

# Why We Say No to CAFTA

Analysis of the Official Text

Bloque Popular Centroamericano  
Alliance for Responsible Trade  
Hemispheric Social Alliance

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This document is the product of a collective effort by a group of Central American and U.S. women and men. It is part of a comprehensive public-education campaign on the U.S.-Central America Free Trade Agreement (CAFTA) being carried out by Central American and U.S. organizations in the Bloque Popular Centraamericano and the Hemispheric Social Alliance.

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# Introduction

This document is the product of a collective effort of analysis of the official text of the free-trade agreement “negotiated” by the Central American and U.S. governments. That agreement is currently in the process of ratification by the National Assemblies and Congresses of those countries.

This effort was made in order to contribute to public understanding of CAFTA through the “decoding” of its logic and contents, so as to identify the social, economic, political and environmental impacts that its implementation would generate.

CAFTA is much more than a simple trade agreement, as it includes a range of mechanisms that combine prohibitions on governments with rights for foreign investors on such issues as investment, national treatment, intellectual-property rights, market access, public services and access to bidding on public contracts.

If implemented, CAFTA would transform privileges for transnational corporations into rights. Since CAFTA would be approved as a treaty in Central America, it would have legal precedence over all secondary legislation in those countries.

Looking at ourselves through the mirror of other countries – such as Mexico, which has more than ten years of experience under NAFTA – the enormous social impacts generated by these agreements becomes clear, on such issues as agriculture, the environment, the de-linking of productive sectors, and the deterioration of labor conditions and families’ well being.

CAFTA was negotiated behind people’s backs. It is based on a logic that favors profit over human rights and sustainability. It is clearly intended to facilitate the accumulation of capital to complement and lock into place the neoliberal reforms carried out by governments in the region.

Our analysis of the official CAFTA text confirms the enormous dangers its implementation would pose, potentially affecting our lives, our environments and the well being of the population in general. For those reasons, with the force of reason and the fervent conviction that, through the integration of our peoples, it is possible to construct another Americas, we say no to CAFTA.

# 1. Agriculture

**R. Dennis Olson,  
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The secretly negotiated text of the Central American Free Trade Agreement (CAFTA) has now been made public, and it is not good news for farmers either in the United States or in the five Central American countries that signed it. However, multinational agribusiness cartels are gleeful. It will now be a test of our democratic institutions, in both Central America and the United States, to see if an open public debate over this flawed treaty can expose it for what it is: just another corporate giveaway to multinational agribusiness cartels at the expense of both independent family farmers in the U.S., and small and subsistence peasant farmers in Central America. There is no agriculture Chapter in the CAFTA text, which somewhat complicates the analysis of CAFTA's possible impacts on agriculture. The following analysis draws on aspects of several Chapters that most directly pertain to agriculture and food security.

## **Expanded predatory dumping of agricultural products**

It is not surprising that agribusiness cartels have won language in CAFTA that clears the way for expanded predatory “dumping” of agricultural products at below the cost of production from one country to another as a means to keep the prices received by farmers in all countries as low as possible. Agribusiness wants to be able to dump commodities in order to beat down commodity prices to ensure cheap raw materials that unfairly subsidize further industrialization and massive centralization of agriculture. Keeping the price of feed grains as cheap as possible represents a massive subsidy to inhumane industrial animal factories that exploit workers and animals and pollute the environment. Additionally, CAFTA expands NAFTA’s Chapter 11 provision that allows private investors to demand compensation and regulatory relief from government due to laws or regulatory measures that are alleged to have the effect of ‘expropriating’ the investor's anticipated profit on the investment. For example, a U.S.-based agribusiness could sue a Central American government if it tried to regulate environmental impacts caused by a massive animal factory in its territory. Conversely for example, a Central American-based agribusiness—including subsidiaries from the U.S. or other industrialized countries—could sue the U.S. government over federal or state environmental laws that would serve to ‘expropriate’ Central American investment in animal factories in the United States.

CAFTA forces Central American countries to remove remaining protections for strategic foodstuffs that are critical to protecting people from starvation. As happened in Mexico under NAFTA, without such protections against predatory dumping, subsistence farmers will be forced from their lands into urban areas to compete for jobs and to face the threat of malnutrition and starvation. Only Nicaragua negotiated export restrictions for a few

basic foodstuffs, but it can only invoke these limited protections temporarily in the event of a “critical shortage of [a] particular food item.”<sup>1</sup>

Protections for important U.S. commodities are also removed, clearing the way for U.S.-based agribusinesses to work with local elite agribusiness owners in Central America to dump agricultural products back into U.S. markets, as well. Some U.S. import protections are phased out over longer periods of time, reflecting the greater political clout in the U.S. of certain commodities like sugar. However, while the remaining protections left in CAFTA allow the U.S. government to pay compensation to Central American sugar exporters (even if they are U.S. headquartered) whenever the U.S. chooses to suspend agreed tariff free sugar exports, they leave sugar farmers unprotected. U.S. sugar growers have concluded that they must defeat CAFTA because it sets the precedent for opening the door for agribusiness cartels to eventually destroy the sugar industry in the United States by predatorily dumping sugar from additional non-CAFTA countries through similar clauses in future trade agreements.

### **Fair Trade products denied market access**

In CAFTA’s Chapter 3 on National Treatment and Market Access for Goods there is a provision that would discriminate against products by non-government organizations and producer cooperatives or their delegated representatives: “No Party may allocate any portion of a TRQ [Tariff-Rate Quota] to producer groups or non-governmental organizations or delegate administration of a TRQ to producer groups or organizations....” Astonishingly, this clause actually forbids governments from allocating a portion of their tariff quotas to traders of commodities like fair trade coffee. To our knowledge, this is the first regional trade agreement to discriminate explicitly against a class of traders, and would allow agribusiness cartels to use CAFTA as a tool to quash competition from fair trade products. Apparently, from the perspective of the Bush Administration, Free Trade means “freeing” multinational agribusiness cartels from legitimate competition especially from fairly traded products!

### **Intellectual property rights, patenting of GE Crops, and biopiracy**

CAFTA Chapter 15 on Intellectual Property Rights would expand the draconian U.S. model of corporate patenting rights, not only requiring compliance with the WTO’s Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), but also requiring ratification of the Union for the Protection of New Varieties of Plants (UPOV) of 1991. In fact, this is the first trade agreement of which we are aware that requires participating countries to ratify UPOV 1991, which confers patent-like corporate protections on plants that trump farmers’ traditional rights to save their own seeds from year-to-year. By requiring ratification of UPOV 1991, CAFTA restricts the ability of Central American countries to use the Article 27 provisions of TRIPS that allow for exemptions to patentable subject matter. CAFTA ratification would substantially strengthen the legal rights of multinational biotech corporations to sue farmers for patent

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<sup>1</sup> Annex 3.2 to National Treatment and Import and Export Restrictions. “Section F: Measures of Nicaragua, Paragraph 1a.

violations, even farmers who choose not to plant genetically engineered (GE) crops, but whose crops become contaminated by pollen drift, by distribution systems, or by other means beyond farmers' control.

Ratification of CAFTA would also restrict the participation of Central American countries in the Cartagena Protocol on Biosafety, which explicitly acknowledges the rights of countries to regulate GE crops based on the Precautionary Principle and to require labeling of GE crops and food. The protocol has now been ratified by 87 countries, which recently met in Kuala Lumpur, Malaysia. The results of the recent negotiations significantly expanded the rights of countries to protect their farmers, public health and the environment from the adverse impacts of GE crop contamination through the precautionary principle, more independent labeling requirements, and clarification of liability. Unfortunately, these new rights won by countries under the Cartagena Protocol will be undermined in Central America if CAFTA is eventually ratified.

### **Secrecy and immunity for corporate criminals**

CAFTA's intellectual property chapter shields multinational corporations from having to divulge to the public "undisclosed data concerning the safety or efficacy of a product that was previously approved in another territory." This secrecy clause protects manufacturers of conventional agricultural chemicals from having to disclose information that pertains to public health.

Chapter 3 of CAFTA makes it illegal for Central American countries to restrict or prohibit imports from the U.S. as a means of curtailing illegal corporate trade practices, including agricultural trade. For example, if a Central American country discovered an illegal multinational corporate trade activity, such as a violation of antitrust laws, the country could not refuse trade shipments of that company as a means to stop the illegal activity. It is not difficult to envision that this CAFTA provision could be used to require continued trade by U.S. corporations and investors convicted of violations of law. Hypocritically enough, Central American countries have no similar trade recourse to this same exemption with regard to the United States.

## **CAFTA: THE NAIL IN THE COFFIN OF CENTRAL AMERICAN AGRICULTURE**

**Carlos Galian**  
**Oxfam International**

Small-scale farmers and agricultural workers will be significant losers under the U.S.-Central America Free Trade Agreement (CAFTA). Many Central American producers of basic grains, such as corn, rice, beans and sorghum, as well as poultry, pig, cow and dairy farmers, will be forced out of business by the flood of cheap subsidized goods coming from the United States. The only products that will continue to receive protection under CAFTA are white corn in Central America, fresh onions and potatoes in Costa Rica, and

sugar in the United States.<sup>2</sup> Yet the “concession” of U.S. negotiators in excluding one of Central America’s sensitive products, white corn, is really no concession at all, given that U.S. production of white corn comprises only about 1.2 percent of its total corn production.

In assessing the impact of CAFTA on agriculture in Central America, it is necessary to look at both the short and long term. The United States will have immediate, tariff-free access to Central American markets for some products. Beginning immediately, the agreement also permits tariff-free entry into the region of a significant volume of U.S. exports that are of strategic importance Central America in terms of employment generation and their contribution to local economies.

### **Immediate impacts**

Each Central American country fared differently with regard to protecting local producers of yellow corn, reflecting the lack of regional integration among Central American countries and, as a result, their weak, separate negotiating positions. Costa Rica will eliminate tariffs on yellow corn beginning the first year under CAFTA, while in the remaining four countries, more than one million tons of yellow corn can be imported via tariff rate quotas (TQRs). In the case of Nicaragua, for example, this means that during the first year under CAFTA, ten times as much yellow corn will enter tariff-free than what was imported free of tariffs, on average, prior to the agreement. Because the cost of U.S. corn on foreign markets is about \$5 per quintal, which is artificially below the cost of production because of U.S. subsidies, corn prices in the region will likely suffer a dramatic drop, seriously affecting producers of yellow corn and sorghum (sorghum is also used for animal feed and, in that sense, is a substitute for yellow corn).

The region will also run the risk of having consumption of white corn, which is preferred by consumers, substituted by yellow corn if the price of the latter drops substantially. In Mexico under NAFTA, consumers began to substitute yellow corn for white corn once Mexico began to import massive amounts of the cheaper yellow variety dumped in the country with the help of US subsidies.

Small and medium-scale rice farmers in Central America will also immediately begin to suffer the impact of massive U.S. imports. During CAFTA’s first year, the United States will be able to export over 380,000 tons of rice, tariff-free, to a region that currently produces approximately 600,000 tons. In 2003, Central American rice imports were already around 549,000 tons, but with tariffs as high as 62 percent in Nicaragua, for example. Yet considering that the three largest recipients of U.S. agricultural subsidies are corporations that produce and export rice, Central American rice farmers will be unable to compete with the U.S. Treasury. CAFTA will mean that subsidized rice from the United States will push down prices to producers in the region, resulting in an immediate displacement of large numbers of Central American rice farmers.

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<sup>2</sup> Office of the U.S. Trade Representative, *CAFTA: Agriculture: Specific Factsheet*, February 2004, available at <http://www.ustr.gov/new/fta/Cafta/2004-04-09-agriculture-specific.pdf>.



### **Medium-term impacts**

While it will take a few more years to feel the impact of CAFTA on other products, the effect will be similar. In the case of poultry for example, Central American governments have said they are pleased by the fact that this sector will be protected for a longer time, thereby ensuring a future for local poultry producers. However, the reality is much harsher. The price of dark chicken meat in Central America ranges between 75 cents and a dollar per pound, yet the U.S. will be able to export dark meat at 20 cents per pound. Central America currently maintains high levels of protection on poultry, with tariffs as high as 160 percent. Even though tariff elimination will be phased-out over 18 years, local producers will likely be priced out of the market long before this period is completed.

### **Export fallacies**

This raw deal for small farmers will not be counterbalanced by great gains in Central America's access to the U.S. market. A comparison of results obtained by the United States in sugar and by the Central Americans in rice and yellow corn illustrates the inequality among negotiating partners. While the United States did not allow any of its strategic export products (such as rice and yellow corn) to be excluded from import-tariff elimination, it insisted on exclusion of its principal sensitive product of strategic interest for Central American exports: sugar. Furthermore, the majority of Central American exports that will receive immediate duty-free access to U.S. markets will first have to overcome non-tariff barriers that present a greater hurdle: sanitary and phytosanitary measures. For example, much of the region's tropical fruit products are plagued by the Mediterranean fruit fly and, therefore, cannot be exported to the United States.

In spite of the triumphant tone of Central American governments in assessing their gains in access to the U.S. market, in essence the region eliminated its tariffs on U.S. imports in exchange for maintaining or marginally increasing privileges in access to the U.S. market that had previously been granted unilaterally through the Caribbean Basin Initiative. As a result, CAFTA will be the nail in the coffin of traditional agriculture in Central America.

## 2. Government Procurement

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Local, state, provincial, and national governments use procurement rules to serve important public policy aims such as consumer protection, economic development, environmental protection, public health and safety, the regulation of anti-competitive practices, gender and racial equity, social justice, and respect for human rights and workers' rights. Current trade rules governing procurement practices in NAFTA and the plurilateral Agreement on Government Procurement at the WTO undermine the ability of governments to enact and enforce procurement rules that are related to these important policy goals. Unfortunately, CAFTA will only reinforce these practices.

CAFTA's Chapter 9 on procurement prohibits governments from favoring local suppliers in government contracts for goods and services. Governments must accord foreign suppliers "national treatment": treatment that is no less favorable than the treatment it applies to its domestic suppliers. In addition, governments are barred from imposing technical specifications in its public contracts if those specifications pose an "unnecessary" barrier to trade, and government contracts can only contain supplier qualifications that are "essential" to the performance of the contract. These basic rules are nearly identical to the procurement rules of NAFTA, the U.S. – Chile Free Trade Agreement, and the WTO's Agreement on Government Procurement.

CAFTA's limitations on government procurement apply to each of the national governments that are part of the agreement, and they also apply to governments at the state and municipal level. Twenty-three U.S. states have already agreed to be bound by the terms of CAFTA, and USTR is working to ensure that all 38 states that agreed to be bound by the procurement rules of the WTO and the Chile agreement eventually sign on to CAFTA as well. Each Central American country has listed municipal authorities in the annex, which means that these local governments will also be bound by CAFTA rules when entering into public contracts for the procurement of goods and services. In the United States, governors have agreed to bind their states to these procurement rules simply by replying to a letter from USTR, without consulting with their own state legislators or the public. The process for binding Central American municipalities is likely to have been just as secretive and undemocratic, if not more so.

CAFTA's procurement rules will have significant impacts on communities throughout the region. The agreement's national treatment rule will prohibit governments from favoring local suppliers, even when there are good social and economic development reasons to do so. The agreement's rules on technical specifications and supplier qualifications will allow foreign companies to ask their home government to challenge procurement rules designed to achieve social or development goals, such as preferences for environmentally-friendly, socially-conscious, or minority-owned firms. While governments were able to make some general exceptions to the procurement rules in

Annex 9.1 to the agreement, in practice countries filed such exceptions to varying degrees, leaving many responsible procurement practices vulnerable.

The U.S. filed an exception for set asides on behalf of small and minority businesses, Costa Rica filed an exception for programs on behalf of small, medium and micro enterprises, and Nicaragua filed an exception for such programs if they are created within three years. But El Salvador, Guatemala and Honduras filed no such exceptions.<sup>3</sup> In addition, Costa Rica and Nicaragua excluded procurement related to a variety of public services (electricity, gas and water distribution; public administration and other services to the community as a whole; compulsory social security services; education, health and social services; sewage and refuse disposal; and sanitation and other environmental protection services), while Guatemala only excluded electricity, gas and water distribution, Nicaragua only excluded some transportation services, and El Salvador filed no general exceptions for public services. The U.S. excluded utilities and transportation services, but filed no general exceptions for other important public services like education and health care.<sup>4</sup>

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<sup>3</sup> See Section G of Annex 9.1 of CAFTA.

<sup>4</sup> See Section E of Annex 9.1 of CAFTA.

# 3. Investment

**Raúl Moreno**  
**CDC and Red Sinti Techan, El Salvador**

## **The objective: liberalization of investment**

Chapter Ten is intended to liberalize the functions and operations of investments and investors, prohibiting governments from establishing any conditions on investment and requiring governments to grant non-discriminatory treatment to foreign investments and investors, all of which would be ensured through the establishment of an investor-state dispute resolution mechanism.

In this regard, the Chapter applies to the measures that a government establishes on investments, thus setting obligations for state-owned enterprises or governmental authorities delegated by a Party to the Agreement.

## **A broad definition of investment**

Since the purpose of CAFTA is to eliminate any government regulations on foreign investment or investors, it is not surprising that it includes a broad definition of those terms, making the chapter a kind of “umbrella” that grants ideal conditions to practically any business or person, to the detriment of the possibility that foreign investment could contribute to national economic growth.

The term investor is defined as a company or person who intends to carry out, who is carrying out or who has carried out investment in the territory of one of the countries that are parties to the agreement.<sup>5</sup> This definition grants privileges to all foreign companies and persons with investments, including those who have not invested but who hope to do so.

The definition of investment includes nearly everything: assets owned or controlled by an investor that have the characteristics of investment, such as capital or other resource commitments; the expectation of obtaining profits or benefits; or the presumption of risk. The modalities of investment cover an extensive array of possible forms, including: companies; stocks; bonds; contracts; intellectual-property rights; licenses; authorizations; permits; and tangible or intangible property rights.<sup>6</sup>

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<sup>5</sup> Art. 10.28: Definitions, CAFTA.

<sup>6</sup> Ibid.

## **Non-discriminatory treatment for foreign investment**

Despite the dramatic differences in levels of development between the U.S. and Central American economies, CAFTA does not provide for Special and Differential Treatment.<sup>7</sup> In fact, it goes beyond the WTO proposals to introduce identical treatment for investors, regardless of their size, competitive capacity or market position.

Two key principles run through CAFTA's investment chapter: National Treatment and Most-favored Nation Treatment. Both of these are designed to eliminate any discrimination against foreign investors, which in practice translates into discriminatory treatment against Central American investors, who have low levels of competitiveness.

National Treatment grants investors – who intend to carry out, who are carrying out or who will carry out – and the investments covered in the definition treatment no less favorable than that granted local investors or investments.<sup>8</sup> However, the chapter also grants Most-favored Nation Treatment,<sup>9</sup> which consists of treatment no less favorable than that granted to investors or covered investments from any other country, even those that are not parties to CAFTA. The benefits under the chapter can be denied, however, if the investor is from a country with which the government does not maintain diplomatic relations.<sup>10</sup>

In addition, under CAFTA, National Treatment and Most-favored Nation Treatment principles could be applied to the reprogramming of Central American countries' public debt, those indebted to the United States and the reprogramming of their debts to creditors in general.<sup>11</sup>

## **Prohibition on governments defining national economic policies**

The importance of Foreign Direct Investment (FDI) in the industrialized countries' growth and development<sup>12</sup> confirms that FDI -- if it is based on a national development strategy and is guided by effective regulations – can contribute to the creation of good jobs, transfer of technology, the generation of public revenues, and a favorable balance-of-payments position. However, all of these potential advantages of FDI evaporate within the framework of CAFTA, given the concepts and content of Chapter Ten, which expressly prohibits governments from establishing performance requirements on any foreign investment.

CAFTA establishes that no government can impose or enforce a broad range of performance requirements on a foreign investor or investment.<sup>13</sup> This is a clear violation

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<sup>7</sup> A principle that, according to the WTO, would grant special privileges to developing countries, exempting them from compliance with certain standards or granting them preferential treatment.

<sup>8</sup> Art. 10.3, CAFTA.

<sup>9</sup> Art. 10.4, CAFTA.

<sup>10</sup> Art. 10.12a, CAFTA.

<sup>11</sup> Anexo 10-A, CAFTA.

<sup>12</sup> See Chang, Ha-Joon (2002): *Kicking away the Ladder*, Anthem Press, London.

<sup>13</sup> Art. 10.9, Numbers 1 a-g, CAFTA.

of national sovereignty, as it denies governments the right to establish public policies that respond to domestic objectives and priorities.

### Prohibitions on government regulation of on investment

Governments cannot require investors	National Implications
a. To export a given level or percentage of goods or services, or achieve a given level of level of domestic content.	Favors imports (supplies and capital goods), thus affecting national production and employment generation.
b. To purchase, use, or accord a preference to goods produced in its territory or to purchase goods from persons in its territory.	Eliminates the possibility of stimulating national production and establishing linkages between foreign investment and the national productive structure.
c. To restrict sales of goods or services in its territory that an investment produces or supplies.	Limits the possibility of granting preferential treatment to national investors and facilitates foreign investors' dominant position in local markets.
d. To relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment.	Prevents influencing the definition of tradable flows by foreign investors so as to favor a more positive relation in terms of national exchange. Limits local investment of profits obtained by foreign investors.
e. To transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory.	Makes one of the theoretical advantages of FDI – the strengthening of national capacities through technology transfer (know how) -- impossible.
f. To supply exclusively from the territory of the Party the goods or services it produces .	Opens the door to monopolistic market management, in spite of the principle of “promoting open competition”. This contributes to greater concentration of national markets, with the aggravating factor that the foreign investment will tend to occur in the area of public services.

*Source: Drawn from Art. 10.9, No. 1, subsections a, b, c, d, e, f, g, CAFTA.*

On environmental matters, Chapter Ten subordinates the application of any environmental measure to the provisions in CAFTA on investment: nothing in the chapter prevents a Party from adopting, maintaining or enforcing measures **“consistent with this Chapter** that it considers appropriate to ensure that investment activities in its territory are undertaken in a manner sensitive to environmental concerns.”<sup>14</sup>

Only when measures under question do not constitute disguised restrictions on trade or foreign investment, or are not applied arbitrarily or unjustifiably – although the CAFTA text does not define mechanisms to determine that – will they not be interpreted as impeding a Party from maintaining environmental measures.<sup>15</sup>

<sup>14</sup> Art. 10.11, CAFTA.

<sup>15</sup> Art. 10.9, 3c, CAFTA

## Indirect expropriation: a new form of plunder

CAFTA reproduces a new form of plunder by transnational corporations that was introduced in the North American Free Trade Agreement (NAFTA), Bilateral Investment Treaties (BITs)<sup>16</sup> and in the draft text for the Free Trade Area of the Americas (FTAA) through the prohibition of indirect expropriation. This provision allows foreign investors bring complaints to international tribunals against any government implementing public policies that, in the judgment of the foreign investor, could affect the non-existent profits they project to receive in the future.

CAFTA will generate greater uncertainty for countries in the region, since up to now only Honduras has implemented a Bilateral Investment Treaty with the United States. El Salvador and Nicaragua have signed BITs, but they have not been ratified, and Costa Rica and Guatemala have not even signed them.<sup>17</sup> This means that currently only Honduras could be sued under the BIT's investor-state clause, but if CAFTA is implemented, all five countries would be obliged to comply with that mechanism, something that has been extremely controversial in the countries where it already exists.

The chapter prohibits direct expropriation, which includes nationalized investments or those directly expropriated through the formal transfer of title or outright seizure, as well as indirect expropriation, which is defined as acts by a government that have an equivalent effect to direct expropriation without formal transfer of title or outright seizure.<sup>18</sup>

Indirect expropriation has proven to be an effective concept for transnational corporations to legally challenge governments that, through their public policies, have established environmental, fiscal and social regulations<sup>19</sup> on their activities that have been interpreted by the transnational corporations as **government actions that interfere with their investment-backed expectations**,<sup>20</sup> and, in consequence, acquire the form of indirect expropriation.

Compensation under this clause includes payment for the "fair market" value at the time of the expropriation plus interest at a commercially reasonable rate for that currency. Moreover, if the fair-market value is not denominated in a currency that is "freely

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<sup>16</sup> The BITs are equivalent to an FTA only in the Investment Chapter, as they are bilateral treaties designed to liberalize investment and also include investor-state clauses. This is a mechanism parallel to the FTAs and the FTAA designed to advance the provisions in the old Multilateral Agreement on Investment (MAI) to eliminate any government regulations on foreign investment.

<sup>17</sup> See <http://www.state.gov/e/eb/rls/fs/22422.htm>.

<sup>18</sup> Annex 10-C, Numbers 3 and 4, CAFTA.

<sup>19</sup> There have been at least 28 cases presented to ICSID and UNCITRAL in which transnational corporations have presented cases against the Mexican, Canadian and U.S. governments, based on NAFTA's provisions on indirect expropriation in its Investment Chapter. The majority of those cases have had favorable results for the transnational corporations. See Public Citizen (2002) *El Ataque contra la Democracia: el historial del Capítulo XI del TLCAN sobre inversiones y las demandas judiciales de empresas contra gobiernos*, Washington.

<sup>20</sup> Annex 10-C, Art 4a, CAFTA.

usable”, the compensation paid will be converted to the currency of payment at the market exchange rate prevailing on the date of payment.<sup>21</sup>

In addition, every country in the Agreement must permit all transfers relating to an investment to be made freely and without delay into and out of its territory. These include contributions to capital, profits, dividends, capital gains, interest, and payments, including those arising out of a dispute.<sup>22</sup>

### **Dispute resolution: mechanisms administered by transnationals**

Within the framework of dispute resolution, Chapter Ten establishes the International Center for the Settlement of Investor Disputes (ICSID), which is attached to the World Bank, and the United Nations Commission for International Trade and Law (UNCITRAL, an UNCTAD agency) as the appropriate venues for arbitration.<sup>23</sup>

The mechanisms for dispute settlement establish supranational tribunals made up of private arbitrators, who are selected by the Parties from a list of technocrats. These arbitration bodies infringe on the administration of justice established by nations and by State sovereignty. There have been at least 28 cases presented by transnational companies at ICSID and UNCITRAL against the United States, Canada and Mexico under NAFTA’s investment chapter. The majority of the decisions in these cases have been in favor of the corporations, although it is worth noting that none of the cases presented to date has resulted in a decision against the United States.<sup>24</sup>

### **Three cases that demonstrate privileges granted to transnationals<sup>25</sup>**

<b>Investor</b>	<b>Venue/Damages</b>	<b>Issue/Status of case</b>
<b>Ethyl</b> 4/14/97	UNCITRAL \$201 million	U.S. chemical company challenges a Canadian environmental regulation that prohibited the use of the gasoline additive MMT used by the company. Case settled. <b>Ethyl wins \$13 million.</b>
<b>Metalclad</b> 1/13/97	ICSID \$90 million	U.S. company challenges decision by Mexican municipality in Guadalupe, San Luis Potosi, to deny permission for the construction of a toxic-waste dump, and declares the site an ecological reserve in the hands of the state government. <b>Metalclad wins \$15.6 million.</b>
<b>Karpa</b> 4/17/99	ICSID \$50 million	U.S. cigarette exporter challenges Mexican government’s refusal to rebate export taxes. <b>Karpa wins \$1.5 million.</b>

<sup>21</sup> Art. 10.7, CAFTA.

<sup>22</sup> Art. 10.8, CAFTA.

<sup>23</sup> Section B: Investor-State Dispute Settlement

<sup>24</sup> Public Citizen, Op. Cit.

<sup>25</sup> Based on information in Public Citizen report.



## 4. Services

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### **CAFTA Goes Beyond WTO GATS Accords**

All of standards established in this chapter are covered in the General Agreement on Trade in Services (GATS) in the WTO, which is applicable to all Central American countries. Nevertheless, the obligations acquired under CAFTA by the Central American governments on the liberalization and deregulation of public services and any other activity considered to be a “service” far exceed the commitments that those countries have agreed to under the GATS framework. This further reduces the governments’ ability to exclude activities considered essential to national development from the provisions in the agreement.

All of the provisions in this chapter and in the articles on “Non-Conforming Measures” apply to measures carried out by governments of central, regional or local authorities, as well as non-governmental institutions in the exercise of authority delegated by governments or central, regional or local authorities.

The chapter requires governments to grant foreign companies non-discriminatory treatment, ensure access to service markets, and to be transparent in the development and application of regulations.

In spite of the fact that Chapter 11 refers specifically to cross-border trade in services, there are others sections in CAFTA that regulate matters related to this issue, such as the chapters on government procurement, investment, telecommunications and financial services, among others. In this regard, the implications of this agreement on the liberalization of services – and the privatization of public services – can only be fully understood to the degree that the analysis also includes these others sections.

### **In CAFTA, all services are objects of trade**

The lack of definition of services in the text of the agreement leaves open the determination of which activities would be covered by the obligations imposed by the provision in the chapter. This omission requires recourse to the GATS definition,<sup>26</sup> which has been questioned for its excessively broad and ambiguous nature.<sup>27</sup>

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<sup>26</sup> Art. I.1.3, sections b and c.

<sup>27</sup> In fact it is a circular definition: “b) The term ‘services’ includes all services in any sector, except those services supplied in the exercise of governmental authority.” In turn, the concept of “services supplied in the exercise of governmental authority” is defined as any service “that is not supplied under commercial

Some observers have noted that, “GATS covers virtually all actions, rules or regulations that have a direct or indirect effect on trade in services. As recognized by the WTO, GATS defines trade in services in such a general manner that it becomes directly relevant for many areas of regulation that traditionally were not affected by the rules of multilateral trade. The inclusive nature of GATS threatens to seriously limit the capacity of national governments to carry out actions or policies in the pursuit of social, environmental or development priorities.”<sup>28</sup>

The absence of a clearly delineated definition of what is considered a service implies that any activity that could eventually be the object of commercial exploitation, regardless of the current legal framework, could be governed by the regulations contained in this chapter. In fact, in CAFTA such sensitive issues as bioprospecting on national biodiversity, hunting and sport fishing, concessions in a maritime-terrestrial zone or petroleum exploration are considered “services”.<sup>29</sup>

### **Liberalization and deregulation as the general rule**

CAFTA rescinds governments’ authority to regulate and limit the number of providers of a service by prohibiting the adoption of measures designed to achieve that goal “whether in the form of numerical quotas or the requirement of an economic needs test.”<sup>30</sup>

The provisions in CAFTA would therefore substitute for decisions that should be subjected to analysis – for each concrete case – of the social, economic or cultural objective that are at stake. It would also generalize a huge number of restrictions and limitations on the capacity of the state to regulate and control the development of activities carried out in its territory and to orient them so that they are compatible with national interests, when the exercise of those powers is considered to be disadvantageous for the interests of foreign service providers.

For example, CAFTA would prohibit requiring service providers to have representation in the country so that they can be held responsible for their actions (Art. 11.5) or to regulate the kind of legal entity by which these providers are set up in the country (Art. 11.4.b). While it is true that some of these obligations are already contemplated in the GATS, CAFTA would considerably broaden and extend them, as described in the box on page 16.

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conditions or in competition with one or many service providers.” This formulation is reproduced in Article 11.1.6 of the Agreement. In practice, this conception will only exclude those government functions that are not susceptible to commercial exploitation such as the powers of the empire.

<sup>28</sup> Citizens’ Network on Essential Services. “Los servicios públicos en peligro: El GATS y la agenda privatizadora.” In *Los pobres y el mercado. Informe Social Watch*. 2003. p. 16.

<sup>29</sup> See Annex 1: Services/Investment Non-Conforming Measures. Schedule of Costa Rica.

<sup>30</sup> Art. 11.4.a.i. CAFTA.

## Specific commitment to privatize postal services

The governments included a specific agreement on **express delivery services**.<sup>31</sup> They commit not to adopt or maintain any restrictions on express delivery services that are not already in place on the date the agreement is signed. In addition, the Central American governments state that they have no intention to direct revenues from their postal monopolies to benefit express delivery services.

This chapter includes the liberalization of the letter delivery, so that transnational companies providing “express delivery” services would benefit from national treatment and most-favored nation treatment, jeopardizing the operations of and employment in the state-owned enterprises and national-private companies that up to now have not had internationally acceptable levels of competitiveness.

As a precedent, the U.S. express delivery company United Parcel Services (UPS) has sued the Canadian government for US\$160 million in a case presented under NAFTA’s investor-state clause at UNCITRAL. UPS claims discriminatory treatment because the Canadian postal service’s parcel delivery service receives subsidies, as it is a public service that operates as a monopoly, and, according to UPS, it should not be allowed to compete in the supply of messenger and parcel delivery services.<sup>32</sup>

Under Title 39 of the United States Code, an independent government agency determines whether postal rates meet the requirement that each kind of mail bear the direct and indirect cost attributable to it, plus the portion of all other costs that the U.S. Postal Service reasonably assigns to that class or type of mail.

## From a system of specific commitments to “negative lists”

The U.S. government has highlighted certain achievements in the CAFTA negotiations, among them that, “The Central American countries will accord substantial markets access across their entire services regime, subject to very few exceptions, using the so-called ‘negative list’ approach.”<sup>33</sup>

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<sup>31</sup> Express delivery services are defined as the collection, transport, and delivery of documents, printed materials, parcels and/or other goods on an expedited basis, while tracking and maintaining control of these items throughout the supply of the service. Express delivery services do not include air transport services, services supplied in the exercise of government authority, and maritime transport services.

<sup>32</sup> Public Citizen, (2002) *El Ataque contra la Democracia: el historial del Capítulo XI del TLCAN sobre inversiones y las demandas judiciales de empresas contra gobiernos*, Washington., p. 14-16.

<sup>33</sup> Office of the U.S. Trade Representative, “Free Trade with Central America. Summary of the U.S.- Central America Free Trade Agreement”. p. 3. [www.ustr.gov](http://www.ustr.gov).

Clearly, one of the touchiest issues in this chapter is the radical change in the procedures to determine which activities or services from each country will be subject to the provisions in the agreement, and, which sectors will be exempted from compliance with the obligations they impose. This procedure also implies defining which national standards or dispositions that are incompatible with the obligations in the agreement (called “non-conforming measures”) can remain and which must be modified or eliminated.

The current system is contained in the GATS (Arts. XVI, XVII and XVIII), according to which countries assume “specific commitments” to liberalize and deregulate **only** those sectors or activities that are explicitly included in the lists in annexes to the agreement, so that commitments made in the GATS do not apply to any other service or activity not specifically listed. However, under CAFTA, a “negative list approach” is utilized, which means that the obligations in this chapter and the investment chapter **are applicable to all services** – whether or not they are mentioned in the agreement – with the sole exception of those that are explicitly included in the lists in the annexes of exclusions and only for those obligations which are explicitly listed as not applicable (Art. 11.6).

In other words, if a service is not on this list of exclusions, it is assumed to be covered by the obligations for liberalization and deregulation described in the agreement. If it is included in the list, it is only exempted from the application of those obligations that are explicitly described.<sup>34</sup>

The implications of this modification are profound. It means that all national standards related to a service that are not explicitly listed should “conform” with the obligations imposed under CAFTA, and if they are not, they could be denounced by other Parties as violating the accord.

Besides the serious impact on governments’ regulatory capacity, this also promotes a grave situation of legal insecurity among national authorities and in the population in general on CAFTA’s real implications, since the interpretation of compatibility or non-compatibility of a national standard with the terms of the agreement will be decided by the supranational dispute-resolution bodies created within the framework of the accord.

In spite of the fact that CAFTA could oblige governments to modify all incompatible measures in national legislation that are not listed in the annexes of “non-conforming measures”, the signing countries have agreed to an extremely brief period with many conditions for adding new measures to those annexes. While the GATS provided for a period of five years for countries to define their lists of specific commitments, CAFTA only granted Central American countries until 25 March 2004 to add new measures to the list of exclusions in Annex No. 1.

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<sup>34</sup> In regards to this last point, this also modifies the current system, since countries currently still have a slightly greater margin of flexibility to pass national laws that respond to their own needs, since they are allowed to leave measures that could eventually turn out to be incompatible as “unconsolidated”, thus opening the possibility that new measures would be proposed in the future. See Law No. 7475, Annex, “List of Specific Commitments”.

Moreover, this possibility is subject to two restrictions: a) changes to agreements on important sectors are not permitted, including “computer services, construction, energy services, professional services, land transportation, audiovisual, telecommunications, urgent delivery services, among others; and b) a measure can only be added if all parties agree.

### **Implications of the services chapter**

There is no doubt that CAFTA creates the conditions for the liberalization of services and, in particular, the privatization of public services. The “negative lists” trick and the opening of government procurement will enable transnational corporations to gain access to the provision of public services, displacing the state (ministries, municipal governments and state-owned enterprises) through services concessions.

The liberalization of public services included in CAFTA presents an enormous risk for the population, as it opens the door to private companies providing essential public services, access to which are inalienable human rights. In the regard, it is crucial that the state maintain the ability to guarantee the population’s right to universal access to those basic services, as well as consumer protection, which would require excluding those services from CAFTA or any other trade agreement.

This chapter also jeopardizes employment at those national service companies – both public and private – that operate in this area. Nevertheless, the text proposes that governments encourage the relevant agencies in their respective territories to develop mutually acceptable standards and criteria (examinations, experience, conduct and ethics, among others) for the granting of licenses and certificates to providers of professional services.

### **The total privatization of telecommunications in Costa Rica**

Annex 13 of CAFTA, if implemented, would lead to the rushed and complete opening of the Costa Rican telecommunications market, to the detriment of ICE and to the direct benefit of U.S. transnational corporations. It establishes discriminatory treatment against national operators, requiring them to make all of their infrastructure available to foreign companies, only charging for the maintenance of operations, while the companies use those resources to reap huge profits.

Although the governments have publicized the “selective” opening of the sector, the text proposes “complete opening” to include “mobile wireless services” (“voice, data and/or broadband services...using mobile or fixed terminal equipment...”), which implies the liberalization of fixed telephone services through fixed wireless terminal equipment. This means that the three most profitable and strategic sectors of telecommunications are being delivered to the U.S. transnationals: **cellular telephones** (which generate the majority of ICE telecommunications revenues); **internet** (which is the fixed telephone service in the immediate future); and **private business networks** (which is the most profitable aspect of international communications, representing some 70 percent of the National Telecommunications System income).

There is nothing in the text that ensures the existence of subsidies and services at cost to users, which will mean an increase in rates paid by consumers.

The discrimination is of such magnitude that, if ratified, CAFTA could shut down the ICE in a short time, and in the future, telecommunications would not be accessible to the majority of the population, but only to a privileged minority.

This would transform the country’s model of solidarity development, given the impossibility of providing a public service at cost or the use of crossed subsidies to guarantee universal access to the population.

**Frente Interno de Trabajadores (FIT-ICE)**

# 5. Intellectual Property

Given the multiple implications of intellectual-property rights on people's lives, this section includes two analyses of CAFTA's Intellectual Property Rights Chapter, one on the agreement's potential repercussions on food production – through control over seeds – and biodiversity, and a second section on the implications of the intellectual-property provisions in CAFTA for the production of medicines, highlighting the clear violation of the population's right to access to medicines.

## 5.1 THE CASE OF SEEDS

**Silvia Rodríguez Cervantes**

**Red de Coordinación en Biodiversidad/Encuentro Popular, Costa Rica**

### **The importance of traditional agriculture**

It is estimated that some 1.4 billion people in the world depend on seeds produced in their fields for subsistence and local commerce. This is true for 90 percent in the Sub-Saharan countries and 70 percent in India.<sup>35</sup> Although to a lesser degree, farmers in industrialized countries also keep seeds to use the following season instead of purchasing them.<sup>36</sup> Actions to preserve, reuse, exchange and freely sell seeds are rights that farmers have enjoyed since the inception of agriculture some 10-12,000 years ago.

### **Traditional production of seeds could be controlled by intellectual property rights**

The value of the global seeds market has been estimated at US\$30 billion a year and is expected to rise to US\$90 billion in the near future. It is economically important to the seeds industry to control the enormous niche for production and sales that is still out of its control. One way to achieve this goal is to establish legal systems related to intellectual property rights that restrict the reuse, exchange and innovation of seeds saved by farmers. In addition to taking away farmers' control over their means of production, these new rules transform those traditional activities into illegal acts, with penalties including prison time.

### **Patents on essential food crops**

There are patents on some varieties or even the genetic characteristics of five essential food crops – rice, wheat, corn, soybean and sorghum. Six multinationals – Aventis, Dow, DuPont, Mitsui, Monsanto and Syngenta – control nearly 70 percent of those patents. These and other crops are covered not by one but by many dozens of patents. For

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<sup>35</sup> Lather Venkatraman, "[Hike research spend in seed technology: Rabobank report](http://www.blonnet.com/bline/2002/03/25/stories/2002032500240700.htm)", Hindu Business Line, Mumbai, 25 March 2002. [www.blonnet.com/bline/2002/03/25/stories/2002032500240700.htm](http://www.blonnet.com/bline/2002/03/25/stories/2002032500240700.htm). Cited in GRAIN. (2003). **Farmers' Privilege Under Attack**. [www.grain.org](http://www.grain.org)

<sup>36</sup> See, for example, Alvaro Toledo, "Saving the seed: Europe's challenge", **Seedling**, GRAIN, Barcelona, April 2002. <http://www.grain.org/seedling/seed-02-04-2-en.cfm>

example, so-called golden rice, which was genetically transformed to include vitamin A, is the object of some 30 patents granted to different companies or persons, so that those who want to produce it must obtain licenses from each of the owners of these various patents.<sup>37</sup>

**Conditions in the 1977 Monsanto contract to license farmers  
to use its patented soybean seed<sup>38</sup>**

The farmers CAN: use the soybean seed that contains the Roundup Ready gene, which is purchased under this contract to be planted ONCE AND ONLY ONCE (emphasis added) to harvest soybean.

The farmer CANNOT, among other things, save any of the seeds produced by plants grown from the seeds purchased with the purpose of using them as seeds or selling them to any other person for that use.

The technology fee is five dollars for every 50 pounds of seed and the farmer must use only Roundup brand glyphosate or other brands authorized by Monsanto as herbicides.

If the farmer violates any of the conditions of the contract, it will be immediately cancelled and the farmer will lose the right to obtain a license in the future. In the case of any transfer of soybean seed that contains the Roundup Ready gene, the farmers will pay a fine plus lawyers' fees and expenses.

Monsanto acquires the authority to inspect all of the farmer's land where soybean is planted for the following three years, in compliance with the contract. The farmer also agrees to report, in response to any request, the site of all fields where soybean is planted for the following three years.

The terms of the contract oblige not only the farmers but also have full validity and effect on heirs, personal representatives and successors. The rights assigned to the farmer, in contrast, will not otherwise be transferable or assignable without Monsanto's written and express consent.

**Intellectual property provisions and contracts undermine farmers' rights**

The agreements on Trade Related Intellectual Property Rights (TRIPS) in the WTO and now, to an even greater degree, the proposed CAFTA, jeopardize farmers' rights to continue traditional agricultural practices. These agreements require countries to grant

<sup>37</sup> Barton, J. and Berger, P. (2001). *Patenting Agriculture*. Issues in Science and Technology, summer 2001.

<sup>38</sup> Source: Farmers' Legal Action Group, 5 February 1997. Cited in: Rodríguez Cervantes, Silvia. (1999). Mas Allá de la Propiedad Intelectual Sobre los Recursos Genéticos Agrícolas: Un Paso Necesario Para El Desarrollo Rural Sustentable. *Revista Perspectivas Rurales No. 5. Año 3 No. 1, 1999*. Programa Regional de la Maestría en Desarrollo Rural de la Universidad Nacional. Heredia, Costa Rica. 1999. P. 73-87.



patents on microorganisms and microbiological and biotechnological processes. In the case of plants, TRIPS permits countries to choose among giving patents, giving a kind of special intellectual property protection or a combination of both, without specifying that the special intellectual property provision must be carried out through the Union for the Protection of Plant Varieties (UPOV-91) agreement, but that is how the United States interprets and imposes the issue.

In Costa Rica, for example, legislators have postponed the approval of UPOV in two legislative sessions, attempting first to approve a national law on those issues so that the process is not determined in reverse, with legislators simply signing off on changes required by the UPOV agreement. Dep. Gerardo Vargas introduced the current bill on 13 November 2003, the national proposal for the Protection of the Rights of Breeders, a proposal that was ignored by the CAFTA negotiators.<sup>39</sup>

### **CAFTA: TRIPS squared**

CAFTA goes beyond TRIPS to require Central American countries to adhere to UPOV-91 and to establish much stronger protections of patents on plants, stating that, “any Party that does not provide protection through patents on plants at the date of implementation of the Agreement will make all reasonable efforts to grant said protection through patents.” If countries do not comply, they will face the threat of sanctions, both from the WTO and from the provisions established in CAFTA.

There is still a discussion within the WTO on modifications and interpretation of Art. 27.3 of TRIPS, for example, to prohibit intellectual property rights on life forms or on whether the provisions in UPOV 91 are the only way to protect plant varieties. However, even if the advances were made within the WTO, they would be immediately nullified in Central America since the CAFTA provisions establish the TRIPS provisions as a floor and indicate that countries can only vary from those rules to the extent that they go beyond TRIPS provisions to broaden the protections and observance of intellectual-property rights in their respective national laws (Art. 15).

This is also reinforced in the case of patents, as Art. 15.9.2 of CAFTA says that, despite the provisions in Art. 27.3 b) of TRIPS (which gives countries the option of not granting patents on plants), “...any Party that does not provide patent protection for plants by the date of entry into force of this Agreement shall undertake all reasonable efforts to make such patent protection available. Any Party that provides patent protection for plants or animals as of, or after, the date of entry into force of this Agreement shall maintain such protection.”

Given the slow discussion process within the WTO, and in view of the fact that CAFTA asks that the “Parties make all reasonable efforts to grant patents on plants,” it is very

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<sup>39</sup> In 1961 six European countries signed the UPOV (the acronym in French) Convention. Its provisions have varied over time. The current version, from 1991, provides the legal framework for intellectual-property rights on plant varieties that is very similar to patents, which, in an almost symbolic way recognizes some rights of scientists, new plant breeders and farmers.

possible that, if CAFTA is ratified, the countries involved would soon implement those “efforts” and grant patents on plants. There would be no going back from that point.

### **What is the UPOV deal offers farmers?**

According to the terms of UPOV 91, which supposedly grants a soft patent, farmers could save protected seeds if for their own use, i.e., for non-commercial uses. However, they cannot exchange or improve the seeds and it restricts their right to buy them from different sources. Under the terms of UPOV, such seeds can only be purchased from the patent owner or from their representatives.

Also, under UPOV, if a farmer plants a seed without paying the corresponding royalties, it is possible that he or she could lose the rights to the harvest and the products derived from it, if discovered by the patent owner.

### **What is the deal that UPOV offers to breeders of new plants?**

Any new plant breeder that utilizes a protected variety as the basis for his or her work must demonstrate that they have made substantial changes in the genotype. If not, it is not considered to be a new variety but rather “essentially derived” from the previous version. In that case, it could only be marketed with the consent of the patent owner.

### **Biodiversity languishes with genetic uniformity**

Under UPOV 91 and the existing patent system, the varieties of plants available for cultivation are reduced. One of the requirements to receive the rights granted under UPOV is that the plant being considered for protection be genetically uniform. This has reduced biological diversity and has had and will continue to have catastrophic consequences for food security. Such diseases as corn smut in the United States and that of potatoes in Ireland are precisely attributed to the homogeneity of cultivars.

In view of these any many other impacts of intellectual-property rights on life forms, many civil-society groups throughout the world believe that none of the accords in TRIPS or the regional free-trade agreements should undermine the rights of farmers and impede the preservation, use, exchange and sale of seeds produced in their fields.

## **5.2 THE POPULATION’S UNIVERSAL RIGHT TO MEDICINES**

### **Mario Devandas, Pensamiento Propio, Costa Rica**

Now that the CAFTA negotiations have concluded, the time has come to put an end to the speculation that occurred during those secretive talks and to discuss the potential impacts of the concrete terms of the agreement. Based on the text, the first and main conclusion is that things turned out worse than we had predicted. The Central American

governments delivered control over our social-security and welfare programs to U.S. companies.

### **It is not one agreement, it is eleven**

The Chapter on Intellectual Property Rights in CAFTA is just 34 pages long, but in the first two pages it commits countries to ratify ten international treaties on intellectual property, so that CAFTA effectively becomes 11 agreements. The ten additional treaties are linked to the World Intellectual Property Organization, and while in many ways they are consistent with the provisions in the WTO, they do not constitute the same legal framework and this has important consequences in terms of the interpretation and application of those standards.

### **A strategic defeat**

The Central American government made a grave strategic error in agreeing to the CAFTA terms. This is evident from the U.S. delegation's expressions of triumph, as the United States' principle objective was to take the issue of intellectual-property rights out of the WTO in order to install it in a bilateral context guided by provisions that have been defined over the years by developed countries in various international protocols. This is not to say that the WTO is friendly to less developed countries, but it does mean that it is a less dangerous scenario than CAFTA. Central America was completely trapped by the spider web constructed by the transnationals on intellectual property.

### **The market for medicines**

The purpose of patents is to stimulate innovation, so it is somewhat contradictory to general liberal economic theory. That theory assumes that mercantile competition is the best way to maximize social satisfaction and to ensure the optimal use of productive resources. Patents are a concession, made by the state, of a monopoly to the innovator, for a period of 20 years, during which time the patent holder has exclusive rights to produce and market the product resulting from his or her innovation. This theoretical contradiction is also expressed as a social tension between the interests of the patent owners and those of consumers, a contradiction that acquires a special ethical dimension when dealing with pharmaceutical products, given that the monopolistic control of the market by the patent holding companies denies immense social sectors access to the essential medicines on which they depend for improvements in the quality of their lives, or even the difference between life and death. A current and very wretched example is the retroviral medicines necessary to treat AIDS.

When the patent expires the monopoly ends and prices markedly decrease. In more than a few cases the original price is 50 times greater. Once a patent expires, another producer can utilize the information and reach the market with his or her product. The transnational pharmaceutical companies sought and achieved their goal of restricting the development of a competitive market for medicines in the CAFTA negotiations.

## **What was negotiated**

For an invention to be patentable it must be new, involve an inventive step, and be capable of industrial application. The requirement that it be new is global in nature. The concept of inventive step implies creation. Patents can not be applied to what already exists in nature; a discovery is not patentable. In CAFTA, however, it was accepted that a new product “is a product that does not contain a chemical entity that has been previously approved in the Party.” In other words, a product could have existed for 100 years, but if it had not been approved for marketing in a particular country, it would be considered new in that context.<sup>40</sup> Although this point is only valid for authorizing marketing, it is not a good precedent for future patent negotiations.

## **Lengthening the patent term**

Patents are granted for a period of 20 years, starting from the moment the application is presented, for the exclusive exploitation of the patented product under monopoly conditions. In the case of medicines and agrochemicals, before receiving permission for marketing, the company must carry out different kinds of tests to ensure the product’s safety and efficacy. Companies allege that such tests, on average, use up 10 to 11 years of the patent period, so that the monopoly period is reduced to 10 or 9 years. In the negotiating sessions, the governments agreed to “adjust the term of the patent to compensate for delays that occur in granting the patent” (Art.15.9.6). This possible lengthening of the patent term could be further extended by the provisions in Art. 15.10.2, which states that, “With respect to any pharmaceutical product that is subject to a patent, each Party shall make available a restoration of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process.” In this case, we are confronted with the difficulty of defining exactly what constitutes an “unreasonable curtailment”. So, there are two possible reasons for lengthening the patent term: one for delays in granting the patent; and one for delays in granting permission to market it. Since these two compensatory periods are not linked, one could interpret this to mean that they are independent of each other, that they could be added together to extend the patent term to 25 years or more.

## **Protection of trial data**

As explained above, after a company patents a new product, it conducts tests on the new medicine’s efficacy and safety. The data generated by these tests are known as trial data. When the patent expires, another company can copy the formula and ask the relevant authorities for permission to market the medicine, making reference to the trial data that was already presented (assuming that it is the same product), or simply indicating that this product already has marketing permission in the country or abroad.

CAFTA establishes that the company copying the product cannot make reference to the trial data until five years after the first company has obtained the respective marketing permission in the country (in the case of agrochemicals, the period is ten years). So a

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<sup>40</sup> See Art. 15.9.1 and 15.10.1c, CAFTA.

company could register in the United States, and then five years later come to some Central American country, and during the following five years no one could request separate permission to market it, so the data are protected for a total of ten years in Central America. The trial data would be available for a generic medicine producer in the United States, but not for a generic medicine producer in Central America.

If we add to this the fact that the patent would expire in the United States before it would in Central America, the conclusion is clear: there would be generic medicines, but they would be produced by U.S. companies, probably by the same transnationals. We would go from a monopoly to a duopoly or a cartel.<sup>41</sup> The prices would be controlled, so as to generate increased profits for the companies. The losers would be the public health service, private-sector consumers, and domestic companies.

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<sup>41</sup> DRAE. Econ. Agreement among various similar companies to avoid mutual competition and to regulate the production, sale and prices in a determined industrial area.

## 6. Environment

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### **An attempt to sweeten a truly toxic stew with green ingredients**

The governments and business elites in the region have presented the results of the recently concluded negotiations as a transcendental achievement because of the inclusion of a Chapter on Environment (Chapter 17) and an Environmental Cooperation Agreement (ECA) in CAFTA. Both texts are held up as the essence of a guarantee that this agreement will promote sustainable development, since, according to the ECA “economic development, social development and environmental protection are independent and mutually reinforcing components of sustainable development,”<sup>42</sup> while the provisions in Chapter 17 ensure that, “The Parties recognize the importance of strengthening the capacity to protect the environment and promote sustainable development in concert with strengthening trade and investment relations.”<sup>43</sup>

However, a simple reading of the texts and their relationship to the other chapters in the agreement reveals their essentially cosmetic nature. They are little more than marketing ploys to better position such discredited agreements. As a Salvadoran environmental activist commented, “They have added a bit of green sweetener to a truly toxic stew.”

### **Vague exhortations to enforce domestic environmental legislation and multilateral environmental agreements**

Although obviously it is not necessary to sign any international agreement, much less a free-trade agreement, to enforce national laws, the text abounds in exhortations to enforce – or even improve – domestic environmental legislation, insisting that, “The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws.”<sup>44</sup>

Despite the fact that the United States has become the main enemy of international environmental agreements (it has not signed the Kyoto Protocol on climate change and it has systematically sabotaged the Convention on Biodiversity, including the Cartagena Protocol on biosecurity, among others), CAFTA reiterates that, “...the implementation of these agreements at the national level is critical to achieving the environmental objectives of these agreements.”<sup>45</sup> Just so there are no doubts, the CAFTA provisions direct the parties to consult periodically on discussions of these environmental agreements at the World Trade Organization (WTO), as if that were the best guarantor of those accords.

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<sup>42</sup> Preamble, draft ECA, CAFTA.

<sup>43</sup> Art. 17.9.1, CAFTA.

<sup>44</sup> Art. 17.2.2, CAFTA.

<sup>45</sup> Art. 17.12.1, CAFTA.

Both of these texts cover in some detail the establishment of the Environmental Affairs Council (EAC) and the U.S. and Central American Environmental Cooperation Commission, the list of priority issues for cooperation, the rules of the procedures, and the flexible and voluntary (especially market) measures and mechanisms to protect and improve the environment. In addition, it establishes opportunities for public participation -- filing submissions that will be taken into consideration (“...including any documentary evidence...that appears to be aimed at promoting enforcement rather than harassing industry”).<sup>46</sup>

In all cases, the approved measures and mechanisms are designed to the measure and discretion of government officials. The participation mechanisms have been carefully constructed to be sterile and inoffensive.

### **Where and how does CAFTA deal with the region’s ecosystems and/or natural resources?**

The provisions in CAFTA ignore the region’s extensive socio-environmental problems and its high vulnerability to disasters. Putting aside any eco-systemic vision, scorning social and cultural assessments of the environment, as well as its productive potential, with a wave of some neoliberal magic wand, the negotiators have **converted nature into merchandise**, and its components have been artificially broken up according to convenience, economic profitability or level of competitiveness.

It is no accident that neither environmental issues nor the destiny of the region’s ecosystems, i.e., natural assets of public property and common use, are dealt with in the Environmental Chapter, and they are not the center of concern in the EAC.

Within this framework, one must look in other chapters to see how these issues have fared, including investment (Chapter 10), services (Chapter 11), government procurement (Chapter 9) and intellectual property rights (Chapter 15).

### **A concrete example: what happened to biodiversity?**

It is well known that Mesoamerica – Central America and southeast Mexico – is the region with the second greatest biodiversity in the world, after the Amazon. It is estimated that it represents close to 10 percent of the known biodiversity on Earth. In addition, this region has large water reserves, a great variety of micro-climates and an enviable geographic position. Because of that, it receives special treatment not only in the environmental section but in Chapter 15 on Intellectual Property Rights.

On the issue of biodiversity – from genetic diversity to the diversity of ecosystems – which is the region’s crown jewel for transnational corporations, especially for pharmaceutical and agribusiness firms, the charm is called patents and the mechanism is access for bioprospecting (i.e., biopiracy). Patents are valuable for developed country transnational companies, who are the owners of more than 95 percent of the patents in the

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<sup>46</sup> Art. 17.7.2, CAFTA.

world. They need for the patents to be well accepted by poor countries in order to ensure their profits.

CAFTA obliges the Parties to give patent protection to plants and animals.<sup>47</sup> Consequently, as a start, it requires the Parties to ratify the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedures by 1 January 2006.<sup>48</sup> That treaty creates a union of countries that operate under common rules on catalogued samples of patented microorganisms. It is administered by the World Intellectual Property Organization.

In addition, CAFTA requires all signing countries to ratify the UPOV Convention (International Convention for the Protection of New Varieties of Plants) before 1 January 2010.<sup>49</sup> The UPOV Convention grants patent rights for plant breeders that work in the seed industry, favoring genetic uniformity and large-scale monoculture. The 1991 version of UPOV, which is the most recent and which is referred to in CAFTA, has no clauses that protect farmers' rights.

## **Conclusion**

It not true that CAFTA is an agreement that will serve the goal of regional sustainable development. It is not even true that it seeks to promote enforcement of environmental legislation in our countries, nor the implementation of multilateral environmental agreements, since it is unnecessary for that end. The environmental chapter and the ECA are nothing more than rhetorical and superficial texts that mainly seek to improve the image and presentation of the agreement.

In the essential provisions in the agreement, nature, especially natural resources and so-called environmental services, are seen as objects for commercial exchange, as "merchandise". According to this perspective, they are not recognized as constituent elements of the network of life, nor is a healthy environment seen as a fundamental human right.

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<sup>47</sup> Chapter 15, CAFTA.

<sup>48</sup> Art. 15.1.3, CAFTA.

<sup>49</sup> Art. 15.1.5, CAFTA. Also see Section 5 of this paper on intellectual-property rights in CAFTA.



# 7. Labor

## **Ariane Grau and Omar Salazar ASEPROLA and Encuentro Popular, Costa Rica**

### **The structure of the Labor Chapter**

CAFTA's Labor Chapter is divided into the following articles:

- Article 16.1: Statement of Shared Commitment
- Article 16.2: Enforcement of Labor Laws
- Article 16.3: Procedural Guarantees and Public Awareness
- Article 16.4: Institutional Arrangements
- Article 16.5: Labor Cooperation and Capacity Building
- Article 16.6: Cooperative Labor Consultations
- Article 16.7: Labor Roster
- Article 16.8: Definitions
- and an annex entitled, "Labor Cooperation and Capacity Building Mechanism"

### **The contents of the Labor Chapter**

In the first article, the Parties agree to recognize existing international labor standards (ILO). Following that acceptance, the second article states that the member countries cannot, for their own benefit, fail to enforce their labor laws, "through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement." The responsibility for carrying out this standard is left to the governments, as well as the recognition that, through this action, "...it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws...as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion or retention of an investment in its territory."

But, lastly, it states that, "Nothing in this Chapter shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party." That provision leaves the rest of the interesting rhetoric described above exposed to the whims of each government according to its particular interests.

Article 16.3 adds that each government should permit fluid legal action and provide rapid information on labor issues, and necessary transparency in legal or judicial processes on these issues. In addition, the chapter specifies that in cases of this kind of violations (delays, lack of transparency, unclear procedures, etc.), the Parties, "to such proceedings may seek remedies to ensure the enforcement of their rights under domestic labor laws. Such remedies may include measures such as orders, fines, penalties, or temporary workplace closures, as provided in the Party's domestic law."

Once again enforcement is left to each country's domestic legislation, making it clear that if there are not laws for certain kinds of violations, there will be no possibility of sanctions. In some countries the ILO provisions and general agreements are clearly unconstitutional, since their constitutions have provisions that prohibit the enforcement of those agreements.

Article 16.4 describes the structure of the Labor Affairs Council, which is charged with reviewing the implementation of the agreement and this chapter, will be made up of representatives from the labor ministries. Each country will also establish a consultative committee that will collect information on the implementation of the chapter (perhaps including complaints on violations) that it will then deliver to the Labor Affairs Council. The consultative committees will support and monitor, where appropriate, these issues up to the dispute-resolution mechanism or Labor Roster as detailed in Article 16.7. It seems that only up to that point, if applied, would the complaint then be passed on to the general dispute-resolution mechanism.

Article 16.5 describes the functions of the so-called Labor Cooperation and Capacity Building mechanism. It proposes the strengthening of the Parties' capacity to improve enforcement of the ILO Declaration on Fundamental Rights at Work. The chapter does not advance beyond strengthening national institutions in terms of fundamental treaties and is lacking in large part due to inadequacies of existing labor laws or structures in each country. It also fails to require mandatory compliance but instead leaves countries to "do what is possible to enforce" the laws.

Article 16.6 develops the form of implementing the labor consultations, and again the specification is in the Labor Affairs Council, which will filter out many of the disputes, especially if they indicate violations by governments, including for example badly designed inspection systems, covered ups, etc.

Article 16.6 (9) indicates that, "In cases where the consulting Parties agree that a matter arising under this Chapter can be more appropriately addressed under another agreement to which the consulting Parties are party, they shall refer the matter for appropriate action in accordance with that agreement." It is not clear if "agreement" refers only to trade agreements or other kinds of international agreements. It seems however, that if the problem is structural to that country, such as the case, for example, of laws do not take into account some ILO provisions, this is not cause for a dispute within CAFTA and "can be more appropriately addressed" in other settings, which means that disputes over violations could potentially be sent to the traditional spaces that have contributed little to the resolution of the cases in each country, and that, in come countries, such as the United States, are not respected, as in the case of ILO decisions against it on freedom of association, etc.

Article 16.7, as described above, shapes the first stage of dispute resolution. The document does not specify how many people will be involved. They should be knowledgeable about the issue, not be involved with any of the parties, be independent and selected for their objectivity, trustworthiness and good judgment. This is an

important issue, especially in Central America, where it is often difficult to reconcile the aspects of objectivity and trustworthiness, when historically and culturally the issue is influenced by the existence of political and economic ties with the majority of persons in positions as arbitrators, even within the ministries of justice.

Article 16.8 defines what is to be understood by the terms laws or legislation related to labor rights: freedom of association; the right to organize and bargain collectively; the prohibition of any kind of forced or compulsory labor; a minimum age of employment for children; and acceptable conditions of work with respect to minimum wage, hours of work, and occupational safety and health.

Once again, we must highlight the fact that the labor regulations described above seem to be more of a concession than an obligation to enforce fundamental rights since they are dealt with directly by each country. In this regard, we present a case in Honduras, cited in an investigation of the limits to labor rights carried out by the Asociación Servicios de Promoción Laboral (ASEPROLA) between July and November 2003:

In late October 2003, an international complaint became even more urgent when Lidia Gonzalez, a 19 year-old woman employed at the SoutheastTextiles, SA factory in Choloma, in the north of Honduras, traveled to the United States with the support of the National Labor Committee (NLC). Southeast Textiles manufactures Sean John tee-shirts, which are used by singer Sean P. Diddy. Gonzalez denounced the fact that workers at the factory are physically and verbally mistreated, forced to work long hours, denied permission to go to the bathroom, and compelled to take pregnancy tests that result in their dismissal if the results are positive. In this case, as in the past, the owners of the company denied the facts, while Honduran business leaders (Jesus Canahuatti, President of the Maquiladora Association of Honduras) denounced Gonzalez and Honduran union leaders as traitors and asked that measures be taken against anyone who complains about these facts internationally, including Charles Kernaghan (Director of the U.S. National Labor Committee) as an international terrorist and the architect of a smear campaign against his company.<sup>50</sup>

In this case, where the violation of laws and legislation is clear, CAFTA's labor chapter could result in measures being taken to pass the complaint on to the Labor Affairs Council, and for the Council to pass it on to the Roster of Labor Experts. However, the president of the Maquiladora Association is a prominent politician in Honduras, so perhaps the issue will not even reach the Council, and if it does, it is possible that it would be instead by referred to the "other agreements", since it relates to national legislation and, under the terms of CAFTA, should be resolved in that arena.

It would therefore be left as a systematic violation outside the context of the free-trade agreement, citing national privacy, when it is clear that the entire matter was generated by a productivity strategy caused by investment in textiles within the articles of CAFTA.

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<sup>50</sup> *Diario La Tribuna*, 29 October 2003. p 8 and 30 October 2003. p 2. Refer also to p. 38 of the 31 October 2003 *Diario El Heraldo*.

## **Observations on labor issues**

We might call the Labor Chapter an agreement of good intentions, since it relies on good will and greater efforts to enforce legislation and international labor provisions. It does not oblige governments to enforce labor rights, and beyond that, it makes it clear that there is no consistency between the local provisions and the agreement itself, and there is no evidence that the provisions in the latter will lead to changes in the State structure.

The approach utilized in the agreement relies primarily on cooperation and training between countries for support and maintenance of laws so that they do not lower countries' labor standards, in such a way that it is not considered an unfair manner of taking advantage of low labor conditions in order to attract investment. On the other hand, the chapter does not provide for specific sanctions for labor violations, but instead relies on an extremely cumbersome mechanism to finally reach the dispute resolution mechanism.

The document repeatedly indicates that the complaints or "consultations" are made by "the Parties" and although it specifies how those consultations would be carried out, it is not clear who would make the judgment that it should proceed to the Labor Affairs Council. What is clear is that the complaints process is not designed to resolve the problems raised by labor organizations, but rather to address those violations that threaten free-trade standards, thus disintegrating any consistency between the agreement and labor relations, which are impossible to separate from each other.

National labor legislation throughout Central America could be changed (those laws that have not already been changed) or are in the process of reform. We have seen two proposals, one in Costa Rica, since the current legislation to reform the eight-hour workday and another in El Salvador, which is still under discussion, which would institutionalize temporary hiring and other labor issues. It is absurd to think that these reforms are not directly linked to the negotiations, which demonstrates once again which interests are represented in the "negotiating" sessions.

The reality is that if CAFTA is approved, national laws will be totally dismantled or in the process of being dismantled, no workers' rights will be protected, and they will be adapted to the best conditions to ensure greater profits for investors from big businesses and those of national capital.