



CAFTA Facts

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CAFTA PRESERVES U.S. SOVEREIGNTY

CAFTA will require virtually no changes to existing U.S. laws. All the United States is required to do is codify the Agreement's tariff-related provisions and rules of origin. As with other FTAs, we will also implement safeguards to address increases in imports that could result from our tariff cuts and cause or threaten serious injury to domestic industry. If a panel ever found the U.S. to be acting inconsistently with a provision of CAFTA, it could not require the U.S. to change the law. In fact, the benefits are on the U.S. side: CAFTA will obligate our trading partners to bring their laws and regulations up to U.S. standards in areas such as the regulation of services, investment, intellectual property, telecommunications, procurement, and e-commerce, thereby allowing U.S. businesses to compete on a level playing field.

Allegation: CAFTA would submit the U.S. to the jurisdiction of international tribunals established under the auspices of the United Nations or World Bank, and would allow those UN/World Bank Tribunals to order payment of U.S. taxpayer dollars to foreign investors.

FACT: The United States has never lost a decision or paid a penny under an investor-state arbitration panel under NAFTA or any other international trade or investment agreement. Moreover, if a panel ever did rule against the United States, it would have no authority to order the government to modify any law, regulation or practice. See CAFTA Article 10.26.1 (limiting awards to monetary damages and restitution of property only).

Nevertheless, the Administration took steps in CAFTA and other recent FTAs to improve the investor-state arbitration process. For example, the ability of governments to control the interpretation of the investment provisions has been strengthened by allowing them to review draft decisions (CAFTA Article 10.20.9) and giving them the ability to issue interpretations of the text that are binding on panels (CAFTA Article 10.20.2). New procedures have also been included, based on U.S. court rules, to dismiss frivolous claims (CAFTA Article 10.20.4) and to ensure full transparency of the proceedings by opening briefs and hearings to the public (CAFTA Article 10.21) and allowing *amicus* submissions (CAFTA Article 10.20.3).

Allegation: CAFTA, like NAFTA, would give more rights to foreign investors operating in the U.S. than American citizens and firms enjoy under our own Constitution.

FACT: In fact, Trade Promotion Authority directs USTR to negotiate investment provisions that do not provide greater substantive rights to foreign investors than are provided under U.S. law to U.S. investors, and existing state laws are specifically carved out of key provisions of the investment chapter. (See, TPA § 2102(b)(3).) This objective was followed in CAFTA, and the Administration has clarified investment provisions since NAFTA. For example, CAFTA provides clearer guidance on what constitutes a compensable indirect expropriation by drawing directly on principles developed by the Supreme Court in interpreting the Fifth Amendment of the U.S. Constitution. See CAFTA Annex 10-C. The Administration further clarified that the guarantee of fair and equitable treatment includes procedural due process in line with that granted by the principal legal systems of the world, including the United States. See CAFTA Article 10.5.2(a).

Allegation: CAFTA undermines regulatory authority regarding land use, health and safety and improperly allows foreign investors to bring challenges for breach of contract by the government.

FACT: This is incorrect and misleading. The United States has never been challenged for breach of contract under NAFTA or the 39 other bilateral investment treaties currently in force, most of which allow arbitration of breach of contract claims against the government. In any case, breach of contract claims are similarly permitted under U.S. law. (See Contract Disputes Act, 41 U.S.C. §§ 601 et seq.) In addition, the Administration has taken strong steps to protect U.S. regulatory authority. For example, CAFTA specifies that nondiscriminatory regulatory actions designed and applied to protect the public welfare do not constitute indirect expropriations “except in rare circumstances.” See CAFTA Annex 10-C.

Allegation: CAFTA would let international rules dictate how U.S. and state taxpayer dollars may be spent.

FACT: The CAFTA allows procuring entities to deny contracts to suppliers that have violated tax or other laws (see CAFTA Article 9.8.6), and procuring entities can still require compliance with local health, safety and wage regulations (see CAFTA Article 9.14). Furthermore, there are a number of exceptions to the procurement rules in CAFTA. For example, the Administration has carved out the U.S. small business set-aside program (which reserves more than 20% of U.S. procurement for small businesses, including virtually all procurements below \$100,000). (See CAFTA, Annex 9.1.2(b)(i), Sec. G, Schedule of the United States, para. 1.) CAFTA also does not cover a number of products purchased by DoD (including textiles, specialty metals and other products under the Berry Amendment) (See CAFTA, Annex 9.1.2(b)(i), Sec. A, Schedule of the United States, note 3.).

The CAFTA rules are essentially the same as the WTO/GATT rules that the United States has abided by for 25 years. It has been a longstanding U.S. policy, enshrined in the Trade Agreements Act of 1979 (19 U.S.C. §§ 2511 et seq.), to open U.S. procurement markets on a reciprocal basis with trading partners that have entered into FTAs with the U.S. or that have signed on to the WTO Government Procurement Agreement (GPA). This policy helps ensure that U.S. businesses will have the opportunity to compete on a level playing field in foreign procurement markets.