

## WIELDING HUMAN RIGHTS AND CONSTITUTIONAL PROCEDURE TO TEMPER THE HARMS OF GLOBALIZATION: COSTA RICA'S BATTLE OVER THE CENTRAL AMERICAN FREE TRADE AGREEMENT

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### 1. INTRODUCTION

On May 28, 2004, the United States and the five small Central American countries of Costa Rica, Nicaragua, Guatemala, El Salvador, and Honduras signed the Central American Free Trade Agreement (CAFTA), followed by the Dominican Republic on August 5.<sup>1</sup> In the next few months, El Salvador, Honduras, Guatemala, and Nicaragua quickly ratified. In July 2005, after intense lobbying by President Bush, the United States Senate approved the agreement by a vote of 54 to 45,<sup>2</sup> and the House of Representatives did so by a slim margin of two votes.<sup>3</sup> A few

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<sup>1</sup> Robert Zoellick met with representatives of the five countries to sign CAFTA at a May 28 ceremony in Washington, D.C., when he vowed that "CAFTA [would] put the U.S. relationship with Central America on a more solid mutual foundation, firmly grounded in our shared commitment to democracy, free markets, free people, and hope." See Press Release, Office of U.S. Trade Representative, United States and Central America Sign Historic Free Trade Agreement (May 28, 2004), available at <http://www.ustr.gov/about-us/press-office/press-releases/archives/2004/may/united-states-and-central-america-sign-historic> (outlining some of the features of the U.S.-Central American free trade agreement and documenting the negotiation process); see also U.S. DEP'T OF AGRIC., FOREIGN AGRIC. SERV., Fact Sheet on Dominican Republic-Central America-United States Free Trade Agreement (Sept. 2009), available at <http://www.fas.usda.gov/info/factsheets/CAFTA/CAFTA-DR0909.pdf> (summarizing the background and key provisions of the trade agreement).

<sup>2</sup> Paul Blustein, *CAFTA Wins Approval from Senate*, WASH. POST, July 1, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/29/AR2005062900752.html>.

<sup>3</sup> Rick Klein, *House Passes Free-Trade Agreement in Tight Vote*; BOSTON GLOBE, July 28, 2005, available at [http://www.boston.com/news/nation/washington/articles/2005/07/28/house\\_passes\\_free\\_trade\\_agreement\\_in\\_tight\\_vote](http://www.boston.com/news/nation/washington/articles/2005/07/28/house_passes_free_trade_agreement_in_tight_vote)

weeks later, the Dominican Republic also ratified.<sup>4</sup> The sole exception remained Costa Rica, where CAFTA's opponents proceeded to wage an intense, two-year long political and legal battle to scuttle the treaty. Following an October 7, 2007 referendum in which the treaty received 51.6% "yes" versus 48.4% "no" votes, the treaty finally seemed headed for ratification by the country's legislature.<sup>5</sup> After obtaining an extension on the initial deadline to implement the treaty, the Costa Rican legislature officially ratified CAFTA by passing the last of several laws necessary to implement the agreement on November 14, 2008.<sup>6</sup> At

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(reporting on the 217 to 215 U.S. House of Representatives vote in favor of CAFTA); Editorial, *CAFTA's Benefits*, WALL ST. J., July 27, 2005, at A12 (arguing in favor of CAFTA by dismissing criticisms and comparisons to NAFTA and highlighting the political and economic gains to be made in the region). *But see* Bernard K. Gordon, *CAFTA's False Advertising*, WALL ST. J., Aug. 1, 2005, at A8 (contending that CAFTA will not lead to sweeping economic gains and politically will encourage competing trade blocs in other parts of the world that will end up hurting the United States).

<sup>4</sup> See Rahul Rajkumar, *The Central American Free Trade Agreement: An End Run Around the Doha Declaration on TRIPS and Public Health*, 15 ALB. L. J. SCI. & TECH. 433, 456-59 (2005) (pointing out that as of May 2004, six countries, including the Dominican Republic, had signed the agreement and describing how the Dominican Republic aggressively used the flexibility of the TRIPS Agreement to promote access to low-cost generic drugs, especially those drugs that combat HIV/AIDS).

<sup>5</sup> See Adam Thomson, *Costa Ricans Vote in Favour of U.S. Trade Pact*, FIN. TIMES, Oct. 8, 2007, <http://www.ft.com/intl/cms/s/0/a20bc444-75af-11dc-b7cb-0000779fd2ac.html#axzz1dv4TgPGA> (documenting the vote's outcome as 51.6% yes, 48.3% no). *But see* John Lyons, *Costa Rica CAFTA Vote Boosts U.S. Policy*, WALL ST. J., Oct. 9, 2007, at A2 (noting the marginal victory for CAFTA and highlighting the growing and vocal opposition); Eva Carazo Vargas, *Costa Rica: Why We Reject CAFTA*, CIP AMERICAS PROGRAM, Mar. 8, 2007 (trans. Laura Carlsen & Katie Kohlstedt), available at <http://americas.irc-online.org/am/4062> (detailing the oppositions' main contentions and platforms).

<sup>6</sup> See Catherine Bremer, *Costa Rica Wins 7-Month CAFTA Deadline Extension*, REUTERS, Feb. 27, 2008, available at <http://www.reuters.com/article/idUSN2748968820080228> (noting the seven-month extension that the United States and other nations granted to Costa Rica before joining CAFTA); see also Trade Policy Developments, *Central America-Dominican Republic-United States*, ORG. OF AM. STATES SICE FOREIGN TRADE INFORMATION SYSTEM, available at [http://www.sice.oas.org/TPD/USA\\_CAFTA/USA\\_CAFTA\\_e.ASP](http://www.sice.oas.org/TPD/USA_CAFTA/USA_CAFTA_e.ASP) (providing an exhaustive timeline of the CAFTA approval and relevant documents concerning the process).

long last, on January 1, 2009, CAFTA entered into force for Costa Rica as a state party.<sup>7</sup>

CAFTA is among the latest in a long line of international and regional trade agreements which have proliferated over the last two decades as part of the broader process of globalization.<sup>8</sup> While governments often describe them as “free trade” agreements, they also serve the purpose of “managing trade” among neighbors and economic rivals so as to regulate competition in politically sensitive sectors of the economy.<sup>9</sup> In 1989, Argentina, Brazil, and Uruguay established MERCOSUR,<sup>10</sup> and in 1992, the United States, Canada,

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<sup>7</sup> See U.S. TRADE REPRESENTATIVE, *2010 National Trade Estimate Report: Costa Rica*, in 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, available at [http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/NTE\\_COMPLETE\\_WITH\\_APPENDnonameack.pdf](http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/NTE_COMPLETE_WITH_APPENDnonameack.pdf) (chronicling Costa Rica's recent ratification of the agreement and describing the most important foreign barriers inhibiting U.S. exported goods and services, foreign direct investment by U.S. persons, and protection of intellectual property rights).

<sup>8</sup> See PAUL Q. HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION* 199 (1996) (discussing trade blocs as an integral part in understanding global economic development and predicting a future dominated by “a newly regionalized international economy”); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 130–35 (1996) (arguing that regional trade blocs are formed based on shared cultural traits and that these related civilizations will increasingly form pacts to compete against other distinct civilizations); PHILIP D. McMICHAEL, *DEVELOPMENT AND SOCIAL CHANGE: A GLOBAL PERSPECTIVE* 110 (2d ed. 2000) (“The world economy has tendencies toward both global and regional integration. Regional integration may anticipate world integration—especially as it promotes trade and investment flows among neighboring countries.”); KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* (1995) (theorizing that organizing economic activity around the nation-state is no longer cost-effective); MALCOLM WATERS, *GLOBALIZATION* 3 (1995) (predicting the collapse of nation-states as autonomous entities and defining globalization as “[a] social process in which the constraints of geography on social and cultural arrangements recede”); Stephen D. Krasner, *Sovereignty*, 122 *FOREIGN POL'Y* 20, 20 (Jan. 2001) (arguing that while transnational organizations and economic globalization will certainly increase, nothing will ever jeopardize the endurance of sovereign nation-states).

<sup>9</sup> *But see, e.g.*, JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 244–48 (2002) (describing how many international and regional “free trade” agreements actually increase certain trade barriers in politically sensitive sectors of the economy by angering local populations).

<sup>10</sup> See Mario E. Carranza, *Can Mercosur Survive? Domestic and International Constraints on Mercosur*, 45 *LATIN AM. POL. & SOC'Y* 67, 68 (2003) (retracing the

and Mexico signed the North American Free Trade Agreement (NAFTA), in both cases with the goal of lowering trade and investment barriers, while leaving certain key economic sectors highly protected and subsidized.<sup>11</sup> In 1994, the World Trade Organization (WTO) was founded as the successor to the General Agreement on Tariffs and Trade (GATT), with the goal of liberalizing global trade in goods, services, and intellectual property, but leaving untouched massive subsidies by the United States and the European Union to their farmers.<sup>12</sup>

Globalization fans have hailed these trade agreements as harbingers of higher levels of trade, prosperity, and the lifting of millions of people out of poverty.<sup>13</sup> Critics, on the other hand, have argued that so-called "free trade" agreements have tended to benefit mostly a few multinational corporations and local elites while harming the economic, social, and cultural human rights of large numbers of people throughout both the developed and

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history of Mercosur and attributing its creation to global competition and pressure to form a regional trade bloc).

<sup>11</sup> See John Cavanagh et al., *Happily Ever NAFTA?*, 132 FOREIGN POL'Y 58, 61 (2002) (highlighting the objectives of NAFTA in the larger context of a debate concerning the merits of NAFTA).

<sup>12</sup> See Elizabeth Bullington, *WTO Agreements Mandate That Congress Repeal the Farm Bill of 2002 and Enact an Agriculture Law Embodying Free Market Principles*, 20 AM. U. INT'L L. REV. 1211, 1216-18 (2005) (arguing that the United States should repeal the Farm Bill subsidies, but highlighting the United States' entrenched adherence to the policy); see also Bernard Hoekman & Kym Anderson, *Developing-Country Agriculture and the New Trade Agenda*, 49 ECON. DEV. & CULTURAL CHANGE 171, 174-75 (2000) (arguing against agricultural subsidies in developed nations because they may have an unbalanced effect on developing countries that cannot compete and export their own products); Jeff King, *Trade Reform and the Corn Market: Prospects for the World Trade Organization Negotiations on Agriculture*, 23 REV. AGRIC. ECON. 47-67 (2001) (arguing in favor of reducing agricultural subsidies, focusing his study on corn and concluding that there is hope for liberalization of the global agricultural market).

<sup>13</sup> See L. Alan Winters et al., *Trade Liberalization and Poverty: The Evidence So Far*, 42 J. ECON. LITERATURE 72, 72-73 (2004) (arguing that empirical evidence supports the view that trade liberalization alleviates poverty); David R. Dollar et al., *Growth Is Good for the Poor 4* (The World Bank Dev. Research Grp., Working Paper Mar. 2002), available at [http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/Growth\\_is\\_Good\\_for\\_Poor\\_Journal\\_Article.pdf](http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/Growth_is_Good_for_Poor_Journal_Article.pdf) ("What we can conclude . . . is that policies that raise average incomes are likely to be central to successful poverty reduction strategies . . .").

developing worlds.<sup>14</sup> The massive and often violent protests that regularly mark the meetings and conferences of the WTO<sup>15</sup> and the large demonstrations that have taken place in several Central American countries since 2005<sup>16</sup> are all reminders of the considerable resistance free trade generates among various sectors of society.

The small nation of Costa Rica is perhaps the most remarkable example of such resistance. A vibrant democracy with five decades of uninterrupted civilian democratic governments, a strong legal and constitutional tradition, and a modest welfare

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<sup>14</sup> See, e.g., Noam Chomsky, *Notes on NAFTA: 'The Masters of Mankind,'* NATION, Mar. 29, 1993, at 412, 412-16 (arguing that the main goal of NAFTA was to empower U.S. corporations through increased protection of U.S. intellectual property rights, rules of origin requirements, and liberalization of services meant to strengthen U.S. banking entities); see also *Business and Human Rights*, HUMAN RIGHTS WATCH, available at <http://www.hrw.org/category/topic/business/trade>; Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L.J. 365, 365-68 (highlighting the rise of unscrupulous corporations that disregard human rights concerns and arguing for increasing shareholder power to include activist proposals); Martin S. High, *Sustainable Development: How Far Does U.S. Industry Have to Go to Meet World Guidelines?*, 14 ALB. L.J. SCI. & TECH. 131, 131-37 (2004) (describing the steps necessary for the global community to reach the goals of sustainable development and predicting that sustainable development will become increasingly important over time).

<sup>15</sup> See generally Chomsky, *supra* note 14 (protesting and arguing against NAFTA because of the possibility of benefitting a few at the expense of the vast majority of people); HUMAN RIGHTS WATCH, *supra* note 14.

<sup>16</sup> See Sherrod Brown, *An Unbalanced Trade Policy*, WASH. POST, May 31, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/30/AR2005053000774.html> (contending that CAFTA will not help Central America and pointing to the mass demonstrations throughout the region, including tens of thousands of protesters in El Salvador and over thirty thousand in Costa Rica); Karen Hansen-Kuhn, *Central Americans Speak Out Against DR-CAFTA: Major Issues and Mobilizations*, GLOBAL EXCHANGE (Mar. 2005), <http://www.globalexchange.org/campaigns/cafta/actions.html> (underscoring and describing the key protests in countries throughout Central America against CAFTA); see also, Chris Hufstader & Andrea Perera, *Resistance in Central America*, OXFAM AMERICA (Jul. 19, 2006), <http://www.oxfamamerica.org/articles/resistance-in-central-america> (advocating research for alternatives to CAFTA and promoting community activism to organize in Nicaragua, El Salvador, Guatemala, and Honduras against the agreement).

state that is advanced by Latin American standards,<sup>17</sup> Costa Rica was the locus of an intense constitutional and political battle over CAFTA that lasted over two years and involved all sectors of its society. In spite of earlier predictions that forecast an easy victory for CAFTA, its opponents came close to derailing it. This article will look at how opponents of CAFTA effectively wielded the language of human rights, constitutional procedure, and the country's courts to generate intense opposition to the free trade agreement, in spite of the strong support of local political and business elites and immense pressures by the United States on the small country.

Costa Rica's battle over CAFTA is a highly instructive case study on several levels. First, it illustrates the powerful social and political countercurrents and intense emotions generated by globalization, as people resist what they perceive to be its assault on local and national values, their sense of identity and traditional ways of life, and absorption into a larger global system dominated by impersonal economic forces and institutions they do not trust and over which they have little control.<sup>18</sup> Second, it underlines the great power which the language of human rights and the rule of law—including constitutional tradition and the power of courts—can have in affirming the legitimacy of claims for individuation and protection against the impersonal processes of globalization. One of the most powerful arguments in the debate was the claim that the treaty endangered the country's uniqueness, its individual identity as a particular community of people bound by certain

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<sup>17</sup> See THE COSTA RICA READER: HISTORY, CULTURE, POLITICS 1 (Steven Palmer & Ivan Molina eds., 2004) (describing Costa Rica as "a democratic oasis on a continent scorched by dictatorship and revolution . . . an egalitarian, middle-class society blissfully immune to the violent class and racial conflicts haunting most Latin American countries").

<sup>18</sup> In contrast, there are some who view globalization favorably. See, e.g., THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 7, 42 (2000) (arguing that globalization is the central organizing principle of the post-Cold War world and suggesting that, in order for a country to thrive economically, a balance must be found between the preservation of the ancient forces of culture, geography, tradition and community, and globalization). But see HUNTINGTON, *supra* note 8, at 125, 311 (recognizing that a conflict between cultures and civilizations will likely result from globalization and urging the West "not to attempt to reshape other civilizations in the image of the West . . . but to preserve, protect, and renew the unique qualities of Western civilization").

specific social and economic values and ideals shared over a common history. Third, the battle over CAFTA illustrates the way in which human rights and constitutional procedure can help to generate and legitimate political forces which, once awakened, may acquire a momentum of their own. Fourth, in spite of the tremendous passions it aroused, the two-year struggle over CAFTA was orderly and peaceful to a high degree, validating to a large extent the resiliency of Costa Rica's political and judicial institutions, the country's non-violent ethos, and the reality of a distinct Costa Rican political and constitutional culture deeply infused by the principles of human rights, the rule of law, and peace.

## 2. THE DEBATE OVER GLOBALIZATION AND FREE TRADE

Costa Rica's battle over CAFTA needs to be placed in the broader context of the debate over the merits of free trade and the advance of globalization, of which free trade is a key element.<sup>19</sup> Globalization can be best described as the process by which, over the last two decades, the world has become highly interconnected economically and culturally at a faster pace than any time since 1914.<sup>20</sup> Key dimensions of globalization have included the spread of market-based capitalist systems over wide areas of the globe, the

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<sup>19</sup> Some see free trade as a benign "inexorable integration of markets, nation-states and technologies to a degree never witnessed before—in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before . . ." FRIEDMAN, *supra* note 18, at 9. *But cf.* Juan Carlos Linares, *The Development Dilemma: Reconciling U.S. Foreign Direct Investment in Latin America with Laborers' Rights: A Study of Mexico, The Dominican Republic and Costa Rica*, 29 N.C. J. INT'L L. & COM. REG. 249, 257-59 (2004) (stating that free trade has diversified the Mexican economy, while also recognizing the damaging effects of the prominence of American-owned maquiladoras in Mexico and the existence of inequality in wages and income among the Mexican citizenry).

<sup>20</sup> In line with this view, some scholars and analysts refer to globalization in terms of consciousness and interdependence, viewing it as a process embodied by "the compression of the world and the intensification of consciousness of the world as a whole . . . concrete global interdependence and consciousness of the global whole in the twentieth century." ROLAND ROBERTSON, *GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE* 8 (1992).

revolution in information and communication technologies, and a massive increase in international trade and capital flows.<sup>21</sup>

As its admiring observers are quick to point out, globalization has yielded important benefits.<sup>22</sup> The spread of market-based capitalism has been partly responsible for unleashing a wave of economic growth that has lifted hundreds of millions of people out of poverty in China, India, Vietnam, and elsewhere.<sup>23</sup> Advances in global travel, communications, and information technologies have resulted in the “CNN phenomenon”, the ubiquity of the internet, and the creation of the “blogosphere”, which have made it harder for repressive regimes to control their populations and to conceal information from them.<sup>24</sup> Increases in global trade and investment,

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<sup>21</sup> See FRIEDMAN, *supra* note 18 at 121, 140 (describing the growing variety of investment instruments and opportunities as a godsend and asserting that the Internet contributed to this new era of globalization); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *A FUTURE PERFECT: THE ESSENTIALS OF GLOBALIZATION* 29 (2000) (arguing that technology, capital markets, and management are each powerful tools, but that the interaction of all three has been the driving force behind globalization).

<sup>22</sup> See generally David R. Dollar & Aart Kraay, *Spreading the Wealth*, FOREIGN AFF., 120, 127-28 (2002) (arguing that, contrary to popular belief, globalization has not resulted in higher inequality within economies but has promoted equality and reduced poverty).

<sup>23</sup> See, e.g., Michael Vatikiotis & David Murphy, *With Aggressive Trade Pacts, China Quietly Builds Clout in Region*, WALL ST. J., Mar. 19, 2003, at A12 (describing China's use of free-trade agreements with other Asian nations and tariff reductions as tools to shape its vibrant economy); Gurcharan Das, *The India Model*, 85 FOREIGN AFF. 2 (2006) (recounting India's integration efforts in the 1990s and identifying its long-lasting results in the form of high economic growth today); see also Benn Steil, *The End of National Currency*, 86 FOREIGN AFF. 83, 95 (2007) (arguing that since “economic development outside the process of globalization is no longer possible[,]” countries should abandon national currencies in the ever-increasing globalized market); Andrew Batson & Shai Oster, *As China Booms, the Poorest Lose Ground*, WALL ST. J., Nov. 22, 2006, at A4 (recognizing that China's role in globalization has helped the country get many people out of poverty, but also questioning why many people are now more impoverished).

<sup>24</sup> See, e.g., David Held, *Democracy and Globalization*, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 11, 13, 18 (Daniele Archibugi et al. eds., 1998) (discussing globalization as a source of deep interconnectedness between countries across the world and describing its effect on cultural and communication trends, such as the Internet); DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* 345, 363 (1999) (arguing that technological innovations have “facilitated an increase both in national communication patterns and in transnational cultural flows[,]” especially



while not benefiting everyone equally, have led to higher rates of economic growth, productivity, and formal employment in those developing countries that have been able to take advantage of these trends.<sup>25</sup> Moreover, globalization has helped to create a higher level of "global consciousness" which has benefited the efforts of human rights activists to draw attention to the plight of the world's poor and the deterioration of the earth's environment.<sup>26</sup>

For its skeptics and detractors, globalization has a different face. It represents the sheer acceleration of economic activity and exploitation of the earth's resources beyond the point of social and environmental sustainability.<sup>27</sup> The great decade of globalization, the 1990s, saw a sharp increase in global warming accompanied by the specter of environmental catastrophe in such poster children of globalization as India and China.<sup>28</sup> The worldwide expansion of market-based capitalism has brought with it massive waves of deregulation, privatization, and social spending cuts that have destroyed already frayed safety nets for hundreds of millions of

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because of shared languages and linguistic competencies); *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999) (describing how global human rights norms have improved human rights practices in a number of countries, including Tunisia, Kenya, Chile, Morocco, and others).

<sup>25</sup> *Contra* Bob Davis, *IMF Fuels Critics of Globalization*, *WALL ST. J.*, Oct. 10, 2007, at A9 (describing the International Monetary Fund's report findings that globalization contributes to increasing income inequality).

<sup>26</sup> *See, e.g.*, MIKE MOORE, *A WORLD WITHOUT WALLS: FREEDOM, DEVELOPMENT, FREE TRADE AND GLOBAL GOVERNANCE* 187-96 (2003) (discussing globalization as being a tool to engage civil society by increasing informational flows and accountability, thus helping increase NGOs and international organizations' reach).

<sup>27</sup> *See* Sean O. Riain, *States and Markets in an Era of Globalization*, 26 *ANN. REV. SOC.* 187, 188 (2000) (describing the effect globalization has on the relationship between states and markets and stating that "[s]tates find themselves trying to respond to pressures from local societies and global markets simultaneously without the breathing room previously offered by controls on transnational trade, finance, and production"). *Contra* John Micklethwait & Adrian Woolridge, *The Globalization Backlash*, 126 *FOREIGN POL'Y* 16 (2001) (arguing that some critics unfairly blame globalization for many of the world's ills).

<sup>28</sup> *See, e.g.*, Ming Wan, *China's Economic Growth and the Environment in the Asia-Pacific Region*, 38 *ASIAN SURVEY* 365, 366 (1998) (analyzing the impact of China's own rapid economic growth and high energy use on the economic climate in the Asia-Pacific region and the world, including issues such as global warming, air pollution, and diminishing of biodiversity).

people in Latin America, China, and Eastern Europe.<sup>29</sup> Global communication technologies have become the key means by which the United States relentlessly exports its consumerist, capitalist culture, thereby transforming other cultures in its image, and destroying the traditional values, cultural identity, and ways of life of hundreds of millions of others.<sup>30</sup> Under globalization, CNN and Hollywood threaten to establish American cultural hegemony over many parts of the world.<sup>31</sup> Meanwhile, massive increases in international trade, investment, and capital flows seem to have benefited disproportionately large multinational corporations and small local elites allied with them, while putting downward pressure on wages, labor protections, and the environment everywhere.<sup>32</sup> Under the titanic stress of global competition, social Darwinism has flourished if not in name at least in practice.

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<sup>29</sup> See, e.g., Jane Spencer, *Clean-Energy Firms Make Pitch to Asia*, WALL ST. J., Apr. 18, 2007, at A9 (revealing China and India's decision to pledge substantial amounts of money to U.S. trade mission efforts to capitalize on growing commitment to renewable energy). For a more detailed analysis of the environmental issues facing China, see Elizabeth C. Economy, *The Great Leap Backward? The Costs of China's Environmental Crisis*, 86 FOREIGN AFFAIRS 38, 46 (2007) (describing the high costs China suffers when dealing with its environmental issues).

<sup>30</sup> See, e.g., Noam Chomsky, *Globalization and its Discontents*, <http://www.chomsky.info/debates/20000516.htm> (last visited Nov. 16, 2011) (stating that in trade relations between the United States and other nations, "ordinary people" from both the United States and other nations do not have their rights protected since U.S. corporations and investors are exclusively benefited).

<sup>31</sup> For an examination of the expanding scope of communication due to globalization, as well as its contribution to cultural change and homogeneity, see J. Michael Greig, *The End of Geography?: Globalization, Communications, and Culture in the International System*, 46 J. OF CONFLICT RESOLUTION 225, 234-35, 238 (2002) (finding that despite the fact that as the range of interaction and communication increases, cultural variation decreases, increased communication can also maintain areas of cultural uniqueness). But see Mario Vargas Llosa, *The Culture of Liberty*, 122 FOREIGN POL'Y 66 (2001) (arguing that globalization does not suffocate local cultures, but rather liberates them from the ideological rigidities of nationalism).

<sup>32</sup> See, e.g., Vito Tanzi, *Globalization without a Net*, 125 FOREIGN POL'Y 78, 78-79 (2001) (describing how globalization decreases the ability of governments to provide welfare programs because it encourages countries to decrease tax rates, thus reducing funding that can be used to help the poor, and it introduces deregulatory pressures that restrict the rights of workers and members of vulnerable groups); Dani Rodrik, *Sense and Nonsense in the Globalization Debate*, 107

Admirers and detractors alike have compelling points to make about the impact of globalization on human welfare in general and human rights in particular. It is also clear that globalization seems threatening to many people not necessarily because it is linking the world more closely at all levels, but because in its current form it is also erasing individual and communal identities, replacing them with a more homogeneous set of global values and allegiances rooted in U.S.-based versions of consumerism and individual economic competition.<sup>33</sup> For many cultures and societies, this cultural and social homogeneity, and the resultant loss of identity it engenders, is indeed one of the most disturbing and resented aspect of globalization.<sup>34</sup> For societies with a strong sense of individual identity that pride themselves on their cultural, social or political uniqueness, the threat of globalization looms particularly large. Costa Rica in Central America is an example of such a society for which globalization, regardless of its other advantages and disadvantages, seems highly threatening because of its impact on the specific social, economic, and political institutions that define its polity.

### 3. THE ORIGINS OF COSTA RICA'S UNIQUE SOCIAL, POLITICAL AND LEGAL INSTITUTIONS

A small country slightly larger than the state of Maryland, with a population of 4.5 million people,<sup>35</sup> Costa Rica has an identity

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FOREIGN POL'Y 19, 26 (1997) (describing how globalization increases the demand for social insurance, but decreases governments' ability to provide it).

<sup>33</sup> See Robert Holton, *Globalization's Cultural Consequences*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 142 (2000) (describing the homogenization effect of globalization on culture as one of "convergence toward a common set of cultural traits and practices" and stating that many criticize the global culture as being exclusively based on American consumerism). *But see* David Rothkopf, *In Praise of Cultural Imperialism?*, 107 FOREIGN POL'Y 38, 39 (1997) (recognizing the positive results of globalization and declaring that "globalization promotes integration and the removal not only of cultural barriers but many of the negative dimensions of culture. Globalization is a vital step toward both a more stable world and better lives for the people in it").

<sup>34</sup> See generally Holton, *supra* note 33 (describing how globalization can result in the loss of identities and the homogenization of cultures).

<sup>35</sup> See *The World Factbook: Costa Rica*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/cs.html> (last updated on Nov. 4, 2011)

uniquely shaped by its special history.<sup>36</sup> In pre-Columbian times, the country was a sparsely populated area separating the more advanced civilizations of upper Central America and the Andes.<sup>37</sup> The arrival of Spanish settlers in the mid-sixteenth-century led to the decimation of the small, existent indigenous communities.<sup>38</sup> With no gold or silver mines with which to attract speculators and no ready supply of cheap labor with which to work large landholdings, Spain largely neglected the area.<sup>39</sup> As a result, the emergent economic and social structures displayed more egalitarian and democratic characteristics than elsewhere in Spanish America, with many of the settlers practicing subsistence farming on small plots.<sup>40</sup> With few indigenous peoples left, little intermarriage occurred; hence, there were fewer class distinctions between “*mestizos*” and “*criollos*.”<sup>41</sup> With the exception of some of the coastal areas, where African slaves worked large estates for the production of export crops, the country’s heartland evolved into a rural democracy dotted by a few cities, each with their own sense of unique identity, who practically functioned as city-states in the ancient Greek model.<sup>42</sup> Isolation from the rest of the Spanish

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(listing general political, economic, historical, geographic, and demographic information about Costa Rica).

<sup>36</sup> See generally Thomas L. Karnes, *The Origins of Costa Rican Federalism*, 15 AMERICAS 249 (1959) (chronicling Costa Rican history from Spanish colonial rule to independence, while underscoring its separatist nature in comparison with the rest of Central America); CHESTER LLOYD JONES, *COSTA RICA AND CIVILIZATION IN THE CARIBBEAN* (2d ed. 1967) (distinguishing Costa Rica from the rest of the Caribbean nations and using it as a model for political and economic development).

<sup>37</sup> CHRISTOPHER BAKER, *HISTORY OF COSTA RICA* 1 (1995).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* at 5; MITCHELL A. SELIGSON, *PEASANTS OF COSTA RICA AND THE DEVELOPMENT OF AGRARIAN CAPITALISM* 6–7 (1980) (arguing that the absence of gold and geographic isolation helped lead to “the development of a strong yeomanry” in which settlers “preferred to set up homesteads which were isolated from the other settlers”).

<sup>41</sup> See BAKER, *supra* note 37.

<sup>42</sup> See, e.g., BAKER, *supra* note 37, at 6; see CHARLES D. AMERINGER, *DEMOCRACY IN COSTA RICA* 10 (1982) (positing that rural democracy may have emerged partly due to a uniformly poor and culturally homogenous colonist class that could not afford to import slaves and largely could not similarly subjugate the indigenous population or other peoples); see also ADELA F. DE SAENZ & CARLOS MELENDEZ, *NUEVA HISTORIA DE COSTA RICA* (5th ed., Imprenta Las Americas Ltda, 1982)

empire aided the development of a highly individualistic, independent spirit among Costa Ricans.<sup>43</sup>

In 1821, the country became peacefully independent following the secession of Mexico and the rest of Central America from the Spanish empire.<sup>44</sup> After a brief civil war in 1823 between conservative and liberal factions for political control in which the liberal forces prevailed, the country entered a long period of progressive reforms characterized by an emphasis on an independent judiciary, freedom of the press, public education, and the extension of credit to small farmers.<sup>45</sup> In 1869, the constitution made primary education for both sexes free and compulsory, and it abolished capital punishment.<sup>46</sup> As early as 1917, efforts were made to establish a system of direct, progressive income taxation.<sup>47</sup> Costa Rica's democratic progress and egalitarian ethos were sharply at odds with conditions prevailing throughout the rest of Central America and most of South America, where civil strife, gaping social and economic inequalities, despotic reactionary regimes, and massive poverty were the norm.<sup>48</sup> In the early 1940s, Costa Rica embarked on further reforms along the lines of Franklin Roosevelt's "New Deal" in the United States, including the establishment of a guaranteed minimum wage, paid vacations,

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("The Costa Rican lifestyle in the Eighteenth Century differed little from that of the prior Century. The greater evils were poverty, depopulation, a lack of roads, and therefore, of communications.").

<sup>43</sup> See, e.g., BAKER, *supra* note 37.

<sup>44</sup> *Id.*

<sup>45</sup> See RICHARD BIESANZ ET AL., *THE COSTA RICANS* 21-22 (1982) (chronicling the rise of a "liberal" democracy in the late 1800s that aimed to educate the population and secularize national institutions).

<sup>46</sup> See JOSE LUIS VEGA CARBALLO, *ORDEN Y PROGRESO: LA FORMACION DEL ESTADO NACIONAL EN COSTA RICA* 250-51 (1981) (discussing the general progression toward Democracy evinced in the 1869 Constitution, despite the fact that it was produced during a two-year period in between two military coups).

<sup>47</sup> See, e.g., BAKER, *supra* note 37.

<sup>48</sup> See generally Terry Lynn Karl, *The Hybrid Regimes of Central America*, 6 J. DEMOCRACY 72 (1995) (describing Costa Rica as an outlier in terms of enjoying relative peace and political stability). *But cf.* WILLIAM EVERETT KANE, *CIVIL STRIFE IN LATIN AMERICA: A LEGAL HISTORY OF U.S. INVOLVEMENT* (1972) (investigating U.S. relations with conflict-ridden Latin America while largely—and conspicuously—omitting Costa Rica, thereby implicating the country's stable and peaceful status).

unemployment compensation, and the codification of workers' rights.<sup>49</sup>

### 3.1. *The 1948 Revolution and 1949 Constitution*

Although initially triggered by the government's efforts to manipulate that year's elections, a popular and largely peaceful revolution in 1948 quickly led to far-reaching changes, including the adoption of the Constitution of 1949, which is in force to this day.<sup>50</sup> The Constitution not only consolidated the liberal and social reforms of the previous century, but also created a constitutional order explicitly founded on the ideals of social democracy.<sup>51</sup> Its most significant achievements, unique in the Western Hemisphere, included the abolition of the army,<sup>52</sup> the establishment of a welfare state with broad social and economic protections, and the further strengthening of the rule of law and the judiciary. Its highly progressive character and impact on the country's legal and social institutions over the past half century make the Constitution a

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<sup>49</sup> See, e.g., BAKER, *supra* note 37, at 12.

<sup>50</sup> See JOHN PATRICK BELL, *CRISIS IN COSTA RICA: THE 1948 REVOLUTION* 155–61 (1971) (narrating how revolutionary leader José Figueres initially sought to transfer power to Otilio Ulate, the perceived winner of the fraudulently overhauled 1948 election, only to head the interim government that passed sweeping progressive reforms before installing Ulate into power).

<sup>51</sup> See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS [CONSTITUTION], Preamble (Costa Rica) (Georgetown University Political Database of the Americas), available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html> (explicitly expressing faith in democracy as a foundation of the Constitution); see also Robert S. Barker, *Taking Constitutionalism Seriously: Costa Rica's Sala Cuarta*, 6 FLA. J. INT'L L. 349, 366 n.102 (1991) (noting the constitutionally granted individual rights in Articles 10–49, social rights and guarantees in Articles 50–74, and political rights and duties in Articles 90–98); THE COSTA RICA READER: HISTORY, CULTURE, POLITICS 141–42 (Steven Palmer & Iván Molina eds., 2004) (characterizing the Constitution of 1949 as marking “the beginning of a fundamentally distinct phase in the political life of the country,” grounded in social justice and the exercise of the right to vote as the sources and objectives of legitimate political power).

<sup>52</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS [CONSTITUTION], art. 12 (Costa Rica) (Georgetown University Political Database of the Americas), available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>.

pivotal milestone in Costa Rica's development as a peaceful social democracy with a strong commitment to human rights.<sup>53</sup>

Title IV of the Constitution guaranteed, as early as 1949, a wide range of civil and political rights such as were embodied eventually in the 1966 International Covenant on Civil and Political Rights.<sup>54</sup> It includes many rights that were not made part of many Latin American constitutions until the 1980s. In addition to declaring the inviolability of human life,<sup>55</sup> it guarantees: complete freedom of movement and travel;<sup>56</sup> the "right to privacy, liberty, and inviolability" of all private documents, written and oral communications;<sup>57</sup> the security of one's home and any other private space, subject to exceptions requiring a magistrate's warrant in writing;<sup>58</sup> freedom of association;<sup>59</sup> the right to petition public officials and to receive a prompt response to such petitions;<sup>60</sup> freedom of speech and of the press;<sup>61</sup> and freedom from compulsory banishment.<sup>62</sup> There is a guarantee, unusual for its time, "assuring free access to government departments for purposes of gaining information about matters of public interest."<sup>63</sup> Costa Rica's national territory was declared "a site of asylum for anyone persecuted for political reasons . . . and if for lawful

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<sup>53</sup> See generally Ethan Katz & Matthew Lackey, *Costa Rica as a Peaceful State: One Costa Rican Lawyer's Odyssey v. His Nation's Establishment*, COUNCIL ON HEMISPHERIC AFFAIRS (Mar. 19, 2010), <http://www.coha.org/costa-rica-as-a-peaceful-state-one-costa-rican-lawyer%E2%80%99s-odyssey-v-his-nation%E2%80%99s-establishment/> (briefly surveying Costa Rica's history and characterizing the country as a "pacifist state").

<sup>54</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (representing an international push to adopt basic universal political and human rights in the 1960s—was adopted by the U.N. General Assembly in 1966 although it did not come into force until ten years later).

<sup>55</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS [CONSTITUTION], art. 21 (Costa Rica) (Georgetown University Political Database of the Americas), available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html> ("La vida humana es inviolable.").

<sup>56</sup> *Id.* at art. 22.

<sup>57</sup> *Id.* at art. 24.

<sup>58</sup> *Id.* at art. 23.

<sup>59</sup> *Id.* at arts. 25–26.

<sup>60</sup> *Id.* at art. 27.

<sup>61</sup> *Id.* at art. 29.

<sup>62</sup> *Id.* at art. 32.

<sup>63</sup> *Id.* at art. 30.

reasons such a person were to be expelled, he shall never be expelled to a country where he would be persecuted."<sup>64</sup>

There are also extensive protections involving due process of law. Everyone is equal before the law, and no discrimination "contrary to human dignity" is permitted.<sup>65</sup> There are guarantees against self-incrimination, as well as against incriminating one's spouse and relatives up to the third degree.<sup>66</sup> No one can be tried by a judge or tribunal especially appointed for the case, but only by regularly constituted courts and judges.<sup>67</sup> Detention without a judicial order cannot exceed twenty-four hours.<sup>68</sup> Cruel or degrading treatment or punishment, life sentences, and the confiscation of goods are banned.<sup>69</sup> A 1989 constitutional amendment explicitly guaranteed the right of habeas corpus.<sup>70</sup>

Title V, dealing with social rights, remains one of the most progressive aspects of the Constitution. It proclaims that "[t]he State shall achieve the highest degree of welfare for all of the country's inhabitants, stimulating production . . . and the most adequate distribution of wealth. Everyone has the right to a healthy and ecologically balanced environment."<sup>71</sup> The Constitution also explicitly protects: the right to work;<sup>72</sup> the right to a minimum wage "that provides well-being and a dignified existence;"<sup>73</sup> an eight-hour workday and forty-eight hour workweek;<sup>74</sup> a day of rest after six consecutive days of work, and paid vacations "that shall be no less than two weeks for every fifty weeks of work;"<sup>75</sup> the right to organize labor unions;<sup>76</sup> and the right to compensation when fired without just cause.<sup>77</sup> The Constitution also established a Social and Health Insurance System (Caja

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<sup>64</sup> *Id.* at art. 31.

<sup>65</sup> *Id.* at art. 33.

<sup>66</sup> *Id.* at art. 36.

<sup>67</sup> *Id.* at art. 35.

<sup>68</sup> *Id.* at art. 44.

<sup>69</sup> *Id.* at art. 40.

<sup>70</sup> *Id.* at art. 48.

<sup>71</sup> *Id.* at art. 50.

<sup>72</sup> *Id.* at art. 56.

<sup>73</sup> *Id.* at art. 57.

<sup>74</sup> *Id.* at art. 58.

<sup>75</sup> *Id.* at art. 59.

<sup>76</sup> *Id.* at art. 60.

<sup>77</sup> *Id.* at art. 63.



Costarricense de Seguro Social or CCSS) to provide protection against the risks of "sickness, disability, maternity, old age, death . . ." <sup>78</sup> All the rights of Title V are "inalienable," and their implementation has as its goal "achieving a permanent policy of national solidarity."<sup>79</sup>

The Constitution's provisions on educational and cultural rights are also advanced. The State is constitutionally required to spend no less than 6% of GDP on education annually,<sup>80</sup> and although this requirement is not strictly enforced, it serves as a powerful political tool through which opposition parties prod the government into spending more on education. The Constitution also specifies that education up to the high-school level is compulsory and free of charge.<sup>81</sup> The State must provide to indigent students school uniforms and food during school hours.<sup>82</sup> The State is obligated to respect academic freedom, and to support two major on-site national universities, as well as a long-distance learning university.<sup>83</sup> Although Costa Rica remains a developing nation, the nation's lack of a military budget helps to make some of these provisions more affordable than they would otherwise be. <sup>84</sup> Indeed, it is thanks to these provisions that the country has a high literacy rate of 95%.

In keeping with its social democratic, communitarian orientation, the Constitution explicitly lists a series of national resources and assets that it considers part of the national patrimony under the stewardship of the State, which can never be owned by private sector entities: hydroelectric power; coal, oil, and all other hydrocarbons; any radioactive minerals; all wire

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<sup>78</sup> *Id.* at art. 73.

<sup>79</sup> *Id.* at art. 74.

<sup>80</sup> *Id.* at art. 78.

<sup>81</sup> *Id.* at art. 78.

<sup>82</sup> *Id.* at art. 82.

<sup>83</sup> *Id.* at art. 87, 85.

<sup>84</sup> For data from the 2000 through 2004 period, see *At a Glance: Costa Rica*, UNICEF, [http://www.unicef.org/infobycountry/costarica\\_statistics.html](http://www.unicef.org/infobycountry/costarica_statistics.html) (last updated Mar. 2, 2010). See also, *2007-2008 Human Development Report: Costa Rica*, U.N. DEV. PROGRAMME, [http://hdr.undp.org/en/media/HDR\\_20072008\\_EN\\_Indicator\\_tables.pdf](http://hdr.undp.org/en/media/HDR_20072008_EN_Indicator_tables.pdf) (last visited Nov. 16, 2011) (indicating that Costa Rica has no military budget); *Background Note: Costa Rica*, U.S. DEP'T OF STATE (Sept. 14, 2011), <http://www.state.gov/r/pa/ei/bgn/2019.htm> (confirming the absence of a military budget).

transmission services; railroads, ports, and airports. These are all placed under the State's dominion and control, and can be exploited by the private sector only through special, time-limited concessions granted by the State through legislation approved by the Legislative Assembly.<sup>85</sup> The Constitution also provides for autonomous state-owned banks and insurance companies that enjoy administrative independence.<sup>86</sup> Although private banks are allowed to operate in Costa Rica today,<sup>87</sup> they have to compete with the state-owned Banco Nacional de Costa Rica, while all insurance services in the country remain under the aegis of the state-owned Instituto Nacional de Seguros (INS).<sup>88</sup>

Among all Latin American states, Costa Rica has one of the soundest judicial systems as well as some of the highest indices of rule of law. The Constitution provides for a strong judicial branch headed by a Supreme Court of Justice.<sup>89</sup> A 1975 constitutional amendment created a Supreme Elections Tribunal with the responsibility to oversee and adjudicate all electoral matters, including voter lists, voting recounts, and challenges to the validity of any particular election.<sup>90</sup> A further amendment in 1989 created a Constitutional Chamber (also known as the "Sala Cuarta" or "Sala

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<sup>85</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS [CONSTITUTION], art. 121 (Costa Rica) (Georgetown University Political Database of the Americas), available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>.

<sup>86</sup> *Id.* at art. 189.

<sup>87</sup> *Background Note: Costa Rica*, *supra* note 84 (indicating that private banks are allowed to operate in Costa provided that they do not compete with state-owned entities).

<sup>88</sup> See *Costa Rica: Constitutions and Institutions*, ECONOMIST INTELLIGENCE UNIT, (Oct. 28, 2003) (explaining monopoly power and the broad reach of the INS); see also Jean-Pierre Unger et al., *Costa Rica: Achievements of a Heterodox Health Policy*, 98 AM. J. PUB. HEALTH, 636, 637-38 (2008) (indicating that insurance agencies are under the Caja Costarricense de Seguridad Social, or CCSS).

<sup>89</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS [CONSTITUTION], art. 152 (Costa Rica) (Georgetown University Political Database of the Americas), available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>. See generally Barker, *supra* note 51, at 365-67 (outlining the power structure of the judicial branch).

<sup>90</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS [CONSTITUTION], art. 9 (Costa Rica) (Georgetown University Political Database of the Americas), available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>.

Constitucional") within the Supreme Court of Justice, which has absolute jurisdiction over all constitutional issues, including conflicts among the branches of government and the constitutionality of treaties and international agreements.<sup>91</sup> Moreover, under the Constitutional Chamber's own jurisprudence, the human rights, including labor rights, stipulated in treaties such as conventions from the International Labor Organization, become a part of Costa Rican constitutional law itself, reviewable only by the Constitutional Chamber.<sup>92</sup> The development over several decades of this intricate network of courts, and the extensive framework of authoritative constitutional jurisprudence, attests to the public commitment to strong legal institutions that can safeguard the constitutional order, protect the human rights of all members of society, and reduce the risks of abuse of power.<sup>93</sup>

Although not a part of the judicial branch, there is also a strong office of the Defensoria de los Habitantes del Pueblo (The Defender of the People of the Nation), created in 1992 by the Legislative Assembly. This office answers only to the legislative branch<sup>94</sup> and is tasked with defending the common good and the interests and

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<sup>91</sup> *Id.* at art. 10. See also, Robert S. Barker, *Stability, Activism and Tradition: The Jurisprudence of Costa Rica's Constitutional Chamber*, 45 DUQ. L. REV. 523, 526-28 (2007) (detailing the origins of the "Sala Cuarta"). See generally Barker, *supra* note 51 (providing a detailed description of the advent of the "Sala Cuarta").

<sup>92</sup> LA DEFENSORIA DE LOS HABITANTES DE LA REPUBLICA DE COSTA RICA, INFORME DE LA DEFENSORIA DE LOS HABITANTES EN RELACION CON EL PROYECTO DE LEY NO. 16047 TRATADO DE LIBRE COMERCIO [The Advocacy of the People of the Republic of Costa Rica, Report of the Ombudsmen in Connection with Free Trade Bill No. 16047] (describing the scope of the Constitutional Chamber's power) [hereinafter INFORME DE LA DEFENSORIA]. See also Barker, *supra* note 51 at 372 (citing Ley de la Jurisdiccion Constitucional, ley no. 7135 de 11 de Octubre de 1989, indicating that the "norms and principles" of international human rights law are subject to constitutional adjudication in Costa Rica).

<sup>93</sup> See Fernando Cruz Castro, *Costa Rica's Constitutional Jurisprudence, Its Political Importance and International Human Rights Law: Examination of Some Decisions*, 45 DUQ. L. REV. 557 (2007) (underscoring the concern for human rights reflected by Costa Rican jurisprudence); see also, Michael Knox, *Continuing Evolution of the Costa Rican Judiciary*, 32 CAL. W. INT'L L. J. 133 (2002) (detailing how the evolution of the Costa Rican judiciary has continued to favor the protection of human rights and guard against the arbitrary exercise of government power).

<sup>94</sup> See *Ley De La DHR* [Law of the DHR], LA DEFENSORIA DE LOS HABINANTES, <http://www.dhr.go.cr/acerca-ley.html> (citing la Ley No. 7319 of November 17, 1992 as creating the "Office of the Defender of the People of the Nation" after legislative discussion beginning in 1985).

welfare of the nation's citizens.<sup>95</sup> This remarkable institution has the legal authority to sue the government, and one of its responsibilities is to examine the impact of legislation or treaties on the social, economic, and political rights of the citizens, with a view toward expanding the scope of human rights protected in the country.<sup>96</sup> The Defensoria played a key role in the long debate over CAFTA. It first published a highly skeptical report on the free trade agreement, and served as a rallying point for its critics. The Defensoria subsequently sued the government before the Constitutional Chamber over the agreement's constitutionality.

### *3.2. The Fraying of the 1948 Settlement*

The social-democratic model upon which the 1948 revolution founded, articulated legally with great detail in the 1949 Costa Rican Constitution, frayed considerably during the decades of the 1980s and 1990s as a result of wider international trends. This was an impact that Costa Rica was unable to avoid. The 1980s, known as Latin America's "lost decade," were particularly hard on Costa Rica. The rise in oil prices during the late 1970s, combined with a slowdown in economic growth, runaway government spending, and large fiscal and trade deficits took their toll in the 1980s as the country faced successive financial and economic crises, a sharp devaluation of its currency in 1981,<sup>97</sup> and a massive external debt of

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<sup>95</sup> Often translated as "Office of the Ombudsman," its full proper name is "Office of the Defender of the People of the Nation." See generally OXFORD SPANISH DICTIONARY 1382 (Beatriz Galimberti Jarman ed., 1994) (supporting this version of the office's name).

<sup>96</sup> See *Competencia y Responsabilidades [Authority and Responsibilities]*, LA DEFENSORIA DE LOS HABITANTES, <http://dhr.go.cr/acerca-respon.html> (highlighting the purpose and responsibilities of the Defensoria de los Habitantes).

<sup>97</sup> See Jorge Rovira Mas, *The Crisis: 1980–1982*, in THE COSTA RICA READER: HISTORY, CULTURE, POLITICS 212, 213 (Steven Palmer & Ivan Molina eds., 2004) (detailing the currency crisis of the 1980s, during which time inflation increased drastically); see also 15 THE NEW ENCYCLOPEDIA BRITANNICA 675 (2007) ("[In 1982], in return for extending Costa Rica's debts, the International Monetary Fund and the World Bank insisted that Monge impose severe austerity measures, including devaluation of the colón, budget and tax cuts, and suspension of some subsidies.").

\$5 billion, amounting to some 120% of annual GDP,<sup>98</sup> which the country could not pay. A succession of governments in the 1990s responded to this long-running crisis by applying "neo-liberal" policies embodied in the "Washington consensus."<sup>99</sup> Under the guidelines of structural adjustment laid down by the International Monetary Fund, Costa Rica cut back its spending on social services and took steps to open up its economy to foreign investment and trade. From 1980 to 2000, the country's index of openness to international trade went up from 0.49 to 0.79.<sup>100</sup>

These policies failed to prevent a decline in the standard of living for the country's disadvantaged population. In fact, critics argued that these policies actually contributed to a noticeable fraying of the country's social safety net. In spite of the constitutional requirement to spend 6% of GDP on education,<sup>101</sup> spending on education declined to 3.9% in 1990,<sup>102</sup> 3.8% in 1995,<sup>103</sup> and as of 2004 it was only 5.5%.<sup>104</sup> From 1991 to 2005, Costa Rica's index of human development dropped from 0.92 to 0.83,<sup>105</sup> and its ranking among countries in the index went down from 28 to 47.<sup>106</sup> Costa Rica's ranking among Latin American countries also declined from second to fifth.<sup>107</sup> While the proportion of households living in poverty declined from 51% to 29% during the 1960s and 1970s,<sup>108</sup> it reached a plateau around 20% throughout the

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<sup>98</sup> *Costa Rica*, ENCYCLOPEDIA BRITANNICA ONLINE (2009), <http://www.search.eb.com/eb/article-272333> (indicating that the country's external debt was \$5 billion).

<sup>99</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 11-13 (indicating adoption of the policies championed in the Washington Consensus).

<sup>100</sup> *Id.* at 14-15.

<sup>101</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS, art. 78, available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>.

<sup>102</sup> See *The State of the Nation in Sustainable Human Development: Summary*, 26 (2004), [http://www.estadonacion.or.cr/Info2005/Ponencias/State\\_of\\_the\\_Nation%20Summary.pdf](http://www.estadonacion.or.cr/Info2005/Ponencias/State_of_the_Nation%20Summary.pdf) (indicating a decline in education spending through the early 2000s).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 17 (tracking the country's declining position on the human development index).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 18.

1980s and 1990s.<sup>109</sup> Opening to imports displaced many domestic agricultural producers but did not lead to lower food prices. Meanwhile, wages stagnated.<sup>110</sup> For a country that prided itself on avoiding the large-scale inequalities that are prevalent in Latin America, it must have been uncomfortable to watch its Gini coefficient (which measures income distribution) rise unfavorably from 0.41 in 2000 to 0.45 in 2004 and 0.48 in 2006.<sup>111</sup>

To make matters worse, the country's political institutions also suffered a sharp decline in credibility, as three of the country's presidents who oversaw the implementation of "neo-liberal" policies were eventually implicated in corruption scandals involving paybacks and improper ties to foreign investors.<sup>112</sup> For many Costa Ricans, the scandals were yet another example of the noxious impact of globalization, runaway free trade, and foreign investment in the once proud but now highly vulnerable institutions of their small country. As a critic put it—perhaps somewhat harshly—Costa Rica, considered by many in the 1960s and 1970s as the "Switzerland" of Central America, was quickly becoming just another "banana republic."<sup>113</sup>

It is indisputable that the political scandals further eroded the already shaky legitimacy of "neo-liberal" prescriptions, and eventually contributed to a growing sense that the country was on the wrong track—that is its cherished political, social, and economic institutions, including its social-democratic model based on principles of social solidarity and equity. Increasingly, the feeling that the nation needed to be rescued from the inexorable

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 19.

<sup>111</sup> *Id.* at 14–22. See also ANDREW D. MASON & CARLOS SOBRADO, WORLD BANK, REP. NO. 35910-CR, COSTA RICA POVERTY ASSESSMENT: RECAPTURING MOMENTUM FOR POVERTY REDUCTION 31 (2007), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/05/23/000020953\\_20070523093115/Rendered/PDF/359100CR.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/05/23/000020953_20070523093115/Rendered/PDF/359100CR.pdf) (noting a gini coefficient of 0.5 in 2001 to 0.48 in 2004).

<sup>112</sup> See Emily Alves & Michael Johnson, *Paradise Lost: Costa Rica Falls Victim to Corruption and Clientelism*, COUNCIL ON HEMISPHERIC AFF. (Dec. 8, 2004), <http://www.coha.org/paradise-lost-costa-rica-falls-victim-to-corruption-and-clientelism> (explaining issues of corruption in Costa Rica including "[a]t least three former presidents . . . accused of heavy involvement in bribery scandals").

<sup>113</sup> See *id.* ("The 'Switzerland of the Western Hemisphere' is being severely shaken by numerous allegations of political corruption.")

assault of forces perceived to be an intrinsic part of globalization permeated. Additionally, an attitude persisted that the policies of the 1980s and 1990s, based on higher doses of free trade and foreign investment coupled with lower levels of social spending, needed to be revised in order to rescue the nation's unique identity as a model of democratic solidarity. It was in this context of growing popular resentment towards globalization, "neoliberalism," and free trade that Costa Rica faced what turned out to be a highly contentious and bitter debate over CAFTA.

#### 4. THE POLITICAL BATTLE OVER CAFTA BEGINS: THE PRESIDENTIAL ELECTION

For almost a year after CAFTA was signed in 2004 by the weak government of President Abel Pacheco, its coming into force seemed to be in doubt as a result of powerful opposition to it within the U.S. Congress. Its narrow approval by Congress in the late summer of 2005 and subsequent ratification by the United States left Costa Rica as the only state that had yet to ratify, and opened the way for a vigorous debate in the country on whether it should do so. This debate, which would last two full years, coincided with the start of the Costa Rican presidential campaign on October 1, 2005.<sup>114</sup>

Although the campaign was scheduled to end on February 5, 2006, with the election of a new president, it dragged on into March 2006, culminating with a recount of the votes.<sup>115</sup> There were 2.5 million eligible voters in Costa Rica and fifty-three political parties, of which fourteen had presidential candidates running.<sup>116</sup> Four out of the five major parties were pro-CAFTA, and ultimately the election came down to two men: Oscar Arias and Ottón

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<sup>114</sup> See *Comienza la Carrera Electoral por la Presidencia de Costa Rica* [The Race for the Costa Rican Presidency Begins], LA NACIÓN, Oct. 1, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/01/ultima-cr2.html](http://www.nacion.com/ln_ee/2005/octubre/01/ultima-cr2.html) (documenting the beginning of the Presidential campaign and describing Oscar Arias as the frontrunner).

<sup>115</sup> See *Arias se Proclama "El Presidente de Todos los Costarricenses,"* [Arian Proclaims "The President of All Costa Ricans"] LA NACIÓN, March 3, 2006, [http://www.nacion.com/ln\\_ee/2006/marzo/04/ultima-ce19.html](http://www.nacion.com/ln_ee/2006/marzo/04/ultima-ce19.html) (chronicling the closely contested election, in which Arias beat his opponent by a mere 1.1% of the vote, that included a recount and 696 complaints of electoral irregularities).

<sup>116</sup> See *Comienza la Carrera Electoral por la Presidencia de Costa Rica*, *supra* note 114 (describing the party breakdown and the composition of the electorate).

Solis.<sup>117</sup> Arias, former president from 1986 to 1990 and winner of the 1987 Nobel Peace Prize for his efforts settling the Central American military conflict, represented the Partido Liberación Nacional (PLN) and supported CAFTA's ratification.<sup>118</sup> Although much younger and less experienced, Solís was articulate and highly intelligent; he was the candidate of the left-of-center Partido Acción Ciudadana (PAC), which opposed CAFTA.<sup>119</sup> From the beginning, there were confident predictions that the debate over CAFTA would dominate the campaign, and that Arias would win that debate—and therefore the election—by an overwhelming margin on the basis of his prestige.<sup>120</sup> To win in the first round, a candidate needed at least 40% of the vote; otherwise, a second round would be held in April.<sup>121</sup>

When the campaign began in October 2005, President Pacheco had not yet sent CAFTA to the Costa Rican Legislative Assembly for ratification.<sup>122</sup> The deadline for the agreement's ratification

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<sup>117</sup> See *id.* (analyzing the diverse stances on CAFTA among the Presidential candidates).

<sup>118</sup> See *Biography: Oscar Arias Sánchez*, NOBEL FOUND., [http://nobelprize.org/nobel\\_prizes/peace/laureates/1987/arias-bio.html](http://nobelprize.org/nobel_prizes/peace/laureates/1987/arias-bio.html) (last visited Nov. 16, 2011) (providing Arias's Nobel Peace Prize biography and discussing his 1987 peace efforts); see also *Background Note: Costa Rica*, U.S. DEP'T OF STATE, <http://www.state.gov/outofdate/bgn/costarica/125678.htm> (last visited Nov. 11, 2011) ("In May 2006, President Oscar Arias of the National Liberation Party (PLN) assumed office . . . . Arias listed passage of the CAFTA-DR, along with fiscal reform, infrastructure improvements, improving education, and improving security as primary goals for his presidency.").

<sup>119</sup> See *Comienza la Carrera Electoral por la Presidencia de Costa Rica*, *supra* note 114 (citing Solís of the PAC as Arias's main opponent); *Entrevista con Rolando Laclé C.: 'TLC debe verse después de las elecciones'* [Interview with Rolando Laclé C.: FTA must be after the elections], LA NACIÓN, Oct. 31, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/31/pais4.html](http://www.nacion.com/ln_ee/2005/octubre/31/pais4.html) ("Oscar Aviles has shown his clear support of the free trade agreement. If he wins, it means that the people endorse his viewpoint.").

<sup>120</sup> See *id.* (predicting that Arias would win because of his prior Presidency and his Nobel Peace Prize).

<sup>121</sup> See *Caída de Arias en Sondeos Abre Posibilidad Segunda Vuelta* [Drops in Polls Opens a Second Round Possibility for Arias], LA NACIÓN, Feb. 3, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/03/ultima-cr5.html](http://www.nacion.com/ln_ee/2006/febrero/03/ultima-cr5.html) (noting the 40% requirement of the vote and the fact that in polls Arias had 42.6% of the vote while Solís had 31.5%).

<sup>122</sup> See *Comienza la Carrera Electoral por la Presidencia de Costa Rica*, *supra* note 114 (explaining that CAFTA would be an important campaign issue because it still



seemed to be fast approaching; if Costa Rica did not ratify by January 1, 2008, it would have had to renegotiate a new agreement.<sup>123</sup> CAFTA's fate was in the air because Pacheco had not decided whether he was going to send it to the Assembly before or after the Christmas break.<sup>124</sup> Moreover, there was heated debate over whether the Assembly should wait even longer, until after the elections, to cast its vote.<sup>125</sup> Toward the end of the year, it became clear that CAFTA would not go to the Assembly until a new president had been elected.<sup>126</sup>

Early in the campaign, the conservative press, especially the influential daily *La Nación*, went on the offensive with a campaign which, though supposedly designed to educate the country about CAFTA,<sup>127</sup> often seemed intent on persuading the public to support

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had not been sent to Congress); *Entrevista con Rolando Laclé C.: 'TLC debe verse después de las elecciones'*, *supra* note 119 (discussing the possibility of the free trade agreement passing and what effect the Presidential election will have); *see also Costa Rica: Country Outlook*, EIU VIEWSWIRE, Oct. 13, 2005, available at 2005 WLNR 26484426 (explaining that the ratification of CAFTA was delayed because of fiscal reform); *Costa Rica Politics: Pacheco Administration Weakens*, EIU VIEWSWIRE, Sept. 27, 2005, available at 2005 WLNR 26526014 (describing the congressional stalemate over CAFTA that arose after Abel Pacheco gained the presidency).

<sup>123</sup> See *Larga Peregrinación del TLC [Long Pilgrimage of the TLC]* LA NACIÓN, Oct. 10, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/10/opinion0.html](http://www.nacion.com/ln_ee/2005/octubre/10/opinion0.html) (pointing to Article 22.5 of the Treaty, which mandated that the Treaty be passed within two years of the opening date in 2006, or else face renegotiation); *see also* Thomson, *supra* note 5 (summarizing Costa Rica's tumultuous ratification debate over CAFTA, culminating with the country's narrow approval of the agreement in an Oct. 7, 2007 referendum).

<sup>124</sup> See *Larga Peregrinación del TLC*, *supra* note 123 (calling on Pacheco in October 2005 to send the agreement to Congress to avoid serious economic repercussions); *see also Entrevista con Rolando Laclé C.: 'TLC debe verse después de las elecciones'*, *supra* note 119 (arguing that the free trade agreement should be discussed before the Christmas vacation to avoid the fervor of the election that would begin in earnest in January 2006).

<sup>125</sup> See *Entrevista con Rolando Laclé C.: 'TLC debe verse después de las elecciones'*, *supra* note 119 (explaining that if the free trade agreement is not discussed before January 2006, there will also be relative calm after the election when the the treaty should be brought to the table).

<sup>126</sup> See *id.* (noting the probability of a vote on CAFTA after the election since the election would present a mandate for or against the agreement).

<sup>127</sup> See, e.g., *Larga Peregrinación del TLC*, *supra* note 123 (representing an op-ed piece in *La Nación* strongly supporting the agreement); Eduardo Ulibarri, *El Abecé del TLC [The ABCs of CAFTA]* LA NACIÓN, Oct. 20, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/21/opinion2.html](http://www.nacion.com/ln_ee/2005/octubre/21/opinion2.html) (lauding a

it. From the outset, the CAFTA debate was colored by high doses of emotion.<sup>128</sup> One often mentioned risk of not ratifying CAFTA within the prescribed time limits was that Costa Rica would be forced to renegotiate the entire treaty on less advantageous terms.<sup>129</sup> Another risk of not ratifying was that the country would lose its status as the primary leader of free trade in Central America and would cease to be an attractive point for domestic and foreign investment.<sup>130</sup> The conservative press further promoted CAFTA by shining a positive light on the United States, portraying a supportive U.S. government that was respectful of Costa Rica's democratic ratification process.<sup>131</sup>

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report written by Ronulfo Jiménez that educated the public about the treaty and at the same time championed it).

<sup>128</sup> See *Larga Peregrinación del TLC*, *supra* note 123 (exemplifying an impassioned op-ed piece, calling on the government to pass CAFTA); see also Rose J. Spaulding, *Neoliberal Regionalism and Resistance in Mesoamerica: Foro Mesoamericano Opposition to Plan Puebla-Panamá and CAFTA*, in *LATIN AMERICAN SOCIAL MOVEMENTS IN THE TWENTY-FIRST CENTURY: RESISTANCE, POWER, AND DEMOCRACY* 323, 331-32 (Richard Stahler-Sholk et al. eds., 2008) (narrating the evolution of Foro Mesoamericano, a coalition of civil activists opposed to regional liberalist policies including CAFTA); *What is CAFTA-DR?*, WASH. OFF. ON LATIN AM., <http://www.wola.org/cafta> (last visited Nov. 16, 2011) (explaining that Costa Rica's non-ratification of CAFTA was due to significant opposition by a broad range of civil society groups in the country which included protests and marches).

<sup>129</sup> See *Larga Peregrinación del TLC*, *supra* note 123 (fearing that upon reopening negotiations other countries in the region and the Bush administration might be less amenable to offer favorable terms to Costa Rica).

<sup>130</sup> See *id.* ("The international risk graders would lower their perception and change their view concerning the country's ability to guarantee its obligations, interest rates would go up, and the ongoing uncertainty would bring about unpredictable volatility in exchange rates.").

<sup>131</sup> See *EE.UU. Respeta Proceso Democrático de Ratificación del TLC por Parte de Costa Rica* [U.S. Respects the Democratic Process of Ratification of the FTA by Costa Rica], *LA NACIÓN*, Oct. 18, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/18/ultima-sr519245.html](http://www.nacion.com/ln_ee/2005/octubre/18/ultima-sr519245.html) (reporting U.S. Secretary of Commerce Carlos Gutiérrez's support of Costa Rica's democratic process and confidence that the country would pass CAFTA); see also *Trabajo en Equipo Será el Éxito del TLC Dijo Secretario de Comercio de EE.UU* [Teamwork will be the success of the FTA said U.S. Secretary of Commerce], *LA NACIÓN*, Oct. 21, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/21/ultima-sr522076.html](http://www.nacion.com/ln_ee/2005/octubre/21/ultima-sr522076.html) (documenting the United States's desire for Costa Rica to follow Nicaragua and pass the FTA and work with the United States).

By late fall, however, the tide in the media turned more critical of CAFTA and of Arias himself.<sup>132</sup> Critics began to wonder about CAFTA's impact on many domestic issues, such as its effects on the cultural sector,<sup>133</sup> unemployment, and poverty.<sup>134</sup> *La Nación* ran a major article on the organized opposition of faculty and students at the University of Costa Rica, who had signed a declaration

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<sup>132</sup> See Julio Rodriguez, *En Vela [Sleepless]*, LA NACIÓN, Nov. 28, 2005, [http://www.nacion.com/ln\\_ee/2005/noviembre/28/opinion4.html](http://www.nacion.com/ln_ee/2005/noviembre/28/opinion4.html) (criticizing the political uproar surrounding CAFTA and the election, and advocating for solutions rather than blind ideology).

<sup>133</sup> See Dra. Alejandra Castro B., *TLC y el Sector Cultural [TLC and the Cultural Sector]*, LA NACIÓN, Oct. 2, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/02/opinion6.html](http://www.nacion.com/ln_ee/2005/octubre/02/opinion6.html) (noting the opposition to CAFTA for fear of U.S. cultural domination, and arguing against it, claiming that it would actually lead to an enriching cultural exchange with many positive cultural effects).

<sup>134</sup> See Katherine Stanley, *Trade-Pact Opponents Turn Up the Heat*, TICO TIMES (Costa Rica), April 15, 2005, [http://www.ticotimes.net/dailyarchive/2005\\_04/daily\\_04\\_12\\_05.htm#story1](http://www.ticotimes.net/dailyarchive/2005_04/daily_04_12_05.htm#story1) (identifying Costa Rican social sector representatives and labor unions as a source of opposition to CAFTA, reasoning that it may have a negative impact on employment); see also Martha Lauer, *CAFTA's October Referendum: A Death Sentence for Costa Rican Trade & Foreign Investment?*, COUNCIL ON HEMISPHERIC AFF. (Aug. 14, 2007), <http://www.coha.org/2007/08/cafta%E2%80%99s-october-referendum-a-death-sentence-for-costa-rican-foreign-investment> ("While CAFTA is viewed as aiding Costa Rica's economy . . . it is being faulted for not taking into account the fate of workers that will be adversely affected by it."); Daniel Zueras, *Companies Eye Pull-Outs if CAFTA Flounders*, INTER PRESS SERVICE (Aug. 28, 2006), <http://ipsnews.net/news.asp?idnews=34486> ("Not only will this free trade agreement fail to generate employment, but we have showed in various studies that it actually threatens up to 200,000 service, agriculture and manufacturing jobs."); John Lyons, *Costa Rica Balks at Free Trade Pact*, WALL ST. J., May 3, 2006, at A2 (indicating opposition to CAFTA partially due to the uncertain effects on lower-class Costa Ricans, the impact of trade agreement clauses governing intellectual property, and the effects on state-run insurance and telephone services); Press Release, Oxfam America, *DR-CAFTA: A Bad Deal for Poor Countries* (April 20, 2005), <http://www.oxfamamerica.org/press/pressreleases/dr-cafta-a-bad-deal-for-poor-countries/?searchterm=cafta> (describing the harmful effect that CAFTA's ratification would have on poor small farmers in Central America).

condemning CAFTA.<sup>135</sup> CAFTA's opponents were organizing themselves and speaking out more vigorously against it.<sup>136</sup>

In mid-November, anti-CAFTA sentiment exploded with a four-hour, peaceful, but highly vocal, march on the capital.<sup>137</sup> The protesters marched on San José from three different locations throughout Costa Rica and joined forces in front of the Assembly while shouting anti-CAFTA phrases and urging their representatives not to ratify the agreement.<sup>138</sup> The estimated number of participants in the San José march ranged between 18,000 to 80,000, while the estimate of total participants in similar marches in the country on that day was 200,000 people, a huge number in light of the country's small population.<sup>139</sup> The organizers articulated their belief that CAFTA would not generate more jobs but instead create more poverty.<sup>140</sup> In a direct attack on Arias, they urged those present to vote for a presidential candidate who did not support CAFTA.<sup>141</sup> Various community leaders from around the country expressed their profound disdain for the agreement, and some stated that they would protest at the legislators' homes, if it would prevent CAFTA from being ratified.<sup>142</sup> The press provided ample coverage of the protests, thus

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<sup>135</sup> See Fernando Duran Ayanegui, *Las Ovejas de Einstein [Einstein's Sheep]* LA NACIÓN, Oct. 24, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/25/opinion1.html](http://www.nacion.com/ln_ee/2005/octubre/25/opinion1.html) (outlining one anti-CAFTA signer's explanation of why he joined the movement, led mostly by University students).

<sup>136</sup> See Jairo Villegas S., *Pacífica Marcha Contra TLC [Peaceful march against the CAFTA]* LA NACIÓN, Nov. 18, 2005, [http://www.nacion.com/ln\\_ee/2005/noviembre/18/pais0.html](http://www.nacion.com/ln_ee/2005/noviembre/18/pais0.html) (reporting one large march against CAFTA in mid-November 2005).

<sup>137</sup> See *id.* (describing the march, which lasted between 10 A.M. and 2 P.M. and closed streets in the capital).

<sup>138</sup> See *id.* (listing the three groups, where they began, and where they ended).

<sup>139</sup> See *id.* ("Organizers, participants, and observers of yesterday's march disagree over the number of people that attended.").

<sup>140</sup> *Id.*

<sup>141</sup> See *id.* (describing one representative's message to the public to send a clear message of "No to CAFTA" and not to vote for a presidential candidate that supports it).

<sup>142</sup> See *id.* (noting that Eddie Gonzalez, of the National Civic Movement, warned that if representatives voted in favor of the agreement, the protestors would "serenade them at their houses").

somewhat blunting the effects of its earlier pro-CAFTA campaign.<sup>143</sup>

In response to the anti-CAFTA march of November 17, CAFTA supporters—primarily private sector employers and employees—marched on the capital on November 23.<sup>144</sup> The marchers urged immediate ratification by the Assembly, arguing that the treaty would guarantee more jobs, enhance exports by expanding Costa Rican markets, and eliminate obstacles to foreign investment, thereby increasing it by eliminating obstacles.<sup>145</sup> Despite the strong and vocal opposition movement, there was still considerable positive press surrounding CAFTA at the end of 2005.<sup>146</sup>

Meanwhile, other factors began to weigh in on the presidential campaign and on the CAFTA debate. While CAFTA opponents pointed out the harmful effects of free trade agreements on other countries—especially NAFTA's allegedly devastating impact on Mexican agriculture<sup>147</sup>—CAFTA supporters called attention to

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<sup>143</sup> See *Larga Peregrinación del TLC*, *supra* note 123 (worrying that the opposition's momentum would quash the agreement).

<sup>144</sup> Alvaro Murillo M., *Manifestantes Urge Aprobación del TLC [Protesters Urge Approval of CAFTA]*, LA NACIÓN, Nov. 25, 2005, [http://www.nacion.com/ln\\_ee/2005/noviembre/25/pais0.html](http://www.nacion.com/ln_ee/2005/noviembre/25/pais0.html) (chronicling the protest in favor of passing CAFTA, composed mainly of private sector workers and their employers).

<sup>145</sup> See *id.* (describing the positions of the protestors involved in the pro-CAFTA march).

<sup>146</sup> See *Impredecibles Términos de Intercambio [Unpredictable Terms of Exchange]*, LA NACIÓN, Dec. 12, 2005, [http://www.nacion.com/ln\\_ee/2005/diciembre/12/opinion0.html](http://www.nacion.com/ln_ee/2005/diciembre/12/opinion0.html) (editorializing about the benefits of an FTA in years of volatile prices in international trade).

<sup>147</sup> See *Economistas Piden Renegociación del TLC de EEUU con Mexico [Economists Call for Renegotiation of NAFTA between Mexico and the U.S.]*, LA NACIÓN, Oct. 18, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/18/ueconomia-la10.html](http://www.nacion.com/ln_ee/2005/octubre/18/ueconomia-la10.html) (summarizing Gary Hufbauer and Jeffrey Schott's "NAFTA Revisited" and its suggestions about reforming NAFTA); OXFAM INT'L, *A RAW DEAL FOR RICE UNDER DR-CAFTA: HOW THE FREE TRADE AGREEMENT THREATENS THE LIVELIHOODS OF CENTRAL AMERICAN FARMERS* 25 (2004), available at [http://www.oxfamamerica.org/files/rice\\_brief111604.pdf](http://www.oxfamamerica.org/files/rice_brief111604.pdf) (describing the collapse of the Mexican rice-growing sector in the wake of the country's ratification of NAFTA); James C. McKinley Jr., *U.S. Trade Pact Divides the Central Americans, With Farmers and Others Fearful*, N.Y. TIMES, Aug. 21, 2005, at 8 (describing that Costa Rican CAFTA critics fear that their country's experience will mirror Mexico's, "whose 10-year experiment in free trade with the United States has depopulated much of the countryside and sent waves of migration north of the border"); see also Larry Birns & Sarah E. Schaffer, *CAFTA and its Discontents*, LA PRENSA SAN DIEGO (June 3, 2005),

subtle pressures exerted by other Central American countries on Costa Rica to ratify CAFTA, lest it be left out of the treaty and its supposed benefits altogether.<sup>148</sup> At a meeting with the U.S. Commerce Secretary, representatives of the other CAFTA members pointedly referred to "CAFTA [as] part of a privileged relationship of the Central-American region," as they urged Costa Rica to ratify.<sup>149</sup> CAFTA supporters also drew attention to the agreements under negotiation between the United States, Panama, and Singapore, in emphasizing that Costa Rica must not fall behind in the race to obtain full guaranteed access to the U.S. market.<sup>150</sup> With Arias holding a strong, uncompromising position in favor of ratifying the treaty<sup>151</sup> Solís struck a more politically pragmatic tone,

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<http://laprensa-sandiego.org/archieve/june03-05/cafta.htm> (noting that more than one million Mexican farmers lost farmland because they could not compete in the wake of NAFTA); Hansen-Kuhn, *supra* note 16 ("Central Americans look with alarm at the experience of Mexican farmers under NAFTA, realizing that their own agricultural sectors, which are the source of up to half of local employment, could be devastated by imports of low-cost farm goods from the United States."). *But see* Lionel Beehner, *Q&A: The CAFTA Debate*, N.Y. TIMES, July 18, 2005, [http://www.nytimes.com/cfr/international/slot3\\_071805.html?pagewanted=print](http://www.nytimes.com/cfr/international/slot3_071805.html?pagewanted=print) (proposing the alternative theory that the post-NAFTA deficiencies in Mexico's economy could be attributed to the devaluation of the peso and a financial crisis in 1994).

<sup>148</sup> See, e.g., *Autoridades Centroamericanas Inician Reunión Sobre TLC con Secretario de Comercio de EE.UU* [Central American Authorities Begin Meeting on FTA with U.S. Secretary of Commerce], LA NACIÓN, Oct. 20, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/20/ultima-sr520984.html](http://www.nacion.com/ln_ee/2005/octubre/20/ultima-sr520984.html) ("The Salvadoran President said . . . that the FTA 'is an important commercial instrument that will greatly help our countries, above all because it will incentivize investments, strengthen existing business, and create new exportation businesses.'").

<sup>149</sup> *Id.* (quotation translated from Spanish).

<sup>150</sup> See *Ambos Países Firmarán en Diciembre Acuerdo de Libre Comercio* [Both Countries Will Sign the Free Trade Agreement in December], LA NACIÓN, Nov. 16, 2005, [http://www.nacion.com/ln\\_ee/2005/noviembre/16/ueconomia-la15.html](http://www.nacion.com/ln_ee/2005/noviembre/16/ueconomia-la15.html) (pointing to the two free trade agreements in the works in Panama and Singapore); see also Fabián Borges, *Investment Board Chief: No Foreign Investment Without CAFTA*, TICO TIMES (Apr. 14, 2004), [http://www.ticotimes.net/dailyarchive/2004\\_04/Week2/04\\_14\\_04.htm#story1](http://www.ticotimes.net/dailyarchive/2004_04/Week2/04_14_04.htm#story1) (describing a Costa Rican business leader's support for CAFTA who pointed to catching up to other countries in foreign direct investment such as Singapore).

<sup>151</sup> Michael Lettieri, *Costa Rica's Elections: Not the Cleanest Game Around*, COUNCIL ON HEMISPHERIC AFF. (Feb. 4, 2006), <http://www.coha.org/2006/02>

by arguing that although free trade could be beneficial, CAFTA should be renegotiated so as to eliminate its alleged asymmetries.<sup>152</sup> In spite of these sharp differences, however, both candidates shared the prevailing consensus that, regardless of CAFTA's eventual fate, the country would have to work more vigorously in the future to address the problems of unemployment and poverty.<sup>153</sup>

Although Arias' victory had seemed inevitable earlier, his strong pro-CAFTA stance, coupled with widespread perceptions that he was arrogant and felt entitled to the presidency, led to a sharp swing of the political tide against him in January.<sup>154</sup> According to a *La Escuela de Estadística de la Universidad de Costa Rica* study, 24% of undecided voters decided to vote for Solís, while only 10% decided to vote for Arias based upon the final week of campaigning.<sup>155</sup> Of those who voted for Solís, 20% decided their votes during the final week of the campaign; furthermore, Solís' campaign influenced the decision of 18% of voters while Arias's campaign only influenced 5% of voters.<sup>156</sup> The CAFTA debate ultimately appeared to benefit Solís because 18% of

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/costa-rica%e2%80%99s-elections-not-the-cleanest-game-around (noting Arias's "vocal support for the yet to be ratified [CAFTA]").

<sup>152</sup> Mauricio Herrera, *Ottón Solís: El Retador Sin Promesas* [*Ottón Solís: The Challenger That Makes No Promises*], LA NACIÓN, Jan. 29, 2006, <http://www.nacion.com/proa/2006/enero/29/reportajes1.html> (noting Solís's desire to renegotiate CAFTA).

<sup>153</sup> See *Expertos Analizan Estrategias Para Crear Trabajo y Bajar Pobreza en Costa Rica* [*Experts Analyze Strategies for Creating Jobs and Lowering Poverty in Costa Rica*], LA NACIÓN, Oct. 20, 2005, [http://www.nacion.com/ln\\_ee/2005/octubre/20/ultima-sr521270.html](http://www.nacion.com/ln_ee/2005/octubre/20/ultima-sr521270.html) (profiling a forum dedicated to job creation and eliminating poverty that even if CAFTA were passed, with one participant explaining that CAFTA was not a "panacea").

<sup>154</sup> Enrique Gomariz Moraga, *Elecciones 2006: El Efecto Placebo* [*Elections 2006: The Placebo Effect*], LA NACIÓN, Feb. 19, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/19/opinion6.html](http://www.nacion.com/ln_ee/2006/febrero/19/opinion6.html) (explaining why Arias received less support in the election than predicted by earlier polls).

<sup>155</sup> Pablo Fonseca, *Estudio de la UCR Afirma que Propaganda del PAC Influyó Más en Gotantes que la del PLN* [*UCR study Sustains that Political Advertising by PAC Influenced Voters More than That of the PLN*], LA NACIÓN, Feb. 10, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/10/ultima-sr623817.html](http://www.nacion.com/ln_ee/2006/febrero/10/ultima-sr623817.html) (detailing a study on voting behaviors in the Costa Rican presidential election and providing explanations for voting fluctuations).

<sup>156</sup> *Id.*

those who voted for him took the issue into consideration, whereas only 2% of voters who voted for Arias were actually voting for CAFTA.<sup>157</sup>

The electoral campaign officially ended on February 2, 2006 at midnight, and February 3 began with the “dry law,” which prohibited the distribution of alcoholic beverages until after the election.<sup>158</sup> At the end of the campaign, Arias was still favored to win. Polls predicted he would garner 42.6% of the vote (a loss of 7% in one week) over Solis’s 31.5% of the vote (a 5.2% increase over the same period).<sup>159</sup> However, there was also a large percentage of undecided voters in conjunction with the 2.8% margin of error.<sup>160</sup> Therefore, there was a good chance that the presidential election would go to the second round between the two leading candidates. Arias maintained that CAFTA would polarize the elections, but that he would win the elections in the first round.<sup>161</sup> He also emphasized that although many people – including him – were not happy with CAFTA, the pros outweighed the cons.<sup>162</sup>

Ultimately, Arias almost lost the election. On February 6, the Supreme Electoral Tribunal announced that Arias had obtained 40.73% of the counted votes and Solis 40.06% – a difference of only 0.67% or 8,741 votes.<sup>163</sup> The election also possessed the highest percentage of abstentions in any first round election.<sup>164</sup> At the

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<sup>157</sup> *Id.*

<sup>158</sup> *Caída de Arias en Sondeos Abre Posibilidad Segunda Vuelta [Arias’ Drop in Polls Opens Possibility of Ballotage]*, LA NACIÓN, Feb. 3, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/03/ultima-cr5.html](http://www.nacion.com/ln_ee/2006/febrero/03/ultima-cr5.html).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *See Candidato Oscar Arias Dice Que TLC Polarizará las Elecciones [Candidate Oscar Arias Says FTA Will Polarize Elections]*, LA NACIÓN, Feb. 4, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/04/ultima-sr618448.html](http://www.nacion.com/ln_ee/2006/febrero/04/ultima-sr618448.html). (explaining that Arias anticipated that debate over CAFTA would polarize the election).

<sup>162</sup> *Id.*

<sup>163</sup> *See Ronald Matute, Arias Confía en la Victoria [Arias Confident of Victory]*, LA NACIÓN, Feb. 6, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/06/pais0.html](http://www.nacion.com/ln_ee/2006/febrero/06/pais0.html) (reporting on the extremely close election based upon preliminary counts).

<sup>164</sup> *Id.*; *Costa Rica Sigue a la Espera de Conocer a Su Presidente Electo [Costa Rica Still Awaiting to Know Its President-Elect]*, LA NACIÓN, Feb. 7, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/07/ultima-cr2.html](http://www.nacion.com/ln_ee/2006/febrero/07/ultima-cr2.html) [hereinafter *Costa Rica Sigue*] (estimating an abstention rate of approximately 34.4%).



conclusion of the first round of elections, the race was clearly between only Arias and Solís: the third place candidate only obtained 8.31% of the vote.<sup>165</sup> On February 7, the Tribunal commenced a manual recount of the votes.<sup>166</sup> Of all the votes, only 11.56% could not be computed electronically; however, the Tribunal decided to recount all of the votes due to the close race.<sup>167</sup> The Tribunal concluded its recount on February 22 and announced in early March that Oscar Arias officially had defeated Ottón Solís by 18,165 votes—a 1.1% margin of victory.<sup>168</sup>

While experts were divided on the degree of influence CAFTA played in the election's close results, the trade agreement clearly presented the chief—as well as the most contentious—issue at the heart of the electoral campaign.<sup>169</sup> Although Arias had originally possessed a seemingly insurmountable advantage over his closest rival in terms of name recognition, experience, and prestige, Arias was fighting for his political life by the conclusion of the election.<sup>170</sup>

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<sup>165</sup> Matute, *supra* note 163.

<sup>166</sup> See *Costa Rica Sigue*, *supra* note 164 (detailing the recount and the estimated vote tallies).

<sup>167</sup> See *Analistas Consideran que TLC Influyó en Resultado Elecciones* [Analysts believe that CAFTA Influenced Election Results], LA NACIÓN, Feb. 7, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/07/ultima-cr3.html](http://www.nacion.com/ln_ee/2006/febrero/07/ultima-cr3.html) (reporting that the Tribunal elected to conduct a manual recount due to the narrow margin between the leading candidates); *Costa Rica Sigue*, *supra* note 164 (stating that due to various reasons, 11.56% of the votes could not be cast electronically).

<sup>168</sup> *Arias se Proclama "El Presidente de Todos los Costarricenses," supra* note 115. See also *Costa Rica: Free-Trade Backer is President-Elect*, N.Y. TIMES, Mar. 8, 2006, at A14 (reporting that Arias defeated Solís by "a little more than 18,000 votes of the 1.6 million cast").

<sup>169</sup> See *Costa Rica: Free-Trade Backer is President-Elect*, *supra* note 168 (highlighting the two leading candidates' positions on CAFTA in a report on the election results); Lorna Chacón, *TLC con EE.UU. Divide a Principales Candidatos Presidenciales en Costa Rica* [FTA with U.S. Divides the Major Presidential Candidates in Costa Rica], LA NACIÓN, Feb. 1, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/01/ultima-sr614713.html](http://www.nacion.com/ln_ee/2006/febrero/01/ultima-sr614713.html) (emphasizing CAFTA as one of the key points of contentions between Arias and Solís); *Analistas Consideran que TLC Influyó en Resultado Elecciones*, *supra* note 167 (noting that analysts believed that the Costa Rican presidential candidates' positions on CAFTA influenced the election's outcome).

<sup>170</sup> See Lettieri, *supra* note 151 (observing that Arias's previously strong political standing had eroded directly prior to the election due to his stalwart support for CAFTA); see also *Costa Rican Election May Give Support to Cafta Foes in U.S.*, WALL ST. J., Feb. 7, 2006, at A13 (noting Solís's surprising surge to a "virtual

While also coming across as aloof and removed from the daily problems of the average Costa Rican, Arias's focus upon CAFTA as his signature campaign issue also obviously harmed his campaign.<sup>171</sup> As the debate over the treaty intensified during the last months of the campaign and more Costa Ricans came to have serious misgivings about CAFTA, Arias's poll numbers correspondingly suffered.<sup>172</sup> By challenging Arias directly on the central question of CAFTA's ratification, Solís gained widespread support that almost put him over the top in the first round.<sup>173</sup>

But Solís also maneuvered far beyond simply opposing CAFTA. As his campaign progressed, he came to articulate the voice of middle class voters such as small farmers, public employees, and labor union members who perceived CAFTA and its agenda as a threat to the Costa Rican social democratic model.<sup>174</sup> The presidential campaign thus was the beginning of a political process of mobilizing the forces opposed to neo-liberalism and

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tie with the campaign front runner, Oscar Arias," whose lead was previously thought to be "insurmountable").

<sup>171</sup> See Lettieri, *supra* note 151 (noting that debate over free trade was "beginning to envelop Arias' previously unimpeachable stature"); see also Frank Kendrick, *Costa Rica's Politics of Change*, COUNCIL ON HEMISPHERIC AFF. (Mar. 8, 2006), <http://www.coha.org/2006/03/costa-ricas-politics-of-change> (describing the Arias campaign as "haughty"); *Costa Rica's Oscar Arias, A Man not Without Flaws*, COUNCIL ON HEMISPHERIC AFF. (Mar. 8, 2006), <http://www.coha.org/2006/03/costa-ricas-oscar-arias-a-man-not-without-flaws> (describing Arias as "[v]ain and with a dismissive personality often accompanied by an unsettling sense of self importance").

<sup>172</sup> See *Nobel Winner Slips at Costa Rica Election*, THE AUSTRALIAN, Feb. 7, 2006, at 8, available at 2006 WLNR 2058006 (recalling that presidential race was the tightest in the history of Costa Rica as Arias's favor "eroded in the days before the election."). See generally *Costa Rican Poll Shows Solís Gaining Strength, Arias Losing Support*, BBC MONITORING LATIN AMERICA—POLITICAL, Feb. 4, 2006 (reporting Solís's gain in the polls).

<sup>173</sup> See *Costa Rica Politics: Tight Election Result*, EIU VIEWSWIRE, Feb. 6, 2006, ("The PAC owes much of its success to the energy of its leader, Mr Solís, and to its centre-left policy stance. The party appealed to the many Costa Ricans sceptical about the free-trade agreement . . . [CAFTA].").

<sup>174</sup> *Id.* (stating that Solís opposes the treaty); see also *Costa Rica Sigue*, *supra* note 164; *Costa Rican Poll Shows Solís Gaining Strength, Arias Losing Support*, *supra* note 172 ("Solís practically doubled his level of support in the rural areas of the Central Valley and in the urban and rural areas in the rest of the country. In fact, in the February 2002 election those were the regions that gave the PAC candidate the least support.").

globalization.<sup>175</sup> As Arias officially assumed the presidency in March of 2006,<sup>176</sup> it was clear that he lacked a mandate for CAFTA, and that the forces mobilized against CAFTA—far from being demoralized by the election's results—were prepared for further battle using the full range of peaceful legal and political instruments available to them.<sup>177</sup>

#### 5. WIELDING HUMAN RIGHTS AGAINST CAFTA: THE DEFENDER OF THE PEOPLE OF THE NATION JOINS THE FRAY

Just a few days after Arias's inauguration, the *Defensoría de Los Habitantes del Pueblo* ("Defender of the People of the Nation") published a comprehensive 400-page report raising serious questions about CAFTA's impact on human rights.<sup>178</sup> The report received a great deal of attention in the Legislative Assembly and the news media. Additionally, its timing, coinciding with the presidential election, was hardly fortuitous. The report formed the

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<sup>175</sup> See *Costa Rica: Political Forces*, EIU VIEWSWIRE, Apr. 20, 2005 (discussing disillusionment with established parties, including Arias's party, and the rise of Solís's PAC party which opposes neo-liberalism); see also Pablo Gámez, *Referendum Rocks Costa Rica to its Foundations (CAFTA)*, FREE REPUBLIC (Oct. 5, 2007), available at <http://www.freerepublic.com/focus/f-chat/1907636/posts> (noting that CAFTA's opponents fear neo-liberalism will end the country's free education, good social provisions, and low-cost electricity and telecommunications).

<sup>176</sup> *Background Note: Costa Rica*, supra note 84.

<sup>177</sup> *Posponen Trámite de TLC en Congreso Hasta Conocer Presidente Electo* [Congressional Step postponed FTA in Congress to Meet President-Elect], LA NACIÓN, Feb. 9, 2006, [http://www.nacion.com/ln\\_ee/2006/febrero/09/ultima-sr622655.html](http://www.nacion.com/ln_ee/2006/febrero/09/ultima-sr622655.html) (Presenting differing views of whether it was legitimate for Congress to move towards ratifying CAFTA in the light of the narrow electoral results and given resistance measures which may arise if Congress addressed CAFTA). See also *Costa Rica Politics: A President at Last*, EIU VIEWSWIRE, Mar. 9, 2006 ("[Arias's] victory will not secure him carte blanche with Congress, however, where his party will not have a majority. In particular, he will struggle to gain legislative approval for the Dominican Republic Central America Free-Trade Agreement (DR-CAFTA) . . .").

<sup>178</sup> *Defensoría de los Habitantes Alerta Sobre Impactos del TLC en Costa Rica* [Ombudsman warns of impact of CAFTA on Costa Rica], LA NACIÓN, March 30, 2006, [http://www.nacion.com/ln\\_ee/2006/marzo/30/ultima-sr668340.html](http://www.nacion.com/ln_ee/2006/marzo/30/ultima-sr668340.html) (stating potential negative effects of CAFTA, including, unfairness stemming from free trade in agriculture, the risk of job losses, and the uncertainty surrounding job creation).

intellectual backbone of the opposition to CAFTA, and it became an authoritative source for many of its arguments against the treaty. It is thus worth examining in detail.

The report began with a net assessment of the impact of globalization and "neo-liberal" policies on the country over the preceding two decades.<sup>179</sup> On the positive side, the Costa Rican economy had become more diversified and more attractive to foreign capital, including high-technology firms.<sup>180</sup> The tourist sector had grown, yielding important benefits to the country's economy and its international image.<sup>181</sup> In spite of recent setbacks, Costa Rica continued to possess some of the highest educational and public health standards in Latin America.<sup>182</sup> Furthermore, protection of its environment had been placed on a solid footing.<sup>183</sup>

On the negative side, economic growth had disproportionately benefited only a few groups tied closely to foreign trade, tourism, and the financial sector, while leaving behind small businessmen and farmers.<sup>184</sup> The labor market was increasingly divided between highly paid professionals and poorly qualified workers who brought in meager earnings and had no job security operating in the informal economy.<sup>185</sup> The increasing disparity in income distribution between "winners" and "losers" in the new economy threatened to weaken the middle class, historically the foundation

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<sup>179</sup> See INFORME DE LA DEFENSORÍA, *supra* note 92, at 3 (describing globalization and neoliberalism as the "transformative" forces in Costa Rica in the last twenty years, largely criticizing the "Washington Consensus").

<sup>180</sup> See *id.* at 52 (listing the comparatively few positive features of neoliberal policy in the last two decades, including industrial goods and services such as tourism).

<sup>181</sup> See *id.* ("It has safeguarded the environment, and it has made the tourism sector an important asset for the generation of foreign currency, scientific development, and the international image of the country.").

<sup>182</sup> *Id.*

<sup>183</sup> See *id.* (explaining that the tourism industry helped environmental conservation efforts).

<sup>184</sup> See *id.* at 53 (explaining that the development helped four groups: exporters, commercial importers, businessmen in the tourism industry, and those in the private financial sector).

<sup>185</sup> See *id.* (implying that because the average Costarican either was not qualified enough to find a high-paying job or the job paid too little, he or she was forced to enter the informal market).

of Costa Rica's democratic stability.<sup>186</sup> Low levels of public investment, triggered by cutbacks in government spending, had led to infrastructural deterioration.<sup>187</sup> Costa Rica's abandonment of public functions—functions it had once considered a social obligation—was contributing to the increase in “social exclusion.” This “social exclusion” was defined by a growing number of individuals who were not only poor, but increasingly outside the network of basic social services and institutions.

The report then proceeded to raise basic questions regarding CAFTA's potential impact on Costa Rica within the context of the changes that occurred in the preceding two decades. More than 50% of Costa Rica's exports went to the United States and 40% of its imports came from the United States; thus, the question was not whether trade between the two countries was a desirable goal, but rather whether CAFTA was the optimal way to structure such a relationship.<sup>188</sup> With a home market 657 times larger than Costa Rica's, U.S. firms were highly competitive relative to Costa Rican enterprises.<sup>189</sup> Moreover, in 2002, President Bush signed a ten-year Farm Bill allocating \$180 billion to agricultural subsidies, placing American food exporters in an unbeatable position vis-à-vis small Central American farmers.<sup>190</sup> Drawing on figures from U.S. NGOs, the report singled out repeated instances of U.S. dumping of agricultural products on world markets from 1990 to 2002, with dumping margins as high as 35% for rice, 61% for cotton, and 13% for corn in 2002 (all vital commodities to Costa Rican agriculture).<sup>191</sup> As a consequence of U.S. agricultural subsidies, and CAFTA's failure to place effective limits on such subsidies, Costa Rican farmers would be unable to compete in any of the above commodities after dropping import tariffs as CAFTA

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<sup>186</sup> *See id.* (explaining that the distribution of wealth has slowly chipped away at the middle class, which jeopardizes political stability).

<sup>187</sup> *See id.* (criticizing the cutbacks of government spending in favor of free market policies).

<sup>188</sup> *See id.* at 30 (expressing concern about the disparity between the benefits received by the United States and those received by Costa Rica).

<sup>189</sup> *See id.* at 55 n.59 (citing figures from a 2005 report to the Costa Rican president authored by Alvar Antillón Salazar).

<sup>190</sup> *See id.* at 66 (indicating the U.S. Farm Bill drastically raised agricultural subsidies, assigning \$180,000 million to U.S. farmers over the ten year period from 2002-2012 and representing a 70% increase on preexisting agricultural subsidies).

<sup>191</sup> *See id.* at 36.

requires.<sup>192</sup> Indeed, Mexico's experience with NAFTA illustrates why, far from being a panacea, free trade agreements can devastate vulnerable developing economies.<sup>193</sup> Between 1994 and 2002, Mexico added 500,000 new jobs in the manufacturing sector but lost 1.3 million agricultural jobs.<sup>194</sup> The report's reference to NAFTA was highly significant, as it reinforced CAFTA critics' invocation of NAFTA as a harbinger of Costa Rica's fate under CAFTA.

After setting out the broad economic and social context for CAFTA, the report began its substantive analysis of the agreement by examining its controversial provisions on intellectual property, focusing on the intellectual property provisions pertaining to pharmaceuticals.<sup>195</sup> Two major issues surfaced immediately. First, CAFTA provided that a patent's term may be extended as a consequence of delays attributable to government conduct. Second, it granted a minimum five-year period during which data disclosed during patent registration can be protected from public access.<sup>196</sup> These provisions go beyond the TRIPS requirements of the World Trade Organization. Thus a developing country like Costa Rica—committed to improving its public health standards within its limited resources—might view these provisions as tilting the balance too far in favor of large U.S. pharmaceutical companies.<sup>197</sup>

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<sup>192</sup> See *id.* at 65–67 (criticizing the United States' use of subsidies to artificially deflate the prices of U.S. agricultural products to the detriment of other countries in free trade blocs).

<sup>193</sup> See *id.* at 55–56, n.61 (citing another report that exposed shortcoming of free trade agreements, pointing specifically to NAFTA).

<sup>194</sup> See *id.* (“[O]n one hand, 500,000 new jobs were created in the manufacturing sector, but on the other, 1.3 million jobs in the agricultural sector were lost between 1994 and 2002.”).

<sup>195</sup> See *id.* at 175–76 (introducing the chapter about intellectual property rights).

<sup>196</sup> See *id.* at 177–80 (setting out some of the issues with CAFTA's intellectual property rights regime).

<sup>197</sup> See Pedro Roffe et al., *A New Generation of Regional and Bilateral Trade Agreements: Lessons from the US-CAFTA-DR Agreement*, in *TRADE AND HEALTH: SEEKING COMMON GROUND* 41, 58, 61 (Chantal Blouin et al. eds., 2007) (noting that CAFTA allows for extensions on patent terms in certain cases and explaining the provision of the TRIPS Agreement requiring protection of test data during the drug approval process); see also Maria Victoria Stout, *Crossing the TRIPS Nondiscrimination Line: How CAFTA Pharmaceutical Patent Provisions Violate TRIPS*

The report also alluded to the Memorandum of Understanding Concerning Public Health Measures, dated August 5, 2004, in which CAFTA's signatories guaranteed access to medications related to pandemics such as HIV/AIDS, tuberculosis, malaria, or in circumstances of extreme urgency or national emergency.<sup>198</sup> The report lamented that the Memorandum was attached to the treaty as a statement of understanding rather than a binding provision.<sup>199</sup> Nevertheless, the Defensoria concluded that the Memorandum would provide future Costa Rican governments a legal and moral basis for resisting pharmaceutical companies' efforts to restrict the availability of medications or setting prices excessively high.<sup>200</sup>

Without reaching a definitive conclusion on the issue, the report noted widespread concern about whether CAFTA's intellectual property regime would increase the Costa Rican government's cost of subsidizing medication prices for disadvantaged members of society.<sup>201</sup> In a 2005 letter to the Defensoria, Dr. Albin Chaves, Director of Pharmaceuticals of the Costa Rican public health service (CCSS), expressed concern that 21% of the CCSS pharmaceutical budget was devoted to innovative medicines and therapies for which generic substitutes are unavailable.<sup>202</sup> The five-year protection period for marketing test data and the time extensions provided for patents due to administrative or bureaucratic delays, implied that cheaper generic drugs would be unavailable for a longer period of time, in turn

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*Article 27.1*, 14 B.U. J. SCI. & TECH. L. 177, 192-98 (2008) (arguing that CAFTA violates the TRIPS Article 27.1 nondiscrimination provision by discriminating in favor of pharmaceutical patent holders).

<sup>198</sup> See INFORME DE LA DEFENSORIA DE LOS HABITANTES *supra* note 92, at 185-86 (representing one of three "fundamental agreements" that were signed in a letter by Central American countries and the United States, assuring that the rights to adequate health care would not be denied).

<sup>199</sup> See *id.* at 186-87 ("[It] is clear that [this letter] is not part of the treaty.").

<sup>200</sup> See *id.* at 201 (recommending that the Memorandum be used to justify future laws that provide maximum access to medications for Costa Ricans).

<sup>201</sup> See *id.* at 201-02 (recommending that a comprehensive study be conducted to anticipate what sort of effect the agreement would have on access to medicine).

<sup>202</sup> See *id.* at 184; see also Ángela Ávalos R., *Albin Chaves: Este Tema Es un Desafío* [Albin Chaves: This Issue Is a Challenge], LA NACIÓN, Nov. 19, 2006, [http://www.nacion.com/ln\\_ee/2006/noviembre/19/pais883693.html](http://www.nacion.com/ln_ee/2006/noviembre/19/pais883693.html) (reporting Chaves's argument that due to an increase in medication prices, Costa Rica must overcome many challenges in order to provide the poor access to medication).

increasing the cost burdens on the public health care system.<sup>203</sup> While it was impossible to estimate the severity of these burdens, they were certainly a risk meriting careful consideration.

While the Defensoria did not find any CAFTA clauses that posed a definitive Costa Rican public health risk, the Defensoria argued that the government could only take advantage of some CAFTA exceptions if it was quite agile and firm in holding the line on others, so as to protect the population's human right to health.<sup>204</sup> It also rather sharply noted that an ethos of "possessive individualism" – which was at odds with human solidarity and distributive justice principles – underlined CAFTA's intellectual property provisions.<sup>205</sup> Relying upon bioethics principles, the report challenged the Costa Rican state to take its moral obligations to the weak and disadvantaged more seriously so as to ensure their full access to affordable and adequate health care.<sup>206</sup>

With regard to CAFTA's impact on the environment, the report underlined a series of significant concerns and urged the Legislative Assembly to enact provisions to clarify and strengthen environmental protections, which may have been ambiguous in the wake of the agreement.<sup>207</sup> It stressed that the constitutional guarantee to the "right to a healthy and ecologically balanced environment"<sup>208</sup> should guide Costa Rica's environmental policies.

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<sup>203</sup> See Roffe et. al, *supra* note 197, at 58, 61 (describing the market exclusivity that is created by protection periods and time extensions, and the resulting delay for market entry of generic competitors).

<sup>204</sup> See INFORME DE LA DEFENSORIA, *supra* note 92, at 200–02 (advocating for, among other things, the strengthening of legal mechanisms to give the greatest degree of possible effectiveness to obligatory licensing, parallel importation, and other practices permitted by the proposed law).

<sup>205</sup> *Id.* at 198 (defining possessive individualism as the belief and practice of treating everyone as sole owner of their own capabilities and productivity without owing anything to society as a whole).

<sup>206</sup> See *id.* at 203 (arguing that the state should seek to buttress trade agreements with the transfer of resources to the disadvantaged by seeking out greater access to financial resources, new knowledge, and more advanced technology).

<sup>207</sup> See *id.* at 216–21 (listing water conservation, soil use, marine resources, and the management of energy resources among the areas of legislation that are excluded from the treaty's basic definition).

<sup>208</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS, art. 50, available at <http://pdba.georgetown.edu/Constitutions>



According to the report, this human right was considered a higher priority than the goals of increasing trade and foreign investment.<sup>209</sup> Moreover, the environment had to be considered a “common patrimony” of all Costa Ricans rather than a public good that could be simply auctioned off to the highest private sector bidder.<sup>210</sup>

The report concerningly highlighted CAFTA’s requirement that disputes be settled through international arbitration, and that the decisions of such arbitral tribunals took precedence over Costa Rica’s domestic courts.<sup>211</sup> While foreign investors challenging Costa Rica’s environmental measures would find recourse through arbitration, Costa Rican citizens, NGOs and other non-governmental entities—whose interests would be affected by the rulings of the arbitral tribunals—would not be able to appear directly in the arbitration proceedings.<sup>212</sup> Rather, only the Costa Rican government and its officials would be permitted to do so. This meant that environmental protection issues would be decided by private arbitral tribunals with ample opportunity to consider the interests of foreign investors, but none to hear those individuals whose lives and human rights would be most directly affected by their rulings.<sup>213</sup>

Yet another problem was that, under CAFTA, foreign investors could impugn environmental regulatory measures as disguised restraints on trade. Such disputes must ultimately appear before

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/Costa/costa2.html (stating that all persons have the right to a healthy and ecologically balanced environment).

<sup>209</sup> See INFORME DE LA DEFENSORIA, *supra* note 92, at 213 (describing Costa Rica’s development model as an effort to balance economic growth and conservation with the aim of promoting human rights).

<sup>210</sup> See *id.* (reasoning that there is a constitutional right to enjoy the environment and an implied right to denounce any efforts to impede that enjoyment).

<sup>211</sup> See *id.* at 229 (quoting Manrique Jiménez Meza) (arguing that binding resolutions and injunctions from arbitration will lead to the subordination of internal courts to arbitration justice).

<sup>212</sup> See *id.* 246 (finding that article 10.28 defines the potential plaintiff as an investor and the potential defendant as the government).

<sup>213</sup> See *id.* at 246–47 (describing several previous arbitrations, including those involving Harken Energy and Vanessa Ventures, in which local groups were not permitted to participate or voice their concerns).

private arbitral tribunals,<sup>214</sup> which are naturally more attuned to the interests of trade and investment protection than environmental interests.<sup>215</sup> All CAFTA members, with the exception of the United States, placed themselves in a disadvantageous position vis-à-vis the United States, by agreeing that trade in services would be wide open except for categories specifically listed in so-called “negative lists,” or lists of specific exceptions. This CAFTA provision was sharply different from the standard terms of the General Agreement on Trade in Services (GATS), under which trade in services is liberalized only to the extent that a state party makes a specific concession.<sup>216</sup> Under CAFTA, all signatories agreed to open up trade in services completely, except for specific negotiated exceptions listed in the “negative lists.”<sup>217</sup> Unlike the other CAFTA members, however, the United States succeeded in negotiating a sweeping clause attached to its “negative list,” indicating that it opened up its markets to services only to the extent of its similar, and more restricted, commitments under the GATS.<sup>218</sup> In practice, this means that, while the Central American nations open up their markets widely in the service sector widely to U.S. companies, the United States restricts its opening in that sector to the same level it already has under the GATS.<sup>219</sup> This asymmetrical opening of its services sector leaves Costa Rica highly vulnerable to a broad swath of future legal attacks on its environmental protection legislation in the guise of challenges to disguised restraints on trade.<sup>220</sup>

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<sup>214</sup> *See id.* at 247 (concluding that the arbitration regime allows investors to modify regulations even if these modifications effect public interest).

<sup>215</sup> *See id.* at 248 (recognizing that decisions of a clearly public character will be relegated to private panels wherein the state becomes more vulnerable to the pressure of transnational corporations).

<sup>216</sup> *See id.* at 233–34.

<sup>217</sup> *See id.* at 250 (concluding that a system utilizing negative lists is more likely to lead to legal uncertainty).

<sup>218</sup> *See id.* (noting that Annex II of the treaty grants the United States a blanket provision for excluding future service imports).

<sup>219</sup> *See id.* (contrasting the potentially relaxed standard to which the United States is subject to the exacting negative lists that would govern other CAFTA countries).

<sup>220</sup> *See id.* (considering that even the extraction of hydrocarbons could fall within the broad definition of services).

Another issue of concern was access to water. Under CAFTA, Costa Rica is obligated to open up its state monopoly over the production and distribution of water to foreign companies.<sup>221</sup> Currently, access to water is considered a human right guaranteed by the state through the provision of a public service.<sup>222</sup> Under CAFTA, however, water would become a commercial resource. The report noted the well-known experience of Cochabamba in Bolivia, where the state privatized water services to foreign providers, resulting in sharply increased water fees, thereby decreasing access to water by some of the poorest citizens.<sup>223</sup>

CAFTA also may undermine Costa Rica's 1998 Biodiversity Statute, through which the country has sought to protect and

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<sup>221</sup> See *id.* at 254–55 (identifying the possibility that state and municipal water service providers who priority in water rights could come under attack from foreign investors interested in exploiting local water resources).

<sup>222</sup> See Manuel Chavez, *Trade and Environment in Latin America: When Institutions, Transparency and Accountability are Essential*, 14 MICH. ST. J. INT'L L. 226, 240–41 (2006).

In 2002 the UN Commission on Human Rights declared the need for water as a basic human right. The Commission ensured that the concept of 'the right to water' was part of the future convention of the UN on water. But because of pressure exerted by the World Bank and the IMF, this notion has shifted to classify water as an economic good instead of a public good.

*Id.* (citing Fritz Brugger, *Some Water for All or More Water for Some?*, in BREAD FOR THE WORLD (2004), available at <http://www.waterjustice.org/uploads/attachments/pdf39.pdf>); U.N. Committee on Econ. Soc. and Cultural Rts., *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, arts. 11, 12, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), available at [http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf) (arguing that the right to water has been recognized in many international documents and is essential to the survival of human beings); see also Melina Williams, Note, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 MICH. J. INT'L L. 469, 472–78 (2007) (discussing international treaties that explicitly recognize water as a human right, and other documents, such as the International Covenant on Civil and Political Rights, which may be interpreted as including water as a human right).

<sup>223</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 238–40; see also SUSAN ARIEL AARONSON & JAMIE M. ZIMMERMAN, *TRADE IMBALANCE: THE STRUGGLE TO WEIGHT HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING 1–2* (2008) (describing the 35% rise in the price of water that the impoverished people of Cochabamba, Bolivia faced after the government auctioned off the city's water utility).

regulate the commercialization of its rich biological and genetic resources.<sup>224</sup> Under CAFTA's provisions dealing with trade in services, Costa Rica has the right to require that foreign companies "that supply services of scientific investigation and bio-inspection with regard to Costa Rica's biodiversity" must designate a legal representative in the country.<sup>225</sup> The Costa Rican Biodiversity Statute defines "bio-inspection" as "the systematic search, classification and research for commercial purposes of new sources of chemical compounds, genes, proteins, microorganisms and other products with current or potential economic value that may be found in the biodiversity sphere."<sup>226</sup> The report found substantial flaws with CAFTA's approach.<sup>227</sup>

First, under the Costa Rican Biodiversity Statute, genetic and biochemical resources are goods that are part of the public weal and therefore remain under the control of the State, which regulates permits for their commercial use.<sup>228</sup> By placing bio-inspection under the rubric of trade in services, thereby linking it to the agreement's rules on investment, a foreign company carrying out bio-inspection could claim investor rights protection over collected materials. Foreign companies could then demand intellectual property rights over the biochemical or genetic properties of such material.<sup>229</sup>

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<sup>224</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 256–57 (noting the differences between Costa Rica's Biodiversity rules and the CAFTA agreement).

<sup>225</sup> *Id.* at 257–58.

<sup>226</sup> *Id.* at 256 n. 244.

<sup>227</sup> *See id.* at 259 (concluding that bio-inspection is transformed from an opportunity for systematic classification into scientific service subject to investor regulation).

<sup>228</sup> *Ley No. 7788: Ley de Biodiversidad*, LA GACETA: DIARIO OFICIAL, May 27, 1998, available at <http://www.glin.gov/search.action> (follow [glin.gov](http://www.glin.gov) hyperlink and search for 129338; then click on title hyperlink and click on Full Text 1 for .pdf) (providing an article by article summary of the Law on Diversity, which grants the total and exclusive authority of biodiversity to the nation of Costa Rica).

<sup>229</sup> *See* Vivian H.W. Wang, *Investor Protection or Environmental Protection? "Green" Development under CAFTA*, 32 COLUM. J. ENVTL. L. 251, 277–80 (2007) (supporting the possibility of demanding investor rights in collected materials); *see also* James McCarthy, *Privatizing Conditions of Production: Trade Agreements as Neoliberal Environmental Governance*, 35 GEOFORUM 327, 333 (2004) (raising concerns that corporate trade arbitration could overrule national and sub-national environmental regulations).

The impact of CAFTA's intellectual property protections' impact on the environment presented another set of problems.<sup>230</sup> Under CAFTA, Costa Rica is obligated to join the International Convention for the Protection of New Varieties of Plants (UPOV).<sup>231</sup> Adopted in 1961, and revised in 1972, 1978 and 1991, the Convention seeks to protect new varieties of plants by securing intellectual property rights for their inventors and developers.<sup>232</sup> Under UPOV, U.S. companies can prohibit Costa Rican farmers from using for commercial purposes seeds from crops obtained through "patented seeds," for commercial purposes.<sup>233</sup> The report noted with serious concern measures adopted by foreign companies to control access to their seeds, such as payments to farmers to spy on their neighbors, and development of "suicide seeds," which produce sterile seeds in the second generation.<sup>234</sup> On the whole, CAFTA will increase the cost of seeds and restrict access to them.<sup>235</sup> The millennial rights of farmers to the seeds produced by their crops, and the traditional relations of social solidarity revolving around the sale and exchange of seeds among farmers, would take second place to intellectual property rights.<sup>236</sup>

With regard to the key human rights area of labor rights, the report raised the question of whether CAFTA placed Costa Rica at a distinct disadvantage.<sup>237</sup> Reflecting its focus on protecting the rights of investors, exporters, and holders of intellectual property rights, CAFTA does not set any labor standards, nor does it seek to raise them in the future, but simply leaves it up to each signatory

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<sup>230</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 243.

<sup>231</sup> *See id.* at 245, at 260 (noting that intellectual property protection over plant varieties is obtained either through the ratification of the UPOV or the granting of patents).

<sup>232</sup> *See* International Convention for the Protection of New Varieties of Plants, art. 14, Dec. 2, 1961, as revised 33 U.S.T. 2703, 815 U.N.T.S. 89 (providing and promoting an effective system of plant variety protection to encourage the development of new breeds of plant life to benefit society).

<sup>233</sup> *See id.*

<sup>234</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 264-65 (noting that steps have been taken to ban so called terminator seeds in countries like Brazil and India).

<sup>235</sup> *See id.* at 265.

<sup>236</sup> *See id.* (describing the situation as the transformation of a millennial right into a crime).

<sup>237</sup> *See id.* at 292 (considering that labor standards may be viewed as an incentive or disincentive to investment).

to comply with its own labor laws.<sup>238</sup> As a concession to critics who argued that the free trade agreement did not place enough emphasis on labor rights, CAFTA has a chapter dedicated to enforcement of labor law standards.<sup>239</sup> Article 16.1(2) states:

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<sup>238</sup> See Dominican Republic–Central America Free Trade Agreement art. 16.2, Aug. 5, 2004, 43 ILM 514, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file320\\_3936.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf) (“Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities.”); see also Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT’L L.J. 386, 432–33 (2005) (“CAFTA . . . does not require . . . Costa Rica . . . to revise [its] labor standards to more closely mirror international core labor rights.”).

<sup>239</sup> See Dominican Republic–Central America Free Trade Agreement art. 16.2, Aug. 5, 2004, 43 ILM 514, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file320\\_3936.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf) (affirming that each Party can establish their own domestic labor standards and ensure that their labor standards are consistent with internationally recognized labor rights); see also *Neighborly Trade*, WASH. POST, Aug. 11, 2003, at A16 (stating that Guatemala and El Salvador revamped its labor laws in preparation for CAFTA negotiations); see also Washington Office on Latin America, *DR-CAFTA and Workers Rights: Moving from Paper to Practice*, INT’L LAB. RIGHTS FORUM (Oct. 12, 2011, 8:24 PM), <http://www.laborrights.org/creating-a-sweatfree-world/changing-global-trade-rules/resources/2099>.

Similar congressional concerns over labor rights nearly caused the defeat of the Dominican Republic–Central America Free Trade Agreement in 2005 in both chambers. To guarantee its passage, former U.S. Trade Representative Robert Portman and Senator Bingaman (D-NM) agreed to provide roughly \$20 million to improve labor rights practice and enforcement, based on the recommendations outlined in the White Paper “The Labor Dimension in Central America and the Dominican Republic–Building on Progress: Strengthening Compliance and Enhancing Capacity.”

*Id.*; see also Jim Lobe, *Labor, Rights Groups Vow to Stop CAFTA in Congress*, COMMONDREAMS.ORG, (Dec. 10, 2003), <http://www.commondreams.org/headlines03/1210-10.htm>. (arguing that “[s]ince multinational companies could challenge environmental and public interest protections before international tribunals . . . how many Central American countries will still take action to safeguard their citizens and environment?”); see *Labor Rights Protections in CAFTA*, HUMAN RIGHTS WATCH (2003), <http://www.hrw.org/legacy/backgrounder/usa/cafta1003.pdf> (discussing the adequacy of labor rights and the enforcement of labor laws under CAFTA); see also Greg Hitt, *Latin Nations Vow Labor Overhauls To Get Trade Pact; To Placate U.S. Lawmakers, Cafta Partners Will Pledge To Assure Workers’ Rights*, WALL ST. J., Apr. 5,

The Parties affirm their full respect for their Constitutions. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 16.8 and shall strive to improve those standards in that light.<sup>240</sup>

Although Chapter 16 urges parties to ensure that their laws comply with internationally recognized standards,<sup>241</sup> critics of the agreement, including many members of the U.S. Congress, believe that the language used in the CAFTA chapter on labor will not improve labor standards in the participating nations.<sup>242</sup> As part of Chapter 16, CAFTA also establishes a ministerial-level Labor Council through which the Ministers of Labor of the signatory states meet periodically to review cooperation on labor matters and the enforcement of each country's own labor standards.<sup>243</sup>

But while CAFTA is not a labor rights agreement *per se*, it will have important implications for labor issues, not all of them positive. The Defensoría report pointed out 50 International Labor Organization conventions, stretching all the way from 1919 to 1999, which Costa Rica had ratified.<sup>244</sup> The other CAFTA members,

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2005, at A15 (“[C]ritics complain that [CAFTA] . . . would do nothing to improve working conditions or ease the culture of hostility toward the labor movement that is pervasive [in Latin America].”).

<sup>240</sup> Dominican Republic–Central America Free Trade Agreement art. 16.1, Aug. 5, 2004, 43 ILM 514, available at [http://www.sice.oas.org/Trade/CAFTA/CAFTADR\\_e/chapter13\\_22.asp#Article16.1](http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/chapter13_22.asp#Article16.1).

<sup>241</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 259.

<sup>242</sup> See Hitt, *supra* note 239, at A15.

<sup>243</sup> See Central American Free Trade Agreement art. 16.4, Aug. 5, 2004, 43 ILM 514, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file320\\_3936.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf) (“The Council shall meet within the first year after the date of entry into force of this Agreement and thereafter as often as it considers necessary to oversee the implementation of and review progress under this Chapter, including the activities of the Labor Cooperation and Capacity Building Mechanism . . .”).

<sup>244</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 278–81 (including the eight fundamental conventions of the 1998 ILO Declaration).

including the United States, had not ratified all of them.<sup>245</sup> By lowering trade and investment barriers without requiring a uniform upgrade of labor standards for all signatories up to the highest levels of labor rights protection, CAFTA could encourage business firms to seek out the producers with the lowest labor costs and lowest labor standards.<sup>246</sup> This would be a classic “race to the bottom” that would punish the Costa Rican economy for its higher levels of labor protection and lead to higher unemployment in the country.<sup>247</sup>

Thus, rather than leading to a strengthening of labor rights, CAFTA could wind up putting pressures on Costa Rican employers and the government to relax the enforcement of existing protections, so as to make the country more attractive to foreign investors.<sup>248</sup> The report noted that even before Costa Rica signed CAFTA, the country already was showing a disturbing tendency in this direction.<sup>249</sup> From 2001 to 2003, for example, out of 695 formal complaints to the Ministry of Labor regarding labor rights violations, in 55% of the cases where government inspectors concluded that remedial action by the employer was required such action was delayed beyond the sixty-day period required by law.<sup>250</sup> In those cases where the government decided that a formal complaint or prosecution was necessary, only 21% of those actions were started within the required 60-day period, with 45% being started between 120 and 180 days.<sup>251</sup> From 2001 to 2005, along with widespread non-enforcement of the deadlines required by law for handling and resolving workers’ complaints, there was a marked decline in the number of employers inspected.<sup>252</sup> Given these

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<sup>245</sup> *See id.* at 278 (considering that as a signatory to more ILO conventions the agreement will create greater obligations).

<sup>246</sup> *See id.* at 280 (finding that even Art. 16.2 of the proposed agreement creates the obligation of the parties to not use the lowering of labor standards as a means of generating investment).

<sup>247</sup> *See id.* at 279 (comparing Costa Rica’s higher standards to those of the United States).

<sup>248</sup> *See id.* (noting the relative weakness of the agreements phrasing of provisions discouraging the weakening of labor protections).

<sup>249</sup> *Id.* at 282–83 (noting a series of disputes with ILO standards including the right to collective bargaining and free association).

<sup>250</sup> *Id.* at 269.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*



trends, the report concluded that Costa Rica was not prepared for the downward pressures that CAFTA may place on workers' rights, and it urged the government to strengthen enforcement of existing labor legislation and to work more vigorously for an upgrade in labor standards among all CAFTA signatories.<sup>253</sup>

Another concern underlined by the report was CAFTA's impact on Costa Rica's state monopolies.<sup>254</sup> As explained earlier, the Constitution requires that certain areas of economic life, such as banking, insurance, telecommunications, and water resources be under the control of the State,<sup>255</sup> although the State may allow private entities to offer services in these areas in accordance with its regulations.<sup>256</sup> Up until now, insurance and telecommunications services have been exclusively in the hands of two state monopolies, the INS (Instituto Nacional de Seguros) and ICE (Instituto Costarricense de Electricidad), although there has been a multimillion dollar "black market" private insurance industry operating in the country for some time.<sup>257</sup> Under CAFTA,

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<sup>253</sup> *Id.* at 267.

<sup>254</sup> *See id.* at 286–87.

<sup>255</sup> *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS, Title XIV, available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html> (asserting that the state retains power over certain sectors of the economy); *see also* Background Note: Costa Rica, *supra* note 84 (listing the industries that have historically been subject to a state monopoly); *see* INFORME DE LA DEFENSORIA, *supra* note 92; *see* Neftali Garro, *Insurance Privatization in Costa Rica: Lessons from Latin America With Special Reference to Uruguay*, 7 CONN. INS. L.J. 359, 409–11 (2001) (detailing the history and development of the National Insurance Institute); *see generally* Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT'L L.J. 285 (2004) (examining how countries' constitutions address issues related to healthcare).

<sup>256</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 283–86.

<sup>257</sup> *See* Costa Rica: Constitution and Institutions, EIU VIEWSWIRE, July 18, 2006, (describing how the ICE and INS enjoy state sponsored monopolies); *see* Costa Rica: Constitution and Institutions, EIU VIEWSWIRE, April 1, 2008 (asserting that despite attempts to break up state run monopolies, "public opposition . . . prevented any changes"); *see* R. Victoria Lindo, *Hydroelectric Power Production in Costa Rica and the Threat of Environmental Disaster Through CAFTA*, 29 B.C. INT'L & COMP. L. REV. 297, 301 (2006) (contending that Costa Rica has a several laws that regulate the private exploitation of its water supply); *see also* Neftali Garro, *supra* note 255, at 409–13, 415 (illustrating the history of the Instituto Nacional de Seguros (INS) and noting that the INS is the only entity which can legally provide insurance).

however, Costa Rica is obligated to permit access and competition by foreign entities in these markets.<sup>258</sup>

The report emphasized that opening up the insurance market to competition would require the creation of an insurance regulatory authority to make sure that private providers comply with certain basic legal and regulatory norms.<sup>259</sup> The report's main concern was not so much the commercial insurance market, although that too would require regulatory oversight, but what it called "social insurance", that is, the provision of basic insurance services to individuals, especially lower income persons, who might not be able to afford the insurance rates likely to be charged by private providers.<sup>260</sup> The report pointedly referred to the experience of several South American countries, where the insurance industry ceased to be a state monopoly only to become a private sector oligopoly.<sup>261</sup> The result was less access for workers and their families to basic insurance services.<sup>262</sup>

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<sup>258</sup> See *Background Note: Costa Rica*, *supra* note 84.

Costa Rica's insurance, telecommunications, electricity distribution, petroleum distribution, potable water, sewage, and railroad transportation industries have been state monopolies. However, under the U.S.-Central American-Dominican Republic Free Trade Agreement (CAFTA-DR), Costa Rica accords substantial market access in a wide range of services, subject to very few exceptions. The wireless telephony, data telecommunications, and insurance markets opened to market competition in 2010. As part of the implementing agenda for CAFTA-DR, Costa Rica intends to strengthen and modernize the state monopoly telecommunications provider (ICE) so that it can remain competitive with new companies entering the market.

*Id.*

<sup>259</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 322 (recognizing the need to create a regulatory entity prior to the liberalization of the insurance market).

<sup>260</sup> *Id.* (noting that any solution should consider how to achieve a balanced outcome that does not leave the insured without protection).

<sup>261</sup> See *The Americas Shift Toward Private Health Care*, 351 *ECONOMIST* 27, 28 (May 8, 1999) (contending that by privatizing their healthcare systems, Latin American countries may restrict the poorest citizens from gaining access to health services).

<sup>262</sup> See Denis Drechsler & Johannes Jütting, *Different Countries, Different Needs: The Role of Private Insurance in Developing Countries*, 32 *J. HEALTH POL. POL'Y & L.*, 497, 506-07 (2007) (arguing that the high premiums that private health insurance companies in Latin America command preclude the poor from purchasing private health insurance); see also Celia Ariart et al., *Managed Care Goes Global: Latin America Confronts the Multinational Health Insurers*, *MULTINATIONAL MONITOR*, Oct.

Regarding the expected opening of the telecommunications market, the report began its analysis by linking access to telecommunications services to the most basic human right: the right to an adequate standard of living.<sup>263</sup> The report noted that, in spite of its flaws and limitations, Costa Rica's model for developing its telecommunications, based on principles of social solidarity and access to all, had resulted in high levels of coverage coupled with tariffs appropriate to the modest living standards of the average citizen.<sup>264</sup> As of 2004, the country had 32 public telephones per 1,000 inhabitants, comparing favorably with China at 24 telephones per 1,000 inhabitants, and even the much wealthier countries of Spain and Italy with 42 and 45 telephones per 1,000 inhabitants respectively.<sup>265</sup> In Latin America, Costa Rica has the highest density of fixed telephone lines coupled with the lowest rates for fixed line service, as well as the lowest rates for cellular phone service.<sup>266</sup> In 2004, Costa Rica also had the highest per capita internet usage for Central America, and in Latin America it was surpassed only by Chile.<sup>267</sup> The report pointed out that the Latin American experience with breaking up state telecommunications monopolies through privatization and opening to foreign

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2004, at 15–16 (“[C]ritics of managed care in Latin America argue that establishing the profit motive as the guiding principle of the healthcare system has restricted access for vulnerable groups . . .”).

<sup>263</sup> See Int'l Covenant on Econ., Soc. and Cultural Rts. art. 11, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 7 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family . . .”).

<sup>264</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 323 (arguing that adequate Access to telecommunications is a means of achieving the human right to an adequate standard of living).

<sup>265</sup> *Id.* at 334 graph 12.

<sup>266</sup> *Id.* at 334–35; see also *Human Development Report 2009: Gender-Related Development Index and Its Components*, U.N. DEV. PROGRAMME, [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Table\\_J.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Table_J.pdf) (last visited Oct. 30, 2011) (providing statistics which reveal the number of telephone mainlines per 1,000 people in 2007, noting that Costa Rica lags behind Argentina, Chile, and Uruguay).

<sup>267</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 311; see also *Human Development Report 2009*, *supra* note 266 (presenting statistics for the year 2005 demonstrating that Costa Rica had 254 Internet users per 1,000 people in 2005, ranking behind Barbados, Argentina, Chile, and Uruguay).

competition raised serious questions.<sup>268</sup> The result generally had been concentration of market share in the hands of one or two major providers, along with a less competitive environment and higher rates.<sup>269</sup>

In response, the report urged the Costa Rican government to prepare the country for the challenges that CAFTA would entail. In particular, the ICE had to be reformed in order to make it more efficient and competitive, if it was to retain its role as the country's telecommunications provider of last resort.<sup>270</sup> The country also had to articulate a post-CAFTA policy of universal access to telecommunications that would obligate private sector providers to extend services to individuals and geographical areas that were not profitable.<sup>271</sup> And a new regulatory agency would have to be created, as in the field of insurance, to oversee telecommunications from the standpoint of the public interest.<sup>272</sup>

#### 6. THE PUBLIC DEBATE'S FOCUS ON CAFTA'S IMPACT ON HUMAN RIGHTS: ECONOMIC HUMAN RIGHTS

The public debate in the country during the year following the election's conclusion echoed the issues raised by the Defensoria's report. Foremost in the minds of CAFTA's opponents were economic human rights and the right to health. In the area of economic human rights, concerns revolved around CAFTA's impact on agriculture, industry, and the public services provided by Costa Rica's state monopolies in water, electricity, and telecommunications. Although, by Central American standards, Costa Rica has a relatively stable developing economy,<sup>273</sup> 20% of its

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<sup>268</sup> INFORME DE LA DEFENSORIA, *supra* note 92, at 375 (arguing that a policy of universal service is necessary for the expansion of telecommunications networks to high cost areas).

<sup>269</sup> *Id.* at 370 (demonstrating the tendency towards concentration in cellular telephone markets across Latin America).

<sup>270</sup> *Id.* at 371-74 (listing a wide array of policy suggestions, including freedom to create new subsidiaries and engage in advertising).

<sup>271</sup> *Id.* at 376 (inquiring in particular as to what new reforms will be needed to retain the current level of density and inclusion).

<sup>272</sup> *Id.* at 364-71 (envisioning as potential regulatory options the strengthening of the national public services regulator, the creation of a new regulatory agency, or the assignment of telecommunications to antitrust authorities).

<sup>273</sup> See Andrew D. Mason & Carlos Sobrado, *Costa Rica: Recapturing Momentum for Poverty Reduction*, 96 EN BREVE 1, 1 (World Bank, Oct. 2006), available at

population lives in poverty, and much of that poverty is concentrated among farmers and single women.<sup>274</sup> Many of the country's poorest people live in rural farming communities.<sup>275</sup> These communities became closely involved in massive anti-CAFTA demonstrations throughout 2006 and the first half of 2007 as their members demanded answers from the Arias government concerning their future livelihood as farmers.<sup>276</sup>

Agriculture contributes to 8.7% of the country's GDP and employs 20% of its workforce.<sup>277</sup> Key crops include fruits, coffee, and sugarcane.<sup>278</sup> As the Defensoria's report pointed out, the primary fear of the agricultural sector was that small farms would be unable to compete with highly subsidized U.S. farm products.<sup>279</sup>

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[http://siteresources.worldbank.org/INTENBREVE/Newsletters/21181757/Oct06\\_96\\_CR\\_Regaining\\_ENV2.pdf](http://siteresources.worldbank.org/INTENBREVE/Newsletters/21181757/Oct06_96_CR_Regaining_ENV2.pdf) (noting that Costa Rica is well known for socio-economic achievements given its "low levels of poverty and inequality by Latin American standards" and also its steady performance in "health, access to improved water supplies, suitable housing and other basic services").

<sup>274</sup> Eva Carazo Vargas, *Costa Rica: Why We Reject CAFTA*, FEMINIST INT'L RADIO ENDEAVOR (Aug. 3, 2007), <http://www.cipamericas.org/archives/1077> (noting that Costa Rica's poverty level hovered at roughly 20% from 1992 to the article's publication in 2007); *Estadísticas Sociales (1997-2009): Pobreza [Social Statistics (1997-2009): Poverty]*, ESTADO DE LA NACIÓN, <http://www.estadonacion.or.cr/index.php/estadisticas/costa-rica/compendio-estadistico/estadisticas-sociales> (click "Pobreza" to download the spreadsheet detailing poverty levels).

<sup>275</sup> *Estadísticas Sociales*, *supra* note 274 (stating that rural areas have more poverty, but does not mention agriculture).

<sup>276</sup> At this time, some public opinion surveys found as many as 60% of all Costa Ricans in favor of CAFTA, a figure that turned out to be much higher than the number who actually voted in favor of it in the October 2007 referendum. The President of the Horticulture Corporation, Giovanni Masis, representing the agricultural business interests as opposed to the wage laborers in the sector, came out strongly in favor of CAFTA, claiming that most agricultural producers were in favor. See Daniel Zuera, *Costa Rica: Multitudinaria Marcha Contra El DR-CAFTA [Costa Rica: Massive March Against DR-CAFTA]*, INTER PRESS SERVICE, Feb. 26, 2007, available at <http://ipsnoticias.net/nota.asp?idnews=40231> (reporting on demonstrations against CAFTA even after pro-CAFTA Arias won the presidential election).

<sup>277</sup> See *Background Note: Costa Rica*, *supra* note 84 (estimating that agriculture accounted for 6.5% of Costa Rica's GDP in 2010).

<sup>278</sup> *Id.*

<sup>279</sup> See Amy Angel, *Transition Policies for the Agricultural Sector, in CAFTA-DR, CAFTA-DR Agrifood Market Integration Consortium 3*, available at [http://camc.tamu.edu/sanjose/angel\\_english.pdf](http://camc.tamu.edu/sanjose/angel_english.pdf) ("CAFTA-DR generated many expectations to improve access to export markets. But it also created fear that

Meanwhile, U.S. special interests made sure that CAFTA would not open U.S. markets as widely to Central American agricultural commodities as the Bush administration and other CAFTA supporters publicly claimed.<sup>280</sup> For example, members of the U.S. sugar industry were highly influential in the agreement's terms regarding sugar tariffs.<sup>281</sup> During the negotiations, Carolyn Cheney, chair of the U.S. sugar industry lobby, was quick to remind Congress that "[CAFTA] only adds to the burden placed upon the American sugar industry, which faces an already oversupplied market and further strengthens our resolve to work diligently to defeat the sugar provisions of the CAFTA-DR."<sup>282</sup> The

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reduced protection would result in more imports, lowering prices in domestic markets and harming the profitability of agricultural products."); Fabian Borges, *CAFTA: A View From Central America*, INSIDECOSTARICA (Mar. 9, 2004), [http://insidecostarica.com/special\\_reports/2004-03/cafta\\_a\\_view\\_from\\_central\\_america.htm](http://insidecostarica.com/special_reports/2004-03/cafta_a_view_from_central_america.htm) (explaining that "[s]mall farmers . . . fear[ed] CAFTA would drive them out of business by forcing them to compete with highly subsidized U.S. farm staples"); McKinley, *supra* note 147, at 8.

Rice farmers here see the agreement as an unmitigated disaster. Even though they have 10 years before the 35% duty on imported rice begins to disappear, most say they will never be able compete with rice farmers in the United States, who have better technology and receive huge subsidies. It costs about \$250 to produce a ton of rice in both countries, but the Americans sell it on the world market for much less, farmers here said. "It's impossible for is [sic] to be competitive with all the subsidies that the North Americans have," said Emilio Rodriguez Pacheco, 48, who farms about 25 acres of rice here. "For the rice sector it's a tragedy."

*Id.*

<sup>280</sup> See REMY JURENAS, CONG. RESEARCH SERV., RL 32110, AGRICULTURAL TRADE IN A U.S.-CENTRAL AMERICAN FREE TRADE AGREEMENT (CAFTA) 10 (2003) (outlining agricultural associations for and against CAFTA but not detailing their effect on the final agreement); see also Press release, Oxfam Int'l, Backroom Deals Enable Bad Trade Agreement to Pass (Nov. 1, 2005), available at [http://www.oxinfra.org/en/grow/news/pressreleases2005/pr050728\\_cafta.htm](http://www.oxinfra.org/en/grow/news/pressreleases2005/pr050728_cafta.htm) (criticizing DR-CAFTA's final terms); Sandra Polaski, Issue Brief, *How to Build a Better Trade Pact with Central America*, CARNEGIE ENDOWMENT FOR INT'L PEACE, (July 2003), available at [http://www.carnegieendowment.org/pdf/files/TED\\_CAFTA\\_Polaski\\_July\\_2003.pdf](http://www.carnegieendowment.org/pdf/files/TED_CAFTA_Polaski_July_2003.pdf) (noting that CAFTA proposals appeared to be driven by politically-connected U.S. special interest groups).

<sup>281</sup> See *Free-Trade Pact Isn't So Sweet for Sugar Lobby*, THE HILL, Feb. 1, 2005, <http://thehill.com/business-a-lobbying/2923-free-trade-pact-isnt-so-sweet-for-sugar-lobby> (discussing the U.S. sugar lobby's opposition to CAFTA terms, which would increase the amount of sugar allowed to enter U.S. markets).

<sup>282</sup> *Id.*

American sugar industry feared that cheap Central American sugar would saturate the U.S. market.<sup>283</sup>

The U.S. sugar lobby ultimately succeeded in keeping the terms of sugar in its favor. CAFTA allows only a small expansion of sugar imports into the United States, up to less than 2% (120,000 tons) of total U.S. sugar consumption, phased in over a 15-year period.<sup>284</sup> Costa Rican sugar producers were obviously disappointed, because sugar is a crop in which they have a comparative advantage, yet they will be unable for a long time to export to their full potential. CAFTA critics feared that with Costa Rican farmers unable to compete, unemployment would swell, along with the ranks of those employed in low paying jobs in the informal sector, thereby worsening poverty and income inequality. In the end, while CAFTA might help to boost Costa Rica's overall GDP, agriculture could suffer.

CAFTA supporters cautioned against assuming such a gloomy outcome. Using rice as an example, they pointed out that although rice is subsidized in the United States, it is also subsidized in Costa Rica, giving Costa Rica an advantage over other Central American countries.<sup>285</sup> Further, they argued that Costa Rican farmers produce only enough staple crops such as corn, rice and beans to cover half the country's needed supply, so imports were needed anyway.<sup>286</sup> As part of CAFTA's provisions, Costa Rica would have

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<sup>283</sup> See Crystal Bolner, *Free Trade Trade-Offs*, INSIDECOSTARICA (Aug. 4, 2003), [http://insidecostarica.com/specialreports/CAFTA\\_free\\_trade\\_trade\\_offs.htm](http://insidecostarica.com/specialreports/CAFTA_free_trade_trade_offs.htm) (relaying that "some U.S. [sugar] producers fear a tidal wave of sugar that could cause the U.S. sugar market to collapse").

<sup>284</sup> See Dominican Republic-Central America Free Trade Agreement: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce, 109th Cong. 95, 98 (2005) (statement of Russell Roberts, Prof. of Economics, George Mason University).

Despite the words "free trade" in the title of the agreement, CAFTA would allow only the tiniest of expansions in sugar imports phased in over 15 years . . . . CAFTA limits the expansion of sugar imports into the United States to less than 2% of US consumption over the next 15 years.

*Id.*

<sup>285</sup> See John Murphy, *Costa Rica's CAFTA Choice*, LATIN BUS. CHRON., Oct. 1, 2007, <http://www.latinbusinesschronicle.com/app/article.aspx?id=1674> (noting that rice is subsidized in both the United States and Costa Rica).

<sup>286</sup> *Id.* ("Costa Rican farmers produce only about half of the rice Costa Ricans consume. . . .").

ten years before the tariff elimination on imports began, and the phase-out would not be completed for twenty years,<sup>287</sup> so as to allow farmers and the government time to adjust to the treaty.

The fate of Costa Rican industry under CAFTA was also the subject of intense public debate. The industrial sector contributes 22.5% of the country's GDP, with textiles and electronics as the primary products.<sup>288</sup> There is, of course, extreme competition in the global economy with respect to textiles, with mammoth textile producers like China and India leading the race. With their large pool of cheap labor, these countries are able to export textiles at extremely low prices.<sup>289</sup> CAFTA supporters argued that, in order to compete with these large economies, Costa Rica needed to take

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<sup>287</sup> *Id.* ("Costa Rican negotiators won an extremely long phase out for the country's tariffs on rice imports, a phase out which doesn't start for 10 years and doesn't finish for 20.").

<sup>288</sup> See *Background Note: Costa Rica*, *supra* note 84; see *Costa Rica: Manufacturing*, EIU VIEWSWIRE, Apr. 1, 2008 (listing statistics for integrated circuits and electronics microstructures, microprocessors, textiles, transfusion and infusion equipment for 2004-2007). "After the first plant built in Costa Rica by a US microprocessor company, Intel, was inaugurated in April 1998, the production of microprocessors became the largest single area of manufacturing activity. Food-processing, medical supplies, chemical products, textiles and metal-processing are also important." *Id.*

<sup>289</sup> See Denis Audet, *Smooth as Silk? A First Look at the Post MFA Textiles and Clothing Landscape*, 10 J. INT'L ECON. L. 267, 268 (2007) (indicating that countries can gain a competitive advantage through low wage rates); John Lyons, *The Economy: Costa Rica Balks at Free-Trade Pact*, WALL ST. J., May 3, 2005, at A2 (noting that Costa Rica is obligated to use U.S. textiles instead of cheaper Asian-made ones); Froma Harrop, *Central American Trade*, CHRISTIAN SCI. MONITOR, May 24, 2005, <http://www.csmonitor.com/2005/0524/p09s02-usfp.html>.

Labor-intensive industries in America continue to fight a hopeless war against competitors paying pennies-an-hour wages. The futility of it all can be seen in the following numbers, provided by A.T. Kearney, a consulting firm: It costs \$135 to make 12 pairs of cotton trousers in the US. It costs \$57 to make the trousers in China and ship them here. It costs \$69 to do so in other parts of the world.

*Id.*; *Textiles: Losing Their Shirts: Central America and the Caribbean Face an Onslaught from Rivals*, ECONOMIST, Oct. 16, 2004, at 92 ("Labour costs are the biggest area of concern[,] as wages paid by Mexican textile chambers are about three times as high as in China); J. F. HORNBECK, CONG. RESEARCH SERV., RL 31870, THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR) 11 (2008) (noting that over the past five years, "U.S. imports from Central America increased by 19.3%").



advantage of free trade agreements that allow greater market access to the United States for its products. Under CAFTA, Costa Rica would be able to export its manufactured goods to the United States without facing high tariffs, supposedly giving it an advantage over Asian economies.

Supporters also argued that CAFTA would help Costa Rica to remain competitive.<sup>290</sup> They cited as examples the case of thread producer Hilos A&E, whose output fell to less than 25% of its former levels as it moved its production capacity elsewhere, and that of zipper factory YKK, which left Costa Rica altogether.<sup>291</sup> In February 2007, a large Wrangler Jean company closed, leaving 400 people without jobs.<sup>292</sup> The closing produced a domino effect, as manufacturers of sub-component materials such as zippers and elastics threatened cutbacks.<sup>293</sup> Many of the newly unemployed were women, including single mothers, who would find it difficult to support their families. In all these cases, the companies had found it cheaper to establish businesses in other Central American countries that, besides having lower labor standards than Costa Rica, already had ratified CAFTA, thereby guaranteeing easy access to the U.S. market.<sup>294</sup>

CAFTA's proponents also claimed that ratification would increase direct foreign investment.<sup>295</sup> As an example, they cited the case of Intel, which has been operating in Costa Rica for over ten

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<sup>290</sup> E.g., Marvin Barquero, *Atraso en TLC Cobra Víctimas [Delay in CAFTA Creates Victims]*, LA NACIÓN, Mar. 28, 2007, available at [http://www.nacion.com/ln\\_ee/2007/marzo/28/economia1045393.html](http://www.nacion.com/ln_ee/2007/marzo/28/economia1045393.html) (describing how the textile industry in Costa Rica struggled because CAFTA had not been approved and implemented yet).

<sup>291</sup> *Id.*

<sup>292</sup> See Marvin Barquero, *400 Sin Empleo por Cierre de Otra Textilera en Costa Rica [400 Out of Work Because Another Textile Plant Closes in Costa Rica]*, LA NACIÓN (Jan. 6, 2007), available at [http://www.nacion.com/ln\\_ee/2007/enero/06/economia950418.html](http://www.nacion.com/ln_ee/2007/enero/06/economia950418.html) (discussing the effect a textile plant's closing will have on workers).

<sup>293</sup> E.g., Barquero, *supra* note 290 ("For example, Hilos A&E reduced its activity by a quarter and the zipper factory YKK left the country.").

<sup>294</sup> *Id.* (explaining why companies that produce raw materials have found it necessary to leave Costa Rica).

<sup>295</sup> See, e.g., Murphy, *supra* note 285 (contending that CAFTA will increase direct foreign investment and create jobs for Costa Rica as demonstrated by the growth each of Costa Rica's four neighbors have seen since implementing CAFTA).

years, and today has two manufacturing plants and a distribution center employing over 3000 people.<sup>296</sup> Intel claims it has contributed to Costa Rica's economic growth, with its products accounting for 20% of the country's manufactured exports.<sup>297</sup> In response, CAFTA skeptics were quick to deplore what they perceived to be the tendency of trans-national corporations to move to Central American countries where they could exploit workers. These countries often have low labor standards, and even when, as in Costa Rica's case, there are strong labor protection laws, they are not strictly enforced.<sup>298</sup> Intel tried to prove these skeptics wrong by becoming three times the recipient of Costa Rica's Social Responsibility Award and a five-time winner of the National Safety Responsibility Award.<sup>299</sup>

The service sector is the largest contributor to Costa Rica's GDP at 71%,<sup>300</sup> and at the center of the debate within this sector was the fate of the state monopolies over electricity, telecommunications, and water services. Like the Defensoria's report, CAFTA opponents argued that, through the Costa Rican Electricity and Telecom Institute (ICE), Costa Rica had been able to provide cheap services to most citizens, including the poorest ones.<sup>301</sup> CAFTA

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<sup>296</sup> See *Background Note: Costa Rica*, *supra* note 84 ("In recent years, Costa Rica has successfully attracted important investments by such companies as Intel Corporation, which employs 3,200 people at its \$1.996 billion microprocessor plant . . . ."); see also *Jobs at Intel: Heredia, Costa Rica*, INTEL, <http://www.intel.com/jobs/costarica/sites/heredia.htm> (last visited Nov. 17, 2011) (describing Intel's facilities and operations in Costa Rica since March 1998).

<sup>297</sup> See *Jobs at Intel: Heredia, Costa Rica*, *supra* note 296 (demonstrating the impact that the large, multi-national corporation has had on the Costa Rican economy).

<sup>298</sup> See Murphy, *supra* note 285 (indicating that single mother heads of households account for up to 90% some textile firms' employees, and referencing a study by Procomer, Costa Rica's export promotion agency, which found that without CAFTA, 73,000 jobs in Costa Rica are vulnerable to cuts, with the majority in the textile sector).

<sup>299</sup> See *Jobs at Intel: Heredia, Costa Rica*, *supra* note 296 (illustrating the proposition that international companies can be socially responsible while simultaneously promoting economic growth).

<sup>300</sup> See, e.g., *The World Factbook: Costa Rica*, CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cs.html> (last visited Nov. 17, 2011) (2010 estimate).

<sup>301</sup> See Borges, *supra* note 279 ("An important segment of the country's population and politically influential labor unions have seen the . . . [ICE] as [a]

supporters countered that the agreement would allow competition and lead to lower prices and higher quality. Costa Ricans would have a broader range of service providers, forcing the ICE to offer modern, efficient telecommunications and electricity.<sup>302</sup>

In fact, the revolution in telecommunications over the last decade, especially the advances in free Internet voice communication, where calls are free regardless of where or how long is the conversation, has been posing a major challenge for ICE independently of CAFTA.<sup>303</sup> It is estimated that within the next three years, 197 million subscribers around the world will use Internet calling.<sup>304</sup> With or without CAFTA, the Costa Rican state no longer will have a monopoly in telecommunications, as anyone with a computer will have access to free telephone calls. But even though the Internet may take business away from ICE, it also could provide new business opportunities in the form of installation and service contracts. In Costa Rica alone, half a million new mobile GSM lines will be acquired, along with 80,000 new broadband Internet sites.<sup>305</sup> This could generate a great deal of business for ICE, but only if it is able to prepare for competition and change so that it can take advantage of these new opportunities.<sup>306</sup>

The future of the Costa Rican state monopoly over water was an equally contentious subject. The fear was that CAFTA could

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synonym[] [for] the country's social-democratic development model, which helped create a large middle class during the latter half of the 20th century.").

<sup>302</sup> See Roy Rojas, *CAFTA: Point of Disagreement in Costa Rica* (Apr. 10, 2007), <http://globalvoicesonline.org/2007/04/09/cafta-point-of-disagreement-in-costa-rica/> (contending that competition will only force the ICE to improve its services).

<sup>303</sup> See, e.g., Anabel González, *Telecomunicaciones y Tecnología: Aunque Algunos No lo Admitan, el Futuro del ICE No lo Define el TLC, Ya lo Definió la Tecnología* [Telecommunications and Technology: Although Some May Not Admit It, ICE's Future not defined by NAFTA, but by Technology], *LA NACIÓN*, Sept. 23, 2005, available at [http://www.nacion.com/ln\\_ee/2005/septiembre/23/opinion6.html](http://www.nacion.com/ln_ee/2005/septiembre/23/opinion6.html) (discussing the impact of Skype on telecommunications and communication costs and indicating that such free Internet communication negates ICE's supposed monopoly over telecommunications in Costa Rica).

<sup>304</sup> See *id.* ("The impact of this technology is so large that it is estimated that the number of voice over IP will reach 197 million people in 2010, without counting those who use a non-subscription based voice over IP simply by downloading Skype, Google or other similar software for free . . .").

<sup>305</sup> *Id.*

<sup>306</sup> See *id.* (indicating that the future of technology and Internet communication determines the future of the ICE).

turn water resources that were not specifically protected as part of a natural park or forest preserve into commercial assets subject to bidding, acquisition, and commercial development by foreign companies.<sup>307</sup> Under the agreement, if a body of water is associated with property rights or otherwise classified as open to commercial use, it is subject to its rules on “national treatment,” meaning that Costa Rica must treat domestic and foreign water providers equally.<sup>308</sup> CAFTA’s opponents worried that the treaty’s water regime would lead to privatization of water distribution, which in turn would lead to price hikes that would impede the right of poor people to the enjoyment of the basic right to water.<sup>309</sup> In addition, there were serious concerns that CAFTA would make it difficult for the Costa Rican government to set aside certain percentages of water resources for local use, leaving many poor communities helpless to manage their own water supplies.<sup>310</sup>

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<sup>307</sup> See María Flórez-Estrada, *CAFTA Threatens to Turn Water into Merchandise*, 39 LATINAMERICA PRESS 1, 6 (Oct. 31, 2007), available at [http://www.lapress.org/objetos/informe/1PI\\_LP3920.PDF](http://www.lapress.org/objetos/informe/1PI_LP3920.PDF).

The Environment and Energy Ministry is currently in charge of managing the water resources, and institutions like the Costa Rican Electricity, Aqueducts and Sewage System Institute have some autonomy in granting concessions, but under CAFTA, state authorities will be potentially powerless before commercial priorities . . . . CAFTA’s method of handling disputes between the state and investors will give multinational companies the privilege to question decisions by national authorities before *private international arbitration courts*, when they feel that their investments have been affected.

*Id.* (emphasis added).

<sup>308</sup> See David Beck, *Water and US-Central American Free Trade Agreement*, AM. FRIENDS SERVICE COMMITTEE, 1 (July 23, 2004), <http://www.afd-pdx.org/Articles/CAFTA-and-Water.pdf> (describing the implications of CAFTA’s treatment of water as a tradable commodity and therefore subject to national treatment regulation).

<sup>309</sup> See Flórez-Estrada, *supra* note 307, at 2 (discussing the current regime under which people who consume less water pay more for it than larger consumers, such as resorts); see also Fabián Borges, *Unions Blast CAFTA, Vow to Stop Treaty*, TICO TIMES (Jan. 27, 2004), [http://www.ticotimes.net/dailyarchive/2004\\_01/Week4/01\\_27\\_04.htm#story\\_one](http://www.ticotimes.net/dailyarchive/2004_01/Week4/01_27_04.htm#story_one) (quoting the secretary general of the National Association of Public and Private Employees that “CAFTA may lead to the privatization of the country’s water services . . . . Costa Rica will lose its current model of public services based on solidarity. The most vulnerable sectors and even the middle class will be left unable to pay for basic services”).

<sup>310</sup> See Flórez-Estrada, *supra* note 307, at 6.

Many of CAFTA's opponents appealed to the United Nations Committee on Economic, Social and Cultural Rights and its declaration that drinking water is a human right fundamental for life and health, as they passionately argued that the nation's citizens should be the "owners" of all natural resources within their country, including water.<sup>311</sup> There were also serious concerns about unregulated pollution, which could affect Costa Rica's drinking water.<sup>312</sup>

CAFTA opponents also feared that the agreement would lead eventually to a larger role for the private sector in education and health care, leaving the public health care and education sectors starved of resources and incapable of providing adequate services for the poor.<sup>313</sup> In response, treaty advocates claimed that the trend toward greater privatization would be good for the economy by offering greater job opportunities for women, even those with little education and experience.<sup>314</sup> Opponents responded that even if

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A major problem to fairer water distribution in Costa Rica is that CAFTA prohibits taxes on the exportation of water. Water is also sold as merchandise: bottled. This means that the country cannot prohibit or restrict its exportation by transnational companies . . . [CAFTA] will impede Costa Rica from giving priority to improving water access to local communities, small businesses or national cooperatives compared to US transnational companies.

*Id.* (internal quotations omitted); Maria Eugenia Trejos, *CAFTA in Costa Rica Would Cause Deepening Inequality*, AMERICAS PROGRAM (Sept. 21, 2007), <http://www.cipamericas.org/archives/925> (arguing that under CAFTA, "businesses' access to the water and natural resources,[sic] and their 'right' to profits take precedence over any measure (whether human or social) that might be taken by the government or municipalities").

<sup>311</sup> See *Expertos Creen Agua Estado Natural No Debe Integrarse Tratados* [Experts Believe Water in State of Nature Must Not Be Incorporated into Trade Agreements], LA NACIÓN, Mar. 17, 2006, available at [http://www.nacion.com/ln\\_ee/2006/marzo/17/ultima-mu4.html](http://www.nacion.com/ln_ee/2006/marzo/17/ultima-mu4.html) (arguing for the sovereign right of nations to control and regulate their water resources).

<sup>312</sup> *Id.*

<sup>313</sup> See Margaret Thompson & María Suárez, *Women of Costa Rica Organize to Stop CAFTA & Call for Solidarity from US Social Forum*, FEMINIST INT'L RADIO ENDEAVOUR (June 23, 2007), [http://www.radiofeminista.net/junio07/notas/cafta\\_banner.htm](http://www.radiofeminista.net/junio07/notas/cafta_banner.htm) (contending that increased privatization has led to higher costs, preventing the poor from accessing education and medical services).

<sup>314</sup> See Fabián Borges, *The Feminine Side of CAFTA*, TICO TIMES (Mar. 14, 2003), [http://www.ticotimes.net/dailyarchive/2003\\_03/Week2/03\\_14\\_03.htm#story\\_o](http://www.ticotimes.net/dailyarchive/2003_03/Week2/03_14_03.htm#story_o)

women could find jobs, their rights would not be adequately protected, as CAFTA does not provide protections against gender discrimination or sexual harassment, leaving it up to each country to enforce its own anti-discrimination laws in these areas.<sup>315</sup>

The debate on CAFTA's impact on labor rights was equally heated, and it followed similar lines as those in the Defensoria's report. The key fear was that, with CAFTA creating a single market within which disparate labor standards were allowed, market forces would tend to punish the country with the strictest labor code, in this case Costa Rica. As a concession to critics, the Bush administration committed over \$40 million per year from 2006 to 2009 to assist all CAFTA members (other than the United States) in enforcing their labor standards.<sup>316</sup> \$8.94 million was committed towards implementing comprehensive training programs for national laws and international standards, \$2 million for judicial administration, \$5 million for establishing worker rights centers, \$3 million to improve worker health and safety primarily in the agricultural sector, and \$3.98 million to reduce discrimination and harassment against women.<sup>317</sup> Critics argued that this small sum would not be enough, considering the poor working conditions in CAFTA countries (with the exception of Costa Rica) and the widespread corruption rampant in the administration of their public finances.<sup>318</sup>

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ne (explaining that proponents of CAFTA believe the agreement will create economic opportunities for women and the poor).

<sup>315</sup> See Carol Pier, *DR-CAFTA Falls Short on Workers' Rights*, HUM. RTS. WATCH (July 26, 2005), <http://www.hrw.org/news/2005/07/26/dr-cafta-falls-short-workers-rights> ("DR-CAFTA only has one enforceable labor rights requirement: that countries apply their own labor laws – even if they are grossly inadequate. If governments change their laws to eliminate rights, that's okay, too, just so long as the new laws are enforced.").

<sup>316</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *CAFTA-DR—LABOR CAPACITY BUILDING: PROMOTING EFFECTIVE ENFORCEMENT OF LABOR LAWS IN THE CAFTA-DR COUNTRIES* (July 2007), [http://ustraderep.gov/assets/Trade\\_Agreements/Regional/CAFTA/Briefing\\_Book/asset\\_upload\\_file739\\_13204.pdf](http://ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file739_13204.pdf) (describing the specific initiatives implemented and money allocated by the United States to improve labor conditions in CAFTA-participating countries).

<sup>317</sup> *Id.*

<sup>318</sup> See Pier, *supra* note 315.

Recently, the U.S. Trade Representative, Rob Portman, promised to support \$40 million a year for labor and environmental capacity building in Central America and the Dominican Republic. But . . . [t]he other

In response, CAFTA supporters drew attention to CAFTA's creation of the ministerial-level Labor Council, through which state parties periodically would review the enforcement of their own labor codes, with the goal of securing long-term improvements in labor conditions. And they pointed out two specific steps that Costa Rica had taken to strengthen enforcement of its labor legislation as part of the process of accession to CAFTA. The previous government had appointed thirty-seven new labor court judges, and "created a center for alternative dispute resolution."<sup>319</sup> Both of these measures would alleviate the crowded labor courts and allow more labor violations to be remedied effectively.

#### 7. HUMAN RIGHTS, HEALTH CARE, AND THE AVAILABILITY OF PHARMACEUTICALS

CAFTA's impact on the price and availability of pharmaceuticals was another topic of intense public debate. As with other bilateral free trade agreements promoted by the United States in recent years, CAFTA's intellectual property provisions seek to enhance the protections available to U.S. patent holders. As discussed by the Defensoria's report, two of the most controversial of these provisions involved are, first, CAFTA's extension of patent terms as a consequence of administrative delays, and second, strict limitations on the use by third parties of data presented by patent holders to a government agency for purposes of securing patent recognition.<sup>320</sup>

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half of the story is the Bush administration's proposal to cut by 87% – from \$93.2 million to \$12 million – the 2006 budget for the U.S. Department of Labor's Bureau of International Labor Affairs (ILAB). ILAB is the principal U.S. agency charged with providing international workers' rights assistance and houses the Office of Trade Agreement Implementation, the national contact point for administering the labor chapters of all free trade agreements to which the United States is party. . . . [T]he Bush administration should renegotiate DR-CAFTA to strengthen workers' rights protections and provide the funds to make them a reality.

*Id.*

<sup>319</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, *CAFTA FACTS: REAL RESULTS ON LABOR RIGHTS: IMPROVEMENTS AS A RESULT OF CAFTA 1 (2005)*, available at [http://ustraderep.gov/assets/Trade\\_Agreements/Regional/CAFTA/Briefing\\_Book/asset\\_upload\\_file823\\_7189.pdf](http://ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file823_7189.pdf).

<sup>320</sup> See José Paulo Brenes Lleras, *CAFTA and Intellectual Property Rights*, 13 AMCHAM'S BUS. COSTA RICA 1 (2005), available at

The Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) allows WTO member countries a minimum non-extendable patent term of twenty years.<sup>321</sup> As a WTO member, Costa Rica is a party to the TRIPS.<sup>322</sup> CAFTA, however, provides for extension of the patent term beyond the standard twenty years to compensate for delays in granting of the patent or regulatory approval.<sup>323</sup> Article 15.9(6)(a) of CAFTA provides that “[e]ach party, at the request of the patent owner, shall adjust the term of a patent to compensate for unreasonable delays that occur in granting the patent.”<sup>324</sup> In addition, Article 15.9(6)(b) provides for adjustments to pharmaceutical patents in cases where there have been delays in the issuance of the respective health permits,<sup>325</sup> stating that:

[W]ith respect to any pharmaceutical product that is covered by 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 resulting from the marketing approval process related

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<http://www.pachecocoto.com/publications/cafta-intellectual-property-rights> (discussing the controversial nature of certain CAFTA provisions that regulate intellectual property rights).

<sup>321</sup> General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1197 [hereinafter TRIPS]. See Christine A. Chung, *A Cry for Cheaper Drugs: CAFTA's Inflexible Intellectual Property Protections Create an Ominous Impact on Life-Saving Medicines*, 13 SW. J. L. & TRADE AMERICAS 171, 175 (2006) (“In 1994, the Central American countries adopted the intellectual property protections of the World Trade Organization . . . which incorporated” TRIPS).

<sup>322</sup> See *Frequently asked questions about TRIPS in the WTO*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_E/trips\\_e/tripfq\\_e.htm#Who'sSigned](http://www.wto.org/english/tratop_E/trips_e/tripfq_e.htm#Who'sSigned) (last visited Nov. 17, 2011) (noting that TRIPS applies to all WTO member countries).

<sup>323</sup> See The Dominican Republic-Central American-United States Free Trade Agreement, ch. 15, art. 15.9(6), Aug. 5, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR] (describing provisions that provide for extensions of patent terms).

<sup>324</sup> *Id.* art. 15.9(6)(a).

<sup>325</sup> *Id.* art. 15.9(6)(b).



to the first commercial marketing of the product in that Party.<sup>326</sup>

This indicates the possibility that the patent period for a pharmaceutical drug may well extend over the twenty-year term provided in the TRIPS agreement because applications for a patent usually are delayed.<sup>327</sup>

In addition, CAFTA increases the protection of publicly undisclosed test data.<sup>328</sup> After a new pharmaceutical product is patented, governments typically require that the product be proven safe before issuing a health permit authorizing its sale.<sup>329</sup> Companies perform extensive clinical trials, submitting the compiled data to the pertinent regulatory agency. The data from these trials is known as marketing "test data."<sup>330</sup> The intellectual

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<sup>326</sup> *Id.*

<sup>327</sup> See 3D → TRADE - HUMAN RIGHTS - EQUITABLE ECONOMY, COSTA RICA: STRENGTHENING PATENT LAWS, WEAKENING HUMAN RIGHTS (2007) [hereinafter 3D], available at [http://www.3dthree.org/pdf\\_3D/3DCESCR\\_CostaRicaNov07.pdf](http://www.3dthree.org/pdf_3D/3DCESCR_CostaRicaNov07.pdf) (stating that patent periods could extend beyond the twenty-year terms outlined in TRIPS due to delays, which is "tantamount to extending the patent term up to twenty five years").

<sup>328</sup> CAFTA-DR, *supra* note 323, art. 15.10(1)(b)-(d).

<sup>329</sup> See Carlos M. Correa, *Protecting Test Data for Pharmaceutical and Agrochemical Products Under Free Trade Agreements*, UNCTAD-ICTSD Dialogue on Moving the Pro-Development IP Agenda Forward: Preserving Public Goods in Health, Education and Learning 1, 2 (Nov. 29-Dec. 3, 2004), available at [http://www.iprsonline.org/unctadictsd/bellagio/docs/Correa\\_Bellagio4.pdf](http://www.iprsonline.org/unctadictsd/bellagio/docs/Correa_Bellagio4.pdf) (describing the use of clinical trial data to establish whether or not a new drug is safe and therefore should be approved by national authorities); see also J. F. HORNBECK, CONG. RESEARCH SERV., CSR REPORT FOR CONGRESS: THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR) 25 (2008) (explaining that "[to] bring a patented drug to market, a drug company must demonstrate through clinical trials that the drug is safe and effective"); RICK NG, DRUGS: FROM DISCOVERY TO APPROVAL 209-10 (2d ed. 2009) (noting that "[i]t is the role of public regulatory authorities [in major countries] to ensure that pharmaceutical companies comply with regulations" so that products are safe for consumption). However, see *Pharmaceutical Federation Campaigns Against Generic Drugs*, TICO TIMES, (Sept. 14, 2005), [http://www.ticotimes.net/dailyarchive/2005\\_09/daily\\_09\\_14\\_05.htm#story2](http://www.ticotimes.net/dailyarchive/2005_09/daily_09_14_05.htm#story2), for a discussion on how generics do not have to show that they are the same as the brand name drugs in Costa Rica.

<sup>330</sup> Correa, *supra* note 329, at 2-3. See generally INT'L FED'N OF PHARM. MFG. & ASS'N, A REVIEW OF EXISTING DATA EXCLUSIVITY LEGISLATION IN SELECTED COUNTRIES (3d ed., 2004) [hereinafter IFPMA] (discussing the legislation and process in which

property rights of pharmaceutical companies are affected in several ways by marketing test data. First, the time spent performing clinical trials, submitting data for review, and gaining approval cuts into the life of the patent, reducing the time the company can profit from its monopoly position.<sup>331</sup> Second, the research to test a new product is expensive, adding even more to the investment costs the company must recoup.<sup>332</sup> Third, marketing test data is not part of the original patent, so it may not receive the same level of protection or compensation for use.<sup>333</sup>

Generic drug producers often rely on the marketing test data of the original patent holder.<sup>334</sup> Instead of performing their own clinical trials to prove that their product is safe, they merely show that it is chemically equivalent to the original product, thereby gaining regulatory approval for use of the generic version.<sup>335</sup> Pharmaceutical researchers complain that this amounts to “free-riding”.<sup>336</sup> Not only have they invested in the original research and

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test data is “submitted to regulatory authorities of countries around the world in order to obtain approval to market the drug”).

<sup>331</sup> See CARLOS MARÍA CORREA, PROTECTION OF DATA SUBMITTED FOR THE REGISTRATION OF PHARMACEUTICALS: IMPLEMENTING THE STANDARDS OF THE TRIPS AGREEMENT 1-3 (2002), available at [http://www.southcentre.org/index.php?option=com\\_content&view=article&id=68%3Aprotection-of-data-submitted-for-the-registration-of-pharmaceuticals-implementing-the-standards-of-the-trips-agreement&catid=41%3Ainnovation-technology-and-patent-policy&lang=en](http://www.southcentre.org/index.php?option=com_content&view=article&id=68%3Aprotection-of-data-submitted-for-the-registration-of-pharmaceuticals-implementing-the-standards-of-the-trips-agreement&catid=41%3Ainnovation-technology-and-patent-policy&lang=en) (discussing the different phases and test data that is required to develop a new pharmaceutical product).

<sup>332</sup> *Id.* at 6 (explaining that the testing involved in bringing a new drug to market involves significant investments).

<sup>333</sup> *Id.*

<sup>334</sup> See *WTO and the TRIPS Agreement*, WORLD HEALTH ORG., [http://www.who.int/medicines/areas/policy/wto\\_trips/en/index.html](http://www.who.int/medicines/areas/policy/wto_trips/en/index.html) (last visited Nov. 18, 2011) (explaining that prior to TRIPS coming into effect, generic drug manufacturers could rely on “originator test data” in seeking approval of pharmaceuticals).

<sup>335</sup> See *id.* (relaying that, prior to TRIPS, “[g]eneric manufacturers need[ed] only to prove that their product [was] chemically identical to the . . . original product, and in some countries, that it [was] bioequivalent”); see also CORREA, *supra* note 331, at 6 (noting an argument for data exclusivity that is grounded in preventing “competitors [from] rapidly producing and registering an exact copy of the drug”).

<sup>336</sup> See Adam Graham-Silverman, *Big Pharma's Free Ride*, SALON, Aug. 12, 2005, [http://www.salon.com/2005/08/12/cafta\\_drugs/](http://www.salon.com/2005/08/12/cafta_drugs/) (arguing that

development of the new drug, they also have subsidized their competition's costs of market access through the latter's use of their test data.<sup>337</sup>

The explicit provisions in CAFTA provide that test data will be protected from access by generic producers for five years after approval by the country's regulatory agency, and in addition countries "may require that the person providing the information in the other territory seek approval in the territory of the [p]arty within five years after obtaining marketing approval in the other territory."<sup>338</sup> Pharmaceutical companies are allowed to run these protections sequentially, so that company X may submit data for approval in the U.S., receive five years of data protection from all other CAFTA members, and then submit data for approval in another CAFTA country for an additional five years of data protection.<sup>339</sup> In practical terms, this means that drug companies can receive up to ten years of exclusive data protection, only five of which will run concurrently with the patent.<sup>340</sup>

CAFTA's Article 15.10 provides that the:

Party shall not permit third persons, without the consent of the person who provided the information, to market a product on the basis of (1) the information, or (2) the approval granted to the person who submitted the information for at least five years for pharmaceutical products . . . from the date of approval in the Party.<sup>341</sup>

In addition, "a Party may require that the person providing the information in the other territory seek approval in the territory of the Party within five years after obtaining marketing approval in

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"[p]harmaceutical companies are using free-trade deals like CAFTA to eliminate global competition—and deny poor patients access to cheaper generic drugs").

<sup>337</sup> See *id.* ("Generic companies seeking approval of their drugs usually use safety data from clinical tests that the name-brand companies conducted, obviating the need to repeat expensive and time-consuming work.").

<sup>338</sup> CAFTA-DR, *supra* note 323, art. 15.10(1)(b).

<sup>339</sup> See Graham-Silverman, *supra* note 336 ("The five-year clock starts ticking in a given country only when a drug is registered there, meaning that a company can prolong its monopoly by registering in countries sequentially. The result is up to 10 years of market protection from generics for a brand-name drug.")

<sup>340</sup> *Id.* (same).

<sup>341</sup> CAFTA-DR, *supra* note 323, art. 15.10(1)(a).

the other territory.”<sup>342</sup> CAFTA critics were concerned that these provisions for lengthening the terms of protection for marketing test data, when coupled with extensions to patent terms as a result of delays, would have the overall impact of delaying the availability of generic substitutes and raising the price of many medications.<sup>343</sup>

As noted earlier, relative to Central America and most of Latin America, Costa Rica has a long tradition of investment in social services and public health. The country's social welfare model has been successful in guaranteeing a high degree of social peace, and is considered to be the key factor in promoting a quality of life superior to that of neighboring countries.<sup>344</sup> The universal health care system is one of Costa Rica's most prized features.<sup>345</sup> In spite of the damage done by the “lost decade” of the 1980s and the sharp cuts in social spending of the 1990s, Costa Rica ranked third in the world in 1995 in life expectancy,<sup>346</sup> and thirty-sixth worldwide for its public health system's performance in 1997, with the United States one rank below it.<sup>347</sup> As of 2000, Costa Rica's public health

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<sup>342</sup> *Id.* art. 15.10(1)(b).

<sup>343</sup> See Jill Replogle, *Central American Trade Pact May Limit Access to Generics*, 363 LANCET 1612, 1612 (2004) (relaying criticisms that these provisions would significantly delay the availability of generic drugs).

<sup>344</sup> See Cassidy Rush, *Despite What President Arias Might Want You to Believe: Why Costa Rica Might Not Need CAFTA After All, and Why It May be a Bad Deal for the Average Costa Rican*, COUNCIL ON HEMISPHERIC AFFAIRS, Oct. 5, 2007, available at <http://www.coha.org/2007/10/05/despite-what-president-arias-might-want-you-to-believe-why-costa-rica-might-not-need-cafta-after-all-and-why-it-may-be-a-bad-deal-for-the-average-costa-rican> (noting that critics argued CAFTA would “wreak havoc on Costa Rica's outstanding healthcare system”).

<sup>345</sup> *The State of the Nation in Sustainable Human Development: Summary*, *supra* note 102, at 34 (stating that any changes to the health insurance system in Costa Rica should “uphold the principles of universal coverage, solidarity in funding, and equitable access”).

<sup>346</sup> WORLD HEALTH ORG., *THE WORLD HEALTH REPORT 1995: BRIDGING THE GAPS* 2 fig.1 (1995).

<sup>347</sup> WORLD HEALTH ORG., *THE WORLD HEALTH REPORT 2000: HEALTH SYSTEMS: IMPROVING PERFORMANCE* 152, annex tbl.1 (2000). See also Press Release, World Health Org., World Health Org. Assesses the World's Health Sys. (June 21, 2000), available at <http://www.who.int/inf-pr-2000/en/pr2000-44.html> (outlining the statistics, found in *The World Health Report 2000: Health Systems: Improving Performance*, to the public).

care service covered approximately 90.4% of the country's population.<sup>348</sup>

These strong results are a reflection of substantial public spending on health care. Although the figures vary depending on the source, over 20% of the national budget is devoted to health care services, with the Costa Rican government citing the figure of 21.5%,<sup>349</sup> and the CIA estimating that 10.5% of the Costa Rican GDP in 2009 went towards health expenditures.<sup>350</sup> Out of this sum, 8% is currently spent on purchasing pharmaceutical goods and medicines.<sup>351</sup> The availability of cheaper generic drugs has enabled the government of Costa Rica to allocate a larger fraction of the budget to sustain the high level and coverage of the health care system by reducing the cost of obtaining medicines.<sup>352</sup> The availability of cheaper generic drugs has enabled the government of Costa Rica to allocate a larger fraction of the budget to sustain the high level and coverage of the health care system by reducing the cost in obtaining medicines.<sup>353</sup> CAFTA's critics argued that the agreement's impact on the availability and cost of generic products would require that the fraction of the health care budget devoted to medications rise from 8% to 45%,<sup>354</sup> in order to obtain the same amount of medications. Additionally, CAFTA critics in Costa Rica

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<sup>348</sup> WORLD HEALTH ORG., *supra* note 347.

<sup>349</sup> *About Costa Rica: Costa Rica at a Glance*, EMBASSY OF COSTA RICA IN WASHINGTON DC, <http://www.costarica-embassy.org/index.php?q=node/20> (last visited Nov. 18, 2011).

<sup>350</sup> *The World Factbook: Costa Rica*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/cs.html> (last updated Nov. 15, 2011).

<sup>351</sup> *CAFTA by the Numbers: What Everyone Needs to Know*, PUB. CITIZEN'S GLOBAL TRADE WATCH (2004), <http://www.citizen.org/documents/CAFTAbyNumbers.pdf>.

<sup>352</sup> *See id.* (noting an 800% increase between the 8% of Costa Rica's healthcare budget spent on pharmaceuticals in 2004 and the estimated 45% of Costa Rica's healthcare budget that would need to be spent on pharmaceuticals under CAFTA's restricted generics competition provisions); *see also* Nria Homedes & Antonio Ugalde, *Multisource Drug Policies in Latin America: Survey of 10 countries*, 83 BULL. WORLD HEALTH ORG. 64, 68 tbl.4 (2005) (noting that "generic drug policies have been promoted as strategies to improve access to pharmaceuticals and control" costs and indicating that Costa Rica has regulations which require certain drugs to be prescribed using their International Nonproprietary Name, or INN).

<sup>353</sup> *See CAFTA by the Numbers: What Everyone Needs to Know*, *supra* note 351.

<sup>354</sup> *Id.*

associated with the Costa Rican pharmaceutical industry offered estimates suggesting that the total cost of medicines in Costa Rica under CAFTA's intellectual property provisions could increase by as much as 800%.<sup>355</sup> Assuming that the fraction of Costa Rica's national budget spent on the health care system would remain unchanged, Costa Rica would be left with the equally unpalatable options of either maintaining universal coverage by substantially diminishing the quality of the service, or maintaining the quality of the service by giving up universal coverage and requiring uncovered citizens to pay for the increased cost of medicines and services.

CAFTA advocates were quick to point out that the chief purpose of strengthening intellectual property rights is to provide incentives for innovation.<sup>356</sup> The development of new pharmaceutical products, in turn, benefits everyone over the long run, even the poorest members of society, as medications become cheaper and more accessible over time.<sup>357</sup> Increases in the price of medicines may be an unfortunate, but temporary consequence of the effort to prevent the unfair commercial use of data by

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<sup>355</sup> See *id.* (estimating the effect of the "CAFTA intellectual property provisions" on the cost of medications in Costa Rica).

<sup>356</sup> See Jill Repogle, *Profit or the Right to Health*, INSIDECOSTARICA, June 19, 2004, [http://insidecostarica.com/special\\_reports/2004-06/profit\\_or\\_right.htm](http://insidecostarica.com/special_reports/2004-06/profit_or_right.htm).

CAFTA supporters . . . say the agreement will assure access to safe, quality drugs for the population through stricter pharmaceutical testing and approval standards. They also say it will stimulate innovation by providing protection for pharmaceutical research and development. . . . Meanwhile, multinational pharmaceutical companies applaud the measures as defending the average US\$900 million investment required to turn a single chemical entity into a marketable pharmaceutical product. "What we want is a fair, open market," said Dr. Rodolfo Lambour, executive director of the Central American Federation of Pharmaceutical Laboratories, which represents major international pharmaceutical companies in the region. "We're not against generics," Lambour said, "they can come into the market once intellectual property rights expire."

*Id.*

<sup>357</sup> See *id.* ("Th[e] Doha Declaration on the TRIPS Agreement and Public Health specifically called for the provision of access to medicine for all. It also assured member nations the right to do this within TRIPS provisions.").

unauthorized third parties.<sup>358</sup> Prior to CAFTA, so went the argument, Costa Rican law did not provide adequate protection to pharmaceutical companies seeking to protect undisclosed data submitted for regulatory approval. CAFTA could wind up encouraging such companies to enter the Costa Rican market, increasing trade between the United States and Costa Rica, and eventually lowering drug prices in the small country.<sup>359</sup>

CAFTA opponents, however, argued that Costa Rica presents a unique situation compared to its neighboring nations due to its high-standard universal health care system. While corporations may need incentives to innovate and market their products in the more backward countries of Central America and the Caribbean, this is not the case in Costa Rica, where the health care system depends on dramatically lower-priced medicines, facilitated by competition from generic substitutes, and its focus is broad access to needed medicines by all of its citizens.<sup>360</sup>

This was, indeed, the position taken by Álvaro Camacho Mejía, President of the National Pharmaceutical Industry Association, and an outspoken opponent of the free trade agreement. He stated that the success of the country's health care system lay in the existence and accessibility of generic medicines, as well as the quality of medical human resources.<sup>361</sup> He argued that while

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<sup>358</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, FOREIGN TRADE BARRIERS: COSTA RICA TRADE SUMMARY 159 (2007) (discussing U.S. concerns regarding "Costa Rica's inadequate enforcement of intellectual property laws").

<sup>359</sup> See *id.* at 157 ("When implemented, the CAFTA-DR will remove barriers to trade and investment in the region and strengthen regional economic integration.").

<sup>360</sup> See, e.g., Robert Weissman, *Dying for Drugs: How CAFTA Will Undermine Access to Essential Medicines*, 25 MULTINATIONAL MONITOR 4 (2004), available at <http://multinationalmonitor.org/mm2004/04012004/april04corp2.html> (explaining that compulsory drug licensing introduces competition while drugs are still covered by patents, lowering prices even before generics are permitted to compete with patented pharmaceuticals); see also Álvaro Camacho Mejía, *Un problema que no existe [A problem that Does Not Exist]*, LA NACION, Feb. 22, 2005 [http://www.nacion.com/ln\\_ee/2005/febrero/22/opinion6.html](http://www.nacion.com/ln_ee/2005/febrero/22/opinion6.html).

("This was the case of NAFTA, since it contemplates reforms on aspects beyond the country's current regulations, generating a shift in society from access to generic drugs, encouraging the monopoly of multinational pharmaceutical companies in the local market, with the implications that this entails.").

<sup>361</sup> See Mejía, *supra* note 360 (indicating that such access and quality incentivizes investment by multinational pharmaceutical enterprises).

CAFTA's intellectual provisions could have a positive effect on other CAFTA members by encouraging pharmaceutical companies to make advanced health care products available, this would not be the case in Costa Rica, where a high-quality health care system was already established based on the easy availability of generic medicines.<sup>362</sup> With social security coverage of more than 90%, and an average life expectancy matching that of developed countries, the country should not subject itself to the same kind of regime as that of its less developed Central American and Caribbean neighbors.<sup>363</sup> "It [was] necessary for Costa Rica to realize the social balance that has allowed Costa Rican population's access to medicines, and to understand that displacement of such system will only be an attempt to solve a problem that does not exist."<sup>364</sup>

CAFTA proponents, while granting that there would be some price increases for medications as a result of the agreement, were quick to argue that the intellectual property provisions themselves would not affect the Costa Rican Social Security System (Caja Costarricense de Seguro Social [CCSS]), nor lead to privatization of the health care system.<sup>365</sup> According to this line of argument, all that CAFTA did was moderately lengthen the terms of protections for some patents and marketing test data.<sup>366</sup> Eduardo Doryan Garrón, Executive President of CCSS and a CAFTA supporter, reassured the public that CAFTA would not damage the health care system or prevent access to generic medicines, as more than 98% of existing medicines funded by the CCSS were on the WHO's

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<sup>362</sup> See *id.* (arguing that there is widespread availability of high quality generic versions of medications in Costa Rica).

<sup>363</sup> See *id.* ("Coverage by the Social Security system reaches 90% of the population.").

<sup>364</sup> *Id.* (translation by author) ("We must reflect on the social balance that has allowed access to these drugs and understand that their displacement is only intended to solve a problem that does not exist.").

<sup>365</sup> See Elías Jiménez F., *TLC y el sistema de salud [CAFTA and the Health System]*, LA NACION, Feb. 23, 2007, [http://www.nacion.com/ln\\_ee/2007/febrero/23/opinion1005429.html](http://www.nacion.com/ln_ee/2007/febrero/23/opinion1005429.html) (explaining that the TLC will not negatively affect the health industry nor the financial status of CCSS, and will not change the structure and autonomy of the CCSS).

<sup>366</sup> See *id.* ("What the FTA does regulate, in the area of medication, is the protection of undivulged information: the test data that provide the necessary information about security and effectiveness that are indispensable to the registration and commercialization of a product in Costa Rica . . .").



list of essential medicines and did not have patents.<sup>367</sup> While his lack of concern was in marked contrast to the letter, mentioned earlier, which his predecessor had written to the Defensoria in late 2005, Doryan Garrón admitted that it was the remaining 2% of the medicines, and the development of new medicines, that might be affected by CAFTA. Even with regard to the latter, however, CAFTA contained exceptions, as admitted in the Defensoria's report, which allowed governments to issue compulsory licenses or take other steps to facilitate access to medications necessary for the treatment of AIDS and other epidemics.<sup>368</sup>

CAFTA opponents, however, stuck to their guns and questioned why its intellectual property provisions were even more stringent than those of the TRIPS, which foes of globalization argue are too stringent anyway.<sup>369</sup> In recent years, the application of the TRIPS Agreement to pharmaceutical products has come under scrutiny as critics have argued that the TRIPS may prevent developing countries from providing cheaper medicines to patients with AIDS and other highly distressing illnesses.<sup>370</sup> In order to address this issue, WTO members unanimously adopted in 2001 the Doha Declaration on the TRIPS Agreement and Public Health.<sup>371</sup>

The 2001 Doha Declaration states that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health" and affirms that "the Agreement can and should be interpreted and implemented in a manner supportive of

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<sup>367</sup> See Eduardo Doryan Garrón, *El Seguro está seguro: TLC y CCSS* [*The Insurance System is Safe: TLC and CCSS*], LA NACION, July 8, 2007, [http://www.nacion.com/ln\\_ee/2007/julio/08/opinion1159621.html](http://www.nacion.com/ln_ee/2007/julio/08/opinion1159621.html) (arguing that CAFTA will not endanger the Health Insurance System of Costa Rica).

<sup>368</sup> See Sylvia Varela, *Sin empleos no hay medicinas* [*Without Jobs there are no medicines*], LA NACION, Aug. 31, 2007, [http://www.nacion.com/ln\\_ee/2007/agosto/31/opinion1222908.html](http://www.nacion.com/ln_ee/2007/agosto/31/opinion1222908.html) (arguing that the protection of Intellectual Property benefits investigation and development of new pharmaceutical products).

<sup>369</sup> See Weissman, *supra* note 360 (providing an overview of arguments supporting and opposing TRIPS and WTO licensing standards).

<sup>370</sup> See *CAFTA & Public Health: Will poor people have access to medicines?*, OXFAM AMERICA (Mar. 22, 2004), <http://lists.essential.org/pipermail/ip-health/2004-April/006280.html> (citing CAFTA as a threat to the development of cheap drugs, AIDS medications in particular).

<sup>371</sup> See *id.* ("The [Doha] Declaration affirmed that TRIPS provisions should be interpreted so as to prioritize public health over patent rights.").

WTO Members' right to protect public health and, in particular, to promote access to medicines for all."<sup>372</sup> While maintaining the WTO members' commitments to intellectual property rights made in the TRIPS Agreement, the Doha Declaration recognizes the need for flexibility, including the right of every member "to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."<sup>373</sup> A compulsory license is a license issued by a government to a non-patent holder to allow it temporarily to produce the patented product or process "without the consent of the patent owner," thereby allowing the non-patent holding companies to produce cheaper generic drugs.<sup>374</sup> The key benefit of compulsory licensing is that it creates competition for a pharmaceutical product while the product is still covered by the patent.<sup>375</sup>

Developing countries have used the threat of a compulsory license as negotiating leverage against large patent-holding pharmaceutical companies.<sup>376</sup> In some cases, including several involving Brazil, even when the government does not issue a compulsory license, the mere prospect that such a license may be issued will encourage patent holders to lower prices voluntarily.<sup>377</sup> Critics argued that CAFTA, by making it more difficult for generic companies to bring products to the market, could affect adversely Costa Rica's prerogatives under the 2001 Doha Declaration.<sup>378</sup> In

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<sup>372</sup> World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/W/2 (2002).

<sup>373</sup> *Id.*

<sup>374</sup> See *TRIPS and Health: Frequently Asked Questions: Compulsory Licensing of Pharmaceuticals and TRIPS*, WORLD TRADE ORG. (Sept. 2006) [hereinafter *WTO Compulsory Licensing*], [http://www.wto.org/english/tratop\\_e/trips\\_e/public\\_health\\_fa\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/public_health_fa_e.htm) (discussing the logistics and rules of compulsory licensing of pharmaceuticals under TRIPS).

<sup>375</sup> *But see* Weissman, *supra* note 360 (quoting opponents of CAFTA as saying "CAFTA's patent and other intellectual property rules will . . . delay generic competition and artificially raise the price of drugs").

<sup>376</sup> See, e.g., AARONSON & ZIMMERMAN, *supra* note 223, at 109 (describing negotiating tactics used by Brazil in its health initiative, which includes its "trade-related intellectual property issues").

<sup>377</sup> See *id.* ("Brazil also noted that, although it had not used compulsory licensing, the threat to do so 'has led a number of foreign laboratories to lower their prices.'"); see also *WTO Compulsory Licensing*, *supra* note 374 (clarifying misconceptions about compulsory licensing and generic medicines under TRIPS).

<sup>378</sup> See Replogle, *supra* note 356.

response, CAFTA advocates insisted that the Costa Rican government's right to issue compulsory licenses would remain undiminished in case of a public health emergency, a point on which the Defensoria's report was in agreement with.<sup>379</sup>

#### 8. WIELDING CONSTITUTIONAL PROCEDURE AGAINST CAFTA

While the public debate over CAFTA was taking place, either in the streets through peaceful demonstrations, or on radio, television, and the nation's newspapers, it was clear that neither side had a convincing edge over the other. Arias had vowed at his inauguration in March of 2006 to push the agreement through the Legislative Assembly, and he spent the first few months of his presidency during the summer and early fall trying to cobble a majority to ratify CAFTA. In accordance with the Constitution, the treaty would require the vote of two-thirds of the members of the Legislative Assembly, or thirty-eight out of fifty-seven.<sup>380</sup> While the government commanded the support of exactly thirty-eight members of the Assembly, this support was wobbly. Many legislators, including some of Arias's close allies, were hesitant to bring the treaty to a vote, fearful that at the last moment there would be enough defections to hand the government an embarrassing defeat.<sup>381</sup> Public opinion polls were not helping. In

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This Doha Declaration on the TRIPS Agreement and Public Health specifically called for the provision of access to medicine for all. It also assured member nations the right to do this within TRIPS provisions. "The Doha Declaration was the product of the international community at its best, recognizing an overriding commitment to healthcare that cannot be subordinated to commercial considerations," Robert Weissman of the Washington-based organization Essential Action wrote in a recent analysis on CAFTA. Weissman and other health activists say these priorities would be reversed under CAFTA.

*Id.*; see also Graham-Silverman, *supra* note 336 (arguing that CAFTA protects the pharmaceutical industry at the expense of public health).

<sup>379</sup> See INFORME DE LA DEFENSORIA, *supra* note 92, at 176.

<sup>380</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS, art. 105, available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html> (passing legislation requires "the approval of two thirds of the total members").

<sup>381</sup> *Costa Rica: Slow Coach*, BUS. LATIN AM., Sept. 18, 2006, at 4.

As the PLN does not have an inter-party alliance in the highly fragmented Legislative Assembly, the prospects for headway on its reform agenda hinges on extensive bargaining over each of its proposed

September 2006, 51% of Costa Ricans were in favor of CAFTA and 23% against, but by March 2007 the numbers had changed to 39% in favor, almost 33% against, and 22% undecided.<sup>382</sup>

As the political process stalled, the battle over CAFTA entered a new phase in which both sides tried to use Costa Rica's complex system of courts and constitutional procedure to prevail. On November 22, 2006, an anti-CAFTA group of citizens, including several anti-CAFTA legislators, presented a petition to the Supreme Electoral Tribunal seeking permission to collect the requisite number of signatures to convoke a national referendum to decide whether Costa Rica should ratify CAFTA. Article 105 of the Constitution provides:

The power to legislate resides in the people, which delegates this power, by means of suffrage, to the Legislative Assembly . . . . The people also can exercise this power through the referendum, to approve or disapprove laws and amendments to the Constitution; such referendum can be convoked by at least five per cent of the citizens registered in the electoral list, or by the Legislative Assembly through a vote of two-thirds of all its members, or by the Executive with an absolute majority of all members of the Legislative Assembly . . . .<sup>383</sup>

On April 12, 2007, the Supreme Electoral Tribunal gave the go-ahead to the collection of signatures.<sup>384</sup> If five per cent (132,270) of

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projects . . . . Among these controversial projects are the fiscal reform bill; the ratification of the Dominican Republic-Central American Free-Trade Agreement (DR-CAFTA).

*Id.*

<sup>382</sup> See *Most Costa Ricans Approve of CAFTA*, ANGUS REID PUBLIC OPINION (Sept. 27, 2006), [http://www.angus-reid.com/polls/7555/most\\_costa\\_ricans\\_approve\\_of\\_cafta/](http://www.angus-reid.com/polls/7555/most_costa_ricans_approve_of_cafta/); *Costa Rica Still Wonders About CAFTA*, ANGUS REID PUBLIC OPINION (Mar. 28, 2007), [http://www.angus-reid.com/polls/3851/costa\\_rica\\_still\\_wonders\\_about\\_cafta/](http://www.angus-reid.com/polls/3851/costa_rica_still_wonders_about_cafta/).

<sup>383</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS, art. 105, available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>.

<sup>384</sup> See Álvaro Murillo, *Gobierno oficializa petición de consulta popular sobre TLC* [Government makes formal requirement for referendum regarding the Free Trade Agreement], LA NACION, Apr. 18, 2007, [http://www.nacion.com/ln\\_ee/2007/abril/18/pais1066202.html](http://www.nacion.com/ln_ee/2007/abril/18/pais1066202.html) (reporting on the governmental decision to request a referendum regarding the Free Trade Agreement).

all registered voters (2,645,391) signed up within a nine-month period, the referendum would be convoked.<sup>385</sup> Once the required number of signatures were collected and properly validated, the Supreme Electoral Tribunal would convoke the referendum.<sup>386</sup> Until then, the Legislative Assembly could continue to debate CAFTA.<sup>387</sup> For the referendum to be valid at all, 30% (793,618) of all registered voters had to participate in it.<sup>388</sup> For its outcome to be binding, such outcome would have to receive the support of at least 40% of all registered voters.<sup>389</sup> The constitutional and historical significance of these events cannot be overstated, as this would be the first referendum in the country's history.

Meanwhile, treaty supporters and opponents had just emerged from a separate constitutional battle that was brief but intense. In early February, pro-CAFTA parliamentarians approved an amendment to a 1999 rule of internal legislative procedure that would allow for expedited debate and vote by a qualified majority of thirty-eight votes on international treaties, such as CAFTA, in the space of twenty-two legislative sessions (twenty-two weeks). Anti-CAFTA legislators immediately appealed this legislative act to the Constitutional Chamber, citing several constitutional irregularities. On March 1, the Constitutional Chamber ruled that

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<sup>385</sup> *See id.*

Beginning with the notification of the completed vote, Corrales and a group of people and institution that support him should begin to collect signatures amounting to 5% of registered voters, composed of 2,645,391 Costa Ricans, according to recent figures from February. This would require 132,270 signatures. The law gives nine months for the collection of signatures, although Corrales said yesterday that a month and a half would be enough for them.

*Id.*

<sup>386</sup> *See id.* (Collecting sufficient signatures is the primary requirement for carrying out a binding referendum like the one requested by the former delegate José Miguel Corrales for the FTA.)

<sup>387</sup> *See id.* ("The proceedings can continue in Congress and the suspension would only be valid when the eventual convocation occurs and for purposes of the plenary vote, according to the 'as such' of the ruling.")

<sup>388</sup> *See id.* ("When the TSE validates the completion of the requisites it can call for a referendum that requires the participation of at least 30% of the population, 796,618 voters, in order to be binding.")

<sup>389</sup> *See id.* ("The percentage of participation necessary for the outcome to be one of obligatory compliance can be up to a 40%, if it is determined that 38 and not 28 votes are necessary for the eventual ratification of the FTA legislation.")

the approved expedited legislative procedure amendment was constitutionally permissible, improving somewhat the prospects that the government would be able to bring CAFTA to a vote in the near future.<sup>390</sup>

The success of anti-CAFTA forces in securing a decision from the Supreme Electoral Tribunal authorizing a popular referendum for the first time in the nation's history left the government in an awkward position. All along, the government had opposed the idea of a popular referendum on CAFTA. The successful move by CAFTA's foes to secure a referendum suggested that they were so confident of having public opinion on their side that they, and not the government, were in favor of consulting the Costa Rican people. Not wanting to be upstaged, Arias, taking advantage of the Constitutional provision that permits a referendum to be convoked by "the Executive with an absolute majority of all members of the Legislative Assembly,"<sup>391</sup> submitted to the Legislative Assembly on April 18 a decree convoking a referendum.<sup>392</sup> Brushing aside the opposition's taunts of political opportunism, he argued that convoking the referendum by executive decree with a legislative majority would make it unnecessary to collect 132,270 signatures and would permit the referendum to take place sooner.<sup>393</sup> In truth, the government

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<sup>390</sup> See, e.g., Ismael Venegas C., *Diputados retoman vía rápida para planes de TLC [Deputies fast track to retake TLC plans]*, LA NACION, Apr. 18, 2007, [http://www.nacion.com/ln\\_ee/2007/abril/18/pais1066203.html](http://www.nacion.com/ln_ee/2007/abril/18/pais1066203.html) (discussing the possibility of the legislature resuming talks to approve the agreement in April, 2007).

<sup>391</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 Y SUS REFORMAS, art. 105, available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>.

<sup>392</sup> See Murillo, *supra* note 384 (reporting on the government's presentation on April 17th of a decree that formally permits a public referendum on CAFTA).

<sup>393</sup> See Katherine Stanley, *Referendum Decree Moves Forward*, TICO TIMES (Apr. 25, 2007), [http://www.ticotimes.net/dailyarchive/2007\\_04/0425071.htm](http://www.ticotimes.net/dailyarchive/2007_04/0425071.htm).

Though all legislators say they support a referendum, some, including Oscar López, say they want it to happen not through the decree, but through citizens' collection of signatures. The TSE gave a group of citizens the right to start collecting signatures earlier this month (TT, April 13), but President Oscar Arias sent a decree to the assembly that could eliminate the signature-collection period (TT, April 20).

*Id.*; see also Arturo Gudiño, *TSE afirma que referendo puede evitar confrontación social [Supreme Electoral Tribunal says that the referendum can avoid social turmoil]*, LA

feared that the opposition would use the process of collecting signatures for the referendum as an additional tool for mobilizing popular sentiment against the treaty.

Not wanting to appear two-sided themselves, the anti-CAFTA legislators voted for Arias's referendum decree, enabling it to obtain an absolute majority in the Assembly easily two days later. The government immediately asked the Supreme Electoral Tribunal to convoke the referendum on the basis of the government's Executive-legislative procedure, as allowed by the Constitution.<sup>394</sup> The anti-CAFTA forces responded to the government's petition by filing their own counter-petition to the Tribunal asking that, since the Tribunal already had authorized the process of convoking a referendum by popular collection of signatures, this process should be allowed to go forward and should not be preempted by the government's subsequent move.<sup>395</sup> CAFTA opponents knew that their favored procedure could be delayed up to nine months, bringing the referendum's date close to March of 2008, by which time the treaty itself provided that Costa Rica's option to join CAFTA would expire.<sup>396</sup> For the same

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NACION, Apr. 27, 2007, [http://www.nacion.com/ln\\_ee/2007/abril/27/ultima-sr1077885.html](http://www.nacion.com/ln_ee/2007/abril/27/ultima-sr1077885.html) (reporting on the opinion of the Supreme Elections Tribunal regarding the need of a referendum concerning the approval of the Free Trade Agreement); Álvaro Murillo, *Costa Rica planea el primer referéndum de su historia* [Costa Rica plans the first referendum of its history], EL PAÍS, Apr. 16, 2007, [http://www.elpais.com/articulo/internacional/Costa/Rica/planea/primer/referendum/historia/elpepuint/20070416elpepuint\\_4/Tes](http://www.elpais.com/articulo/internacional/Costa/Rica/planea/primer/referendum/historia/elpepuint/20070416elpepuint_4/Tes) (reporting on the referendum and the positions of supporters and opponents); *Costa Rica mulls referendum for CAFTA trade pact*, BDNEWS24, Apr. 13, 2007, <http://www.bdnews24.com/details.php?id=58599>.

"If the agreement is passed before the nine-month period, the tribunal would have to decide whether to shelve the referendum or allow the vote to proceed if enough signatures are gathered," said Antonio Sobrado, interim president of the tribunal. Complicating the issue—the court could close the nine-month voting period to show support for a referendum early if the requisite votes were collected more quickly

*Id.*

<sup>394</sup> See, e.g., Murillo, *supra* note 384 ("The minister of the Presidency, Rodrigo Arias, brought before congress decree 33717-MP which activates one of the three mechanisms established by law in order to celebrate a binding referendum.").

<sup>395</sup> Stanley, *supra* note 393.

<sup>396</sup> See *Costa Rica: Yes to CAFTA?*, LATIN BUS. CHRONICLE (May 1, 2007), <http://www.latinbusinesschronicle.com/app/article.aspx?id=1172>.

reasons, the government was eager to ensure that, if a referendum were to occur, it would take place as soon as possible to avoid the prospects of missing the treaty's deadline for accession.<sup>397</sup> On May 2, the Supreme Electoral Tribunal ruled that, given the choice between two constitutionally valid avenues for a referendum, the simpler, more expeditious, and less expensive procedure was preferable.<sup>398</sup> Hence, the government's decree convoking a referendum was valid, and a date could be set for the referendum as long as ample time was provided for both sides to organize their campaigns.<sup>399</sup>

While this complicated set of battles before the Supreme Electoral Tribunal was taking place, CAFTA's opponents had been eyeing another possible instrument, in addition to a judicially-sanctioned popular referendum, with which to delay or injure the treaty, perhaps fatally: the Constitutional Chamber itself, which had full authority to rule on all constitutional questions, including the validity of treaties. They argued with increasing vehemence that, even before the referendum took place, the treaty should be submitted to the Constitutional Chamber for review of, what they had perceived as, serious constitutional flaws.<sup>400</sup> There was no

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[I]nstead of waiting for up to nine months to hold the referendum once all the requisites are filled, the referendum can be held within three months . . . avoiding an unnecessary delay . . . . [T]he anti-CAFTA forces in Congress have been using all legal maneuvers to avoid a final vote.

*Id.*

<sup>397</sup> See Stanley, *supra* note 393 ("In a statement, the Union of Chambers praised the legislators' 'patriotism' and expressed hopes that the referendum will take place in a timely manner, given that Costa Rica risks being left out of CAFTA if it does not make a decision by March 2008.").

<sup>398</sup> See Katherine Stanley, *Tribunal Says CAFTA Referendum Could be Held in September*, TICO TIMES (May 4, 2007), [http://www.ticotimes.net/dailyarchive/2007\\_05/0504071.htm](http://www.ticotimes.net/dailyarchive/2007_05/0504071.htm) ("Interim TSE president Luis Antonio Sobrado told reporters that he and his fellow justices have discarded an initiative to convene a nationwide CAFTA referendum by collecting signatures. This method would have meant a wait of up to 14 months before a vote could take place.").

<sup>399</sup> See Resolución Electoral No. 977-E-2007 (Tribunal Supremo De Elecciones) [Supreme Electoral Tribunal], April 12, 2007 (Costa Rica), available at <http://www.tse.go.cr/juris/electorales/0977-E-2007.htm>.

<sup>400</sup> See *Costa Rica Politics: CAFTA Approval Under Threat*, EIU VIEWSWIRE, June 6, 2007, available at ProQuest, Doc. No. 1298610351.

A recent study carried out by the Universidad de Costa Rica concluded that there are 17 issues in DR-CAFTA's text which may be at odds with



point in having a referendum, with all of its high economic costs and delays, if in the end the Constitutional Chamber ruled that the treaty was unconstitutional anyway. Moreover, the citizens had a need and a right to know whether the treaty on which they would vote in a referendum was constitutional and only the Constitutional Chamber could provide such review.<sup>401</sup>

Sensing an obvious danger to the treaty's viability, the government, speaking through the Minister of the Presidency, Rodrigo Arias (brother of the President), stated on April 17 that a constitutional review before the referendum was unnecessary.<sup>402</sup> The treaty had been analyzed in great detail by experts and approved by the Legislative Assembly's International Relations Committee, where it had been the subject of intense legal scrutiny.<sup>403</sup> According to Arias's reasoning, if a citizen found any minor constitutional flaws, such flaws should be examined by the Constitutional Chamber, but only after the treaty had been ratified

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the country's constitution. Most of these are either related to the creation of obligations to the state that are not envisaged in the constitution, or the delegation of what are considered to be state's responsibilities to commissions that should be created if the treaty goes into effect.

*Id.*; *Sala IV to Review CAFTA*, TICO TIMES (May 14, 2007), [http://www.ticotimes.net/dailyarchive/2007\\_05/0514072.htm](http://www.ticotimes.net/dailyarchive/2007_05/0514072.htm).

The Constitutional Chamber of the Supreme Court (Sala IV) Friday accepted a request from Ombudswoman Lisbeth Quesada to review [CAFTA] before the country votes on it in a referendum . . . . In a statement released by Quesada's office when she requested that the court review CAFTA April 27, she listed workers' rights, health benefits, intellectual property and the protection of minority groups as areas she sees as problematic or not included in the trade pact.

*Id.*

<sup>401</sup> See Marina Ramírez Altamirano, *Consulta Constitucional del TLC [Constitutional Consultation about the Free Trade Agreement]*, LA NACION, May 5, 2007, [http://www.nacion.com/ln\\_ee/2007/mayo/05/opinion1085601.html](http://www.nacion.com/ln_ee/2007/mayo/05/opinion1085601.html) (arguing in favor of the review of the constitutionality of the referendum). *But see* Rubén Hernández Valle, *Supremacia constitucional [Constitutional Supremacy]*, LA NACION, Apr. 18, 2007, [http://www.nacion.com/ln\\_ee/2007/abril/18/opinion1065785.html](http://www.nacion.com/ln_ee/2007/abril/18/opinion1065785.html) (arguing that the Supreme Court cannot review the Constitutionality of the referendum regarding the approval of CAFTA).

<sup>402</sup> See Murillo, *supra* note 384 ("The Minister of the Presidency ruled out submitting the TLC to a revision before the electorate decides 'yes' or 'no' for the TLC.").

<sup>403</sup> See *id.* (Arias urged, "[T]he FTA has been negotiated by people of great experience, processed in a legislative comisión and analyzed in depth.")

and came into force.<sup>404</sup> The government's refusal to submit the treaty to review by the Constitutional Chamber served only to prod the opposition even more into calling for such a procedure.

Just ten days after Arias's statement, on April 27, the Defender of the People of the Nation (La Defensoria de los Habitantes del Pueblo) jumped into the fray again by presenting a formal petition to the Constitutional Chamber asking it to review the free trade treaty, thereby handing the government another legal and political embarrassment.<sup>405</sup> The Defender questioned the treaty's constitutionality on the narrow grounds of its potential impact on human rights.<sup>406</sup> Under Article 96 of Costa Rica's Constitutional Jurisdiction Statute, the Defender can request an advisory opinion from the Constitutional Chamber regarding legislative proposals it deems could infringe on "fundamental rights or liberties recognized by the Constitution or by international human rights instruments binding upon Costa Rica."<sup>407</sup>

On May 12, the Chamber agreed to review the treaty's constitutionality and stated it would issue its ruling prior to the referendum then scheduled for September 23.<sup>408</sup> The government, while disagreeing with the court's decision to review the treaty's constitutionality, responded with a brief statement indicating its respect for the Constitutional Chamber's authority.<sup>409</sup> On May 24, nineteen members of the Legislative Assembly presented a 130-page petition to the court seeking to impugn CAFTA on constitutional grounds beyond those related to human rights,

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<sup>404</sup> See *id.* (Arias argued, "If any doubt remains, any citizen may request the review of a specific topic that is in tension with the constitution.").

<sup>405</sup> Ana Lupita Mora, *Sala IV admite consulta de constitucionalidad del TLC [IV Courtroom Admits the Constitutionality Review of the Free Trade Agreement]*, LA NACIÓN, May 12, 2007, [http://www.nacion.com/ln\\_ee/2007/mayo/12/pais1093994.html](http://www.nacion.com/ln_ee/2007/mayo/12/pais1093994.html) (reporting on the decision of the IV Courtroom of Costa Rica's Supreme Court in revising the constitutionality of the referendum about the approval of CAFTA).

<sup>406</sup> See *id.* (highlighting the fact that the Defender under Article 96 of the Constitution could mandate an opinion on any piece of legislation if it threatened Constitutional or international human rights).

<sup>407</sup> *Id.*

<sup>408</sup> See *id.*

<sup>409</sup> See *id.* (noting a government spokesman's respect for the court's decision while hoping that it won't interfere with the planned referendum date).

which had been the scope of the Defensoría's petition.<sup>410</sup> On June 2, the court announced that it would carry out a full constitutional review of the treaty, meaning it would not limit itself to human rights issues.<sup>411</sup> The court explained it would issue its ruling no later than July 11, so as to allow plenty of time for the referendum to take place if necessary.<sup>412</sup> Meanwhile, the main pro-CAFTA civic association, led by Alfredo Volio, also submitted to the court a brief explaining why the treaty did not violate Costa Rica's constitution.<sup>413</sup>

### 8.1. *The Constitutional Chamber's Ruling*

On July 3, by a majority of five to two, the court upheld the constitutionality of CAFTA.<sup>414</sup> The Supreme Electoral Tribunal immediately issued the formal convocation for the popular referendum, to be held on October 7.<sup>415</sup> The court limited its review of the treaty to the narrow question of whether any of its provisions violated or in any way altered the Constitution.<sup>416</sup> The

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<sup>410</sup> Ana Lupita Mora, *19 diputados consultan constitucionalidad del TLC a Sala IV [19 Deputies Contest the Constitutionality of the TLC at the IV Courtroom of the Supreme Court]*, LA NACIÓN, May 24, 2007, [http://www.nacion.com/ln\\_ee/2007/mayo/24/ultima-sr1108774.html](http://www.nacion.com/ln_ee/2007/mayo/24/ultima-sr1108774.html) (reporting the presentation made by nineteen deputies challenging the constitutionality of the TLC).

<sup>411</sup> Álvaro Murillo, *Sala IV revisará todo el TLC antes del referendo [IV Supreme Courtroom of the Supreme Court will Revise the Entire TLC Before the Referendum]*, LA NACIÓN, June 2, 2007, [http://www.nacion.com/ln\\_ee/2007/junio/02/pais1117952.html](http://www.nacion.com/ln_ee/2007/junio/02/pais1117952.html) (reporting the judicial proceeding developed before the Supreme Court of Costa Rica).

<sup>412</sup> Álvaro Murillo, *Sala dará fallo de TLC a más tardar el 11 de julio*, LA NACIÓN, June 12, 2007, [http://www.nacion.com/ln\\_ee/2007/junio/12/pais1129413.html](http://www.nacion.com/ln_ee/2007/junio/12/pais1129413.html) (detailing the timing of the review process).

<sup>413</sup> See Murillo, *supra* note 411 (describing how Defensoria de los Habitantes and 18 delegates of the national assembly presented their opposition before the court).

<sup>414</sup> Álvaro Murillo, *Sala IV Declara Constitucional el TLC [IV Supreme Courtroom of Costa Rica Supreme Court Declares the Free Trade Agreement Constitutional]*, LA NACIÓN, July 3, 2007, [http://www.nacion.com/ln\\_ee/2007/julio/03/ultima-sr1155196.html](http://www.nacion.com/ln_ee/2007/julio/03/ultima-sr1155196.html) (reporting the decision of the Supreme Court of Costa Rica declaring the Free Trade Agreement constitutional).

<sup>415</sup> See *id.*

<sup>416</sup> See *id.* (citing in its totality the Court's opinion wherein it chooses to answer the constitutional question while the majority chose to ignore questions of the legislative procedure).

majority found no such instance as it analyzed each of the challenges to CAFTA.<sup>417</sup>

By a five-to-two majority, the court ruled that the treaty's provisions for arbitration did not violate the Constitution because Costa Rica would be able to choose some of the arbiters in every case, and also could object to an arbitral decision if it violated the Constitution.<sup>418</sup> The treaty's Free Trade Commission, composed of representatives of the signatory states, and which has authority to adopt by consensus interpretations of the treaty binding for the arbitral tribunals, also was not *per se* unconstitutional, since the Costa Rican representative always would be able to object to treaty interpretations that violated the country's constitutional order.<sup>419</sup>

On the salient human rights issues highlighted by the Defensoría's earlier report and its subsequent petition to the Constitutional Chamber, the same five-to-two majority of the court found no constitutional violations.<sup>420</sup> The treaty preserved the authority of its parties to adopt justifiable and non-discriminatory measures to protect human, animal, and plant life and health.<sup>421</sup> The highly controversial Article 15 dealing with intellectual property protections of pharmaceuticals also did not violate the Constitution.<sup>422</sup> The court interpreted CAFTA as reaffirming respect for the Doha Declaration of 2001 on the right of states to take public health measures and as not prohibiting compulsory

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<sup>417</sup> See JORGE ENRIQUE ROMERO-PÉREZ, SALA CONSTITUCIONAL, VOTO 9469-07 TLC-USA, ANÁLISIS Y COMENTARIOS [CONSTITUTIONAL COURTROOM, VOTE 9469-07, TLC-USA, ANALYSIS AND COMMENTARIES], (LEX, 1st ed. 2007) (providing the Court's opinion with commentaries).

<sup>418</sup> See *id.* at 26-32 (holding that CAFTA does not force parties to choose arbitration).

<sup>419</sup> See *id.* at 26-34 (citing the Court's presumption that the interests of the country will be protected both because of the presence of a representative on the Free Trade panel and the court's ability to intervene in particular cases in which a fundamental right may be violated).

<sup>420</sup> See Murillo, *supra* note 412 (quoting in full an opinion wherein Magistrates Solano, Mora, Calzada, Vargas and Jínesta hold that there was no constitutional violation).

<sup>421</sup> See ROMERO-PÉREZ, *supra* note 417, at 55 (noting that article 21.1 establishes the duties of the parties to protect human and animal life).

<sup>422</sup> See *id.* at 55-57 (holding that the impact of CAFTA on the price of medication falls outside the constitutional domain).

licensing.<sup>423</sup> The treaty did not alter the State's obligation to guarantee effective access to a universal system of social insurance based on principles of social solidarity.<sup>424</sup>

According to the court, the treaty also did not affect any of the existing laws on environmental protection, nor did it diminish the State's regulatory authority in environmental matters.<sup>425</sup> Under CAFTA, foreign investors would still be obligated to comply with all existing environmental regulations, as long as these regulations had a rational basis and were nondiscriminatory in nature.<sup>426</sup> In the future, the State would have undiminished powers to adopt new environmental regulations as necessary, so long as they met these minimum requirements.<sup>427</sup> The treaty's provisions on telecommunications were equally constitutionally neutral. The State would retain its authority to regulate private sector telecommunications providers and to adopt policies to insure access by the poor to basic telecommunications services.<sup>428</sup>

By a majority of six to one, the court also found that Costa Rica's "list of exceptions" or "list of non-conforming measures," found in the treaty text itself, and in which the country affirmed its right to grant special protections to disadvantaged groups, including indigenous groups, was constitutionally adequate.<sup>429</sup>

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<sup>423</sup> See *id.* (arguing that petitioners are not correct both because there is no direct contradiction of Doha and because the agreement explicitly states its agreement in article 15.9.3).

<sup>424</sup> See *id.* at 55–61 (affirming that the treaty did not become unconstitutional because the negotiation did not take place with specialists and dismissing).

<sup>425</sup> See *id.* at 68 (holding that the absence of environmental regulations within the treaty does not void those regulations if they are present in national legislation).

<sup>426</sup> See Dominican Republic-Central America Free Trade Agreement, 19 U.S.C. § 4001 et seq. (2005), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (granting broad environmental regulatory powers to parties despite conflicts with CAFTA investment guidelines to the extent environmental laws and regulations meet Article 10.9 standards).

<sup>427</sup> See ROMERO-PÉREZ, *supra* note 417, at 68–70 (recognizing that all laws currently in force regarding the environment are preserved).

<sup>428</sup> See *id.* at 63–67 (holding that because any internal regulation of the treaty must remain consistent with the principles of the state's rule of law the treaty's treatment of telecommunication is not unconstitutional).

<sup>429</sup> See *id.* at 62–63 (arguing that the state has reserved its right to adopt measures for social well being even if they are incompatible with the treaty).

CAFTA opponents also had argued that the definition of “territory” in the treaty’s text implied a modification of Costa Rica’s territorial boundaries, including especially its 200-mile Exclusive Economic Zone (EEZ) with its valuable fishing and mineral resources.<sup>430</sup> By a six-to-one majority the court ruled that CAFTA did not impair Costa Rica’s territorial boundaries as defined in its Constitution, nor did it abridge any other territory-related rights or prerogatives the country might enjoy as a result of other treaties or provisions of public international law.<sup>431</sup>

The court ruled unanimously on several other important legal and human rights issues. First, it ruled that, contrary to the allegations of critics who claimed that Costa Rica would be unable to renounce the treaty once it joined, the country could leave the treaty regime after giving six-months notice, as specified in the treaty itself.<sup>432</sup> Second, CAFTA’s provisions on telecommunications were not discriminatory against the state’s electricity and telecommunications monopoly (ICE), nor would they enable foreign companies to skirt the country’s legal procedures for bidding for licenses for use of the communications channel spectrum.<sup>433</sup>

Third, the court also ruled unanimously that CAFTA’s Environmental Council (a ministerial-level group set up to review trade-related environmental issues) permits modalities for the participation of citizens in its deliberative processes and does not

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<sup>430</sup> Stephen Bindman, *Contentious CAFTA – A Turning Point for Costa Rica?*, COUNCIL ON HEMISPHERIC AFF. (Apr. 24, 2008), available at <http://www.coha.org/contentious-cafta-a-turning-point-for-costa-rica/> (explaining that the United States does not recognize the law of the sea, which would grant Costa Rica seabed rights “up to 200 miles off its coast”); Patricia Forkan, Global Trade Watch’s Letter to HSUS’ Humane Society International, GLOBAL JUST. FOR ANIMALS & ENV’T (May 12, 2005), available at <http://freetradekillsanimals.org/?page=WallachHSI> (explaining the environmental effect CAFTA would have due to various provisions within, including the non-recognition of the 200 mile Exclusive Economic Zone by the United States).

<sup>431</sup> See ROMERO-PÉREZ, *supra* note 417, at 75–82 (detailing the Court’s stance on CAFTA’s impact on the country’s sovereignty).

<sup>432</sup> See *id.* at 34 (recognizing that Costa Rica still retains the right to vote on whether or not a different period were adopted).

<sup>433</sup> See *id.* at 63–67 (recognizing that the treaty acknowledges the existence of a regulatory entity responsible for overseeing fees and recognizing that the treaty actually operates as a guarantee for telecommunications consumers).

exclude similar modalities for citizen participation in environmental issues currently existing within Costa Rica's domestic order.<sup>434</sup> Thus, it did not present a constitutional problem.<sup>435</sup> Fourth, none of CAFTA's labor provisions were unconstitutional.<sup>436</sup> The treaty would allow the country to maintain and improve its labor standards, and it affirmed its respect for the ILO conventions and other labor rights and guarantees embodied in the Constitution.<sup>437</sup> Fifth, there was no constitutional violation in the treaty's use of "negative lists" or "lists of non-conforming measures" as part of its text.<sup>438</sup>

The court also ruled by unanimity on a highly sensitive issue. CAFTA critics had alleged that the inclusion of firearms and other light weapons in the treaty's tariff schedules, coupled with Costa Rica's failure to include in its "list of non-conforming measures" its prohibition on the arms trade, meant that CAFTA would make Costa Rica a haven for arms smuggling—thereby contributing to rampant violence and weakening the country's prized historic ethos of peacefulness.<sup>439</sup> The court held that the inclusion of firearms in tariff schedules did not prevent Costa Rica from enforcing its own laws and regulating or restricting the arms trade in any way it saw fit for the sake of public order.<sup>440</sup> Finally, the court also ruled that the treaty did not violate the constitutionally protected rules regarding bidding for public projects, public

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<sup>434</sup> See *id.* at 69 (noting that a Reading of article 17 affirms that there are sufficient avenues open to citizen participation in the enactment of new laws).

<sup>435</sup> See *id.*

<sup>436</sup> See *id.* at 70.

<sup>437</sup> See *id.* (noting that the treaty directly lists a series of labor rights but is not intended to be an exhaustive or exclusive list and merely seeks to create a minimum standard).

<sup>438</sup> See *id.* at 71-72.

<sup>439</sup> Louisa Reynolds, *Country Profile: Costa Rica*, NEW INTERNATIONALIST, Sept. 2007, at 36 (discussing the argument that CAFTA would invite U.S. weapons manufacturers and "tarnish Costa Rica's image as an island of peace amidst a sea of violence"); Jane Bussey, *5 Questions With Otton Solis: Costa Rican Economist says CAFTA is a Bad Deal - A Former Presidential Candidate Explains Why He is Against the Central American Free Trade Agreement*, MIAMI HERALD, Nov. 3, 2008, at G6 (detailing CAFTA's potential impact on the country's involvement in the drug trade).

<sup>440</sup> See ROMERO-PÉREZ, *supra* note 417, at 72-73 (arguing that despite the presence of banned goods on Costa Rica's tariff relief list, Costa Rica is not obligated to allow the free sale of those goods).

contracts, and the authority of the Inspector General,<sup>441</sup> nor did it affect the constitutional framework for municipal autonomy.<sup>442</sup>

The court's carefully reasoned opinion, though welcomed by the government and the pro-CAFTA forces, was an obvious disappointment to the treaty's opponents, who resolved to work even harder to defeat the treaty at the upcoming referendum. Some of the leading labor unions and farmers' groups went further, openly expressing their contempt for, and questioning the legitimacy of, both the Constitutional Chamber and the Supreme Electoral Tribunal for what they perceived to be their docility toward the Arias brothers in the face of the looming surrender of the country's sovereignty to the brave new world of grasping foreign investors and U.S. corporations embodied by CAFTA.<sup>443</sup> In line with much of Costa Rica's history, however, neither the intense disappointment nor the heated vitriol of many of CAFTA's foes led to any kind of violence.<sup>444</sup> As the Defender of the People of the Nation, herself one of the leading critics of CAFTA who had presented the initial petition for review to the Constitutional Chamber, explained, the court's decision "strengthens the country's institutional integrity."<sup>445</sup> For many Costa Ricans like

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<sup>441</sup> See *id.* at 73–74.

<sup>442</sup> See *id.* at 83–84 (recognizing that municipalities shall continue to retain their power so long as internal legislation continues to be upheld).

<sup>443</sup> See, e.g., Rosario Incer Arias, *TSE y Sala Cuarta no nos Merecen Respeto* [Supreme Electoral Tribunal and Fourth Courtroom of the Supreme Court do not Deserve our Respect], LA NACIÓN, July, 6, 2007, [http://www.nacion.com/ln\\_ee/2007/julio/06/opinion1158190.html](http://www.nacion.com/ln_ee/2007/julio/06/opinion1158190.html) (denouncing the Chamber and SET as mechanisms serving the Arias "dictatorship"); see also Carlos A. Villalobos, *Grupo Anti-TLC Desconoce Legitimidad de Sala IV y TSE* [Anti Free Trade Agreement Group Challenges the Legitimacy of the IV Courtroom of the Supreme Court and the Supreme Electoral Tribunal], LA NACIÓN, July 6, 2007, [http://www.nacion.com/ln\\_ee/2007/julio/06/pais1158546.html](http://www.nacion.com/ln_ee/2007/julio/06/pais1158546.html) (listing some of the approximately 30 organizations affiliated with the Comisión Nacional de Enlace).

<sup>444</sup> Tico Times Staff, *Costa Rica Makes History with CAFTA Referendum*, TICO TIMES, (Oct. 8, 2007), [http://www.ticotimes.net/dailyarchive/2007\\_10/100807.htm#story2](http://www.ticotimes.net/dailyarchive/2007_10/100807.htm#story2) (detailing the lack of tangible conflict associated with disagreement over CAFTA).

<sup>445</sup> Carlos A. Villalobos, *Sala IV Resuelve que El TLC es Constitucional* [IV Courtroom of the Supreme Court Decides that the TLC is Constitutional], LA NACIÓN, July 4, 2007, [http://www.nacion.com/ln\\_ee/2007/julio/04/pais1155599.html](http://www.nacion.com/ln_ee/2007/julio/04/pais1155599.html) (reporting on the opinion of the Supreme Court of Costa Rica deciding the constitutionality of CAFTA).



her, the court's decision was confirmation that vital legal and political issues could be reasoned and debated peacefully, deliberately, and in accordance with the agreed upon rules of the Constitution.

8.2. *The Referendum Campaign: Money, Dirty Tactics, and U.S. Pressures*

The court's opinion unleashed a fierce three-month public opinion battle by both sides to secure victory at the October 7 referendum.<sup>446</sup> CAFTA opponents, when not outright dismissive of the court's opinion, which after all was silent on the question of whether the country should adopt CAFTA and ruled only on whether it was constitutional,<sup>447</sup> focused on the treaty's threat to national sovereignty and identity.<sup>448</sup> Their argument was that CAFTA would dilute further Costa Rica's ability to shape its own economic and social character by opening it up to more foreign investment and trade, subjecting it to various transnational economic, legal, and political constraints, and weakening its overall autonomy.<sup>449</sup> The Costa Rican social democratic model, already weakened over the previous twenty-five years by the relentless pressures of globalization<sup>450</sup> and its own inability to finance its ambitious social vision, would become further

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<sup>446</sup> See, e.g., Álvaro Murillo, *Sentencia de Sala IV Sobre TLC Desata Campañas [Decision of the IV Courtroom of the Supreme Court on Free Trade Agreement unleashes Political Activism]*, LA NACIÓN, July 5, 2007, [http://www.nacion.com/ln\\_ee/2007/julio/05/pais1157043.html](http://www.nacion.com/ln_ee/2007/julio/05/pais1157043.html) (describing the heated political atmosphere following the Chamber's decision).

<sup>447</sup> See ROMERO-PÉREZ, *supra* note 417 (reporting the Court's decision, which was on constitutional grounds).

<sup>448</sup> See Kate E. Kaiser, Comment, *The Fight for Access to AIDS Medications: How the Central American Free Trade Agreement Conflicts with Costa Rica's Constitutional Courts*, 25 WIS. INT'L L.J. 535, 559-61 (2007) (noting popular resistance to CAFTA and the reasons behind it).

<sup>449</sup> See *id.* (same); see also *id.* at 554-58 (discussing CAFTA's effects on Costa Rican sovereignty, in particular examining the decision to set up mechanisms for alternative dispute resolution).

<sup>450</sup> See PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 2-3 (2002) (noting how globalization has weakened states' ability to protect their citizens from international conglomerates with monopolistic property rights).

transmogrified into a neo-liberal market society ruled by the decline of solidarity and the relentless quest for individual profit.<sup>451</sup>

Treaty supporters were equally passionate and their arguments covered as wide a range of rationality and realistic expectations concerning their preferred outcome. They argued that accession to CAFTA, far from weakening the country, would make it more competitive, especially at a time when the small neighboring nation of Panama was making an open bid for stealing Costa Rica's own prospects of becoming a future "Central American Tiger," a bicoastal Singapore at the intersection of North and South America.<sup>452</sup> CAFTA represented both the inevitable—in the world of globalization, Costa Rica could not hope to prosper without it—as well as an unmatched opportunity to modernize the country by reforming Costa Rican economic and social institutions.<sup>453</sup> The treaty's more ideological supporters quickly drew links between opposition to the treaty and the forces of Hugo Chavez and Fidel Castro supposedly bent upon hijacking the country toward a Cuban or Venezuelan anti-free market, authoritarian model.<sup>454</sup>

As the referendum campaign drew to a close, it became extremely tight, with polls showing a narrow margin of difference between both sides and a large number of undecided voters.<sup>455</sup> On September 6, only four weeks before the vote, the country was rocked by a leaked memo from Kevin Casas, one of the country's

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<sup>451</sup> See, e.g., Esteban Oviedo, 92 *Sacerdotes Toman Posicion Politica a Favor del NO* [Priest take Political Position in favor of the Option No], LA NACIÓN, Sept. 26, 2007, [http://www.nacion.com/ln\\_ee/2007/septiembre/26/pais1255189.html](http://www.nacion.com/ln_ee/2007/septiembre/26/pais1255189.html) (reporting the Costa Rican Episcopal Conference's position on the political arguments for and against CAFTA's approval in Costa Rica).

<sup>452</sup> See *Strong Economic Growth Potential Puts Albania and Panama Top of Long Term Investment List*, PROP. WIRE, July 20, 2008, <http://www.propertywire.com/news/related-stories/albania-panama-long-term-investment-200807201344.html> (noting Panama's sustained economic growth in conjunction with the country's expansion of the Panama Canal).

<sup>453</sup> See Jerry Haar, *Costa Rica's Free Trade Victory*, LATIN BUS. CHRON. (Oct. 15, 2007), <http://www.latinbusinesschronicle.com/app/article.aspx?id=1703> (detailing how CAFTA would improve Costa Rica's economic climate and reform some of its "nanny-state" features).

<sup>454</sup> See Oviedo, *supra* note 451 (quoting the anti-CAFTA monks' response to the argument that the "No" side was following Chavez or Castro's lead).

<sup>455</sup> *Trading Arguments*, THE ECONOMIST (July 12, 2007), available at [http://www.economist.com/node/9481436?story\\_id=E1\\_JQRTQPG](http://www.economist.com/node/9481436?story_id=E1_JQRTQPG) (discussing the arguments supporting and opposing DR-CAFTA for Costa Rica).

two vice presidents, to President Oscar Arias and his brother Rodrigo, recommending the use of various dirty political tactics to defeat the "No" faction.<sup>456</sup> The memo, dated July 29, reveals the mentality then prevailing among some senior governmental officials, who feared that CAFTA would lose at the polls.

Casas began by lamenting the decline of national confidence in the Costa Rican political establishment as a result of the revelations of corruption at the presidential level in the 1990s.<sup>457</sup> The country's governance had suffered, and the government lacked the credibility to impart legitimacy to a project as controversial as CAFTA.<sup>458</sup> At the moment, he rued, "nobody believes a word said by the government or the politicians and for this reason, it would be lunacy to delegate in them the defence of the treaty."<sup>459</sup> Further, he lamented that the CAFTA campaign had become "a struggle between rich and poor, and between the government and the people."<sup>460</sup> The anti-CAFTA coalition was "formidable: universities, the church, unions, environmental groups, etc."<sup>461</sup> On the other side, the pro-CAFTA forces were "only the government, and some of the big entrepreneurs."<sup>462</sup>

According to Casas, to prevent CAFTA's defeat, the ruling party's political machine needed to take several measures. He

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<sup>456</sup> Memorandum from Kevin Casas, Vice President & Minister of Planning, Costa Rica, and Fernando Sánchez, Representative and President of the Electoral Comm'n, Costa Rica, to Óscar Arias, President, Costa Rica, and Rodrigo Arias, Minister of the Presidency, Costa Rica *passim* (July 29, 2007) [hereinafter Casas Memo], available at [http://www.wola.org/publications/leaked\\_memo\\_on\\_cافتa\\_vote\\_in\\_costa\\_rica](http://www.wola.org/publications/leaked_memo_on_cافتa_vote_in_costa_rica) (follow "Download" hyperlink) (outlining the strategies to be used by the Arias administration in promoting the CAFTA movement).

<sup>457</sup> *Id.* at 1 (identifying the low level of government credibility as a reason why government support has failed to grant CAFTA any legitimacy). See generally James C. McKinley, Jr., *Letter from the Americas: Putting Presidents On Trial Can Hurt Your Reputation*, N.Y. TIMES, Nov. 3, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9F03EED71F3DF930A35752C1A9629C8B63&sec=&spon=&pagewanted=1> (detailing some of the scandals of the 1990s that generally left Costa Rican politicians out of favor with voters).

<sup>458</sup> See Casas Memo, *supra* note 456, at 1 (discussing severely diminished confidence in government, and the importance of coming up with new strategies to build support for CAFTA).

<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at 2.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

suggested that the fifty-nine pro-CAFTA mayors belonging to the ruling party (the PLN) be put in charge of the pro-CAFTA campaign in each of their districts, and that "a very simple idea" be conveyed to them: "the Mayor that doesn't win [CAFTA in] his [district] will not get a penny from the government in the next 3 years."<sup>463</sup> Casas noted that many PLN local leaders were not campaigning for CAFTA in order not to "burn themselves before the next election."<sup>464</sup> But they needed to be told in no uncertain terms that the opposite logic would prevail: any PLN leader who did not commit fully to the pro-CAFTA fight would "burn," that is, would be punished by the ruling party and the government.<sup>465</sup>

Casas also urged a well-financed, massive media campaign with several specific goals. The first goal was to debunk the notion of a struggle between rich and poor by choosing "almost exclusively, workers and small entrepreneurs" as pro-CAFTA faces in media ads.<sup>466</sup> Second, "[s]timulate fear."<sup>467</sup> Create "[f]ear of loss of jobs" if CAFTA were to lose.<sup>468</sup> Create "[f]ear of attack to the democratic institutions" if the anti-CAFTA forces were to prevail.<sup>469</sup> Spread the "[f]ear [of] foreign influence."<sup>470</sup> As he explained in greater detail,

[w]e have to insist everywhere on the connection of the [anti-CAFTA forces] with Fidel, Chaves and Ortega, in very strident terms . . . [which] might be uncomfortable to some people, but . . . it can have a considerable impact amongst the simplest people, which is where we have the most serious problems.<sup>471</sup>

In his memo, Casas also hit upon the one single tactic that was ultimately most effective in raising the number of pro-CAFTA votes: get employers of major manufacturing and service firms to

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<sup>463</sup> *Id.*

<sup>464</sup> *Id.* at 3.

<sup>465</sup> *See id.* ("The reasoning has to be exactly the opposite: the one who doesn't entirely cooperate, 'burns.'").

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 4.

<sup>469</sup> *Id.* at 4.

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

persuade their employees vote for the treaty.<sup>472</sup> Casas knew that the government had to be careful. The Supreme Electoral Tribunal had issued strict guidelines prohibiting the use of government resources to proselytize referendum voters.<sup>473</sup> After noting the existence of one million workers, Casas urged that the pro-CAFTA campaign persuade business leaders and managers to “invite” government officials to visit their shops and factories to talk about the government’s vision for the country’s future, as an underhanded way to distribute pro-CAFTA propaganda.<sup>474</sup> Following such visits, business managers also could make their own efforts to persuade workers to vote for CAFTA. Finally, Casas also urged the organization of a massive pro-CAFTA demonstration, though he noted that this would not be easy due to the difficulty of getting people sufficiently motivated to attend.<sup>475</sup>

The publication of Casas’s Machiavellian memo unleashed a storm of public criticism against the government.<sup>476</sup> The memo, after all, had been addressed to the President and the Minister of the Presidency, neither one of whom apparently had expressed any objections to its counsels. As public pressure mounted, the government repudiated the memo, clarifying that it reflected solely the personal views of Vice President Casas.<sup>477</sup> Ultimately, Casas resigned from office.<sup>478</sup>

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<sup>472</sup> See *id.* at 5–6 (proposing the organization of “a systemic visit program to companies by high government officials,” geared towards gaining the votes of over a million workers).

<sup>473</sup> See *Scandal Topples Costa Rican Vice President, Clouds Outlook As Cafta Referendum Nears*, NOTICEN: CENT. AM. & CARIBBEAN AFF., Sept. 27, 2007 [hereinafter *Scandal*], available at Factiva, Doc. No. NTCN000020070929e39r00001 (noting the PAC’s charges to the Supreme Electoral Tribunal that the Casas memo violated electoral code provisions).

<sup>474</sup> See Casas Memo, *supra* note 456, at 5–6 (stating that “[n]o campaigning effort is potentially as effective as” appealing to the workers).

<sup>475</sup> See *id.* at 6 (“It is recommendable to organize a public act or festival that is multitudinous (it could be a march, but there we almost always have problems). But people have to feel supported and motivated.”).

<sup>476</sup> See *Scandal*, *supra* note 473 (mentioning the launch of a criminal investigation, calls for governmental resignations, and increased energy of anti-CAFTA forces in the wake of the leaked memo).

<sup>477</sup> See *id.* (discussing the subsequent resignation of Casas, and the government’s urging to “turn the page and leave [the] memorandum”); see also Bindman, *supra* note 430 (“While such wrong-doings by Casas were in full public

The scandal over the Casas memo seemed to shift the political and moral momentum in favor of the anti-CAFTA forces, but not for long. In Washington, senior Bush administration officials, alarmed at the prospects that CAFTA might lose, decided to aid the Arias government and the pro-CAFTA forces. For the previous two years, one of the chief arguments of the pro-CAFTA party had been that, if Costa Rica refused to accede to the treaty, it would lose the trade preferences it received from the United States through the Caribbean Basin Initiative (CBI).<sup>479</sup> Under CBI, Costa Rica has enjoyed exceptionally open access to U.S. markets for many of its goods, especially agricultural products and light manufactures, since the program's inception in 1984.<sup>480</sup> After the November 2006 U.S. congressional elections, in which the Democrats took control of the House and Senate, a number of Costa Rican opponents of CAFTA canvassed several leading Democratic members of Congress and received the reassuring answer that if CAFTA was not ratified, Congress still would renew

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view, the public turned against CAFTA . . . . Arias denied any personal knowledge or involvement in the whole affair . . . .").

<sup>478</sup> See *supra* text accompanying note 472.

<sup>479</sup> See Peter Baker, *Free-Trade Fight Reflects Broader Battle*, WASH. POST, Oct. 12, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101102272.html> (discussing the Bush administration's stance that if CAFTA was rejected, there would be no guarantee that CBI trade preferences for textiles and apparel, which were set to expire in September 2008, would be renewed); see also McKinley, Jr., *supra* note 147.

A high-ranking Costa Rican official, speaking on the condition of anonymity for fear of offending his American counterparts, said the implicit threat was that temporary trade preferences enjoyed under old agreements would not be renewed. Central American countries had to get on board with the new pact or risk watching their exports dwindle. United States trade officials say they argued that a permanent agreement was a better deal for smaller countries than the two-decade-old, one-way trade preferences that could disappear at the whim of Congress. But they did not dispute that reluctance to extend the preferences past 2008 might have spurred countries to join the new pact. "If a country chooses not to ratify Cafta and open its markets to U.S. goods and services, it should not automatically assume that Congress would continue to provide it preferential one-way access into the U.S. market," said Neena Moorjani, a spokeswoman for the United States trade representative, Rob Portman.

*Id.*

<sup>480</sup> See Libby Colen Roper, *Trade Provisions of CBI Starting to Pay Benefits*, 7 BUS. AM. 30, 30-31 (Aug. 20, 1984) (describing early benefits from CBI).

Costa Rica's CBI trade preferences when they came up for renewal in 2008.<sup>481</sup> After all, so went the reasoning, it would be counterproductive for the United States, especially at a time of concern over the possible penetration of Central America by Hugo Chavez's influence and oil money, to punish Costa Rica, a paragon of democratic stability and friendly ally of the United States, by taking away its CBI preferences.<sup>482</sup>

But with CAFTA on the verge of losing at the polls, the Bush administration decided to play hardball. On October 1, the day after 100,000 anti-CAFTA demonstrators paralyzed the streets of San Jose, Deputy U.S. Trade Representative John Veroneau pointedly warned that Congress might not renew Costa Rica's CBI preferences if it turned down CAFTA.<sup>483</sup> Two days later, Veroneau's boss, U.S. Trade Representative Susan Schwab, repeated the warning in a highly publicized interview to Costa Rica's leading newspaper, *La Nación*.<sup>484</sup> Her barely veiled threat angered CAFTA opponents, who in turn sought help from

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<sup>481</sup> Bindman, *supra* at note 430.

[T]he Bush administration threatened that Costa Rica would lose its existing trade privileges if the referendum wasn't signed and ratified. U.S. Ambassador to Costa Rica, Mark Langdale, often repeated this threat during the final hours leading up to the referendum. Bush's legal authority to end Costa Rica's preferred status under the Caribbean Basin Initiative, however, has been contested by some outraged members of the U.S. Congress, who argue that it was a law that grants Costa Rica those privileges, not Bush's noblesse oblige.

*Id.*

<sup>482</sup> See generally Editorial, *The Stakes in CAFTA*, WASH. POST, July 26, 2005, at A18 (proposing that failure to pass CAFTA would help anti-American demagogues, starting with Chavez).

<sup>483</sup> Press Release, Office of the United States Trade Representative, Statement from Ambassador John Veroneau, Deputy U.S. Trade Representative (Oct. 1, 2007), available at [http://ustraderep.gov/Document\\_Library/Press\\_Releases/2007/September/Statement\\_from\\_Ambassador\\_John\\_Veroneau,\\_Deputy\\_US\\_Trade\\_Representative\\_printer.html](http://ustraderep.gov/Document_Library/Press_Releases/2007/September/Statement_from_Ambassador_John_Veroneau,_Deputy_US_Trade_Representative_printer.html) (stating Veroneau's inability to predict the United States' reaction if Costa Rica were to reject CAFTA).

<sup>484</sup> Armando González R., *EE. UU. Descarta Renegociar Tratado de Libre Comercio [The United States Rules Out a Renegotiation of Free Trade Agreement]*, LA NACIÓN, Oct. 5, 2007, [http://www.nacion.com/ln\\_ee/2007/octubre/05/pais1265471.html](http://www.nacion.com/ln_ee/2007/octubre/05/pais1265471.html) (explaining the position of the United States' government toward an eventual renegotiation of the terms of CAFTA with Costa Rica).

Democrats on Capitol Hill.<sup>485</sup> In a strongly worded letter, House Speaker Nancy Pelosi and Senate Majority Leader Harry Reid asked U.S. Ambassador Mark Langdale not to interfere with Costa Rica's democratic processes by threatening Costa Rica.<sup>486</sup> Vermont Senator Bernard Sanders, a self-styled socialist, traveled to the country to show his solidarity with the anti-CAFTA movement, and urged Costa Ricans to resist U.S. intimidation.<sup>487</sup> In response, White House spokeswoman Dana Perino issued a statement warning Costa Ricans that if they rejected CAFTA, they should not expect the United States to renegotiate the treaty as some of its opponents hoped.<sup>488</sup> Essentially, CAFTA was a take-it-or-leave-it proposition. The White House statement, coming as it did on the eve of the referendum, achieved its intended effect, as momentum shifted back in favor of those who argued that, in spite of CAFTA's flaws, Costa Rica could not afford the risk of being permanently left out of a free trade treaty with its largest commercial partner.

In spite of the intense political passions surrounding it, the October 7 referendum was peaceful and orderly.<sup>489</sup> In keeping with Costa Rica's civic traditions, the Supreme Electoral Tribunal drafted several thousand school children to serve as guides and helpers at the polling stations, and 5,600 inmates from the country's sixteen prisons had the opportunity to cast their vote.<sup>490</sup>

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<sup>485</sup> See Baker, *supra* note 479 (outlining the actions and response of Democrats in the final days before the CAFTA vote in Costa Rica).

<sup>486</sup> See *id.* (discussing the letter sent by Nancy Pelosi and Harry Reid, and the efforts of the Bush administration in response).

<sup>487</sup> See *id.* ("My job going down there . . . was to tell the people they will not be punished by voting against CAFTA . . . . They should vote however they want.").

<sup>488</sup> See Manuel Roig-Franzia, *Costa Ricans Vote on Trade Pact*, WASH. POST, Oct. 8, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/07/AR2007100701460.html> (describing the active roles of top U.S. officials in Costa Rica's CAFTA debate, and the threat by Dana Perino to "not renegotiate the trade pact if CAFTA is voted down").

<sup>489</sup> See *OAS Affirms Transparency of CAFTA Referendum*, ACAN-EFE (Oct. 9, 2007), available at [http://www.citizenstrade.org/ctc/wp-content/uploads/2011/05/acan\\_oascaftareftrasp\\_10092007.pdf](http://www.citizenstrade.org/ctc/wp-content/uploads/2011/05/acan_oascaftareftrasp_10092007.pdf) (noting the absence of problems or irregularities with Costa Rica's CAFTA referendum).

<sup>490</sup> See Randall Corella V., *Votos Llegaron Tarde en Las Cárcelas [Ballots were made Available Late in Jails]*, LA NACIÓN, Oct. 8, 2007, [http://www.nacion.com/ln\\_ee/2007/octubre/08/pais1264828.html](http://www.nacion.com/ln_ee/2007/octubre/08/pais1264828.html) (describing how the elections developed in Costa Rican jails).



Some 45,000 citizens, evenly representing the two opposing factions, served as "fiscales," or overseers at the poll stations to guard against irregularities, alongside 10,000 poll workers formally hired by the Supreme Electoral Tribunal.<sup>491</sup> Voter turnout was high, with about 60% of registered voters participating.<sup>492</sup> Two weeks later, the Supreme Electoral Tribunal concluded a manual recount of the votes, confirming 51.6% of votes in favor of CAFTA and 48.4% against it.<sup>493</sup>

Shortly after the referendum, the leading opposition party, the PAC, announced that it was pulling out of the broad national anti-CAFTA coalition, the "Movimiento del NO al TLC."<sup>494</sup> The PAC agreed not to hinder the government as it guided the treaty and thirteen laws of implementation (the so-called "implementation agenda") through the Legislative Assembly.<sup>495</sup> This support was contingent on the government's following up on its earlier pledges to approve eight different "compensatory measures" that would aid farmers and small businessmen likely to be hurt by CAFTA and increase education spending to 8% of GDP.<sup>496</sup> The government and its legislative allies were pleased to agree.<sup>497</sup>

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<sup>491</sup> See *Mayoría de Ticos Diría "No" al TLC con EU* [Most Costa Ricans would say no to the Free Trade Agreement with the United States], EL NUEVO DIARIO, Oct. 7, 2007, <http://impreso.elnuevodiario.com.ni/2007/10/07/internacionales/60856> (describing the results of polls prior to the referendum which showed the rejection of the Free Trade Agreement by most Costa Ricans).

<sup>492</sup> Tribunal Supremo de Elecciones, Resultados del Escrutinio Referéndum 2007 a Nivel Nacional, [http://www.tse.go.cr/ref/ref\\_def/pais.htm](http://www.tse.go.cr/ref/ref_def/pais.htm) (last visited Nov. 5, 2008).

<sup>493</sup> *Id.*

<sup>494</sup> Carlos A. Villalobos & Irene Vizcaíno, *PAC se Aparta de Movimiento del NO* [Citizen's Action Party (PAC) Leaves NO Movement], LA NACIÓN, Oct. 10, 2007, [http://www.nacion.com/ln\\_ee/2007/octubre/10/pais1272035.html](http://www.nacion.com/ln_ee/2007/octubre/10/pais1272035.html) (reporting the resignation of Citizen's Action Party to the coalition against CAFTA's approval after the results of the referendum).

<sup>495</sup> Esteban Oviedo & Hassel Fallas, *Gobierno y PAC acuerdan inicio de negociaciones sobre el TLC* [Government and Citizen's Coalition Party agree initiating negotiations regarding the Free Trade Agreement], LA NACIÓN, Oct. 9, 2007, [http://www.nacion.com/ln\\_ee/2007/octubre/09/pais1270041.html](http://www.nacion.com/ln_ee/2007/octubre/09/pais1270041.html) (reporting the terms of the negotiations between Citizen's Coalition Party and the Government to approve the legal amendments required for the implementation of CAFTA).

<sup>496</sup> *Id.*

<sup>497</sup> Esteban Oviedo, *Solís Propone a Arias 18 Proyectos de 'Mitigación'* [Solís Proposes 18 "Mitigation" Projects to Arias], LA NACIÓN, Oct. 11, 2007,

## 9. CAFTA AND THE FUTURE OF COSTA RICA

Costa Rica's closely fought battle over CAFTA sharply divided a society that takes pride in its consensus approach to political and social issues. In addition to involving every major social and economic group, the struggle affected every major institution in the country, including all three branches of government. Since the 1948 Revolution, no issue has been more divisive or engendered more public passion than CAFTA.

Once Oscar Arias decided to run for president and declared himself in favor of CAFTA, the treaty's foes knew they would have an uphill battle on their hands. After Arias's victory, following an extremely tight race he almost lost, CAFTA's opponents began their effort to slow down the treaty through every conceivable political and judicial avenue available to them. The first to come to their aid was the office of the Defender of the People of the Nation. Because its formal political function is to monitor and strengthen the country's observance of its human rights obligations, including the impact of proposed legislation and treaties, the Defender carries a great deal of credibility. Its detailed report on CAFTA, and the thoughtful, critical questions it raised about the treaty's potential effects on human rights proved to be a powerful encouragement to treaty opponents. A few months after the report was published, emboldened by Arias's inability to get the Legislative Assembly to approve CAFTA, the treaty's opponents made recourse to another constitutional mechanism that could slow the treaty or perhaps even kill it: the popular referendum. By now, the pro-CAFTA forces within the government and civil society knew the treaty was in trouble, and they too began to make full use of Costa Rica's sophisticated political and judicial instruments to save CAFTA.

Treaty supporters first pushed through the Legislative Assembly a measure to allow it to debate and vote on the treaty in an expedited fashion. They then went to the Supreme Electoral Tribunal to argue successfully the measure's constitutionality when its opponents challenged it. But the Supreme Electoral Tribunal also declared constitutional the proposal by CAFTA's foes

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[http://www.nacion.com/ln\\_ee/2007/octubre/11/pais1273799.html](http://www.nacion.com/ln_ee/2007/octubre/11/pais1273799.html) (reporting on the terms proposed by the Citizen's Coalition Party leader to the government to mitigate the effects of CAFTA in Costa Rica).

to hold a popular referendum. In response, treaty advocates persuaded Arias to call a referendum by presidential decree, which he did, thereby insuring that the referendum would be held soon. CAFTA's opponents wanted the referendum to be held through the popular initiative instead of by presidential decree, so that they would have nine months during which to mobilize their supporters; with some luck, they also might push the date close enough to March 1 so as to cause Costa Rica to miss the treaty's deadline for accession. Treaty supporters were cheered when the Supreme Electoral Tribunal ruled, after a series of contentious arguments before it, that the referendum should be held through the most expeditious method possible, that is, through the presidential decree.

At this point, and much to the government's annoyance, the Defender of the People of the Nation stepped into the debate again by challenging the constitutionality of the treaty, and asking the Constitutional Chamber to rule on the issue before the referendum took place. A number of anti-CAFTA legislators followed the Defender's lead and brought their own petition to the Chamber for constitutional review. Several weeks later, the court ruled that none of the numerous challenged provisions of CAFTA violated the Constitution. The court's sweeping ruling disappointed, but did not slow down, CAFTA's persistent foes.

The vigorous three-month long referendum campaign that followed illustrated all of the strengths and weaknesses of a typical, mature democratic society. The absence of violence on the part of CAFTA's passionate opponents was exemplary, as was the generally high level of civic debate and energy shown by both sides in raising money, organizing their campaigns, and reaching out to the broad public. Far less exemplary was the effort by leading political figures, such as Kevin Casas, to engage in dirty tricks, including by calling for the use of appropriated funds to pressure mayors into securing a pro-CAFTA outcome in their districts. The practices outlined in Casas's memo, though unfortunately common in most democratic societies, left a bitter taste in the heated campaign. Equally deplorable were the United States's last-minute threats, which succeeded in shifting the tide in favor of the pro-CAFTA faction. Long-time students of U.S. relations with Latin America were left wondering whether, in spite of Washington's rhetoric to the contrary, much had changed since the old days of American imperialism and hegemonic manipulation in the region.

The referendum itself was a model of orderliness and democratic civility, as was its aftermath, with the major opposition party declaring that, in spite of its continuing misgivings about CAFTA, it would respect the referendum's results and would not obstruct the treaty's implementing legislation. For its part, the Arias government wisely struck a conciliatory tone and restated its commitment to push through a package of "compensatory measures" aimed at smoothing the Costa Rican economy's transition to CAFTA and increasing the country's competitiveness by, among other things, boosting spending on education. Arias also called on all Costa Ricans to put aside the intense polarization triggered by the CAFTA debate and work together for the country's future.

It is difficult to predict how CAFTA will change Costa Rica over the next decade and to what extent the worst fears of its opponents or the most ambitious expectations of its advocates will materialize. But what seems to be beyond question is that the debate itself may have had a profound, and mostly positive, impact on the country's commitment to human rights, constitutionalism, and democratic solidarity by validating the vigor, resiliency, and popular support for the institutions that safeguard such values. While they ultimately lost the political battle, CAFTA's opponents made skillful and persistent use of human rights and constitutional procedure to slow down the treaty and force the government to make significant concessions in the form of greater commitments to social spending that will keep the free trade treaty from mortally wounding the social democratic model. Moreover, the battle over CAFTA created a large popular movement, elements of which will likely remain energized and active in the Costa Rican political system for a long time, contributing to a more vigorous democratic culture. In light of the damage done to Costa Rica by the economic crisis of the 1980s and the political corruption scandals of the subsequent decade, the country has been in sore need of political renewal. Some of the forces mobilized by the CAFTA debate may play a key role in promoting such renewal, even as CAFTA itself, if accompanied by a complementary social and educational agenda, may wind up invigorating the country's economy.

A key fear of CAFTA's enemies was that the treaty would speed up the harmful impact of globalization on Costa Rica. The forces mobilized by the CAFTA debate will ensure that, regardless of CAFTA's actual impact, future Costa Rican governments will

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face significant political pressures to maintain a serious commitment to the social democratic values enshrined in the 1949 Constitution. The battle over CAFTA forced the current government to make significant concessions along these lines, and future governments will have to do likewise. Thus, the long, intense debate over the country's accession to the treaty served to temper whatever future disadvantages the treaty may bring with it. Costa Rica will not avoid all the harms of globalization, but its commitment to human rights and constitutional procedure may enable it to achieve a reasonable synthesis: a more competitive economy, well integrated into the world trading system, encased within a sturdy institutional framework of human rights, the rule of law, and the values of its cherished, if challenged, social democratic model.