

Memo from Department of Commerce/USTR to Rep. Lofgren, and CPATH Responses  
July 20, 2005

*Note: On July 15, 2005, CPATH summarized a number of health concerns regarding CAFTA in a memo requested by Rep. Zoe Lofgren. She offered to forward these concerns to the Department of Commerce. Following is the Dept. of Commerce's response to issues raised by CPATH on health issues, and by California State Senator Liz Figueroa on government procurement.*

The CAFTA creates a level playing field for trade. The agreement is not just about tariffs, however. It encourages the CAFTA governments to fight corruption, adopt open and transparent rulemaking procedures and installs non-discriminatory laws and regulations. These elements are the hallmark of due process and are in place at all levels of government in the United States.

**The U.S. Government seeks input from segments of society, including public health representatives, in trade negotiations.**

- The Office of the United States Trade Representative (USTR) manages a trade advisory committees (ITACs) system in cooperation with the Department of Commerce (Commerce) and other federal agencies. USTR has met within the past few weeks with a number of public health groups, including the Center for Policy Analysis on Trade and Health (CPATH), who are interested in serving on the trade advisory committees. Their request is being given careful consideration.
- The Industry Trade Advisory Committees (ITACs) are not the only source of private sector input to trade negotiations. Before negotiating a free trade agreement, the Administration publishes a Federal Register notice and holds a public hearing in order to obtain public comments that would assist USTR in amplifying and clarifying negotiating objectives for the proposed agreement and to provide advice on how specific goods and services and other matters should be treated.

CPATH NOTE: Only cleared advisors on USTR Advisory Committees have access to the content of ongoing negotiations. USTR agreed to talk with CPATH and colleagues after repeated requests from us. Staff were unable to provide any information about the content of current negotiating proposals, or to tell us what the US offered in June under GATS. (USTR released the previous GATS offer in 2003 but is holding this one in secret.)

**The CAFTA fully preserves the United States' right to regulate. It does not challenge state and federal health protections.**

- The agreement ensures that federal, state and local agencies continue to have an absolute right to set environmental, health, and safety standards at the levels they consider appropriate. The agreement simply provides that the legitimate standards that governments impose must be non-discriminatory and transparent, and not be used as disguised barriers to trade. Nothing in CAFTA prevents the United States or any state and local government from enacting, modifying, or fully enforcing domestic laws protecting consumers, health, safety, or the environment.

CPATH NOTE: The key word here is "simply." Trade dispute panels have routinely found that particular safety standards are in fact discriminatory even if on their face they don't state that they are.

They may also find that these standards are not the least trade-restrictive possible.

The only real protection for environmental, health and safety standards is to explicitly exclude them from coverage under CAFTA rule. As our memo documents, CAFTA does not do this.

- CAFTA dispute resolution procedures provide that, on request of a disputing Party, or on its own initiative, the dispute resolution panel may seek information and technical advice from any person or body that it deems appropriate, including health experts.

CPATH NOTE: Health experts should be required where appropriate, not optional.

**The CAFTA provides a transparent, non-discriminatory framework under which professional services providers in the CAFTA-DR region can export their services. The agreement recognizes the some professions are subject to licensing requirements, and in no way preempts the role of professional licensing organizations.**

- The CAFTA, consistent with the principle of non-discrimination, provides that licensing of professionals, such as lawyers, doctors, and accountants, should be based on objective and transparent criteria, such as ensuring competence. The CAFTA does not remove or weaken U.S. licensing and certification requirements.

CPATH NOTE: If health professional licensing is not specifically excluded from CAFTA rules, it is included. Licensing rules in the US could be considered discriminatory because they differ from those of other countries.

- The temporary licensing provision in CAFTA states: “where the Parties agree, each Party shall **encourage** the relevant bodies in its territory to develop procedures for the temporary licensing of professional service suppliers of another Party.” The authority for determining whether or not to pursue and approve temporary licensing procedures remains with the professional licensing organizations.

**CAFTA Procurement Provisions – promoting open, transparent and non-discriminatory purchasing procedures routinely applied by the U.S. federal and state governments**

- A longstanding objective of U.S. trade policy has been to open opportunities for U.S. suppliers to compete on a level playing field for foreign government contracts. The CAFTA guarantees U.S. access to a \$8 – 12 billion procurement market which includes sectors where U.S. goods and services companies are very competitive (aerospace, energy, health care, construction, environmental technology, and information communication technology).
- There is nothing in the agreement that would prevent a government from specifying non-discriminatory standards for quality and performance, environmental protection, and public health and safety. The CAFTA government procurement rules do not undermine public policy objectives and protections.
- As is true under the WTO’s Agreement on Government Procurement and all other Free Trade Agreements to which the United States is a party, a state’s commitment to cover government procurement under the CAFTA is voluntary. A state decides whether, and the extent to which, it will

cover its procurement under the agreements and the manner in which it will commit to cover its procurement.

- Regarding the concerns highlighted with the University of California's decision on outsourcing, the CAFTA and other trade agreements only cover prime contracts. Additionally, this particular instance would not violate CAFTA, were it in force, because the University of California is not covered by the state under CAFTA, the WTO agreement and other FTAs.

**CPATH NOTE:** UC isn't covered by CAFTA. Other medical facilities are. This is only a matter of chance. If Illinois lost a trade challenge to its right to keep medical transcription in-state, would California have any hope of passing a similar law?

**CAFTA Investment Rules Promote Fair, Rules-Based, and Transparent Systems.**

- Foreigners who invest in the United States get access to fair, transparent, and rules-based legal systems. But for many U.S. investors, the playing field is not level. Foreigners get access to the U.S. legal system, but U.S. investors overseas are often disadvantaged.
- Trade agreements like CAFTA strengthen transparency and the rule of law and promote anti-corruption efforts. And, when all else fails, they provide a fair way for investors to protect their rights through investor-state arbitration.

**CAFTA does not prevent the production and humanitarian distribution of affordable lifesaving medications**

- CAFTA-DR does nothing to disrupt a country's ability to protect public health. This means that countries can take all necessary actions in order to ensure adequate supply of drugs to address epidemics, such as HIV/AIDs, tuberculosis, and malaria, and national health emergencies. They can do that now, and they can do that after CAFTA-DR.

**CPATH NOTE:** No, countries' rights to supply drugs are narrower under CAFTA than under existing WTO rules under TRIPS.

- The CAFTA does not hinder access to generic drugs. In order to approve a drug for sale, countries require extensive information from a company regarding the safety and efficacy of the drug. Under CAFTA, companies that undertake this costly process are protected from competitors piggy-backing off the information provided by the first company in bringing a drug to market for five years. If the drug is not under patent, competitors would be free to conduct their own tests and submit their product for approval.

**CPATH NOTE:** No one expects generic drug companies to recreate clinical trials. Doing so would be unethical (requiring that researchers deny a drug we know is effective to some study subjects) and costly.

This is called data-protection and is already required by the World Trade Organization. By way of comparison, the European Union (E.U.) requires data protection for 6 – 10 years.

**CPATH NOTE:** The WTO recognizes that developing countries require different rules from the EU.

- CAFTA-DR offers state of the art intellectual property protections for pharmaceutical companies looking to do business in Central America. With strong protection for patents in the CAFTA-DR, pharmaceutical companies will be potentially increasing, rather than decreasing the availability of medicine.
- The U.S.-Jordan FTA, signed in 2000, contained an intellectual property chapter that covered data protection. Since 2000, there have been 32 new innovative product launches in Jordan, a substantial increase in the rate of approval of innovative drugs.

**CAFTA will Accomplish More for Worker Rights than Trade Preference Programs**

- CAFTA offers a better enforcement mechanism, a more constructive way to solve labor problems and contains stronger obligations on worker rights.

## CAFTA - GOVERNMENT PROCUREMENT

Governments are typically the single largest purchasing entity in any market. Government procurement is generally ten to fifteen percent of a country's GDP. Total GDP of our six CAFTA-DR trading partners is over \$83 billion, thus total procurement for these countries is estimated to be between \$8 billion and \$12 billion.

The Agreement's government procurement provisions provide for non-discriminatory access to the procurements of the largest purchasing entities in the CAFTA-DR region. These procurements include sectors where U.S. goods and services companies are very competitive, including aerospace, energy, health care, construction, environmental technology, and information communication technology (ICT).

The Agreement covers the purchases of most Central American and Dominican Republic central government entities, including key ministries and state-owned enterprises. Central America and the Dominican Republic also agreed to include a vast majority of their provinces and municipalities. U.S. companies will immediately benefit as Central American and the Dominican Republic governments implement CAFTA-DR's procurement obligations. Some of these benefits are highlighted below.

- Under CAFTA-DR, Honduras will eliminate the requirement that foreign firms act through a local agent in order to participate in public tenders.
- The CAFTA-DR requires Parties to apply fair and transparent procurement procedures, and just as importantly, provide timely and effective bid review procedures, should there be concerns about award of the bids.
- CAFTA-DR addresses current inadequate notification procedures and prescribes that bids be open for a minimum of forty days.
- CAFTA-DR clarifies that build-operate-transfer contracts (BOTs) are within the scope of government procurement. BOTs act as financing vehicles for large-scale construction projects and the building or rehabilitation of public work facilities and figure prominently in CAFTA-DR governments' infrastructure financing plans. The Chile Free Trade Agreement was the first free trade agreement to contain this provision and it is significant that the CAFTA-DR also contains the guarantee that U.S. suppliers receive non-discriminatory and transparent treatment when competing for BOT contracts.
- The Dominican Republic will phase out association and participation requirements placed on foreign companies that want to do business with the government.

### *Key CAFTA-DR Procurement Provisions*

- Central American governments, ministries and departments cannot apply "buy local" provisions that discriminate against U.S. suppliers and the Dominican Republic is phasing out such provisions. Low-value contracts are excluded and the U.S. small business set-asides program remains unchanged
- The CAFTA-DR imposes strong disciplines on government procurement procedures, such as requiring advance public notice of purchases, provision of information to all interested suppliers regarding covered procurement opportunities, as well as timely and effective bid review procedures.
- The Agreement contains strong provisions to ensure integrity in government procurement. CAFTA governments must also institute debarment procedures to weed out suppliers that engage in fraudulent or illegal actions related to procurement. This is a groundbreaking provision.