

CPATH ♦ Center for Policy Analysis on Trade and Health

Bringing a Public Health Voice to Trade and Sustainable Development

To: Rep. Zoe Lofgren
From: Ellen R. Shaffer and Joe Brenner, CPATH
Re: Health Concerns regarding CAFTA
Date: July 15, 2005

Representative Lofgren, CPATH appreciates the opportunity to present you with a summary of several key concerns regarding the adverse health effects of CAFTA. This memo is based on CPATH's analysis, and a number of national health organizations have endorsed our views. In summary, these concerns are:

- 1. Public health is unrepresented in trade negotiations.**
- 2. CAFTA's "Domestic Regulation" rule challenges state and federal health protections.**
- 3. CAFTA destabilizes professional licensing rules.**
- 4. Government Procurement rules undermine public policy objectives and protections.**
- 5. Private, foreign corporations can directly challenge domestic laws and regulations.**
- 6. CAFTA prevents the production and humanitarian distribution of affordable lifesaving medications.**

1. Public health is unrepresented in trade negotiations. The US Trade Representative's Advisory Committees are legally required to include a fair balance of interests. These Advisory Committees are highly influential in determining trade policy, according to Committee members and to a report by the General Accountability Office in 2002. There is significant representation by the pharmaceutical, tobacco, alcohol, processed food and health insurance industries, but no representative concerned with the effects of trade agreements on people's health. The GAO report recommended that USTR include public health and other key unrepresented interests. On May 2, 2005, CPATH and 8 other national health organizations formally requested such representation in letters to the USTR and Secretary of Commerce. (Request attached separately.) The USTR has provided no timeline for meeting this request. The Secretary of Commerce has not responded.

2. CAFTA's "Domestic Regulation" rule challenges state and federal protections. The Article on Domestic Regulation (11.8) in CAFTA adopts controversial provisions of the WTO's General Agreement on Trade in Services (GATS) that would apply to both federal and state measures. This Article limits laws and regulations, including measures which protect health, and applies to health care and other services. It 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. Public health

officials may view a technical standard that protects industrial or environmental health, or a licensing rule, as “necessary to the quality of a service,” while trade dispute resolution tribunal members, who are trained in commodity trading, may not.

Our consultation with California health officials suggests that regulations at risk can include the safety of water, sewage, health care services, and food, as well as state regulations on health professional licensing, and tobacco and alcohol control.

The Domestic Regulation rule is still being negotiated at the WTO level, and therefore there are no GATS dispute decisions yet on this particular rule. However, in numerous disputes under WTO agreements and NAFTA, the health defense has failed in all cases except one. For example, the U.S. lost a 1991 WTO dispute regarding its ban on imports of tuna from countries that permitted fishing methods which incidentally kill dolphins; the U.S. sought to protect the dolphins. Under NAFTA, Mexican taxpayers were required to pay the Metalclad Company \$16 million when Mexico refused to reopen a toxic waste dump which Metaclad planned to operate.

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.

The US schedule of exemptions from CAFTA, stated in Annex I, on p. I-US-14, exempts all current state measures regarding cross border services from a number of CAFTA rules, if those measures do not already conform with CAFTA. These rules include: National Treatment (Articles 10.3 and 11.2), Most-Favored-Nation Treatment (Articles 10.4 and 11.3), Local Presence (Article 11.5), Performance Requirements (Article 10.9), and Senior Management and Boards of Directors (Article 10.10).

However, federal and state measures are not exempt from the Domestic Regulation rule (Article 11.8). 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.” It is not well established what a public purpose is. If it refers to ownership or operation exclusively or primarily by a public sector entity, many health and educational services would not meet this definition, and would be subject to CAFTA’s Domestic Regulation rule.

Further it is unclear whether future measures related to health and social services, however defined, would be exempt from **Market Access** rules. This rule also prohibits limits on the supply of a service. CAFTA says such future rules are exempt only to the extent they are listed in Annex II.

On p. II-US-3 of CAFTA Annex II, in the version of CAFTA posted today on the USTR website, the U.S. lists an exemption to the Market Access rule for social services, but

then refers to Article 10.4. Article 10.4 in the Investment chapter is the Most Favored Nation rule, not Market Access.

On p. II-US-8, the U.S. separately lists an exemption to the Market Access rule in the Services chapter, 11.4, and only to this rule, for all sectors. The exemption says the U.S. can adopt or maintain any measure “that is not inconsistent with the United States’ obligations under Article XVI of the General Agreement on Trade in Services.”

Therefore, since the U.S. has committed to subject hospitals and health insurance to market access rules under GATS, there is reason to believe that future measures related to these services could be subjected to Market Access rules under CAFTA. (The Investment chapter specifies that in the event of a conflict between itself and another chapter, the other chapter shall apply.)

3. CAFTA destabilizes professional licensing rules.

Licensing health care professionals is a key quality control measure. 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.

4. Government Procurement rules undermines public policy objectives and protections.

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.

The government procurement provisions in Chapter 9 of CAFTA would apply to governments at the national level. They also apply to 23 U.S. states and additional local jurisdictions if they have affirmatively agreed to sign on. 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.

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)

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 agreed to sign on, this limitation could be a trade violation.

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 setasides 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.

5. Private, foreign corporations can directly challenge domestic laws and regulations.

There are a few and relatively inconsequential changes from NAFTA in the CAFTA investor-state rules. CPATH finds persuasive other analyses that find CAFTA continues to provide foreign private investors greater rights than they enjoy under U.S. law.

Regardless of that issue, the CAFTA provisions noted above provide new grounds for foreign investors, and CAFTA party governments, to challenge U.S. domestic regulations related to health protections and to health-related services. These challenges would bypass the U.S. judicial system and would be adjudicated by transnational trade tribunals, which in the past have not supported health claims.

6. CAFTA prevents the production and humanitarian distribution of affordable lifesaving medications.

CPATH has documented our concerns regarding this issue in our testimony to the U.S. House Committee on Ways and Means. We attach that testimony separately, and simply refer to that issue in this memo.