

Comments Regarding the Free Trade Area of the Americas, Second Draft:  
Effects on Universal Access to Health Care and Water Services

Presented to the Office of the United States Trade Representative  
Trade Policy Staff Committee  
and  
The FTAA Civil Society Committee

January 31, 2003

by

**The Center for Policy Analysis on Trade and Health (CPATH)**

Ellen R. Shaffer, PhD, MPH, Director  
Joseph E. Brenner, MA, Director  
Alicia Yamin, JD, MPH, Advisory Board

98 Seal Rock Drive, San Francisco, California 94121-1437  
phone: 415-933-6204 fax: 415-831-4091  
ershaffer@cpath.org

Thank you for the opportunity to comment on the draft agreement of the Free Trade Area of the Americas (FTAA), dated November 1, 2001. These comments are in response to the notices in the Federal Register on December 27, 2002, in which the Office of the United States Trade Representative (USTR) and the FTAA Civil Society Committee invited written comments regarding any aspect of the second draft of the FTAA, including the process.<sup>1</sup> We note that the USTR has left the comment period open until February 28, 2003, and that the Civil Society Committee invites comments through May 1, 2003.

These preliminary comments by CPATH update our earlier comments on the Services provisions of the first draft of the FTAA. Those comments, dated Sept. 23, 2002, discussed the likely effects of the FTAA on universal access to health care services and to water. We summarize our main points regarding this new draft below, followed by comments on specific sections.

**Main points**

1. Inequalities in access to health care and to safe water, as well as inequalities in economic wellbeing, are increasing throughout the hemisphere, with adverse consequences for the health of populations.
2. We have serious reservations about subjecting vital human services such as health care and water to binding trade rules that facilitate privatization and corporate models of

financing and delivering services, while restricting the ability of governments at all levels to regulate in the interest of the public's health.

3. We urge that an assessment of the impact of trade in services be required, as it is in Article XIX of the General Agreement on Trade in Services, and that such assessments assure that policy proposals do not have an adverse impact on health or create conditions that undermine health promotion, as required in two European agreements: article 129 of the Maastricht treaty (1992) and article 152 of the Amsterdam treaty (1997).

4. We urge the USTR to support all language that differentiates treatment for developing nations, which include 32 of the 34 proposed signatories.

5. The USTR and the FTAA Civil Society Committee should immediately publish all responses to these Notices online, and inform every respondent where the comments are published.

### **Comments on specific sections**

#### **ARTICLE 1: Scope and Sectoral Coverage should exclude vital human services including health care and water.**

Paragraphs 1.2 and 1.6. These sections propose several alternative formulations for services to exclude. The U.S. should support excluding government procurement by a Party or state enterprise, subsidies or grants provided by a Party or a state enterprise, and services or functions of government, including health care, water, government-supported loans, guarantees, insurance, grants and tax incentives, pensions, income security, social security, child care or protection, air transportation services, law enforcement, and correctional services, and cross-border trade in financial services.

We note the stated interest of the U.S. Coalition of Service Industries in privatizing health care systems in the Americas and elsewhere, expressed in its comments to the USTR on November 27, 2000:

“Historically, health care services in many foreign countries have largely been the responsibility of the public sector. This public ownership of health care has made it difficult for U.S. private-sector health care providers to market in foreign countries. (E)xisting regulations...present serious barriers in OECD countries, including restricting licensing of health care professionals, and excessive privacy and confidentiality regulations. In most emerging markets...barriers can be erected in the future as laws and regulations are enacted, absent commitments in writing.”<sup>2</sup>

Successful publicly financed health care systems operate with popular support in Canada and many other nations in the Americas, and others may choose to adopt such models. Trade rules should not compromise countries' rights and abilities to enact and enforce regulations regarding their health care systems by including health care services in the FTAA.

The wording of other sections of this agreement will bear on the extent to which national autonomy on this issue is compromised, including Government Procurement, Investment, Market Access, Dispute Settlement and Competition Policy. Given the uncertainty in wording, and past precedents in NAFTA disputes that have challenged government decisions intended to protect population health, it is imperative at this time to exclude health care and other vital human services from the Services chapter.

Paragraph 1.7 continues to accord flexibility in meeting commitments to developing countries and smaller economies, which is positive.

## **ARTICLE 2: MOST FAVORED NATION TREATMENT (MFN)**

Paragraph 2.3 requires that countries can exempt measures from the FTAA only if simultaneously listed as an exemption under GATS. This requirement is unnecessarily cumbersome to developing nation, particularly since the terms of the two agreements are still in flux.

Paragraph 2.4 requires that sub-regional and bilateral trade agreements regarding MFN must be more expansive than the FTAA, but does not permit more restrictive rules. This unnecessarily constrains sub-regional autonomy.

## **ARTICLE 6: STANDARD OF TREATMENT**

This article is at best difficult to comprehend. It requires parties to accord service suppliers the better of the treatments required by the Articles on Most Favored Nation Treatment and National Treatment. Since MFN usually requires that all foreign suppliers receive equal treatment among each other, while National Treatment usually requires that foreign suppliers receive equal treatment with domestic national suppliers, this language would seem to favor the latter interpretation, regardless of how these articles are ultimately defined in the FTAA.

## **ARTICLE 7: MARKET ACCESS**

The second definition of paragraph 7.1 should be accepted. This provision does not prevent countries from adopting measures that restrict types of joint ventures, or the degree of foreign investment permitted in services.

Oppose the version of paragraph 7.3, No Local Presence, that prevents a requirement that a service supplier maintain a representative office or be resident in a territory as a condition for the cross-border supply of a service. Such a requirement may be necessary to assure performance for vital human services.

Oppose Non-Discriminatory Quantitative Restrictions, which requires that countries list non-discriminatory quantitative restriction and re-negotiate this list every two years. This is a mechanism for wearing down countries' preferred exceptions. Oppose language on

page 8.25 on Future Liberalization, which states as an aim eventually eliminating all restrictions on trade in services.

Recommended action: Alternatively, require documented evidence that liberalization has achieved economic growth, equitable distribution of wealth and other measures of population health to be agreed upon, as a condition of further liberalization.

## **ARTICLE 8: DEFINITIONS**

The definition of services, and of services supplied in the exercise of government authority, is critical. As stated above, vital human services should be excluded entirely. Services supplied in the exercise of government authority are those services so designated by the government. The test proposed is inadequate: any service supplied neither on a commercial basis, nor in competition with one or more service suppliers. Under these rules any government health care provider that buys medications or equipment from a commercial supplier could be ruled not to be deemed a service supplied in the exercise of government authority.

## **SECTION ON OTHER ISSUES RELATED TO THE ABOVE**

### Domestic Regulation

Paragraph 6 requires that measures relating to qualifications, standards and licensing shall only be considered not to be barriers to trade under certain circumstances, including that they are based on objective and transparent criteria, that they avoid unnecessary regulations and are not more burdensome than necessary to ensure the quality of the service. As has been pointed out in criticism of the GATS, this language depends on who is making the interpretation, and what standards the judges in turn are using. There is no international agreement on a wide range of measures that govern health care, and there is considerable variation among the U.S. states and localities. These definitions leave virtually any standards subject to challenge.

Annex on professional services. The stated purpose is to establish rules for reducing and gradually eliminating barriers to the provision of professional services in the 34 FTAA nations. As noted above, this is a worthwhile objective, but not one appropriately negotiated in the context of a trade agreement.

### General Exceptions

The language grants countries the right to adopt measures necessary to the protection of plant, animal and human life and to preserve the environment, but draft language qualifies this by asserting that such measures cannot be applied in a manner disproportionate to their purpose, have protectionist aims, or constitute an unnecessary obstacle to trade within the region.

This suggests that if in response to repeated outbreaks of water-borne or water-related diseases while water systems were managed by foreign private corporations, a country were to adopt measures restricting the management of water systems to domestic suppliers, this measure could be challenged and in fact nullified. This is not consistent with rules that prioritize public health over commercial interests.

---

<sup>1</sup> Federal Register, December 27, 2002, Volume 67, Number 249, Notices, Page 79231-79234.

<sup>2</sup> Coalition of Service Industries. Response to Federal Register Notice of March 28, 200. Solicitation of public comment for mandated multilateral trade negotiations on agriculture and services in the World Trade Organization and priorities for future market access negotiations on non-agricultural goods. P. 65. Viewed on 1/20/03 at: <http://www.uscsi.org/publications/papers/CSIFedReg2000.pdf>. [OECD= Organization for Economic Cooperation and Development]