. TBT issues are of serious concern to public health.

### 2. Health is of Secondary Importance to Trade

During the 1993 Vienna Human Rights Conference, 171 governments arrived at the consensus that “the promotion and protection of human rights is a matter of priority for the international community.” Health is recognized as a fundamental human right, a universal aspiration of all people, and a matter of economic development and security. Protection from factors that negatively impact the health of individuals and populations is a precondition for the enjoyment of all human rights. The International Covenant on Economic, Social and Cultural Rights establishes a role for governments in respecting, protecting and fulfilling the conditions necessary for health and well-being. At the World Summit for Social Development convened in Geneva in 2002, national leaders pledged to protect health, and to “give the highest priority to the promotion of social progress, justice, and the betterment of the human condition.”

International trade agreements, conversely, prioritize the rights of corporations over health and human rights. This is documented in the remainder of this report. One striking example from CAFTA:

**Under Article 21.1.2 (Exceptions), nations are granted the right to exempt measures that are necessary to protect human, animal or plant life. However, this exception applies only if it is “not applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries, or a disguised restriction on trade in services.” In comparison, Article 21.2, Essential Security, gives nations the right to exempt any measures they consider necessary for peace and security. There are no qualifications to this right.**

Historically, when nations have taken the position that their regulations are exempt from trade agreement rules because they are necessary to protect human, animal, or plant life or health, they have had to shoulder the burden of proof. In doing so, nations have had to meet a two-tiered test: 1. show that the health or environmental measure is necessary, i.e., that it is effective, and that no less trade restrictive measures to achieve the same public health purpose were available; and 2. if proven to be necessary, show that the

proposed public health measure does not constitute a “disguised restriction on international trade” or “arbitrary or unjustifiable discrimination.” A number of WTO rulings have applied the “necessity” test. On only one occasion was justification found to uphold the public health measure. Other trade panel decisions have ruled against the public health measures. One notable case occurred in 1990 when Thailand’s restriction of importation of U.S. cigarettes and internal taxes were found unjustified, even though the WTO trade panel recognized that chemicals and other additives in U.S. cigarettes may have been more harmful than those in Thai cigarettes.

**3. People across the globe are threatened with reduced access to vital services including health care, water supply and sanitation, education, and energy. Trade agreements facilitate privatization of these services, making them less affordable and accountable. Health is recognized as a human right.**

CAFTA opens the door to further deregulation and privatization of services such as health care and water. Health care corporations in the Americas have undermined national health systems, national economies, and the public’s health. Privatizing and deregulating water has resulted in serious harm to population health, through higher prices, decreased access to safe water, and increased water-related illnesses such as cholera.

**CAFTA Rules on Services**

**National Treatment (Article 11.2):** Nations cannot provide less favorable treatment to any service supplier from another CAFTA country than to a domestic supplier.

**Example:** U.S. hospitals could not give preferences to U.S. medical transcription companies.

\*\* Both federal and state governments are covered by this rule.

**Most Favored Nation (Article 11.3):** Nations cannot provide less favorable treatment to any one CAFTA country compared with another CAFTA country.

**Example:** If El Salvador permits companies from any other CAFTA country to operate hospitals in El Salvador, it cannot treat hospital corporations from a third CAFTA country, such as the U.S., less favorably. This opens Central American hospitals to US corporate health care.

\*\* State governments are not covered by this rule.

**Market Access:** Nations cannot impose limits on the number of service suppliers, the number of total services transactions, the number of services operations or the total services output, or a quota on the number of people employed.

**Example:** The US could not limit the number of specialty diagnostic imaging companies in an area. Limits on the number and type of tobacco and alcohol distributors could be challenged by any of the Central American countries or the Dominican Republic, all of which produce and distribute both types of products.

\*\* Federal and state governments are covered by this rule.

CAFTA is a “negative list” or “top down” agreement, in which all services are automatically covered by CAFTA rules, unless they are specifically excluded from coverage in writing in an Annex. Health care, water supply and sanitation, education and energy are therefore automatically covered by and subject to the rules of CAFTA. The Chapter on Services (Chapter 11) incorporates provisions of the WTO’s General Agreement on Trade in Services (GATS), some of which are still under negotiation due to their controversial nature.

This means that services must be available for competition by foreign private companies. Under the “Market Access” rules of CAFTA, nations cannot impose limits on the number of private sector service suppliers, the number of services operations or the total services output, or have a quota on the number of people employed. State and local agency regulations and actions based on economic, environmental, or social concerns, for example mandating staff-patient ratios in hospitals, could be challenged by other CAFTA nations as trade violations under CAFTA.

Further, under “National Treatment” rules of CAFTA, nations cannot provide less favorable treatment to any service supplier from another CAFTA country than to a domestic supplier. Although they may serve valuable social, economic, and environmental purposes, laws that could favor domestic service suppliers over foreign companies, such as to promote local economic development, can be challenged as trade violations under CAFTA.

#### **4. CAFTA rules preempt the authority of public health officials to protect health standards: professional licensing, environmental and occupational health, alcohol and tobacco protections, privacy rules, and patients’ rights**

CAFTA equates government regulations and public services with barriers to trade such as tariffs. Domestic regulations, including those proven effective in protecting and advancing public health, could be challenged before international trade tribunals as unnecessary barriers to trade.

#### **4A. CAFTA’s “Domestic Regulation” rule challenges state and federal protections**

Many nations have expressed caution about the final wording of the “domestic regulation” rule in the General Agreement on Trade in Services (GATS), which is still being negotiated at the WTO level. As written, it can serve as a basis for prioritizing commercial concerns over legitimate protections for health.

The Article on Domestic Regulation (11.8) in CAFTA adopts controversial provisions of GATS that would apply to both federal and state measures, which limit laws and regulations, including measures which protect health, and may affect health care and other services. This rule requires that domestic measures be:

- **No more burdensome than necessary to ensure the quality of the service**
- **Not a restriction on the supply of a service**
  
- **Decisions on whether or not a domestic measure is “more burdensome than necessary,” and therefore a restriction on trade, are made by trade tribunals, not health experts.**

When a trade challenge is lodged, Dispute Resolution Tribunals are appointed to hear the evidence and issue a ruling. Public health professionals may view a technical standard that protects industrial or environmental health, or a licensing rule, as “necessary to the quality of a service,” while tribunal members, who are trained in commodity trading, may not.

**Example: The US banned imports of tuna from countries that did not mandate fishing methods which reduced the incidental killing of dolphins. This ban was overturned in 1991 by a WTO trade tribunal because the U.S. did not pursue less trade restrictive actions, e.g., negotiating an international agreement on fishing practices. (Trade panels have not considered whether alternative measures are socially and politically feasible as a practical matter, only whether they are theoretically available.)**

- **“Not a Restriction on the Supply of a Service”** - Standards and licensing may in fact restrict the supply of a service, where oversupply of specialized health services results in high social costs or poor quality.

**States must be able to set standards that restrict access to hazardous substances such as alcohol and tobacco. Licensing for health professionals, hospitals and other health care facilities, as well as for construction contractors, are sensitive issues that require careful consideration by local, state and national representatives, as well as through regional and international bodies. Hospitals must be able to protect medical and financial privacy. The Domestic Regulation rule in CAFTA does not exempt or provide a mechanism to address these important issues.**

**Since CAFTA is a “negative list” agreement, all federal and state measures are automatically subject to its rules, and to possible trade challenge, unless they are specifically excluded in writing in an Annex.** “Measures” are defined as any law, regulation, procedure, requirement, or practice. The US schedule of exemptions from CAFTA, stated in Annex I, exempts all current state measures regarding services from a number of CAFTA rules, if those measures do not already conform with CAFTA. These rules include National Treatment, Most Favored Nation, Local Presence, Performance Requirements, and Senior Management and Boards of Directors. **However, federal and state measures are not exempt from the Domestic Regulation rule.** Countless numbers of state measures, which do not conform with CAFTA’s Domestic Regulation rule and which have not been specifically exempted from coverage under CAFTA, may be subject to challenge as trade violations under CAFTA.

**Social services, including health and education,** are excluded from coverage under the Domestic Regulation rule only if they are “social services established or maintained for a public purpose.” Since many health and educational services would not meet this definition, they would be subject to the Domestic Regulation rule of CAFTA.

#### **4B. Professional Licensing**

Licensing health care professionals is a key quality control measure. In response to the shortage of nurses in the US, created in part by insufficient pay and stressful working conditions, many employers have turned to recruiting nurses from developing countries. Immigrant nurses are often highly skilled, but face exploitive working conditions in the US. Further, they may compound serious staff shortages in their countries of origin when they leave. Similarly, US health insurance companies frequently threaten to lower their expenses by recruiting foreign physicians. Recent news about outsourcing highly skilled jobs from the US, including medical transcription and radiology interpretation, give meaning to these threats.

The USTR’s Advisory Committee on Services (Industry Sector Advisory Committee 13) consists almost exclusively of members of the Coalition of Service Industries, the largest companies in finance, insurance, and telecommunications in the US. Their comment on the treatment of health care services in CAFTA:

**“CAFTA breaks new ground concerning the temporary licensing of physicians and surgeons that will be helpful for US hospitals engaged in international medical care to gain market presence. The committee encourages negotiators to continue to refine temporary licensing language for inclusion in all future Free Trade Agreements.”**

In CAFTA, the US does not state conditions or limitations for temporary licensing of health care professionals. The five Central American countries generally state that the principle of reciprocity would govern any changes in their rules. However, there are some interesting variations on this issue and on coverage of vital human services, as presented below.

**EXCLUSIONS FROM SERVICES AND CONDITIONS ON PROFESSIONAL LICENSING  
LISTED BY CAFTA COUNTRIES**

**Costa Rica**

Foreign physicians and nurses who wish to join the professional associations in Costa Rica (a condition of practicing) must prove that in their home jurisdictions, Costa Rican professionals can practice in like circumstances.

Costa Rican physicians and surgeons, dental surgeons, microbiologists, nurses and nutritionists get preference for certain paid social services slots. Foreign professionals can practice temporarily.

At private institutions of higher education, no less than 85% of faculty and administrators must be Costa Rican nationals.

**El Salvador**

Foreign professionals must be authorized to reside permanently, and reciprocity must exist in the country of origin. This applies to doctors, dentists, veterinarians, midwives, nurses, physiotherapists, and paramedics.

Only Salvadorans can teach natural history and the Salvadoran constitution.

Preferences for socially or economically disadvantaged minorities can be adopted or maintained with respect to National Treatment, Local Presence, Performance Requirements, or Senior Management. (But not regarding Market Access or Most Favored Nation)

**Guatemala**

Notary Publics must be Guatemalan.

**Honduras**

Only Hondurans can serve as customs agents or notaries.

Must be Honduran by birth to exercise senior management of newspapers

Mail service is reserved to HONDUCOR; but telecommunications is no longer a public monopoly

Electricity is exempt from Market Access rules

Public sector has responsibility for, but can contract out for:

Sewers, water supply, fight against marine contamination

Professional services:

Based on reciprocity; temporary practice allowed under some circumstances

No more than 5% of nurses in each medical facility can be foreign nationals

Foreign clinicians, veterinarians and microbiologists must pay higher registration fees than Central Americans

**Nicaragua**

Professional services: Recognition is based on reciprocity

Drinking water and sewage services are reserved to ENACAL, and are exempt from Market Access rules

#### **4C. Undermining Public Policy Objectives and Protections through Government Procurement**

Local, state and national governments use procurement practices as important instruments for enacting public policy. Contracts can specify standards for quality and performance, environmental protection, public health and safety, gender and racial equity, labor practices and human rights. Local hiring and other practices can favor sustainable economic development. Government contracts can call for and enforce medical and financial privacy rules.

CAFTA rules on government procurement undermine these important government capabilities. Under CAFTA, governments cannot favor local companies or service suppliers, or impose technical specifications if they pose “unnecessary” barriers to trade. The rules apply to purchases over certain income levels: \$6,725,000 for construction and various lower amounts for goods and services at the federal and sub-federal levels.

The WTO’s Agreement on Government Procurement contains similar rules, but it applies only to the 28 countries that signed it, all of which are developed countries. CAFTA is a backdoor route to weakening government protections.

The government procurement provisions in Chapter 9 of CAFTA would apply to governments at the national level. They also apply to state and local jurisdictions if they have affirmatively agreed to sign on. While this kind of agreement would normally go through state legislatures, the USTR has approached only governors for their consent. Given the highly secretive nature of the trade negotiations, it is likely that many of the 23 US states that have agreed did so with little public debate. Once CAFTA is approved, states that have signed on to the Government Procurement provision would have to take extraordinary and costly steps to reverse their decision.

**Example: A recent case in California illustrates the potential problems. A subcontractor to a University of California hospital hired a medical transcriptionist in Pakistan, but then failed to pay her. The transcriptionist contacted the hospital, threatening to reveal confidential medical records if she was not paid. The hospital claimed it was unaware that its work was shipped overseas, but enacted a policy to keep medical transcription work within the US in the future. The University is a state institution. Under CAFTA’s government procurement rules, if California agrees to sign on, this limitation could be a trade violation.**

States can apply “restrictions that promote general environmental quality in the state,” but only “as long as such restrictions are not disguised barriers to trade.” (note to Annex B in Section 9) Trade tribunals, not public health or environmental officials, would determine whether environmental or trade considerations took precedence in the case of a challenge.

#### Country Exceptions to the Government Procurement Provisions

CAFTA countries listed some exceptions to this Chapter, but they were not consistent or sufficiently extensive to protect public health, the environment, human rights, or other policy goals.

Costa Rica and El Salvador listed a great many hospitals that would be covered.

Costa Rica and Nicaragua both excluded health and social services and electricity. Nicaragua additionally excluded education. Guatemala excluded only electricity, and Honduras only air transport.

The US excluded set-asides for small and minority-owned businesses, and utilities and transportation. But it did not exclude most vital human services: health care, water and sanitation, education, and energy.

#### **4D. Private, Foreign Corporations Can Directly Challenge Domestic Laws and Regulations**

As under the foreign investment chapter (Chapter 11) of the North American Free Trade agreement (NAFTA), investor rights provisions in CAFTA give private companies the ability to challenge laws and regulations adopted by democratically elected governments and officials, seeking compensation for loss of current and future profits. Decisions are made by appointed trade tribunals that are not required to have any experience or expertise in public health.

**Example: Under a similar rule in NAFTA, a Canadian company has been able to stop California from removing MTBE from gasoline, although MTBE is a likely carcinogen that was found to be leaking into the water supply.**

**Example: Under similar investment provisions of NAFTA, the US-based Metalclad company successfully sued Mexico for “expropriation” of their property and won \$16 million, resulting from San Luis Potosi’s decision not to reopen a waste disposal site, which had been operated by Metalclad, and which a geological audit found was polluting the ground water.**

**Chilling Effect: The Investor Rights provision of NAFTA has had a chilling effect on national legislation. In 1994, Canada withdrew its intent to legislate "plain" packaging for cigarettes when American tobacco company Philip Morris threatened to sue the Canadian government, demanding millions of dollars for "expropriation" of their intellectual property, i.e. their trademarks, if Canada proceeded with its plan.**

The investment rights provision in CAFTA, with its broad and undefined language, opens the door for direct challenges by private corporations to legitimate public laws and regulations, including those that protect health and the environment.

#### **5. CAFTA Preempts the Production And Humanitarian Distribution of Affordable Lifesaving Medications – Intellectual Property Provisions Threaten Access**

CAFTA presents a number of road blocks to the introduction of generic medicines. The production of generic medicines, and in some cases even the prospect of competition from generics, have consistently resulted in lower prices for pharmaceuticals. A developing generic medications industry promises to make affordable medications increasingly accessible to the populations of Central America. CAFTA would significantly curtail that industry.

CAFTA provisions exceed the requirements of the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires countries to provide 20-year patent protection for pharmaceuticals. Under TRIPS, governments can authorize generic production while products are on patent, a process known as compulsory licensing. However, to be affordable, generic companies must be able to rely on the results of human and animal studies that demonstrate to regulatory authorities that drugs already approved for the market are safe and effective. Generic producers then can show that their

generic version is chemically equivalent and bioequivalent (meaning it will work the same in the body as the brand-name drug). CAFTA provisions go beyond TRIPS in preventing access to such regulatory data, thereby preventing or greatly delaying the production of generics. These provisions include an additional extension of time limits, after the 20-year patent, and application to drugs produced anywhere in the world, even if the drug is not under patent in a given country.

These provisions contradict the historic 2001 Doha Declaration on the TRIPS Agreement and Public Health, in which all WTO members "affirm[ed] that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all" and "in this connection ... reaffirm[ed] the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose."

### **Conclusion: The Public Health and Health Care Community: Reframing the Trade Debate to Prioritize Health**

The policies and actions of the United States and other governments play a pivotal role in shaping the ground rules for global trade. The trade negotiation process presents an important opportunity to promote a safe and just global community with publicly accountable and sustainable health care, water supply, and other vital human services, and sound public health policies. The Call for Public Health Accountability in International Trade Agreements, urges our elected representatives, the United States Trade Representative, and our allies around the globe advocating for fair trade agreements, to:

1. Assure that health takes priority over commercial interests.
2. Call for an assessment of the impact of trade agreements on population health, and assure based on such assessment that these agreements do not have an adverse impact on health.
3. Exclude vital human services such as health care and water, and intellectual property rules that affect affordable medications, from trade negotiations and challenge under trade agreements.
4. Include public health representatives in the negotiating advisory process, and promote transparency and democratic accountability at all levels of trade negotiations.
5. Support enforceable commitments to advancing population health, and to achieving universal access to health care, affordable medications, and safe, affordable water in the U.S. and internationally.